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Jeremy Ritter-Wiseman

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**DEPARTING FROM THE ORIGINAL GOALS OF THE U.S.
SENTENCING GUIDELINES: DRUG SENTENCING
DISPARITIES IN THE U.S. DISTRICT OF MARYLAND**

BY JEREMY RITTER-WISEMAN*

INTRODUCTION

In Fiscal Year 2018, the single most prosecuted type of federal crime in the United States District of Maryland was drug trafficking.¹ Drug trafficking, accounting for 32.3% of all federally prosecuted crimes in the District of Maryland, was more than double the amount of the second most prosecuted type of crime, Firearms, which accounted for only 15.2% of all prosecuted crimes.² This number is also 5.3 percentage points above the national average for drug trafficking.³ Despite making up only 41.2% of Maryland’s total population,⁴ minorities account for 84.3% of all federally prosecuted drug crimes in Maryland since 2006.⁵ Although that statistic represents a problematic disparity in itself, this Comment will instead address a different area of sentencing disparity: the disparity between the rates of downward departures and variances given to white versus non-white drug offenders. This Comment will argue that despite the implicit goal of the Sentencing Reform Act of 1984 (hereinafter “the SRA”)—and thus the creation and implementation of the Federal Sentencing Guidelines—of remedying sentencing disparities due to demographic differences such as race, there remains significant race disparities in the granting of downward departures and variances by district court judges. As a quasi-case study of this disparity, this Comment will present how this plays out in the United States District of Maryland.

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* JD candidate, 2021, University of Maryland Francis King Carey School of Law. The author would like to thank Jim Wyda for his helpful guidance and useful edits and suggestions. He would also like to thank all the editors of the *Journal of Race, Religion, Gender and Class*. Finally, the author would like to thank his parents for their endless encouragement and support.

¹ See U.S. SENT’G COMM’N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2018: DISTRICT OF MARYLAND 3, Table 1 (Aug. 2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/md18.pdf>.

² See *id.*

³ See *id.*

⁴ See *Quick Facts: Maryland*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MD> (last visited Apr. 20, 2020).

⁵ See U.S. SENT’G COMM’N, 2006-2017 INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 32 (2006-2017) (hereinafter “COMBINED SOURCEBOOKS”).

Part I of this Comment traces the history of the United States Sentencing Guidelines.⁶ This section will trace the movement towards sentencing reform beginning in the 1970s and leading to the enactment of the SRA.⁷ It will discuss the purported goals of the SRA—namely, the reduction of judicial discretion and the increase in uniformity in sentencing.⁸ This section will also explain how the Sentencing Guidelines were altered as a result of the landmark Supreme Court decisions *Apprendi v. New Jersey*, and *United States v. Booker*, the latter having rendered the usage of the Guidelines advisory instead of mandatory.⁹

Part II discusses the concepts of sentencing departures and sentencing variances more generally.¹⁰ This section will first define the terms and will then explain how courts use departures and variances to alter sentences to go outside of the prescribed Guideline range.¹¹ More importantly, this section will show how sentencing variances were essentially created by the Supreme Court's ruling in *Booker*, re-opening the door for judicial discretion and thus less uniformity in sentencing.¹²

Part III then looks at sentencing data from the United States District of Maryland since 2006.¹³ The data reveals that in the District of Maryland, white drug offenders are treated with significantly more leniency than non-white drug offenders through the rate of downward departures and variances.¹⁴ The data shows that offenders who commit crimes involving drugs such as Methamphetamine and Oxycontin/Oxycodone, who are typically white, receive significantly more downward departures and variances, as compared to offenders who commit crimes involving Crack, PCP, and Heroin, who are typically non-white.¹⁵ This section also shows how this disparity in Maryland is reflective of a problem on the national level where the data shows similar disparities.¹⁶

Part IV discusses how an offender's criminal history might help explain the disparity outlined in Part III.¹⁷ Yet, this section also argues

⁶ See *infra* Part I.

⁷ See *infra* Part I-A.

⁸ See *infra* Part I-A.

⁹ See *infra* Part I-B-C; see also *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*, 543 U.S. 220, 222 (2005)

¹⁰ See *infra* Part II.

¹¹ See *infra* Part II-A.

¹² See *infra* Part II-B.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III-A.

¹⁵ See *infra* Part III-A.

¹⁶ See *infra* Part III-B.

¹⁷ See *infra* Part IV.

that the computation of an offender's career history itself has racial implications, including how the "career-offender" provision of the Guidelines unfairly punishes minorities, and the how the reality of over-policing in Baltimore City causes minorities to be arrested with greater frequency than white persons.¹⁸

Based on the data discussed in this Comment, it appears that in the United States District of Maryland, race plays a role in the granting of departures and variances, and ultimately in the computation of one's sentence.¹⁹ White drug offenders are receiving far more departures and variances than non-white drug offenders.²⁰ To the reformers who pushed through sentencing reform in the 1970s and 80s, and to the proponents of greater uniformity in sentencing, this data represents a disheartening retreat to the pre-Guidelines era which was riddled with inconsistent sentencing.²¹

I. THE HISTORY OF THE SENTENCING GUIDELINES

Modern federal sentencing has largely been determined by the United States Federal Sentencing Guidelines.²² Part I-A. provides a brief history of the impetus behind the enactment of the SRA, which led to the creation of the Guidelines.²³ Part II-B. and Part II-C. then chart the changes the Guidelines underwent as a result of landmark Supreme Court rulings.²⁴

A. *Enactment of the Sentencing Reform Act of 1984*

The history of the United States Sentencing Commission and the Federal Sentencing Guidelines (hereinafter "the Guidelines") can be traced back to the writings of Judge Marvin E. Frankel.²⁵ Frankel, a former judge of the United States District Court for the Southern District

¹⁸ See *infra* Part IV-A-C

¹⁹ See *infra* Part III-A.

²⁰ See *infra* Part III.

²¹ See *infra* Part I-A.

²² See *Mission*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about-page> (last visited Apr. 20, 2020).

²³ See *infra* Part I-A.

²⁴ See *infra* Part II-B-C.

²⁵ See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 35 (1998).

of New York, conducted a study in 1972 into sentencing within the Second Circuit.²⁶ Drawing upon his findings, Frankel published his sentencing manifesto that same year, entitled: *Criminal Sentences: Law without Order*.²⁷ In his book, Frankel calls for the formation of a “Commission on Sentencing,” which would be responsible for three things.²⁸ First, the Commission would be responsible for studying “sentencing, corrections, and parole.”²⁹ The Commission would also formulate laws and rules, which would be directly informed by the Commission’s studies.³⁰ Third, and most important in Frankel’s eyes, the Commission would enact such rules, which would be binding on federal judges.³¹

At the time, this proposition was somewhat radical as Congress had the sole power to promulgate sentencing rules. To confer this power to an independent Commission would delegate a lawmaking power away from Congress. However, in regards to sentencing, Frankel found it necessary for Congress to delegate such power in sentencing as, he notes, “relative details, numerous and cumulatively important, neither require nor are likely to receive from the legislature the necessary measure of steady attention.”³² Frankel was “deeply skeptical of judicial discretion,” and believed judicial discretion resulted in “arbitrary cruelties perpetrated daily.”³³

One of Frankel’s biggest admirers was Senator Edward M. Kennedy.³⁴ An equally fierce critic of the sentencing system at the time, Kennedy was the original sponsor of the SRA.³⁵ After years of fruitless attempts to pass a sentencing reform bill, Kennedy’s—and thus Frankel’s—goal was finally realized when Congress passed the SRA in 1984 with significant bipartisan support.³⁶ In passing the SRA, Congress

²⁶ See *id.*; see also Frankel, Marvin, E., FED. JUD. CTR., <https://www.fjc.gov/history/judges/frankel-marvin-e> (last visited Apr. 20, 2020).

²⁷ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

²⁸ *Id.* at 119.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² FRANKEL, *supra* note 27, at 122.

³³ STITH & CABRANES, *supra* note 25, at 35–36 (quoting FRANKEL, *supra*, note 27, at 103)).

³⁴ *Id.* at 35 (Kennedy once dubbed Judge Frankel the “father of sentencing reform” (citing 128 Cong. Rec. 26503 (1982))).

³⁵ *Id.* at 38 (Senator Kennedy had described sentencing in federal courts in markedly harsh terms including calling it “a disgrace,” “hopelessly inconsistent” and “desperately in need of reform”).

³⁶ Brent E. Newton and Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1184 (2017).

had two primary goals.³⁷ First, Congress wanted to increase “honesty in sentencing.”³⁸ By “honesty,” Congress meant to remedy the scenario whereby a judge would sentence an individual to prison for a specific amount of time, only for that individual to be released by a Parole Commission after completing a fraction of that sentence.³⁹

The second stated purpose was to narrow sentencing disparities.⁴⁰ The enactment of the SRA sought to correct the problem where two offenders, convicted of similar crimes, would receive far different sentences merely because they were sentenced by different judges.⁴¹ Known as the “inter-judge disparity,” a 1974 study published by the Federal Judicial Center revealed the depth of this problem by showing that fifty federal judges in the same circuit, who were given twenty hypothetical cases, varied wildly in their proposed sentences.⁴² Senators who drafted the SRA cited this study, describing the variations in sentences as “astounding.”⁴³

The primary tool in Congress’ toolbelt to address sentencing disparities was one of Frankel’s creation, the U.S. Sentencing Commission (hereinafter “the Commission”).⁴⁴ The Commission consisted of a bipartisan committee and two “nonvoting members.”⁴⁵ The Commission was mandated to, among other things, draft guidelines that would avoid “unwarranted disparities among defendants . . . found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences . . . by mitigating or aggravating factors not taken into account in the establishment of the guidelines.”⁴⁶

One type of disparity the Commission hoped to remedy was sentencing disparities attributable to race.⁴⁷ In the buildup to the passing of

³⁷ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (citing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837)).

³⁸ *Id.* (quoting S. REP. NO. 225, 98th Cong., 2d Sess. 54, 56, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239)).

³⁹ *Id.* (citing S. REP. NO. 225, 98th Cong., 2d Sess. 56, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3239)).

⁴⁰ *Id.* (citing S. REP. NO. 225, 98th Cong., 2d Sess. 38, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221)).

⁴¹ Newton & Sidhu, *supra* note 36, at 1178–79.

⁴² *Id.* at 1179 (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 5, 9–10 (1974)).

⁴³ *Id.* (quoting S. REP. NO. 98–225, at 41 (1983)).

⁴⁴ Breyer, *supra* note 37, at 5; Newton & Sidhu, *supra* note 36, at 1184 (“Congress followed Judge Frankel’s suggestion, creating a bipartisan Commission . . .”).

⁴⁵ Newton & Sidhu, *supra* note 36, at 1184 (quoting 28 U.S.C. § 991(a) (1988)).

⁴⁶ *Id.* at 1185 (citing 28 U.S.C. § 991(b)(1)(B) (1988)) (internal quotations omitted).

⁴⁷ *Id.* at 1180–81.

the SRA, it was “widely acknowledged” that demographic factors, especially race and gender, contributed to sentencing disparities.⁴⁸ Particularly, studies revealed that one’s race may correlate to how harsh or lenient a judge would be in sentencing.⁴⁹ Narrowing sentencing disparities was therefore a “key motivation” behind the promulgation of the sentencing guidelines.⁵⁰ One of the co-sponsors of the SRA, then-Senator Joseph R. Biden of Delaware, underscored the need to cure the current sentencing system of its invidious disparities during debate on the SRA:

[U]nder the present sentencing system . . . most of the people who wind up in jail are people who are poor, and people who are black and people who are from a minority . . . [T]he studies show the white middle-class guy gets a more lenient sentence than the black guy, and you know that is kind of disturbing. We find out judges are not color blind and judges do not leave their baggage at home. And we found there is significant disparity in how judges apply the sentences when they see defendants.⁵¹

After its creation, the Commission confirmed this uncomfortable reality by conducting its own study which showed similar disparities attributable to race.⁵² Overall, in passing the SRA, and in authoring the Guidelines, unfair sentencing disparities due to race were top-of-mind to the proponents of sentencing reform.⁵³

⁴⁸ *Id.* at 1180; see also William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359 (1991) (citing Gary Kleck, *Racial Discrimination in Criminal Sentencing*, 46 AM. SOC. REV. 783, 784 (1981) (“In his review of more than sixty empirical studies related to racial discrimination at sentencing, Gary Kleck summarized findings by identifying five categories of sentencing practices that might produce differential results based on race”)).

⁴⁹ See JOAN PETERSILIA, *RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* 3 (1983) (finding evidence that minorities were treated more severely in sentencing: “[f]or the same crime and with similar criminal records, whites are more likely to get probation, to go to jail instead of prison, to receive shorter sentences, and to serve less time behind bars than minority offenders”).

⁵⁰ Lucius T. Outlaw III, *Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice*, 44 AM. J. CRIM. L. 220, 228 (2017); see also Wilkins, Jr. et al., *supra* note 48, at 364 (noting that the “elimination of unwarranted sentencing disparity” was a “principal goal” of the SRA).

⁵¹ Wilkins, Jr. et al., *supra* note 48, at 366 (quoting 130 Cong. Rec. 839 (1984)).

⁵² *Id.* at 366–67.

⁵³ Newton & Sidhu, *supra* note 36, at 1180–81 (citing Wilkins, Jr. et al., *supra* note 48, at 362 (“As stated by the original chair of the Commission, Judge William W. Wilkins, Jr., and two leading original staff members in 1991: ‘Suffice it to say it was against this backdrop of such unfair sentencing practices that the most recent attempt at sentencing reform was conceived and

B. Appendi v. New Jersey: The Precursor to Booker

In *Appendi v. New Jersey*, the Supreme Court addressed the constitutionality of a New Jersey hate crime statute.⁵⁴ The statute provided for “an extended term of imprisonment” if the trial judge found that a defendant committed the underlying offense with the purpose of intimidating a protected subclass.⁵⁵ In 1994, Petitioner Charles C. Appendi, Jr. pleaded guilty to two counts of second-degree possession of a firearm for an unlawful person, carrying a sentence of between five and ten years in prison, after he admitted to firing bullets into the home of an African-American family.⁵⁶ As part of the plea deal, the State reserved the right to request an enhanced sentence under New Jersey’s hate crime statute and Mr. Appendi reserved the right to challenge the enhancement on constitutional grounds.⁵⁷ Following a plea hearing where the trial judge accepted Mr. Appendi’s guilty plea, the State moved for an enhanced sentence.⁵⁸ Soon after, the trial judge held an evidentiary hearing for the purpose of determining Mr. Appendi’s “purpose” for the shooting.⁵⁹ After hearing testimony, the judge found by a preponderance of the evidence that “the [underlying] crime was motivated by racial bias” and consequently enhanced Mr. Appendi’s sentence.⁶⁰

The Supreme Court granted cert to determine whether the Due Process Clause of the Fourteenth Amendment requires “that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt.”⁶¹ Writing for a 5-4 majority, Justice Stevens referred to the reasonable doubt standard as “vital” in order to protect against erroneous loss of “liberty upon conviction,” as well as the stigma of conviction.⁶² Therefore, it follows:

developed, culminating in legislation that created the . . . Commission and the federal sentencing guidelines”)).

⁵⁴ 530 U.S. 466, 468–69 (2000).

⁵⁵ *Id.* (quoting N.J. STAT. ANN. § 2c:44-3(e) (1999)) (internal quotations omitted).

⁵⁶ *Id.* at 469–70.

⁵⁷ *Id.* at 470.

⁵⁸ *Id.*

⁵⁹ *Id.* at 470–71.

⁶⁰ *Appendi*, 530 U.S. at 471 (quoting App. to Pet. for Cert. 143a); *Id.* at 470–71 (stating that if the trial judge found that there was no motivation based on racial bias, the convictions would have carried a maximum sentence in the aggregate of 20 years. But because the trial judge applied the enhancement, the maximum on that one count alone would be 20 years).

⁶¹ *Id.* at 469.

⁶² *Id.* at 484 (internal quotations omitted) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). There, the Court found unconstitutional a New York statute permitting a judge to find by a

[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.⁶³

In other words, if a defendant faces a sentence enhancement that goes beyond the bounds of the statute and is based on a fact that is not an element of the crime, that fact should have to be proven to a jury beyond a reasonable doubt.⁶⁴

At the heart of the Court’s reasoning was the apparent lack of a distinction between an “element” of a crime and a “sentencing factor.”⁶⁵ To the Court, the analysis rested on what effect a factor has on the defendant’s punishment.⁶⁶ If a sentencing factor “expose[s] the defendant to a greater punishment,” it is indistinguishable from an element of the offense which must be submitted to the jury.⁶⁷

This is not to say, however, that a “sentencing factor” has no meaning. The Court determined that while a “sentencing factor” can have an aggravating or mitigating effect in sentencing, it nevertheless “supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense.”⁶⁸ Conversely, an enhancement based on a “sentencing factor” is an increase beyond the maximum authorized sentence, and is thus the “functional equivalent” to an element of the offense.⁶⁹ Moreover, the holding by the Court declared that an element of an offense is “any fact that increases

preponderance of the evidence whether a juvenile had committed a crime, violating the Fourteenth Amendment. The decision set the prevailing standard that every element of a crime must be proven beyond a reasonable doubt in order to convict). *In re Winship*, 397 U.S. at 359–64.

⁶³ *Apprendi*, 530 U.S. at 484.

⁶⁴ *Id.*; *Id.* at 490 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt”).

⁶⁵ *Id.* at 494 (referencing *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) *overruled by* *Alleyne v. United States*, 570 U.S. 99, 105 (2013)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Apprendi*, 530 U.S. at 494 n.19 (emphasis in original).

⁶⁹ *Id.*

the maximum statutory penalty for the crime.”⁷⁰ In her dissenting opinion, Justice O’Connor forebodingly highlights that the Court’s ruling essentially invalidates the Guidelines.⁷¹ Because *Apprendi* severely limits a judge’s ability to make factual determinations, which the Guidelines rely heavily on, the Court’s ruling in *Apprendi* paved the way for the Court’s ruling that followed in *Booker*.⁷²

C. United States v. Booker: *The Reintroduction of Judicial Discretion*

The immediate precursor to the Supreme Court’s ruling in *United States v. Booker* was the Court’s decision in *Blakely v. Washington*, in 2004.⁷³ In *Blakely*, the Court addressed Washington State’s Sentencing Reform Act, which permitted a judge to depart from a statutory maximum if the judge found that the defendant acted with “deliberate cruelty.”⁷⁴ In other words, a judge could enhance a sentence based on a finding of fact that was not submitted to a jury. Applying their ruling from *Apprendi*, the Supreme Court held that a defendant in Washington state had “the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment,” and found that the sentence at question, as applied by the Washington state judge, violated the defendant’s Sixth Amendment rights.⁷⁵ In a dissenting opinion, Justice Breyer dubiously pondered how the Court’s holding could be reconciled with the Guidelines, foreshadowing the Court’s holding in *Booker* only six months later.⁷⁶

I. *The Court’s Holding*

Freddie Booker was charged with possession with intent to distribute at least 50 grams of crack cocaine and was found guilty by a jury of violating 21 U.S.C. § 841(a)(1).⁷⁷ The statute provided for a minimum sentence of 10 years in prison.⁷⁸ When combined with Booker’s criminal

⁷⁰ Andrew J. Fuchs, Note, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 *FORDHAM L. REV.* 1399, 1419 (2001).

⁷¹ *Apprendi*, 530 U.S. at 544 (O’Connor, J., dissenting).

⁷² See Fuchs, *supra* note 70, at 1434.

⁷³ 542 U.S. 296 (2004).

⁷⁴ *Id.* at 300 (citing WASH. REV. CODE §9.94A.390(2)(h)(iii) (statute transferred to WASH. REV. CODE 9.94A.535 (2019)).

⁷⁵ *Id.* at 313 (emphasis in original).

⁷⁶ *Id.* at 346 (Breyer, J., dissenting); *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

⁷⁷ *Booker*, 543 U.S. at 227.

⁷⁸ *Id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii)(2018)).

history, the Guidelines required the district court judge to assign Booker a “base” sentence of at least 210 months, nearly 22 years in prison.⁷⁹

The district court judge then held a post-trial sentencing proceeding and found by a preponderance of the evidence that Booker possessed an additional 566 grams and that he was also guilty of obstructing justice.⁸⁰ The judge’s additional findings required Booker’s base sentence to be increased to a minimum of 360 months, or 30 years in prison.⁸¹ On appeal, the Seventh Circuit found that the sentence did not comport with the Supreme Court’s ruling in *Apprendi* and reversed.⁸² The Supreme Court granted the Government’s petition for writ of certiorari to determine whether the Court’s “*Apprendi* line of cases applies to the Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect.”⁸³ The Court’s opinion in *Booker* was delivered in two parts.⁸⁴ In the first opinion, Justice Stevens addressed the constitutionality of the Guidelines.⁸⁵ Upon finding the mandatory requirement of the Guidelines to be unconstitutional, Justice Breyer then attempted to reconcile the Guidelines with the Court’s constitutional holding.⁸⁶

Justice Stevens first addressed whether the application of the Guidelines offended the Booker’s Sixth Amendment protections.⁸⁷ Finding “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures” at issue in *Blakely*, the Court held that “the Sixth Amendment as construed in *Blakely*” applies to the Guidelines as well.⁸⁸ Therefore, any fact “which is necessary to support a sentence exceeding the maximum authorized by the facts . . . must be . . . proved to a jury beyond a reasonable doubt.”⁸⁹

Importantly, Justice Stevens noted that if the Guidelines were instead merely advisory, instead of mandatory, “their use would not implicate the Sixth Amendment,” because, as Stevens points out, the Court

⁷⁹ *Id.*; U.S. SENT’G COMM’N, GUIDELINES MANUAL § 4A1.1 (Nov. 2003), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2003/manual/CHAP4.pdf>.

⁸⁰ *Booker*, 543 U.S. at 227.

⁸¹ *Id.*

⁸² *Id.* at 227–28.

⁸³ *Id.* at 229. The Court also granted cert to address a similar sentencing scenario regarding Respondent Ducan Fanfan. However, for brevity’s sake, because the question presented to the Court was unchanged as between Booker and Fanfan, only the facts from Respondent Booker’s case are reproduced here. *Id.* at 227–28.

⁸⁴ *Id.* at 225.

⁸⁵ *Booker*, 543 U.S. at 230.

⁸⁶ *Id.* at 245–46.

⁸⁷ *Id.* at 226.

⁸⁸ *Id.* at 226–27, 233.

⁸⁹ *Id.* at 244.

recognizes a sentencing judge's discretionary authority when imposing a sentence "within a statutory range."⁹⁰

Justice Breyer's opinion then attempted to salvage what he could of the Guidelines by "determin[ing] what Congress would have intended in light of" the Court's constitutional holding.⁹¹ Breyer concluded that had Congress "been faced with the constitutional jury trial requirement" from the Court's constitutional holding, Congress "likely would not have passed the same Sentencing Act."⁹² Consequently, the Court adopted an approach that excised two provisions of the Guidelines in order to reconcile Congress' intent with the Court's constitutional holding.⁹³

The first excised provision makes the Guidelines binding on federal judges, thus rendering the Guidelines advisory, not mandatory.⁹⁴ Breyer, one of the architects of the Guidelines, emphasizes that while the Court is rendering the Guidelines advisory, the Court does not mean to diminish the "strong connection between the sentence imposed and the offender's real conduct," which was integral to Congress' attempt to increase uniformity in sentencing.⁹⁵

The Court further stressed real offense conduct, that is, the "real conduct that underlies the crime of conviction," as being necessary to a system that reduces sentencing disparities and promotes uniformity, which was one of Congress' basic goals in passing the SRA.⁹⁶ Moreover, de-emphasis on real conduct would have "particularly troubling consequences" regarding prosecutorial power, according to Breyer.⁹⁷ Instead of a judge basing a sentence upon the actual conduct of the offender, sentences would largely be determined by the "conduct the prosecutor chose to charge," which the Court noted was a power that the

⁹⁰ *Booker*, 543 U.S. at 233.

⁹¹ *Id.* at 246 (citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996)) (internal quotations removed).

⁹² *Id.* at 258.

⁹³ *Id.* at 246. The second provision the Court severed from Act is the provision setting forth "standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see [18 U.S.C.] § 3742(e)," because that provision "contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons" (emphasis in original). *Id.* at 259–60. Although a consequential ruling in itself, that Court's excision of that provision is irrelevant to the topic of this paper and is thus unaddressed.

⁹⁴ *Id.* at 245.

⁹⁵ *Booker*, 543 U.S. at 246.

⁹⁶ *Id.* at 250, 253.

⁹⁷ *Id.* at 256.

SRA vested in judges.⁹⁸ Thus, to help preserve the SRA's emphasis on real-offense conduct, the Court urged that even though the Guidelines would not be advisory, the SRA "nonetheless requires judges to take account of the Guidelines together with other sentencing goals."⁹⁹

In sum, Breyer explains how the Court's ruling still advances the impetus that led to the Guidelines being enacted in the first place: "[t]hese features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."¹⁰⁰ Moreover, the Court's ruling kept the Sentencing Commission intact, further directing it to continue to "writ[e] Guidelines, collect[] information . . . undertake[] research," and to revise the Guidelines accordingly.¹⁰¹ Breyer concluded by stressing that the Court's decision was not the final say on the matter, as Congress remained free to amend the SRA to comport with the Constitution in a way that "Congress judges best for the federal system of justice."¹⁰²

2. *The Effect on the Guidelines*

Unsurprisingly, *Booker* was seen as "an earthquake" to the sentencing status quo.¹⁰³ However, preceding *Booker* was a long line of Supreme Court decisions that increasingly chipped away at the Guidelines.¹⁰⁴ One of the most significant immediate changes from *Booker*

⁹⁸ *Id.* "[T]he power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment." *Id.* at 257; see also David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268 (2005) (explaining the opposite of real-offense sentencing, known as "charge-offense sentencing." Charge-offense sentencing refers to the setting of a sentence or sentencing range "based entirely on the statute of conviction").

⁹⁹ *Id.* at 259; see 18 U.S.C. § 3553(a) (2018) (other sentencing goals includes, *inter alia*, "[T]he need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

¹⁰⁰ *Booker*, 543 U.S. at 264–65.

¹⁰¹ *Id.* at 264.

¹⁰² *Id.* at 265.

¹⁰³ Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 1, 15 (2013).

¹⁰⁴ See e.g., *Jones v. United States*, 526 U.S. 227, 248 (1999) (holding that "facts determining a statutory sentencing range" must be submitted to a jury and proven beyond a reasonable doubt); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact other than a prior conviction which would increase the penalty for a crime beyond the statutory maximum "must be submitted to a jury and proved beyond a reasonable doubt"); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that capital defendants, under the Sixth Amendment, are entitled to have "any fact on which the legislature conditions an increase in their maximum punishment,"

was that federal sentencing judges gained far more discretion.¹⁰⁵ The other significant development, likely a direct cause of the first, was the rate at which judges sentenced offenders to sentences within the prescribed Guideline range. In the year prior to *Booker*, 72% of all federal sentences were within the Guideline range, meaning 28% of all federal offenders received some time of departure, either downward or upward.¹⁰⁶ In the eleven months following *Booker*, the percentage of sentences that fell within the range dropped to 61.2% nationally.¹⁰⁷ This was more than double than the previous largest year-to-year variation in sentence-rates that fell within the Guidelines.¹⁰⁸ This statistic evidences the single most consequential change stemming from *Booker*—specifically, that sentencing judges were now more willing to use their discretion to go outside of the Guidelines. This development was also reflected in the Commission’s creation of a new statistical category in response to *Booker*: the “variance.”¹⁰⁹

II. UNDERSTANDING DEPARTURES AND VARIANCES

A. Departures and Variances, Defined

As defined by the United States Sentencing Commission, a sentence departure can be one of three things.¹¹⁰ A departure can be a sentence that falls “outside the guideline range.”¹¹¹ It can be a sentence that is “otherwise different from the guideline sentence,” or a departure can be an “assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range.”¹¹² A departure is most often triggered upon a government motion “to reward cooperation.”¹¹³

be presented to a jury); *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (finding a Washington state statute that permitted a judge to increase a sentence beyond the statutory maximum based on a fact that was not presented to the jury as offensive to the Sixth and Fourteenth Amendments in light of the Court’s holding from *Apprendi*).

¹⁰⁵ Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUSTON L. REV. 279, 280 (2006).

¹⁰⁶ *Id.* at 297.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 300.

¹⁰⁹ *Id.* at 305.

¹¹⁰ U.S. SENT’G COMM’N, PRIMER: DEPARTURES AND VARIANCES 1 (2019), https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Departure_Variance.pdf (hereinafter “PRIMER ON DEPARTURES AND VARIANCES”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

A “downward departure” is defined as “a court’s discretionary imposition of a sentence more lenient than the standard [G]uidelines propose, as when the facts militate in favor of a lesser punishment.”¹¹⁴ Accordingly, an upward departure is a harsher sentence than what the Guidelines propose, “when the court concludes that a criminal’s history did not take into account additional offenses committed by the prisoner.”¹¹⁵ Simply put, a downward departure adjusts the Guideline range to below what the range would otherwise be, and an upward departure adjusts the range to go above it.¹¹⁶

Whereas a sentencing departure diverges from what the Guidelines propose based on reasons contained within the Guidelines themselves, a sentencing variance is a divergence from the Guidelines based solely on the “exercise of the court’s discretion under § 3553(a).”¹¹⁷ Eighteen U.S.C. § 3553(a) directs sentencing judges to impose sentences that comply with the following sentencing purposes:

the need . . . (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 further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]¹¹⁸

In other words, departures were incorporated as part of the Guidelines when the Commission first established them, permitting judges to exercise discretion, but limiting those discretions to “departure authority” contemplated by the Commission’s policy statements.¹¹⁹ Variances, though, are sentences that are “neither within the applicable [g]uidelines range nor imposed pursuant to the departure authority in the Commission’s policy statements.”¹²⁰ Although slight, the differences between departures and variances are important as they are subject to

¹¹⁴ *Downward Departure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹⁵ *Upward Departure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹⁶ Compare *supra* note 114, with *supra* note 115.

¹¹⁷ *United States v. Fumo*, 655 F.3d 288, 317 (3d Cir. 2011) (quoting *United States v. Floyd*, 499 F.3d 308, 311 (3d Cir. 2007)).

¹¹⁸ 18 U.S.C. § 3553(a)(2)(A)–(D) (2018).

¹¹⁹ PRIMER ON DEPARTURES AND VARIANCES, *supra* note 110, at 2 (a sentence with a departure is a sentence technically still within the Guidelines as it is imposed “pursuant to the departure provisions of the policy statements in the guidelines” (citing *United States v. Crosby*, 397 F.3d 103, 111 n.9 (2d Cir. 2005)).

¹²⁰ *Id.* (alteration in original) (citing *Crosby*, 397 F.3d at 111 n.9)).

different analysis and notice requirements.¹²¹ Moreover, when a judge believes that a sentence under the Guidelines is too harsh, and the available departures offer no recourse, the judge may instead vary to go outside of the Guidelines.¹²²

B. *Booker and Variances*

Booker had little to no effect on sentencing departures.¹²³ Contrarily, sentencing variances were essentially created by the Court's holding in *Booker*.¹²⁴ Variances grant district courts the ultimate authority when imposing a sentence, "regardless of what the guideline range is found to be," if the court views the sentence as "sufficient, but not greater than necessary" to meet the goals outlined in § 3553(a).¹²⁵ A critical case in understanding *Booker's* effect on how courts may vary, especially in regard to drug cases, is *Kimbrough v. United States*.¹²⁶

In *Kimbrough*, the Supreme Court addressed a portion of the Guidelines that exhibited a substantial disparity in punishments regarding crack and powder cocaine.¹²⁷ As enacted, the Guidelines imposed the same punishment for a drug trafficker dealing in crack cocaine as one dealing in 100 times more powder cocaine.¹²⁸ The Court held that a district court judge "may determine . . . that . . . a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing," as established in 18 U.S.C. § 3553(a).¹²⁹ When doing so, the judge is permitted to consider "the disparity between the Guidelines' treatment of crack and powder cocaine offenses."¹³⁰

Kimbrough was important for two reasons. First, it was the first time the Supreme Court addressed the "demonstrably false predicate

¹²¹ *Id.* at 44 ("Courts have held that variances are not subject to the guideline analysis for departures").

¹²² *Id.* ("In some situations, a prohibited ground for departure may be a valid basis for a variance").

¹²³ *See id.* at 10 (expounding on the impact of *Booker* on "Criminal History Departures," by noting that "since the 2005 *Booker* decision, courts may vary, rather than depart, from the guidelines" when considering departures based on an offender's criminal history); *see also id.* at 13 (regarding *Booker's* effect, or lack thereof, on substantial assistance motions, explaining that "[s]ince *Booker*, the procedure for granting a substantial assistance motion has remained largely unchanged").

¹²⁴ *See* PRIMER ON DEPARTURES AND VARIANCES, *supra* note 110, at 10, 13.

¹²⁵ *Id.* at 44 (emphasis added) (citing 18 U.S.C. § 3553(a) (2018)).

¹²⁶ *See infra* note 134.

¹²⁷ 552 U.S. 85, 91 (2007).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

understandings” of crack offenses and the people who commit them.¹³¹ The Court noted that in a series of reports, the Sentencing Commission concluded that the large disparity reflected in the differing punishments between crack and powder cocaine engenders distrust of the criminal justice system due to the “widely-held perception” that the disparity is driven by race.¹³² After numerous pleas to Congress to reduce the disparate ratio, the Commission independently implemented a “modest amendment” to ameliorate the disparity, but conceded that the amendment represented only “a partial remedy.”¹³³

Secondly, *Kimbrough* established the precedent for courts to vary from the Guidelines based solely on “policy disagreements.”¹³⁴ Reaffirming their holding in *Kimbrough* in a later case, the Court acknowledged that its holding “was a recognition of district courts’ authority to vary from the crack cocaine guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”¹³⁵

Other than permitting courts to vary from the Guidelines, what *Booker* did more than anything, though, was to reintroduce judicial discretion back into the sentencing process.¹³⁶ Beginning with Judge Frankel’s work on illuminating the alleged evils of judicial discretion, the sentencing reform movement hoped to rid unwelcome judicial discretion through the passage of the SRA.¹³⁷ The original purpose of statutorily *requiring* judges to abide by the Guidelines was the single most important factor in remedying invidious sentencing disparities.¹³⁸ Thus, by allowing federal district judges to vary from the Guidelines recommendation, the underlying purposes of the SRA and the Guidelines were undone by the Court’s decision in *Booker*.¹³⁹ The following data on drug

¹³¹ Brief for The American Civil Liberties Union as Amicus Curiae Supporting Petitioner, *Kimbrough v. United States*, 552 U.S. 85 (2007) (No. 06-6330).

¹³² *Kimbrough*, 552 U.S. at 98 (citing U.S. SENT’G COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 103 (May 2002)) (internal quotations omitted); the Court also notes that “[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed ‘primarily upon black offenders.’” *Id.*

¹³³ *Id.* at 99–100 (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-72 (2007)).

¹³⁴ *Leading Cases*, 122 HARV. L. REV. 276, 326 (2008).

¹³⁵ PRIMER ON DEPARTURES AND VARIANCES, *supra* note 110, at 54 (emphasis in original) (citing *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam)).

¹³⁶ *See United States v. Booker*, 543 U.S. 220, 245–46 (2005).

¹³⁷ *See supra* Part I-A.

¹³⁸ Wilkins, Jr. et al., *supra* note 48, at 369.

¹³⁹ *See Booker*, 543 U.S. at 245–46.

sentencing in the District of Maryland highlights how the granting of departures and variances has introduced new disparities since *Booker*.

III. THE UNITED STATES DISTRICT OF MARYLAND

A. *Disparities in the Granting of Departures and Variances Based on Race*

Between 2006 and 2017, the United States District of Maryland saw 9,280 offenders prosecuted for a federal crime.¹⁴⁰ Of those 9,280 offenders, over one third were drug offenders.¹⁴¹ Of those offenders, the ones prosecuted for crimes involving certain drug-types, such as Methamphetamine and Oxycodone/Oxycontin, are predominantly white.¹⁴² Conversely, other offenders, the ones prosecuted for crimes involving drugs such as Crack Cocaine, Heroin, and PCP, are mostly non-white.¹⁴³ What the following data shows is that, in the District of Maryland, the drug-types with a higher percentage of white offenders result in far more lenient sentences through downward departures and variances than drug-types with mostly non-white offenders.

Pursuant to 28 U.S. Code § 997, the United States Sentencing Commission issues an annual report to each branch of government, detailing “the activities of the Commission.”¹⁴⁴ The Commission refers to these reports as the Commission’s “*Sourcebook of Federal Sentencing Statistics*.”¹⁴⁵ The Sourcebook contains statistics on “the application of the federal sentencing guidelines” and provides national data as well as data on individual United States districts and circuits.¹⁴⁶ Additionally, the Commission provides an “Interactive Sourcebook,” which allows for the aggregation of multiple years of data.¹⁴⁷ To observe how departures and variances have played-out since *Booker*, I looked at the combined statistics in the District of Maryland, from fiscal years 2006 to 2017.¹⁴⁸

¹⁴⁰ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See* COMBINED SOURCEBOOKS, *supra* note 5, for explanation of “non-white offenders.”

¹⁴⁴ 28 U.S.C. § 997 (1984).

¹⁴⁵ U.S. SENT’G COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 28 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁴⁸ 2006 is the year after *Booker*, and thus the first year where a judge was allowed to go outside of the Guidelines range.

The Sourcebook allows one to identify the race composition of drug offenders in each drug-type. For instance, between 2006-2017, there have been 1,070 individuals convicted of a crime involving “Powder Cocaine,” in the District of Maryland, of which 67.2% are black.¹⁴⁹ Below is a table showing the race composition of drug offenders in each drug-type.

Table 1: Race of Drug Offenders in Drug-Type in the District of Maryland (2006-2017)¹⁵⁰

Drug Type	Number	White (%)	Black (%)	Hispanic (%)	Other (%)	Non-White Total (%) ¹⁵¹
Powder Cocaine	1,070	15.5	67.2	16.8	0.5	84.5
Crack Cocaine	738	8.0	87.9	4.1	0.0	92.0
Heroin	834	7.6	85.3	7.0	0.2	92.5
Marijuana	228	28.1	62.3	5.3	4.4	72.0
Methamphetamine	64	59.4	10.9	9.4	20.3	40.6
Oxycodone/Oxycontin	133	53.4	42.1	2.3	2.3	46.7
PCP	74	5.4	91.9	2.7	0.0	94.6

The table shows that the drug types with the largest percentage of white offenders are Methamphetamine (hereinafter “Meth”) and Oxycodone/Oxycontin (hereinafter “Oxy”), consisting of 59.4% and 53.4% white offenders respectively.¹⁵² Conversely, the drug types with the largest percentage of non-white offenders are Crack Cocaine, Heroin, and PCP,¹⁵³ all of which are above 90%.¹⁵⁴

Below is a table that shows sentences, relative to Guideline ranges, for each drug-type. It shows the percent receiving sentences

¹⁴⁹ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁵⁰ *Id.* This data was obtained through the Commission’s Interactive Sourcebook. Once you choose a certain table to view, in this instance, Table 34 of the 2017 Interactive Sourcebook titled “Race of Drug Offenders in Each Drug Type,” you can filter the data to show all offenders since 2006, and also narrow to view only the District of Maryland. *Id.*

¹⁵¹ This statistic is not included in the COMBINED SOURCEBOOKS but it is included here to represent offenses committed by minority groups in total. It includes offenders identified as Black, Hispanic, Native American/Alaskan Native, Asian or Pacific Islander, Multi-Racial, and Other.

¹⁵² COMBINED SOURCEBOOKS, *supra* note 5.

¹⁵³ Phencyclidine, also known as “PCP” or “angel dust,” is a hallucinogenic drug. *Phencyclidine*, DRUG ENFORCEMENT ADMIN. (Mar. 2020), https://www.deadiversion.usdoj.gov/drug_chem_info/pcp.pdf.

¹⁵⁴ COMBINED SOURCEBOOKS, *supra* note 5.

within the range prescribed by the Guidelines; the total percentage all upward departures and variances; the percentage who receive a §5K1.1 departure;¹⁵⁵ the percentage of those receiving all other downward departures; and the percentage who receive a downward variance.

Table 2: Sentences Relative to the Guidelines Range for Drug Offenders in Each Primary Drug Type in the District of Maryland (2006-2017)¹⁵⁶

Drug Type	Number	Within Guide-line Range (%)	Total Upward Departures and Variances (%) ¹⁵⁷	§5K1.1 (%)	Other Downward Departures (%) ¹⁵⁸	Downward Variance (%) ¹⁵⁹
Powder Cocaine	1,071	28.7	2.0	39.8	16.7	11.9
Crack Cocaine	738	34.0	2.2	31.8	19.0	12.7
Heroin	833	29.9	3.2	31.2	24.1	10.9
Marijuana	228	30.7	1.3	35.1	15.3	15.4
Methamphetamine	64	12.5	0.0	56.3	10.9	18.8
Oxycodone/Oxycotin	133	14.3	0.0	42.9	19.6	23.4
PCP	74	43.2	1.4	27.0	13.5	14.9

There are a few figures of note in this table. The column labeled “§5K1.1,” pertains to one of the most frequently utilized downward departures.¹⁶⁰ This provision of the Guidelines allows the court to depart from the Guideline range only upon a motion by the prosecutor “stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁶¹ From the table, the drug types receiving the most §5K1.1

¹⁵⁵ See *supra* note 145.

¹⁵⁶ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁵⁷ This column combines the following categories: Upward Departures; Upward Departures w/ Booker; Above Range w/ Booker; Remaining Above Range. *Id.*

¹⁵⁸ This column combines the following categories: § 5K3.1 – Early Disposition; Other Gov’t Sponsored; Downward Departure; Downward Departure w/ Booker. *Id.*

¹⁵⁹ This column combined the categories, “Below Range w/ Booker,” and “Remaining Below Range.” *Id.*

¹⁶⁰ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁶¹ U.S. SENT’G COMM’N, GUIDELINES MANUAL §5K1.1 (Nov. 2018), <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-5#5k11>. Upon such motion from the government, a court may depart for reasons that include, but are not limited to, the following: “(1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered; (2)

departures, are: Meth (56.3%) and Oxy (42.9%).¹⁶² Referring back to Table 1, Meth and Oxy also have the largest percentage of white offenders of all of the drug types.¹⁶³ Conversely, the drugs offenders receiving the least amount of §5K1.1 departures are those who are charged with crimes involving PCP (27%), Crack Cocaine (31.8%), and Heroin (35.1%).¹⁶⁴ Again referring back to Table 1, these three drug types also include the largest percentage of non-white offenders.¹⁶⁵

Another figure that stands out is the column labeled, “Downward Variance.”¹⁶⁶ These are sentences in which the court has imposed a sentence that goes below the Guideline range, citing a reason based not on the Guidelines, but on 18 U.S.C. § 3553(a).¹⁶⁷ Again, the drug offenders receiving the most downward variances are offenders who are prosecuted for Oxy (23.4%)¹⁶⁸ and Meth (18.8%) related offenses.¹⁶⁹ To show the stark disparity in sentencing based on the drug-type, Table 3, below, shows the percent of non-white offenders and the total percentage of all downward departures and variances.

the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant’s assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant’s assistance.” *Id.*

¹⁶² COMBINED SOURCEBOOKS, *supra* note 5.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* note 157.

¹⁶⁷ *See supra* note 118.

¹⁶⁸ It is important to note that while the rest of the drugs mentioned in this paper carry mandatory minimum sentences, crimes involving the illegal possession or sale of Oxycodone/Oxycontin do not. *See* 21 U.S.C. § 841 (2018).

¹⁶⁹ COMBINED SOURCEBOOKS, *supra* note 5.

Table 3: Percentage of Non-White Offenders by Drug Type Combined with Percentage of Total Downward Departures and Variances by Drug Type in the District of Maryland (2006-2017)¹⁷⁰

Drug Type	Number	Non-White Total (%)	Total Downward (%) ¹⁷¹
Powder Cocaine	1,071	84.5	68.4
Crack Cocaine	738	92.0	63.5
Heroin	833	92.5	66.2
Marijuana	228	72.0	65.8
Methamphetamine	64	40.6	85.9
Oxycodone/Oxycontin	133	46.7	86.0
PCP	74	94.6	55.4

Here, it can be clearly seen that the drug types with the lowest percentage of non-white offenders, PCP and Crack Cocaine, by far, receive the smallest percentage of total downward departures and variances.¹⁷² Conversely, the drug types with the highest percentage of white offenders, Oxy and Meth, have significantly higher rates of downward departures and variances.¹⁷³ Because there seems to be an apparent correlation between drug-type and race, and because there is further correlation between drug-type and one's chances of receiving a downward departure or variance, these numbers reveal a serious sentencing disparity attributable to one's race at play in the District of Maryland. However, this trend is not confined to the District of Maryland alone.

B. Reflection of a National Problem

The data outlined in the preceding subsection is also borne out in the national statistics, highlighting a larger problem. The following table is a duplication of Table 3, but with national statistics.

¹⁷⁰ *Id.*

¹⁷¹ This column combines the following categories: §5K1.1 Substantial Assistance; §5K3.1 Early Disposition; Other Gov't Sponsored; Downward Departure; Downward Departure w/ Booker; Below Range w/ Booker; Remaining Below Range. *Id.*

¹⁷² *See supra* Table 3.

¹⁷³ *See supra* Table 3.

Table 4: National Percentage of Non-White Offenders by Drug Type Combined with Percentage of Total Downward Departures and Variances by Drug Type (2006-2017)¹⁷⁴

Drug Type	Number	Non-White Total (%)	Total Downward (%)
Powder Cocaine	64,381	86.6	52.8
Crack Cocaine	46,209	92.0	50.6
Heroin	24,574	84.8	59.0
Marijuana	64,180	77.2	47.0
Methamphetamine	64,822	55.5	63.0
Oxycodone/Oxycontin	7,462	35.6	70.1
PCP	734	96.0	55.7

Although the disparities are a little less stark, the same pattern can be seen. The drug-type with the lowest percentage of non-white offenders, Oxy, has the highest rate of downward departures and variances.¹⁷⁵ The drug-type with the second lowest percentage of non-white offenders, Meth, also has the second highest rate of total downward departures and variances.¹⁷⁶

Looking then at the two drug-types with the highest percentage of non-white offenders, PCP and Crack Cocaine, they appear to be granted the *least* amount of downward departures and variances, with the exception of marijuana.¹⁷⁷ These statistics largely comport with the conclusion drawn using the data from the District of Maryland.

IV. AN OFFENDER'S CRIMINAL HISTORY

It would be naïve and improper to assume that the discrepancies outlined in the preceding section can be explained by racial bias among

¹⁷⁴ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ The low amount of marijuana departures and variances can be best explained by the Guidelines' lenient treatment of marijuana crimes. For instance, an offender who has between 10-20 kilograms of marijuana will be assigned the same base level category of someone who has 10-20 grams of heroin, for a ratio of 1,000-1. U.S. SENT'G COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (Nov. 2018), <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-2-d#NaN>.

judges alone. The 600-page Guidelines Manual, published by the Commission, is replete with adjustments that can affect a sentence.¹⁷⁸ This section addresses how the Guidelines take into account an offender's criminal history, one of the more significant ways in which a Guideline range can be altered, and how that criminal history might relate to the rate at which judges depart and vary downward.¹⁷⁹

The argument goes like this: a particular judge might be more willing to depart or vary for a particular offender with a lower criminal history category, and vice versa for an offender with a higher criminal history category. But the determination of an offender's criminal history category in itself carries racial implications.¹⁸⁰ The inherent racial biases built into an offender's criminal history category can cause an overrepresentation of non-white offenders in the drug-crime statistics.¹⁸¹ Part IV-A. shows how the Guidelines compute an offender's criminal history and presents data from the District of Maryland.¹⁸² Part IV-B. discusses the problems with the "Career Offender" designation which can drastically alter an offender's criminal history category and result in much higher sentences.¹⁸³ Finally, Part IV-C. discusses over-policing in Baltimore City and how that further explains the higher criminal history categories among non-white drug offenders in Maryland.¹⁸⁴

A. *Criminal History Category: What the Data Shows*

Likely the most significant provision that can affect a particular Guideline range—other than the crime itself—is an offender's criminal history.¹⁸⁵ When computing an offender's sentence, two things are taken into account: the offense level and the offender's criminal history category.¹⁸⁶ Criminal history categories range from Category I, the least serious, to Category VI, the most severe.¹⁸⁷ A particular offender is

¹⁷⁸ U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018 (Nov. 2018), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf> [hereinafter USSG].

¹⁷⁹ See Outlaw, *supra* note 50, at 220.

¹⁸⁰ *Id.*

¹⁸¹ See *infra* Part IV-C.

¹⁸² See *infra* Part IV-A.

¹⁸³ See *infra* Part IV-B.

¹⁸⁴ See *infra* Part IV-C.

¹⁸⁵ See Outlaw, *supra* note 50, at 220 (stressing that "[q]ualifying as a career offender changes the entire landscape of a defendant's prison exposure. It can transform a sentencing exposure that would normally be a few years into decades of imprisonment, and even life imprisonment").

¹⁸⁶ See USSG, *supra* note 178, at 407.

¹⁸⁷ *Id.*

awarded a certain amount of “points” based on the offender’s prior record, if the offender has one.¹⁸⁸ If the crime at issue carries an offense level of 15, for instance, the Guideline range for an offender with a Category I criminal history is 18-24 months in prison.¹⁸⁹ However, if the same offense level was committed by an individual with a Category VI criminal history, that range increases to 41-51 months in prison.¹⁹⁰ Table 5 below shows the distribution of criminal history categories in each drug type in the District of Maryland.

Table 5: Criminal History Category of Drug Offenders in Each Drug Type in the District of Maryland (2006-2017)¹⁹¹

Drug Type	Number	I	II	III	IV	V	VI
Powder Cocaine	1,040	40.0	15.8	15.4	5.9	3.0	18.9
Crack Cocaine	710	15.8	13.0	19.3	10.4	4.1	37.5
Heroin	804	32.2	11.1	17.9	6.1	2.0	30.7
Marijuana	214	55.6	10.3	13.1	7.9	1.9	11.2
Methamphetamine	63	71.4	14.3	7.9	0.0	0.0	6.3
Oxycodone/Oxycontin	128	50.0	9.4	20.3	7.8	3.9	8.6
PCP	67	17.9	14.9	22.4	9.0	6.0	29.9

Most readily apparent is the high percentage of Category VI offenders among drug types with the most non-white offenders versus drug types with the least non-white offenders.¹⁹² Crack Cocaine, Heroin, and PCP have, by far, the most offenders with the most Category VI designations, whereas Meth and Oxy have by far the fewest offenders with a Category VI designation.¹⁹³ One could be forgiven for logically

¹⁸⁸ USSG, *supra* note 178, at 379–80. The instructions for determining the Criminal History Category are as follows: (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month. (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a). (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection. (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection. *Id.*

¹⁸⁹ *Id.* at 407.

¹⁹⁰ *Id.*

¹⁹¹ COMBINED SOURCEBOOKS, *supra* note 5.

¹⁹² *Id.*

¹⁹³ *Id.*

concluding, then, that because non-white drug offenders have more serious criminal histories, judges will be more reluctant to depart and vary downwards. Yet, it is important to note that being presented with an offender who is assigned a Category VI criminal history category, does not in any way hinder a judge's ability to depart and vary downward. An offender's criminal history category simply 'moves the goal-posts' of an offender's potential sentence.¹⁹⁴ Thus, in theory, the amplifying effect of an offender's criminal history category should not drastically alter the rate of departures and variances, at least, not to the extent discussed in the prior section.

Nevertheless, the above data suggests that one's race can have an effect on one's criminal history category, meaning the computation of one's criminal history category has implicit bias built within it.¹⁹⁵ One way this plays out is when offenders qualify as a "career offender."

B. The Problematic "Career Offender" Guideline

The Guidelines section on computing a defendant's criminal history contains a subsection that can greatly increase an offender's criminal history category, even if prior convictions are for relatively innocuous crimes.¹⁹⁶ This subsection outlines the problems inherent in the "career offender" guideline.¹⁹⁷ In order to qualify as a career offender, a defendant must meet three requirements:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.¹⁹⁸

Subsection B of the provision further states that once an offender qualifies as a career offender, the offender's criminal history category

¹⁹⁴ See Outlaw, *supra* note 50, at 219 n.9.

¹⁹⁵ See COMBINED SOURCEBOOKS, *supra* note 5.

¹⁹⁶ See Outlaw, *supra* note 50, at 225 ("[A] defendant with two priors for selling small amount of drugs is subject to the same offense level, criminal history category, and therefore presumed sentencing range, as a defendant with two priors for rape, murder, or arson").

¹⁹⁷ USSG, *supra* note 178, at 395–96.

¹⁹⁸ *Id.* at 395.

automatically becomes Category VI, the most severe category, greatly increasing the Guideline range.¹⁹⁹

The career offender provision, however, is “fraught with potential imprecision” due to the incredible amount of predicate crimes that can qualify.²⁰⁰ As a result, there is the “potential for wide discrepancy in the gravity of past antisocial conduct among career offenders.”²⁰¹ For instance, an offender who has two prior convictions for violent assaults will be subjected to the same career offender enhancement as an offender who has two prior convictions for street-level drug sales.²⁰² On some level, the inclusion of “a crime of violence” makes sense as a predicate felony that would qualify one as a career offender; if an individual is routinely violent and past sentences have not abated the problem, the interest in keeping the public safe overtakes any interest in rehabilitation.

What is more problematic, however, is the inclusion of a “controlled substance offense” as the only other set of predicate felonies that would qualify an offender.²⁰³ The presumption that drug offenses are inextricably linked to violent offenses, a substantial reason why drug offenders are coupled with violent offenders in the career offender category, has been shown to be without merit.²⁰⁴ Furthermore, the percentage of controlled substance offenders who are non-white greatly outweigh the percentage of white offenders, whereas white-collar crimes, which can be arguably be as harmful as drug offenses, are committed predominately by white offenders.²⁰⁵

¹⁹⁹ *Id.* One caveat is that in order to automatically be assigned a criminal history category of VI, one’s offense must be otherwise lesser than offense levels stated in a table outlined in the subsection, but it would be rare for this not to occur unless the predicate offense is a serious one such as murder. *Id.*

²⁰⁰ *United States v. Adkins*, 937 F.2d 947, 952 (4th Cir. 1991).

²⁰¹ *Id.* (internal quotations omitted).

²⁰² *See* Outlaw, *supra* note 50, at 225.

²⁰³ *Adkins*, 937 F.2d at 952.

²⁰⁴ Outlaw, *supra* note 50, at 230.

²⁰⁵ *See* Norman Abrams, *Assessing the Federal Government’s “War” on White-Collar Crime*, 53 TEMP. L. Q. 984, 1001, 1006–07 (1980) (quoting *White Collar Crime: Hearings Before the Subcomm. On Crime of the House Comm. on Judiciary*, 95th Cong., 2d Sess. 65–66 (1978) (testimony of Deputy Attorney General Benjamin Civiletti) (“Some in our society erroneously assume that white-collar offenses affect only the money or property rights of affluent individuals or the public or private institutions who can well afford the loss. Such offenses, however, have both a direct and indirect impact on all social classes and often inflict their greatest harm on the poor, the infirm and other segments of society that can least afford it. Further, the impact of white-collar illegality extends beyond simply pecuniary loss. Corruption of government officials can affect the quality of our food and the safety of our homes. Such illegality also has invidious effect on the public’s perception of the integrity of our political, economic, social and governmental institutions. Official corruption invariably involves breaches of trust, either in the

A primary motivation behind the career offender guideline is the desire to impose “especially long sentence[s] upon those who have committed prior offenses” in order to deter where prior punishments have failed to.²⁰⁶ However, this preconception is not reflected in the reality of the career offender guideline. First, there is a strong likelihood that an offender with two prior convictions for low-level drug dealing will have spent no time in prison before being labeled a career-offender.²⁰⁷ Upon a third conviction, that individual will be assigned a Category VI criminal history and will likely face an enormous prison enhancement despite never having served any time in prison. In order to achieve the desired deterrence effect, there must be “an appropriate relationship between the sentence for the current offense and the sentences . . . for the prior offenses.”²⁰⁸ In the aforementioned scenario, the career offender guideline is not serving its function because there has not been a real attempt to deter the offender in the previous two convictions.

Another primary motivation behind the career offender guideline is to reduce recidivism.²⁰⁹ Yet, the data shows that drug offenders do not recidivate with greater frequency than others, and in fact, recidivate less than other offenders who have criminal history categories of VI.²¹⁰ The Sentencing Commission itself has conceded that the career offender guidelines “makes the criminal history category a *less* perfect

legal or moral sense, and such offenses generate in the public a deep sense of betrayal and disappointment. When an elected official accepts a bribe, a bank official abuses his position for personal gain, a corporate officer engages in illicit activity, or an employed worker fraudulently obtains unemployment insurance benefits, we as citizens feel cheated. Such public perceptions are fertile ground for the development of widespread public cynicism and a conviction that the entire economic and political system is corrupt and lacks integrity. It is precisely because white-collar offenses have the capacity to subvert the basic assumptions of our institutions and drain our national will that I consider white-collar illegality to be one of our most urgent law enforcement problems”).

²⁰⁶ United States v. Mishoe, 241 F.3d 214, 220 (2d Cir. 2001).

²⁰⁷ See COMBINED SOURCEBOOKS, *supra* note 5.

²⁰⁸ *Mishoe*, 241 F.3d at 220.

²⁰⁹ *Outlaw*, *supra* note 50, at 60, 228.

²¹⁰ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 134 (Nov. 2004), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (“[T]he recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI. The overall rate of recidivism for category VI offenders two years after release from prison is 55 percent. The rate for offenders qualifying for the career criminal guideline based on one or more violent offenses is about 52 percent. But the rate for offenders qualifying *only on the basis of prior drug offenses is only 27 percent*”) (emphasis added) (internal citation omitted).

measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.”²¹¹

Overall, while an offender’s criminal history can help explain the large disparity outlined in the previous section, it too involves implicit racial biases. The inclusion of drug offenses as a predicate felony under the career offender guideline unfairly punishes minority groups by overrepresenting a particular offender’s criminal history.²¹² The career offender guideline becomes further problematic when one considers that minority populations are more often subject to increased police surveillance resulting in more arrests and convictions, as is the reality in Baltimore, Maryland.²¹³

C. *Over-Policing of Baltimore City*

Another explanation for the disparity in criminal history categories in the U.S. District of Maryland is Baltimore’s infamous over-policing problem. Baltimore City is an over-policed city.²¹⁴ In 2016, the Baltimore Police Department employed 41 officers for every 10,000 residents, which at the time was the fourth highest rate of any police department in the country with over 500 officers.²¹⁵ Most of the over-policing, however, is concentrated in predominantly African American neighborhoods.²¹⁶

Following the death of Freddie Gray and the ensuing civil unrest in Baltimore in April 2015, the Department of Justice launched an investigation into the practices of the Baltimore City Police Department (“BPD”).²¹⁷ In a 164-page report, the DOJ details its conclusions, finding that there is “reasonable cause to believe that BPD engages in a pattern or practice of conduct that violates the Constitution or federal law.”²¹⁸ Among the alleged practices was “using enforcement strategies that produce severe and unjustified disparities in the rates of stops,

²¹¹ *Id.* (emphasis in original).

²¹² Outlaw, *supra* note 50, at 229.

²¹³ *See infra* Part IV-C.

²¹⁴ *See infra* note 218.

²¹⁵ Scott Beyer, *In Baltimore, Police Seem Everywhere and Nowhere at Once*, GOVERNING (Nov. 2018), <https://www.governing.com/columns/urban-notebook/gov-baltimore-police-paradox.html>.

²¹⁶ *See infra* note 218.

²¹⁷ Del Quentin Wilber & Kevin Rector, *Justice Department report: Baltimore police routinely violated civil rights*, BALT. SUN (Aug. 9, 2016), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-doj-report-20160809-story.html>.

²¹⁸ U.S. DEP’T OF JUST., C.R. DIVISION, INVESTIGATION OF THE BALTIMORE CITY POLICE DEP’T 3 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter INVESTIGATION OF THE BALTIMORE CITY POLICE DEP’T].

searches and arrests of African Americans[.]”²¹⁹ Moreover, the concentration of these stops, searches, and arrests occur in “predominantly African-American neighborhoods.”²²⁰

The report also notes that BPD’s unabated targeting of African American neighborhoods “disproportionately harms African-American residents.”²²¹ Because BPD stopped African American residents “three times as often as white residents,” African Americans accounted for 86% of “all criminal offenses” despite comprising only 63% of the city’s population.²²² Furthermore, the report found that there were “large racial disparities in BPD’s arrests for drug possession.”²²³ For instance, BPD arrested African Americans for drug possession at five times the rate of others, despite survey data showing that African Americans “use drugs at rates similar to or slightly exceeding other population groups.”²²⁴

This “over-policing,” can result in an overrepresentation of the over-policed group in criminal statistics. In Baltimore, the result is an overrepresentation of African Americans in the criminal justice system which produces deep distrust between law enforcement and the African American community which thus exacerbates the problem.²²⁵ Over-policing can help explain why the Maryland criminal history statistics are so severely skewed in showing an overrepresentation of minority groups. African Americans are stopped, searched, and arrested more often, resulting in more convictions, with a particular emphasis on drug-related crimes.

CONCLUSION

The motivation behind the enactment of the SRA and the promulgation of the U.S. Sentencing Guidelines was a noble one.²²⁶ The need to narrow sentencing disparities represents overarching principles of

²¹⁹ *Id.*

²²⁰ *Id.* at 5. In one of the more jarring statistics in the report, it was revealed that although the stops mostly occurred in African American neighborhoods, the neighborhoods encompassed a relatively “small portion of Baltimore residents.” Thus, “hundreds of individuals—nearly all of them African American—were stopped on at least 10 separate occasions” between 2010–2015, and “seven African-American men were stopped *more than 30 times* during this period” (emphasis added). *Id.* at 6.

²²¹ *Id.* at 7.

²²² *Id.*

²²³ INVESTIGATION OF THE BALTIMORE CITY POLICE DEP’T, *supra* note 218, at 8.

²²⁴ *Id.*

²²⁵ See THE WEST BALTIMORE COMM’N ON POLICE MISCONDUCT AND THE NO BOUNDARIES COALITION, OVER-POLICED YET UNDERSERVED 15 (Mar. 8, 2016), <http://www.noboundariescoalition.com/wp-content/uploads/2016/03/No-Boundaries-Layout-Web-1.pdf>.

²²⁶ See *supra* Part I.

equality and justice that should be reflected in the United States criminal justice system. However, since the passing of the SRA, sentencing disparities persist and have real implications for defendants all over the country.²²⁷ In Maryland, drug offenders who are white receive greater leniency in federal court in the form of departures and variances than drug offenders who are non-white.²²⁸ This is a disconcerting realization which needs to be addressed if the goal of the SRA and the Guidelines is to be fully realized.

²²⁷ *See supra* Part III-B.

²²⁸ *See supra* Part III-A.