

Courts Are Permitted to Reject and Vary Categorically From the Crack Cocaine U.S.  
Sentencing Guidelines Based on Policy Disagreements with Those Guidelines:  
*Spears v. United States*

CRIMINAL LAW – CRIMINAL PROSECUTION – SENTENCING GUIDELINES - COCAINE - The United States Supreme Court held that the District Court did not commit reversible error by categorically rejecting the Sentencing Guidelines ratio between powder cocaine and crack cocaine quantities, recalculating the ratio from the statutory 100:1 to a ratio of 20:1 to be used in the determination of the defendant's sentence.

*Spears v. United States*, 129 S.Ct. 840 (2009).

Steven Spears (“Spears”) was tried and found guilty of conspiracy to distribute at least fifty grams of cocaine base and at least 500 grams of powder cocaine.<sup>1</sup> At sentencing, the district court found that these quantities warranted an offense level of thirty-eight, which placed Spears within criminal history category IV due to his particular criminal history, and concluded that the advisory sentencing range, found in the United States Sentencing Guidelines<sup>2</sup> (“Guidelines”), was between 324 to 405 months imprisonment.<sup>3</sup> The district court adopted the rationale that the application of a 100:1 quantity ratio between powder and crack cocaine under the sentencing Guidelines would result in a sentence substantially higher than required to promote statutory objectives.<sup>4</sup> The district court then computed the sentence using a 20:1 crack-to-powder cocaine ratio, granting a downward variance to an offense level of thirty-four, which in turn produced an advisory Guidelines range of 210 to 262 months' imprisonment.<sup>5</sup> Spears was sentenced to the statutory minimum of 240 months imprisonment, which led Spears, as well as the Government, to appeal.<sup>6</sup>

The Court of Appeals for the Eighth Circuit reviewed the case for abuse of discretion regarding the reasonableness of the district court's sentence.<sup>7</sup> The court of appeals affirmed Spears' conviction, and additionally reversed and remanded sentencing.<sup>8</sup> Spears subsequently appealed to the United States Supreme Court, which granted his writ of certiorari.<sup>9</sup> The Supreme Court vacated the judgment and remanded the case to the court of appeals for further consideration.<sup>10</sup>

The Court of Appeals for the Eighth Circuit again affirmed Spears' conviction, reversed the

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1. *Spears v. U.S.*, 129 S.Ct. 840, 841 (2009). On June 2, 2004, law enforcement responded to an anonymous report of drug trafficking in a room at the Hamilton Inn in Sioux City, Iowa. *U.S. v. Spears*, 469 F.3d 1166, 1168 (8<sup>th</sup> Cir. 2006). The officers who were dispatched observed a high volume of traffic both entering and leaving the specified hotel room. *Id.* The officers stopped several vehicles whose occupants had been observed leaving the room, in which they discovered crack cocaine. *Id.* After obtaining a search warrant, the officers executed it upon the room and found Spears, Elliot Ward, and one other person. *Id.* Spears was arrested, and after the officers gave him his *Miranda* warnings, he admitted in a videotaped interview with Iowa law enforcement that he had previously sold both crack and cocaine. *Id.*

2. U.S. SENTENCING GUIDELINES MANUAL (2006).

3. *Spears v. U.S.*, 129 S.Ct. at 841 (citing U.S.S.G. 2D1.1(c)(2006)). The court noted that the crack-to-powder ratio was later reduced. *Id.* (citing U.S.S.G. supp.app. C, amdt. 706 (2007)).

4. *Id.* These objectives are found in § 3553 of the United States Code. 18 U.S.C. § 3553(a) (West 2003).

5. *Spears*, 129 S.Ct. at 842.

6. *Id.*

7. *Spears*, 469 F.3d at 1170.

8. *Id.* at 1178. The court of appeals stated that, as an unelected body, a court cannot dictate its own sentencing policy views and discard the sentiments of Congress; courts are required to yield to Congress regarding sentencing procedures. *Id.*

9. *Spears v. U.S.*, 128 S. Ct. 858 (2008).

10. *Id.*

sentencing decision, and remanded the case to the district court.<sup>11</sup> In its opinion, the district court stated that its dicta in *Kimbrough v. United States*<sup>12</sup> was incorrect, and that the court of appeals adopted the determination that cocaine Guidelines, like all Guidelines, are advisory only and a district judge must include the Guidelines range when considering factors controlling the length of the sentence.<sup>13</sup> The judge may then find in particular circumstances that a within-Guidelines sentence is decidedly more than required in terms of sentencing.<sup>14</sup> The court of appeals concluded that the district court did not consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses during its analysis, instead substituting its own ratio, and conducted no further statutorily required analysis.<sup>15</sup> Spears again appealed to the United States Supreme Court, which granted certiorari.<sup>16</sup>

The Supreme Court examined whether the district court erred by conclusively rejecting the sentencing Guidelines' ratio between powder cocaine and crack cocaine quantities when it recalculated Spears' offense level.<sup>17</sup> The Court held that a district court may, in the instance of a disagreement with the Guidelines based on policy grounds, not only reject but also deviate absolutely from the crack cocaine Guidelines.<sup>18</sup> In addition, the Court held that the lower courts may deviate from the crack cocaine Guidelines in a typical case where no "particular circumstances" would substantiate a deviance from the Guidelines' sentencing parameters.<sup>19</sup>

The per curiam opinion<sup>20</sup> began with the Supreme Court stating that it has held that cocaine Guidelines are advisory only, similar to any other set of Guidelines, and that a district court does not abuse its discretion when it determines, during sentencing, that the crack-to-powder disparity results in a sentence deemed "greater than necessary" by the court to achieve § 3553(a)'s purpose, even in the instance of a typical case.<sup>21</sup> The Court stated that, even where a defendant in this kind of case presents no special or mitigating circumstances, the sentencing court may deviate from the Guidelines' sentencing range in a way that produces a lesser sentence.<sup>22</sup> Additionally, the sentencing court may do so based completely on its own interpretation that the 100:1 crack-to-powder cocaine ratio not only creates an incongruity when compared with the meaning of § 3553(a), but is also contrary to the policy aims of the statute itself.<sup>23</sup>

The majority then explained, in light of *Kimbrough*, that decisions of a sentencing court that vary from the Guidelines are given a high amount of deference by similar sentencing courts when a particular case is "outside the heartland" from which the Guidelines were intended to apply by the Sentencing Commission.<sup>24</sup> In contrast, an "inside the heartland" departure, which occurs when the sentencing court disagrees unambiguously on policy grounds with the Guidelines, is entitled a lesser

11. U.S. v. Spears, 533 F.3d 715, 716 (8th Cir. 2008)

12. *Kimbrough v. United States*, 128 S.Ct. 558 (2007).

13. *Spears*, 533 F.3d at 717 (citing *Kimbrough*, 128 S.Ct. at 564).

14. *Id.*

15. *Id.*

16. *Spears*, 129 S.Ct. at 842.

17. *See generally Spears*, 129 S.Ct. 840.

18. *Id.* at 843-44

19. *Id.* at 844.

20. A *per curiam* opinion is "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 922 (8th ed. 2005).

21. *Id.* at 842 (citing *United States v. Booker*, 543 U.S. 220 (2005)).

22. *Id.* These circumstances include, but are not limited to, service to country or community, an extraordinarily disadvantaged childhood, an exaggerated criminal history score, or any post offense rehabilitation. *Id.* (citing *Spears*, 533 F.3d at 719.)

23. *Spears*, 129 S.Ct. at 842. All that is needed to justify such a variance is simply a policy view of the sentencing court that the 100:1 ratio creates the incongruity. *Id.* (citing *Spears*, 533 F.3d at 719.)

24. *Id.* at 842-43 (citing *Kimbrough*, 128 S.Ct. at 563).

amount of deference by similar sentencing courts.<sup>25</sup> The majority stated, however, that there is no need to discuss this matter in regards to the crack cocaine Guidelines, since those particular Guidelines do not stress the Sentencing Commission's exercise of its usual institutional role.<sup>26</sup> Therefore, *Kimbrough* held, in regards to the crack cocaine Guidelines, a sentencing court's complete disagreement with the Guidelines, leading to a variance from the Guidelines, is not a dubious and disreputable use of the court's power.<sup>27</sup> The majority stated, as recognized in *Kimbrough*, that district courts may, based on policy disagreements, vary from the crack cocaine Guidelines based on a decision of the court that the Guidelines would yield an excessive sentence in any particular case.<sup>28</sup> Therefore, a district court has discretion to determine, during sentencing, that it may analyze the facts of each individual defendant's situation and subsequently vary from the 100:1 ratio if it deems necessary.<sup>29</sup>

A district court may frame its final sentencing decision in consideration of § 3553(a)'s purpose; which is to “impose a sentence sufficient, but not greater than necessary” to fully perform the sentencing goals summarized by § 3553(a)(2).<sup>30</sup> The Supreme Court clarified this statement to indicate that it is appropriate for a district court to inexactly specify not to specify exactly what ratio it was using, but to proceed with an analysis based on the entirety of § 3553(a).<sup>31</sup> The Court of Appeals for the Eighth Circuit interpreted this to mean that that a district court, in the course of an individualized determination, may not categorically disagree with the Guidelines' established ratio.<sup>32</sup> For that reason, the court of appeals argued, a district court may not replace the Guidelines' ratio with one of its own creation.<sup>33</sup> The Supreme Court majority disagreed with the court of appeals' determination.<sup>34</sup>

When the 100:1 ratio is rejected, necessity mandates the acceptance of an alternative ratio to regulate a typical case, such as *Spears*.<sup>35</sup> The majority found that when sentencing judges are authorized to reject an imbalance caused by the adoption of the crack-to-powder ratio, it logically followed that the sentencing judge must have the authority to correct the imbalance through the adoption of what they conclude to be the most appropriate ratio applicable to the case at hand.<sup>36</sup> In other words, the ability to reduce a typical defendant's sentence necessitates an allowance for the district court to adopt a replacement ratio.<sup>37</sup>

The majority then clarified its earlier statements, noting that district courts have the power to both discard and deviate absolutely from the crack cocaine Guidelines based on strategy disagreements with the Guidelines.<sup>38</sup> The Court pointed out that the district court's choice of a replacement ratio was

25. *Id.* at 843 (citing *Kimbrough*, 128 S.Ct. at 563).

26. *Id.*

27. *Id.*

28. *Spears*, 129 S.Ct. at 843.

29. *Id.* (citing *Kimbrough*, 128 S.Ct. at 563).

30. *Id.* Section 3553(a)(2) states that the need for the sentence imposed is:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from future crimes of the defendant . . .

18 U.S.C. § 3553(a)(2)(A) - (C) (West 2003).

31. *Spears*, 129 S.Ct. at 843.

32. *Id.*

33. *Id.*

34. *Id.* “If it meant that, our vacating of the Eighth Circuit's judgment in *Spears I* would have been inexplicable, because that supposedly impermissible disagreement and substitution was precisely the reason for *Spears I*'s reversal of the District Court.” *Id.*

35. *Id.*

36. *Spears*, 129 S.Ct. at 843.

37. *Id.*

38. *Id.* at 844.

based upon two decisions from other courts<sup>39</sup>, which in turn were based on the Sentencing Commission's judgment that a 20:1 crack-to-powder ratio would be appropriate in an everyday case.<sup>40</sup>

The majority next criticized the approach adopted by the court of appeals, stating that it would yield one of two results.<sup>41</sup> First, the district courts could treat the Guidelines' crack-to-powder ratio as mandatory, believing that they may not vary from those ratios based on "categorical" disagreements with the Guidelines on policy grounds.<sup>42</sup> Second, the district courts could continue to vary, but call these categorical policy disagreements "individualized determinations".<sup>43</sup> While it is true the district court cut its sentencing analysis short, the reason for this was that it had already determined that the mandatory minimum sentence was required, which mooted any of Spears' arguments for a reduced sentence.<sup>44</sup> The decision not to indulge futile assertions, stated the Court, does not constitute the procedural error upon which the court of appeals based their reversal.<sup>45</sup>

The majority concluded by stating that it is absurd to say that a judge may not consider a 100:1 ratio excessive when prior disagreements were sanctioned.<sup>46</sup> It is absurd, the Court wrote, to think that a sentence which is viewed as reasonable in the context of § 3553(a) becomes unreasonable when a disagreement with the 100:1 ratio is the foundation of the sentencing judge's departure from the Guidelines.<sup>47</sup> Due to similar opinions in other courts, the majority decided to clarify their prior holdings.<sup>48</sup> The Supreme Court concluded that the Court of Appeals for the Eighth Circuit had erred in reversing the district court's recategorization of Spears' sentence using the 20:1 ratio instead of the 100:1 ratio, and reversed and remanded the judgment for proceedings consistent with the opinion.<sup>49</sup>

In his dissenting opinion, Chief Justice Roberts began by stating that while there are arguments against the court of appeals' reversal, there was an error so apparent as to require a summary reversal and that there existed good reason not to address the question presented.<sup>50</sup> The court of appeals recognized that *Kimbrough* held that district courts have authority, based on policy concerns, to depart from the Guidelines.<sup>51</sup> In doing so, the court in *Kimbrough* reasoned that district courts may determine that the 100:1 ratio results in a disproportionately harsh sentence through consideration of the sentencing goals of § 3553(a) and by conducting a personal assessment of the defendant, including their particular circumstances.<sup>52</sup> The dissent found this petition for certiorari involved a specific issue of whether district courts that disagree with the Guidelines' underlying policy may replace the Guidelines' crack-to-powder ratio with one of their own.<sup>53</sup> Chief Justice Roberts additionally noted that the Supreme Court has approved of instances when a district court has framed its sentencing in line with § 3553(a)'s instruction to "impose a sentence sufficient, but not greater than necessary to

39. U.S. v. Perry, 389 F. Supp. 2d 278 (D.R.I. 2005); U.S. v. Smith, 359 F. Supp. 2d (E.D. Wis. 2005).

40. *Spears*, 129 S.Ct. at 844.

41. *Id.*

42. *Id.*

43. *Id.* The first contradicts precedent, and the second is "institutionalized subterfuge", neither of which are acceptable sentencing practices. *Id.*

44. *Spears*, 129 S.Ct. at 844.

45. *Id.*

46. *Id.*

47. *Id.* at 844-45

48. *Id.* at 845. "[W]e should therefore promptly remove from the menu the Eighth Circuit's offering, a smuggled-in dish that is indigestible." *Id.*

49. *Spears*, 129 S.Ct. at 845. Justice Kennedy would grant the petition for a writ of certiorari and set the case for oral argument. *Id.*

50. *Id.* (Roberts, C.J., dissenting). Justice Alito joined Chief Justice Roberts in his dissenting opinion. *Id.* Justice Thomas dissented but did not write an opinion. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

accomplish the sentencing goals,” and when it did not purport to establish its own sentencing ratio.<sup>54</sup> The dissent also noted that two other courts have followed the court of appeals' interpretation of that language.<sup>55</sup> Additionally, the majority had cited no circuit court decision contradictory to that interpretation.<sup>56</sup> Chief Justice Roberts stated that the majority may be correct that the holding here follows from *Kimbrough*, but it is not clear that the result in the instant case essentially follows from it.<sup>57</sup> Viewed in this light, the dissent argued, these facts do not equate to a summary reversal.<sup>58</sup>

The minority went on to question the majority's decision to accept this case for plenary review.<sup>59</sup> Lower courts had agreed on whether district courts may use a categorical ratio of their own to replace the Guidelines' crack-to-powder ratio.<sup>60</sup> Chief Justice Roberts additionally stated that he did not see a need for the use of Supreme Court supervisory power, as the court of appeals had not departed exceedingly far from the generally agreed upon course of procedure.<sup>61</sup> Therefore, in light of the fact that several new precedents have been announced in a relatively short period of time, the issues raised in *Spears* could be honed by further discussion in the courts of appeals.<sup>62</sup> Accordingly, Chief Justice Roberts determined that prior to new Supreme Court precedent being set forth, the courts of appeals should be given time to address the issues in light of the one-year-old decision in *Kimbrough*.<sup>63</sup> Therefore, the dissent believed that the majority's opinion would complicate, rather than simplify, crack cocaine sentencing jurisprudence.<sup>64</sup>

Due to a prolonged period of perceived inconsistencies in the sentencing process, the Sentencing Reform Act of 1984 (“SRA”) was written to “bring consistency, coherence, and accountability to the federal sentencing process.”<sup>65</sup> Prior inconsistencies included instances in which sentences in narcotics cases within the statutory limits were subjected, based on the jurisdiction, to no review, limited review, or full review.<sup>66</sup>

Although similar in chemical structure, powder and crack cocaine are not treated similarly by sentencing courts.<sup>67</sup> The 100:1 ratio for crack versus powder offenses involving equal amounts of drugs produces a sentencing disparity where a major supplier of powder cocaine to many individual dealers may hypothetically receive a shorter sentence than a dealer who buys the powder, but then processes and sells it as crack.<sup>68</sup> This disparity originated in the Anti-Drug Abuse Act of 1986 (“the Anti-Drug Act”).<sup>69</sup> The Anti-Drug Act adopted the 100:1 ratio in response to Congressional findings comparing the dangers of the two substances, choosing to treat one gram of crack as the equivalent of 100 grams of powder cocaine.<sup>70</sup>

54. *Spears*, 129 S.Ct. at 845 (Roberts, C.J., dissenting).

55. *Id.* at 846 (citing *U.S. v. Russell*, 537 F.3d 6 (1st Cir. 2008); *U.S. v. Gunter*, 527 F.3d 282 (3rd Cir. 2008)).

56. *Spears*, 129 S.Ct. at 846 (Roberts, C.J., dissenting).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Spears*, 129 S.Ct. at 846 (Roberts, C.J., dissenting).

61. *Id.*

62. *Id.* “*Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period.” *Id.*

63. *Id.*

64. *Id.*

65. Kate Stith and José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1247 (1997)

66. 25 AM. JUR. 2d *Drugs and Controlled Substances* § 205 (2009)

67. *Kimbrough*, 128 S.Ct. at 566.

68. *Id.*

69. *Id.* See Pub. L. No. 99-570, 100 Stat. 3207 (1986).

70. *Kimbrough*, 128 S.Ct. at 567. The Congressional findings included that:

(1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and

The Supreme Court also explored the constitutionality of sentencing Guidelines in *United States v. Booker*.<sup>71</sup> The Court reviewed the opinion of the United States Court of Appeals for the Seventh Circuit, which stated that the application of the SRA violated the Sixth Amendment.<sup>72</sup> It concluded that in order to agree with Congressional intent, two provisions of the SRA, which had the effect of making the Guidelines mandatory, had to be stricken from the SRA itself.<sup>73</sup> A sentencing court must consider the Guideline ranges, but it may fashion a sentence in light of the statutory concerns mentioned in § 3553(a).<sup>74</sup>

Freddie J. Booker was charged with possession with intent to distribute at least fifty grams of cocaine base, or crack.<sup>75</sup> The crack cocaine Sentencing Guidelines required a base sentence of 210 to 262 months in prison.<sup>76</sup> The district judge held a post-trial sentencing proceeding and determined that Booker possessed an additional 566 grams of crack, and was guilty of obstruction of justice.<sup>77</sup> These determinations required a new sentence between 360 months and life imprisonment; the judge chose to impose a sentence of 30 years.<sup>78</sup> The Court of Appeals for the Seventh Circuit held that the sentence violated the Sixth Amendment, and remanded the case to the district court in order to either hold a special sentencing hearing before a jury, or to sentence Booker, within the sentencing range supported by the original jury trial.<sup>79</sup>

The Supreme Court, in its analysis, stated that the Guidelines, as written, would not violate the Sixth Amendment if they could be interpreted as advisory provisions recommending, but not requiring, the enactment of a particular sentence in response to differing fact patterns.<sup>80</sup> The Court additionally noted a judge's broad discretionary authority in imposing a sentence within a statutory range.<sup>81</sup> However the Guidelines were mandatory, not advisory, and therefore, sentencing judges were required to follow them.<sup>82</sup> While § 3553(a) listed the Guidelines as a factor to be considered in sentencing, § 3553(b) stated that a court shall issue a similar sentence, as well as one within the Guidelines' range, with limited departures allowed in certain cases.<sup>83</sup>

The Guidelines permit departures from the sentencing ranges in cases where the judge determines that circumstances, whether aggravating or mitigating, were not sufficiently considered by the Sentencing Commission when drafting the Guidelines, and an alternative sentence should apply.<sup>84</sup>

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dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

*Id.*

71. 543 U.S. 220 (2005)

72. *Booker*, 543 U.S. at 228. The Sixth Amendment of the United States Constitution states that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. CONST. amend. VI.

73. *Booker*, 543 U.S. at 227.

74. *Id.* at 222.

75. *Id.* at 227.

76. *Id.*

77. *Id.*

78. *Booker*, 543 U.S. at 227.

79. *Id.* at 228.

80. *Id.* at 233.

81. *Id.*

82. *Id.*

83. *Booker*, 543 U.S. at 233-234.

84. 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV).

*Booker* was an illustration of the problems presented by mandatory Guidelines.<sup>85</sup> The jury's findings placed Booker within the Guidelines' offense level of thirty-two, and approved a sentence of 210 to 262 months based on his criminal history.<sup>86</sup> Booker's case was a run-of-the-mill drug case; it contained no circumstances that the Guidelines left unconsidered.<sup>87</sup> Therefore, the decision of the sentencing judge would have been reversed if he had imposed a sentence outside of that range.<sup>88</sup> Due to additional findings of fact, Booker was sentenced to 360 months, a sentence almost ten years longer than the maximum Guidelines limit.<sup>89</sup> This kind of practice lowers the significance of the verdict on the maximum sentencing.<sup>90</sup> In *Booker*, the maximum sentence was raised from 262 months to life imprisonment.<sup>91</sup>

The question of what remedy to use was answered by finding the provision that made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1)(Supp. IV), incompatible with the Sixth Amendment, and removing it from the statute.<sup>92</sup> The holding of the Court, in the course of the removal, rendered the Guidelines essentially advisory.<sup>93</sup> Ultimately, a sentencing court after *Booker* must consider the Guideline ranges, but it is simultaneously allowed to alter the sentence after review of the statutory concerns of §3553(a).<sup>94</sup>

However in 2007, after additional research and experience in using the crack-to-powder cocaine ratio, the Sentencing Commission concluded that the disparity failed to meet the sentencing objectives of both the Anti-Drug Act and the SRA.<sup>95</sup> The Commission did not endorse identical treatment of crack and powder cocaine, but found that the ratio exaggerated the differences between them, and led to a recommendation that the ratio be significantly decreased.<sup>96</sup> The Commission adopted a change in the Guidelines, effective on November 1, 2007, which reduced by two levels the base offense levels for both crack and powder cocaine.<sup>97</sup>

In *Kimbrough v. United States*, the United States Supreme Court addressed whether the sentencing disparity between crack cocaine and powder cocaine was an exception to the rule that the sentencing Guidelines are advisory, and whether the sentencing court was able to consider the disparity's effects in sentencing.<sup>98</sup> Derrick Kimbrough pleaded guilty to four drug related charges.<sup>99</sup> Using the Guidelines, the court computed Kimbrough's sentence to ensure it fit within the statutory sentencing range.<sup>100</sup> Kimbrough's plea included responsibility for fifty-six grams of crack cocaine and approximately ninety-two grams of powder cocaine, resulting in a base offense level of thirty-two.<sup>101</sup> The district court additionally found that Kimbrough had testified falsely at a codefendant's trial,

85. *Booker*, 543 U.S. at 235.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Booker*, 543 U.S. at 236.

91. *Id.*

92. *Id.* at 245.

93. *Id.*

94. *Id.* at 245-46.

95. *Kimbrough*, 128 S.Ct. at 568. See UNITED STATES SENTENCING COMMISSION, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

96. *Kimbrough*, 128 S.Ct. at 568.

97. *Id.* at 569.

98. *Id.* at 558.

99. *Id.* at 559. The charges were conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than fifty grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense. *Id.* at 564.

100. *Id.* at 564-65.

101. *Kimbrough*, 128 S.Ct. at 565. See U.S.S.G. §2D1.1(c) (Nov. 2004).

raising his base offense level to thirty-four, and his criminal history category to II.<sup>102</sup> With the addition of a firearms charge, Kimbrough's final Guidelines range was 228 to 270 months.<sup>103</sup> The district court concluded that a sentence in this range would be more than required to accomplish the purposes of § 3553(a), and sentenced Kimbrough to 180 months in prison with five years of supervised release.<sup>104</sup> The Court of Appeals for the Fourth Circuit stated that when a sentencing judge crafts a sentence outside the Guidelines' range, based only on his disagreement with the discrepancy between cocaine offenses, he has acted improperly and has crafted an unreasonable sentence.<sup>105</sup> Kimbrough appealed, and the Supreme Court granted certiorari to determine whether the discrepancy between crack and powder cocaine offenses was advisory under the rule of *Booker*.<sup>106</sup>

The government in *Kimbrough* presented three arguments supporting the proposition that the Guidelines, in adopting the 100:1 ratio, limited the flexibility of a sentencing court when applying § 3553(a).<sup>107</sup> The first argument was that the Anti-Drug Act forbids the Sentencing Commission and courts from crafting sentences which differed from the 100:1 ratio.<sup>108</sup> The second argument was that Congress, in rejecting the Sentencing Commission's 1:1 ratio, required the quantities of the drug in question to be considered under the 100:1 ratio by both the Sentencing Commission and sentencing courts.<sup>109</sup> Third, two problems will occur, argued the government, if district courts are permitted to differ from the Guidelines based on ratio disagreements.<sup>110</sup>

The Supreme Court disagreed with the first argument, stating that it lacked footing in the context of the Anti-Drug Act, and noting that the Court had not required the Commission to adhere to other drug requirements under the Anti-Drug Act.<sup>111</sup> Therefore, the Anti-Drug Act does not require the Commission or post-*Booker* sentencing courts to always use the 100:1 ratio for crack cocaine quantities, excepting those amounts that activate statutory minimum sentences.<sup>112</sup> The Supreme Court also disagreed with the second argument due to the fact that Congress did not act on the proposed amendment to the Guidelines, towards which it had already shown disapproval.<sup>113</sup> This unspoken acceptance of the Sentencing Commission's amendment weakened the government's position, which was premised on assumptions inferred from congressional silence.<sup>114</sup> Finally, the Supreme Court disagreed with the third argument's disparities, based not only on the decision in *Neal* but also the advisory Guidelines, which combined with both judicial review on a reasonableness standard and a continual revision of the Guidelines, will help to dodge a deluge of sentencing disparities in the future.<sup>115</sup>

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102. *Kimbrough*, 128 S.Ct. at 565.

103. *Id.* at 565.

104. *Id.* at 565. In its § 3553(a) analysis, the court took into account the "nature and circumstances" of the offense and Kimbrough's history and characteristics. *Id.* The court further contrasted the Guidelines range of 228 to 270 months with 97 to 106 months, including a five year mandatory minimum sentence for the firearms charge; this was the range that would have been applied if Kimbrough had been accountable for an equivalent amount of powder cocaine. *Id.*

105. *Id.*

106. *Id.* at 565-66.

107. *Kimbrough*, 128 S.Ct. at 570. All three arguments were rejected by the Court. *Id.* at 563.

108. *Id.*

109. *Id.* at 572.

110. *Id.* at 573. The first problem is that departures from the ratio could result in sentencing "cliffs" around cocaine quantities that activate the mandatory minimums, and the second is that defendants committing similar offenses will receive differing sentences if courts are allowed to differ from the Guidelines based on their disagreement with the discrepancy between the cocaine ratio, based solely on the sentencing judge's discretion in the matter. *Id.*

111. *Id.* at 572. *See Neal v. United States*, 516 U.S. 284 (1996).

112. *Kimbrough*, 128 S.Ct. at 572.

113. *Id.* at 573.

114. *Id.*

115. *Id.* at 573-74.



The Sentencing Commission had previously reported that the crack-to-powder disparity produces disproportionately harsh sanctions, creating sentences for offenses that are excessive when viewed against the purpose of § 3553(a).<sup>116</sup> Therefore, a sentencing court has not abused its discretion, even in a typical case, if it concludes that the consequence of the crack-to-powder discrepancy is a sentence "greater than necessary" to accomplish the intentions of § 3553(a).<sup>117</sup>

The Supreme Court concluded that the sentencing court's decision was proper.<sup>118</sup> The sentencing court correctly calculated and considered the advisory Guidelines range, addressed § 3553(a), and did not establish its own ratio after rejecting the 100:1 ratio; instead the court crafted a sentence not "greater than necessary" while still meeting statutory sentencing goals.<sup>119</sup> The decision in *Kimbrough* examined whether the district judge had abused his discretion when he found that statutory factors endorsed a reduced sentence, and if these factors justified a substantial deviation from the Guidelines' advisory range.<sup>120</sup> The Supreme Court answered in the negative, stating that the district court properly examined and weighed the particular circumstances of the case, simultaneously giving weight to the Sentencing Commission's position that the crack-to-powder disparity was inconsistent with § 3553(a) in their creation of the 180 month sentence.<sup>121</sup>

The ruling in *Booker* stood for the proposition that while there are mandatory Guidelines created by the SRA, a sentencing court need only consider these Guidelines, not implement them to the letter.<sup>122</sup> The sentencing court needs only to tailor the sentence to the oft-mentioned concerns of § 3553(a).<sup>123</sup> In *Kimbrough*, the government argued that an exception to the freedom of a sentencing court in applying § 3553(a) during sentencing was created in light of the Guidelines' express adoption of the 100:1 crack-to-powder ratio.<sup>124</sup> The Supreme Court ultimately disagreed, due to the fact that the sentencing judge considered the Guidelines range, compared it with the concerns of § 3553(a), and crafted a sentence to meet sentencing goals but not be greater than necessary to accomplish them.<sup>125</sup>

In cases dealing with crack cocaine Sentencing Guidelines, a sentencing judge must walk a fine line in order to avoid having a sentence reversed as an abuse of discretion. In line with the goals of the SRA and the Anti-Drug Act, the judge must first examine the sentencing Guidelines concurrently with a defendant's offense level to calculate a sentence.<sup>126</sup> Due to the decisions of *Booker* and *Kimbrough*, sentencing does not end there. The sentencing judge must then apply the goals espoused by § 3553(a) in order to craft a sentence sufficient to punish the crime but not out of proportion with the severity of the crime itself.<sup>127</sup>

In the instant case, the Supreme Court held that the district court did not abuse its discretion when it recalculated Spears' sentence using a 20:1 ratio based on a categorical disagreement with the Guidelines' 100:1 ratio, resulting in a lesser sentence.<sup>128</sup> The dissent stated that by allowing the sentencing court to create its own 20:1 ratio, the majority's opinion would complicate, rather than simplify, crack cocaine sentencing jurisprudence.<sup>129</sup> The minority additionally argued that summary

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116. *Id.* at 575.  
117. *Kimbrough*, 128 S.Ct. at 575.  
118. *Id.*  
119. *Id.*  
120. *Id.* at 576.  
121. *Id.*  
122. *Booker*, 543 U.S. at 245.  
123. *Id.*  
124. *Kimbrough*, 128 S.Ct. at 570.  
125. *Id.* at 575.  
126. *See Booker*, 543 U.S. at 222.  
127. *Kimbrough*, 128 S.Ct. at 575.  
128. *Spears*, 129 S.Ct. at 844.  
129. *Id.* at 846 (Roberts, C.J., dissenting).

judgment was unnecessary, as the issue presented, whether a district court may absolutely reject the Guidelines' ratio between powder cocaine and crack cocaine quantities during sentencing, is a distinct issue from precedent.<sup>130</sup>

On the contrary, the decision of the instant case is directly in line with *Booker* and *Kimbrough*. Those precedents stated that the sentencing judge must examine the Guidelines, compare the suggested sentence to the goals of § 3553(a), and determine if the sentence is sufficient, but not greater than necessary, to meet those goals.<sup>131</sup> What those cases did not state is what sentence should be applied if a court cannot create its own ratio for a particular case. The dissent in *Spears* indicates, through citation to the *Russell* and *Gunter* decisions, that decisions should be determined on an individualized, case by case basis.<sup>132</sup> The creation of a ratio for a court serves the purpose of establishing precedent to more efficiently sentence similar cases in the future. How is the creation of a ratio for one specific court more likely to complicate crack cocaine sentencing jurisprudence than each case being decided on a case by case ratio in all the myriad courts, with no criteria and no precedent?

Finally, § 3553(a)(2) stated a need to provide just punishment, provide deterrence to criminal conduct, and “protect the public from future crimes of the defendant.”<sup>133</sup> When arrested, *Spears* was selling drugs from a single hotel room; hardly a criminal mastermind that needs to be isolated from the public for the maximum amount of time possible.<sup>134</sup> The district court sentenced him to 240 months, or twenty years, imprisonment, as opposed to the potential twenty-seven years minimum imprisonment under the Guidelines.<sup>135</sup> This sentence is still a quarter of an average man's lifetime, during which time *Spears* will likely lose the suppliers of the drug needed to repeat his crime in the future.

As Chief Justice Roberts stated in his dissenting opinion in *Spears*, the district courts and courts of appeals have considered several new cases over a short amount of time, and those courts should be allowed to engage those cases prior to the addition of new precedent.<sup>136</sup> The Chief Justice summarized by stating that “a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.”<sup>137</sup> But this metaphor is exactly what the majority avoided. By granting summary judgment, the Supreme Court does not set forth more exceptions for the lower courts to consider. Instead, *Spears* merely follows in line with *Booker* and *Kimbrough*. A sentencing judge must still craft a sentence in light of the the Guidelines and § 3553(a); the only addition from *Spears* is the clarification of the freedom of a sentencing judge to create a sentencing ratio based on a categorical disagreement with the Guidelines.

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130. *Id.*

131. *Id.* at 843 (majority opinion).

132. *Id.* at 845 (Roberts, C.J., dissenting) (citing *Russell*, 537 F.3d 6; *Gunter*, 527 F.3d 282).

133. 18 U.S.C. § 3553(a)(2)(A)-(C) (West 2003).

134. *Spears*, 469 F.3d at 1168.

135. *Id.* at 1169.

136. *Spears*, 129 S.Ct. at 846 (Roberts, C.J., dissenting).

137. *Id.*