United States District Court for the Northern District of Texas
Dallas Division

United States of America,
Plaintiff,

v.

Marsha Cunningham,
Defendant.

No. 3:97-CR-263-M(02)
ECF

Defendant's Supplemental Motion for Sentence Reduction Under 18 U.S.C. § 3582(c)(2)

> "[T]he problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems. ... The Commission, however, views the amendment only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems."[1]

* * * * *

> "The Commission believes that there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. The Commission remains committed, however, to its recommendation in 2002 that any statutory ratio be no more than 20-to-1."[2]

[1] Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (May 1, 2007), available at http://www.ussc.gov/guidelin.htm .

[2] Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Senate Judiciary Committee Subcommittee on Crime and Drugs, February 12, 2008, available at http://www.ussc.gov/testimony/Hinososa_Testimony_021208.pdf

Table of Contents

Table of Authorities

FEDERAL CASES

STATUTES

MISCELLANEOUS

1. Amendment 706

This Court may modify a defendant's term of imprisonment once it has been imposed when the United States Sentencing Commission makes an amendment to the Guidelines retroactive and the amended guideline was part of the basis of the defendant's guideline range.

> The court may not modify a term of imprisonment once it has been imposed except that —
>
> . . . .
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)[3], upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

On November 1, 2007, Amendment 706 altered the drug quantity table set forth in USSG § 2D1.1, lowering the base offense level for offenses involving "cocaine base" (crack cocaine) by two levels.[4] On December 7, 2007, the Sentencing Commission approved making Amendment 706 retroactive by listing it in USSG §

---

[3] This statute provides that the Sentencing Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. § 994(o). It further directs the Commission to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). It also provides that various representatives of the Federal criminal justice system shall submit their observations, comments, and questions to the Commission. 28 U.S.C. § 994(o).

[4] See USSG App. C., Amdt. 706.

1B1.10(c)'s list of retroactive amendments with an effective date of March 3, 2008.[5] Because Amendment 706 has been made retroactive and the defendant's sentence was based on the pre-Amendment 706 drug quantity table, 18 U.S.C. § 3582(c) allows this Court to review and reduce, as warranted by the factors set forth in 18 U.S.C. § 3553(a), the defendant's sentence.[6]

In revisiting the defendant's sentence, the guidelines, their commentary, and the Commission's policy statements remain advisory.[7] When sentencing (or, as here, effectively re-sentencing) a defendant, this Court "*may not presume that the Guidelines range is reasonable.*"[8] Rather, this Court must treat the Guidelines "as one factor among several" that 18 U.S.C. § 3553(a) mandates it consider,[9] albeit the "initial" one that it should use as a "starting point."[10] Once this Court correctly calculates the sentence that the Guidelines recommend, the Court must then "make an individualized assessment," considering the remaining factors sets forth in § 3553(a).[11] Because the Guidelines merely reflect a "wholesale" view "rough[ly] approximat[ing] … sentences that *might* achieve § 3553(a)'s objectives," Booker and § 3553(a) requires this Court to tailor an individualized sentence "at retail" that actually *does* achieve § 3553(a)'s objectives in the case before it. Consequently, this Court must "filter the Guidelines'

---

[5] USSG § 1B1.10 (Supp. Mar. 3, 2008).

[6] See 18 U.S.C. § 3582(c).

[7] See United States v. Booker, 543 U.S. 220, 245 (2005).

[8] Gall v. United States, 128 S.Ct. 586, 596-597 (2007) (emphasis added).

[9] Kimbrough v. United States, 128 S.Ct. 558, 564 (2007).

[10] Gall v. United States, 128 S.Ct. at 596.

[11] Gall v. United States, 128 S.Ct. at 597.

general advice through § 3553(a)'s list of factors."[12] When the Guidelines' "rough approximation" conflicts with this Court's view of the sentence warranted by other § 3553(a) factors, this Court may disregard the sentence recommended Guideline sentence in favor of one is tailored to the circumstances of the particular defendant.[13]

This Court has discretion to find that the Guidelines' "rough approximation" of an appropriate sentence would result in a sentence "greater than necessary", because the Court has the discretion to disagree with the Sentencing Commission's policy judgements - *especially those animating the drug quantity table set forth in USSG § 2D1.1*.[14] This Court,"may determine … that, in a particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing" the individual defendant, by "consider[ing] the disparity between the Guidelines' treatment of crack and powder cocaine offenses."[15] Indeed, as the government readily conceded in Kimbrough, since "the Guidelines 'are now advisory, … courts may vary [from the Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.' "[16]

2. United States v. Hicks

In United States v. Hicks, the Ninth Circuit acknowledged that Booker vested sentencing judges with the discretion to disagree with not only a specific sentencing

---

[12] Rita v. United States, 127 S.Ct. 2456, 2463, 2465, 2469 (2007) (emphasis added); see also Gall v. United States, 128 S.Ct. at 598 ("[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue" (quoting Koon v. United States, 518 U.S. 81, 113 (1996))).

[13] Rita v. United States, 127 S.Ct. at 2463–2464 ("[t]he sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since Booker, by imposing a non-Guidelines sentence)").

[14] See Kimbrough v. United States, 128 S.Ct. at 564 ("under Booker, the cocaine Guidelines, like all other Guidelines, are advisory only," hence, treating "the crack/powder disparity effectively mandatory" is error).

[15] Kimbrough v. United States, 128 S.Ct. at 564 (citing 18 U.S.C. § 3553(a)).

[16] Kimbrough v. United States, 128 S.Ct. at 570 (some quotation marks omitted; citation omitted; brackets in original).

guideline, but with the Sentencing Commission's policy statements as well.[17] It did so, moreover, in the context of a proceeding to reduce a sentence under 18 U.S.C. § 3582(c). The Court observed that § 3582(c)(2) "allows the district court to re-calculate the defendant's sentencing range using the newly reduced Guideline, and then determine an appropriate sentence in accordance with § 3553(a) factors."[18] Booker's "clear language," the Court further noted, "makes the [re-calculated] range advisory."[19] The Court explained:

> Booker explicitly stated that, "as by now should be clear, [a] mandatory system is no longer an open choice." Booker, 543 U.S. at 263 …. Although the Court acknowledged that Congress had intended to create a mandatory Guidelines system, Booker stressed that this was not an option: "[W]e repeat, given today's constitutional holding, [a mandatory Guideline regime] is not a choice that remains open.… [W]e have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law. Id. at 265 …. The Court never qualified this statement, and never suggested, explicitly or implicitly, that the mandatory Guideline regime survived in any context.
>
> In fact, the Court emphasized that the Guidelines could not be construed as mandatory in one context and advisory in another. …. [T]he Court dismissed this notion, stating, "we do not see how it is possible to leave the Guidelines as binding in other cases.… [W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create." Id. at 266 …. In short,

[17] United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007).

[18] United States v. Hicks, 472 F.3d at 1170.

[19] United States v. Hicks, 472 F.3d at 1170.

> Booker expressly rejected the idea that the Guidelines might be advisory in certain contexts an not in others, and Congress has done nothing to undermine this conclusion.[20]

Accordingly, "Because a 'mandatory system is no longer an open choice,' … *district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2).*"[21] "Mandatory Guidelines," the Ninth Circuit concluded, "no longer exist, in this context or any other."[22] That being so, the final clause of § 3582(c)(2) — limiting a reduction to one that is "consistent with applicable policy statements issued by the Sentencing Commission" — must be read to require no more than application of the Guidelines in an advisory, rather than a mandatory fashion.[23]

The Ninth Circuit further considered what effect the Sentencing Commission's policy statements should have in a § 3582(c)(2) proceeding after Booker.[24] Addressing whether the policy statements set forth USSG § 1B1.10 (Nov. 2000) preclude a district court from "go[ing] below the Guidelines' minimum when modifying a sentence under § 3582(c)(2)," the Ninth Circuit held they did not, and — important here — that even if they did, they "must be void" under Booker.[25]

---

[20] United States v. Hicks, 472 F.3d at 1170 (some ellipses and brackets added and some in original).

[21] United States v. Hicks, 472 F.3d at 1170 (quoting United States v. Booker, 543 U.S. at 263) (emphasis added).

[22] United States v. Hicks, 472 F.3d at 1172.

[23] Cf. United States v. Richardson, 516 F.3d 145, 153 (2d Cir. 2008) (holding that, "[i]n the wake of Booker," the requirement that a sentence imposed below a statutory mandatory minimum on the basis of substantial assistance "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission," § 3553(e), "must be read to require application of the Sentencing Guidelines in an advisory, rather than in a mandatory, capacity" (citing United States v. Castillo, 460 F.3d 337, 353–354 (2d Cir. 2006) (§ 3553(f) requires application of advisory Guidelines after Booker))).

[24] See United States v. Hicks, 472 F.3d at 1172–1173.

[25] United States v. Hicks, 472 F.3d at 1172.

The pre-Booker version of USSG § 1B1.10 that the Court confronted in Hicks provided that "the court should consider the term of imprisonment that it would have imposed had the amendment[s] to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced[.]"[26] An application note added that "the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected."[27] And background commentary remarked that reductions of retroactive Guideline amendments were "discretionary" and did "not otherwise affect the lawfulness of a previously imposed sentence, [did] not authorize a reduction in any other component of the sentence, and [did] not entitle a defendant to a reduced term of imprisonment as a matter of right."[28]

In holding that these policy statements did not preclude a court from treating the re-calculated guideline range as advisory, the Court emphasized that § 1B1.10(b) "state[d] only that the court 'should *consider* the term of imprisonment that it could have imposed …,' and not that it may *only* impose that sentence."[29] The Court similarly observed that, "just because Hicks is not entitled to a sentence reduction as a matter of right does not mean that he may not be entitled to one as a matter of discretion."[30]

---

[26] USSG § 1B1.10(b), p.s. (Nov. 2000).

[27] USSG § 1B1.10 app. n. 2 (Nov. 2000); see also USSG § 1B1.10 app. n. 2 (Mar. 2008) (same).

[28] USSG. § 1B1.10 cmt. background; see also USSG § 1B1.10 cmt. background (Mar. 2008) (same).

[29] United States v. Hicks, 472 F.3d at 1172.

[30] United States v. Hicks, 472 F.3d at 1172.

3. USSG § 1B1.10

The Sentencing Commission's recent amendment of § 1B1.10, which went into effect on March 3, 2008, attempts to make the Guidelines mandatory in a § 3582(c)(2) proceeding and to preclude a district court from departing below the minimum of the re-calculated guideline range. Among other things, the new version of § 1B1.10 suggests that "[a] reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if … an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range."[31] It opines that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant."[32] It amends the use of "should" — which the Ninth Circuit relied upon in Hicks — to "shall," in USSG § 1B1.10(b).[33]

The provision that the district court shall substitute only the retroactive amendment for the corresponding guideline provisions that were applied to the defendant, which was and still is set forth in USSG § 1B1.10 app. n. 2, is redundantly incorporated directly into § 1B1.10(b)(1), but modified to expressly state that the district court "shall leave all other guideline application decisions unaffected."[34] The amended policy statement advises that "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a

---

[31] USSG § 1B1.10(a)(2)(B) (Mar. 2008).

[32] USSG § 1B1.10(a)(3) (Mar. 2008).

[33] See USSG § 1B1.10(b)(1) (Mar. 2008) ("the court shall determine the amended guideline range that would have been applicable …").

[34] USSG § 1B1.10(b)(1) (Mar. 2008).

term that is less than the minimum of the amended guideline range[.]"[35] And it unequivocally states that "[i]n no event may the reduced term of imprisonment be less than the term of imprisonment that the defendant has already served."[36]

The Sentencing Commission's commentary to § 1B1.10 goes even further. Evidently, the Commission was not content with simply capping a reduction at the low-end of the re-calculated guideline range. Instead, it seeks to impose a one-way ratchet that works *only in favor of the government.* One application note seeks to preclude applying a retroactive amendment if it does not reduce the defendant's guideline range when operating alone.[37] Another application note attempts to limit this Court's consideration of § 3553(a)'s non-Guideline factors.[38] Other application notes allow this Court to consider "the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment,"[39] and "post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment."[40] Both of these things, however,

---

[35] USSG § 1B1.10(b)(2)(B) (Mar. 2008) provides an exception to this general limitation: "If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate."

[36] USSG § 1B1.10(b)(2)(C) (Mar. 2008).

[37] See USSG § 1B1.10 app. n. 1(A) (Mar. 2008) ("a reduction … is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: … the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)").

[38] See USSG § 1B1.10 app. n. 1(B)(i) ("the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such a reduction, but only within the limits described in section (b)," i.e., only in reducing a sentence by the amount warranted by the retroactive amendment operating alone).

[39] USSG § 1B1.10 app. n. 1(B)(ii).

[40] USSG § 1B1.10 app. n. 1(B)(iii).

can only be considered in determining whether "a reduction is warranted" in the first place and "the extent of such a reduction … within" the re-calculated guideline range.

In other words, these application notes would attempt to limit this Court's consideration of § 3553(a)'s non-Guideline factors, and allow it to either *deny* giving the reduction at all or *elevate* the new sentence above the low-end of the re-calculated guideline range. The examples of how the Commission envisions § 1B1.10 operating in a § 3582(c)(2) proceeding set forth in Application Note 3 make it clear that it believes evidence should be introduced only to deny a reduction all together or to persuade the Court to impose a sentence that is not at the low-end of the re-calculated guideline range.[41]

As has been noted, this Court is not bound by USSG § 1B1.10 or its commentary. Presciently, the Ninth Circuit observed in Hicks:

> Booker makes clear that the Guidelines are no longer mandatory in *any* context …. Booker was not a mere statutory change which can be set aside …; rather, it provides a constitutional standard which courts may not ignore by treating the Guidelines ranges as mandatory in any context. Thus, to the extent that the policy statements are inconsistent with Booker by requiring that the Guidelines be treated as mandatory, the policy statements must give way.[42]

While the government may claim that this portion of Hicks is "dicta" that need not be followed, the defendant submits that it is "considered dicta," which the Ninth Circuit's reasoning in Hicks fully supports, and which this Court should heed.[43]

---

[41] See USSG § 1B1.10 app. n. 3 (Mar. 2008).

[42] United States v. Hicks, 472 F.3d at 1173 (emphasis in original).

[43] "[I]n evaluating dicta, '[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement ..., though technically dictum, must carry great weight, and may even ... be regarded as conclusive.' " McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 19 (1st Cir. 1991) (quoting Charles A. Wright, The Law of Federal Courts § 58, at 374 (4th ed. 1983)).

But in any event, the Ninth Circuit's view in Hicks accords with the Supreme Court's observation in Neal v. United States that "the Commission does not have the authority to amend [a] statute" that the Supreme Court has previously construed, so as to say or allow something that the Supreme Court's construction of the statute precludes.[44] The statute *as construed by the courts* "controls" if it conflicts with a provision of the Guidelines.[45] The Commission cannot effectively overrule or otherwise limit Booker by way of amending USSG § 1B1.10. Nor, for that matter, can the Commission overrule or limit judicial decisions such as Hicks, Gall, Kimbrough, or Rita. Accordingly, to the extent that USSG § 1B1.10 (Mar. 2008) would render any provision, commentary or policy statements of the Guidelines binding and mandatory on this Court, then it must give way under Booker or any of its progeny. Similarly, to the extent that § 1B1.10 attempts to overrule or limit the Ninth Circuit's construction of § 3582(c)(2), it is § 1B1.10, and not Hicks that must give way.

And there are good reasons not to heed § 1B1.10's advice. For one thing, the amendments to § 1B1.10 and its application notes inject an unexplained internal inconsistency into § 1B1.10. Making an amendment retroactive by listing it in § 1B1.10(c) represents the Sentencing Commission's view that reducing a defendant's sentence by the amount warranted by the retroactive change fulfills the purposes of sentencing: "The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing[.]"[46] Yet the amendments to § 1B1.10 and its application notes discussed above put into effect a quite different "policy

---

[44] Neal v. United States, 516 U.S. 284, 290 (1996).

[45] Neal v. United States, 516 U.S. at 294.

[46] USSG § 1B1.10 cmt. background (Mar. 2008).

determination." First, it presumes that a reduction does *not* necessarily achieve the purposes of sentencing, and it concludes that a reduction would only do so if neither the public's safety nor post-sentencing conduct suggest otherwise.

Moreover, like the pre-Amendment 706 drug quantity table's 100:1 crack/powder ratio, § 1B1.10 is not based on any determination made from empirical data or national experience. As such, it does "not exemplify the Commission's exercise of its characteristic institutional role."[47] Among other things, the amended § 1B1.10 was not the product of consultation with authorities or representatives of the Federal criminal justice system.[48] It has not been subject to congressional review,[49] nor the notice and public comment that attend to the guidelines.[50]

Section 1B1.10 also attempts to cut off the purposes of sentencing set forth in § 3553(a)(2).[51] Rather than establish a sentencing policy that strives to "permit individualized sentences" and that "reflects, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," § 1B1.10 attempts to prohibit this Court's consideration of such things.[52] In sum, the Sentencing Commission's authority to promulgate a policy statement — without consulting experts, without notice and public comment, and without congressional review — must be exercised in accordance with the Commission's statutory duties, its purpose, and the statutory purposes of sentencing. Amended § 1B1.10, however,

---

[47] Kimbrough v. United States, 128 S.Ct. at 575.

[48] See 28 U.S.C. § 994(o).

[49] See 28 U.S.C. § 994(p) (providing for congressional review only of guidelines, not commentary or policy statements).

[50] See 28 U.S.C. § 994(x).

[51] See 28 U.S.C. § 994(a)(2) (mandating that policy statements shall "further the purposes set forth in section 3553(a)(2)").

[52] See 28 U.S.C. § 991(b).

does not assure that the purposes of sentencing set forth in § 3553(a) are met, nor does it accord with the Commission's statutory duties and purpose. As Kimbrough teaches, this Court may reject § 1B1.10 for precisely these reasons.

4. The Bad Math

There are also good reasons to reject not only the pre-Amendment 706 drug quantity table, but the new, post-Amendment 706 drug quantity table as well. While the new drug quantity table appears to have been adopted after the Commission had studied the matter more thoroughly than when it adopted the old table, it still incorporates widely disparate ratios.[53] It is difficult, if not impossible, to comprehend how the new crack/powder ratios "provide certainty and fairness" or how it "avoid[s] unwarranted sentencing disparities."[54] Nor has the Commission provided any sort of empirical or experiential basis to justify varying the crack/powder ratio based on the amount of drugs involved in the offense.[55] Rather, the new ratios are random, arbitrary, and without rational basis.[56] Adopting a partial remedy to a known problem is one thing, but adopting an *irrational*, partial remedy is quite another. When the Sentencing Commission promulgates a provision that is based on "unsound judgment," such as the arbitrary crack/powder ratios animating USSG § 2D1.1's new drug quantity table, this Court may exercise its discretion to reject that provision of

---

[53] See Kimbrough v. United States, 128 S.Ct. at 573 ("as a result of the 2007 amendment, … the Guidelines now advance a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1"); see also USSG, Appendix C, Amdt. 706 ("Reason for Amendment") (Nov. 2007).

[54] 28 U.S.C. § 911(b).

[55] See USSG App. C, Amdt. 706 ("Reason for Amendment") (Nov. 2007).

[56] One might perceive a rational basis for progressively escalating the crack/powder ratio correlatively with the base offense level, but the new drug table does not do this. Instead, it varies the ratio without discernable rationale. For example, at base offense level 24, the ratio is 80:1, at base offense level 26, it is 25:1, and at base offense level 28, it is 57:1. Rather than reflect some empirical or experiential lesson that the Commission has learned, the fluctuating ratios seem to be simply a bi-product of the Commission's decision to lower the base offense levels for crack-related cases by two levels throughout the drug quantity table.

the Guidelines.[57]

There is yet another reason to reject the new drug quantity table: it is based on bad math. While the Sentencing Commission amended the base offense levels for cocaine base, it did not amend the base offense levels for marihuana.[58] As a result, applying the new table in cases that require converting an amount of cocaine base into an amount of marihuana creates inequalities between similarly situated defendants, the very thing the conversion process purports to remedy. Under this new table the conversion ratios vary wildly by offense level.[59]

[57] See Rita v. United States, 127 S.Ct. at 2468.

[58] For a detailed time line of the critical events and communications showing the United States Sentencing Commission's awareness of the mathematical anomalies in the drug equivalency tables and its assurances that it will correct the problem: Jason Hawkins, "Memorandum Regarding New Amendments to the Crack Cocaine Guidelines" (May 17, 2007), available at http://www.fd.org/odstb_CrackCocaine.htm; and National Federal Defender Sentencing Resource Counsel, "Timeline of Commission's Awareness and Actions with Respect to the Bad Math Problem" (March 18, 2008), available at http://www.fd.org/odstb_CrackCocaine.htm .

[59] SeeUSSG § 2D1.1 app. n. 10(D)(i)(II) (Nov. 2007). At base offense levels 12–18, 10 kilograms of marihuana is equivalent to 1 gram of cocaine base. A gram of cocaine is equivalent to 13.3, 15, 16, 5, 11.4, and 14 kilograms of marihuana at base offense levels 20, 22, 24, 26, 28, and 30, respectively. At base offense level 34, a gram of cocaine is equivalent to 6 kilograms of marihuana. And a gram of cocaine is equivalent to 6.7 kilograms of marihuana at base offense levels 32, 36, and 38.

Base Offense Level	Ratio of Powder to Crack	Ratio of Marihuana to Crack
38	33:1	6,700:1
36	33:1	6,700:1
34	30:1	6,000:1
32	33:1	6,700:1
30	70:1	14,000:1
28	57:1	11,400:1
26	25:1	5,000:1
24	80:1	16,000:1
22	75:1	15,000:1
20	67:1	13,300:1
Lower	50:1	10,000:1

As a result, a defendant may be propelled into a higher base offense level simply by operation of the conversion ratio.[60] In cases where conversion into an equivalent amount of marihuana is involved, the new drug quantity table thus advises treating defendants differently for no apparent reason beyond fiat This Court need not and should not follow such automated advice.[61]

---

[60] For example, base offense level 24 applies to a cocaine base range of 5–20 grams and a marihuana range of 80–100 kilograms. Applying the new conversion ratio (which is 1600 grams of marihuana = 1 gram of cocaine base) to the low end of the cocaine base range correlates to the low end of the marihuana range (5 x 16 = 80). Yet applying the new conversion ratio to the high end of the cocaine range does *not* correlate to the high end of the marihuana range (20 x 16 = 320 ≠ 100). Instead, it correlates to an amount of marihuana that propels the defendant into the next base offense level, 26, which applies to 100–400 kilograms of marihuana. See James Egan, "Faulty Math In New Cocaine Base Equivalency Table" (Jan. 18, 2008), available at www.fd.org/odstb_CrackCocaine.htm .

[61] See United States v. Horta, 534 F.Supp.2d 164 (D. Me. Feb. 19, 2008) (imposing a sentence outside the Guidelines under 18 U.S.C. § 3553(a)(6) because there was no "rational policy basis" for the "computational anomaly" that results from using USSG § 2D1.1's conversion table for marihuana equivalency); United States v. Watkins, 531 F.Supp.2d 943, 944 (E.D. Tenn. Jan. 14, 2008) (granting departure pursuant to USSG § 5K2.0(a)(2)(B) (Nov. 2007) because using the conversion table under USSG § 2D1.1 (Nov. 2007) "produce[s] an irrational result" in that it "results in an anomalous

As these tables clearly demonstrate, the various crack to powder ratios create sharp disparities and inequalities in the advisory guideline ranges available for a particular offense. Applying the various ratios to Ms. Cunningham reveals the following guideline ranges:

Old Crack to Powder Ratio: 100 : 1	Current Crack to Marihuana Ratio at New Offense Level: 6,700 : 1	Crack to Marihuana at Lowest Ratio: 5,000 : 1
Old Offense Level: 36	New Offense Level: 34	New Offense Level: 34
Criminal History Category: I	Criminal History Category: I	Criminal History Category: I
Old Guideline Range: 188-235 months	New Guideline Range: 151-188 months	New Guideline Range: 151-188 months

Crack to Powder Ratio: 20:1[62]	Crack to Powder Ratio: 1:1[63]
New Offense Level: 34	New Offense Level: 28
Criminal History Category: I	Criminal History Category: I
New Guideline Range: 151-188 months	New Guideline Range: 78-97 months

and disproportionate sentence").

[62] This is the **maximum** ratio recommended by the United States Sentencing Commission. See supra footnote 2.

[63] This would be the ratio if the defendant had not mixed two parts regular cocaine, one part baking soda, and some tap water over a candle to turn the powder cocaine into crack cocaine.

5. Marsha Cunningham - The Person Behind the Statistic

Ms. Cunningham is before this Court as a 37-year old African-American[64] woman who entered the Bureau of Prisons at the age of 26 years old when she was arrested on August 5, 1997. It appears she has served 128 months of a 190 month sentence - a sentence which the United States Sentencing Commission now recognizes there is no justification for.[65] According to the Bureau of Prisons website , she is currently set to be released a little over three years from now on August 24, 2011.

Marsha Cunningham was born in Clovis, New Mexico to the union of A.J. and Betty Shepard. She had a good and happy childhood growing up with an intact family. Ms. Cunningham was a good basketball player and graduated from Levelland High School in Levelland, Texas in 1990. Ms. Cunningham's mother described her daughter as being well respected in the community when she was growing up and also helped at home by raising her younger brothers, Michael Shepard and Benny Joe Shepard.

Upon graduation from high school, Ms. Cunningham attended the American Business School for one semester in 1992. Although she attended for only one semester, it was there she learned to perform clerical work and how to type and operate computers. With these skills she landed several jobs following her graduation including jobs as a receptionist with First Image Management Company, Babich and Associates,

---

[64] African-Americans still comprise the majority of crack cocaine offenders, but that has decreased, from 91.4 percent in 1992 to 82.2 percent, according to preliminary fiscal year 2007 data. White offenders comprise 8.3 percent of crack cocaine offenders, compared to 3.2 percent in 1992. Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Senate Judiciary Committee Subcommittee on Crime and Drugs, February 12, 2008, available at http://www.ussc.gov/testimony/Hinososa_Testimony_021208.pdf

[65] Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Senate Judiciary Committee Subcommittee on Crime and Drugs, February 12, 2008, available at http://www.ussc.gov/testimony/Hinososa_Testimony_021208.pdf

and Affiliated Computer Services.

Ms. Cunningham was in the beginning of launching a successful career, but her life came crashing down when she met and fell in love with Phillip Foote in March 1997. Phillip Foote was using a false name and introduced himself as Miguel Johnson. After a brief stint of dating she allowed Phillip Foote to move in with her. While Phillip Foote was living at Ms. Cunningham's apartment he began dealing crack cocaine and storing it in the apartment. Upon execution of a search warrant of the apartment, law enforcement officials found crack cocaine in a drawer underneath the stove and both powder and crack cocaine in the car Phillip Foote was driving. Phillip Foote admitted that the drugs were his.[66]

Ms. Cunningham was charged with the same crimes as Phillip Foote and the jury convicted both Ms. Foote and Mr. Cunningham on all four counts of the indictment. This was so even though investigative reports revealed there was no indication Ms. Cunningham was directly or indirectly involved in the drug transaction.[67] At sentencing, Ms. Cunningham received a mandatory guideline driven sentence of 190 months, while Phillip Foote received 215 months.

Marsha Cunningham's past ten years have been difficult. From behind bars she has watched the passing of two of her grandparents and her father has entered a nursing home. "He's hoping that she gets out soon so that he can see her. Put his arms around her."[68]

During her time in prison she has tried to make the best of her situation. Ms. Cunningham has completed many of the classes offered by the Bureau of Prisons

---

[66] [PSR p. 5, ¶ 22].

[67] [Addendum to the PSR, p. 2].

[68] Karen Mathews, Drug Sentencing Guidelines Take Effect, Associated Press, March 3, 2008. Available online at http://news.lp.findlaw.com/ap/other/1110//03-03-2008/20080303143503_16.html

including: 1) overall wellness; 2)advanced ceramics; 3) comprehensive legal research; and 4) career planning techniques. Furthermore, she has maintained a steady job with Unicor prison industries throughout her entire incarceration which provided her with enough money to pay off the $5,000.00 fine ordered by the Court at her sentencing.

At the time of Ms. Cunningham's sentencing she was categorized as having a criminal history category of I. Indeed, Ms. Cunningham never had a previous arrest, much less a conviction. According to the data published by the United States Sentencing Commission, those people with a criminal history category of I have only a 11% chance of recidivism.[69] Ms. Cunningham does not pose a "significant public safety risk" nor is she among the "most serious and violent offenders in the federal system" that United States Attorney General Michael B. Mukasey sought to frighten the American public about in his testimony before the United States Congress.[70]

6. Conclusion

At a minimum, this Court should re-calculate and reduce Ms. Cunningham's guideline range by two levels in accord with Amendment 706. However, Ms. Cunningham urges the Court to look deeper and take into account any relevant disparities — such as the disparity that results from applying the arbitrary ratios in the new drug quantity table or the increased disparity between that re-calculated guideline range and the range that results from applying the career offender guideline — this Court should exercise its discretion under Booker and § 3553(a) and reduce the defendant's sentence to one that is "no greater than necessary" to fulfill the purposes of sentencing. The Sentencing Commission and the government would have this Court

---

[69] See United States Sentencing Commission, "Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines" (May 2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf .

[70] Statement of the Honorable Michael B. Mukasey, Attorney General, United States Department of Justice, before the United States House of Representatives Committee on the Judiciary, February 7, 2008, available at http://judiciary.house.gov/media/pdfs/Mukasey080207.pdf

mechanistically reduce Ms. Cunningham's range by two levels only if the case falls within the narrow range of cases in which those two levels themselves added time to her term of imprisonment. Such an act is one "that could [be] performed by a machine; it is not a judicial assessment of the individual before the court."[71] Section 3582(c)(2), by mandating that this Court impose a new sentence in accord with § 3553(a), requires this Court to *individualize* the new sentence it imposes on the defendant. It does not reduce this Court to being a mere calculator. Accordingly, Ms. Cunningham requests that she be sentenced to time-served. Society has extracted enough from Ms. Cunningham and she should be given the opportunity to reintegrate into society instead of languishing in a minimum security prison for another three years. "She's been in there for so long. For so long."[72]

Respectfully submitted this 7th day of April, 2008.

/s/ Jason D. Hawkins

Jason D. Hawkins
Assistant Federal Public Defender
Federal Public Defenders Office
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746
214.767.2886 facsimile
Texas Bar No. 00795763
Jason_Hawkins@fd.org
Attorney for Marsha Cunningham

[71] United States v. Cherer, 513 F.3d 1150, 1163 (9th Cir. 2008) (Noonan, J., concurring and dissenting).

[72] Karen Mathews, Drug Sentencing Guidelines Take Effect, Associated Press, March 3, 2008. Available online at http://news.lp.findlaw.com/ap/other/1110//03-03-2008/20080303143503_16.html

Certificate of Service

I, Jason D. Hawkins, hereby certify that on April 7, 2008, a copy of the foregoing motion was hand delivered to the United States Attorney's Office, at 1100 Commerce Street, 3rd Floor, Dallas, Texas, 75202. Additionally a copy was sent to Ms. Marsha Cunningham, USM No. 30862-077, FMC Carswell, Federal Medical Center, P.O. Box 27137, Fort Worth, TX 76127.

/s/ Jason D. Hawkins

Jason D. Hawkins
Assistant Federal Public Defender