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I. Introduction

It was a classic ‘David’ versus ‘Goliath’ fight. The college basketball season was all but over for the 15-11 Maryland Terrapins when they marched into Chapel Hill to play Atlantic Coast Conference (ACC) rival North Carolina. Sally Jenkins, *Terrapins Savor Taste of Triumph*, Washington Post, February 22, 1986. North Carolina, a favorite to win the national championship, had only lost once all season. *Id.* Maryland, on the other hand, was 4-7 in the conference and in danger of missing the NCAA tournament. *Id.* As expected, the Terrapins were vast underdogs to North Carolina. *Id.*

On February 21, 1986, ‘David’ stepped onto the court of the Dean E. Smith Student Activities Centers and beat ‘Goliath’ 77-72 in overtime. *Id.* Neither Maryland, nor North Carolina went on to win a national title that year, but the game was significant for other reasons. <http://tarheeltimes.com>(follow the “basketball schedule” hyperlink; then 1985-1986 season). That game would have disappeared into the distant memory of college basketball fans everywhere, but for the performance of a 22-year-old Maryland basketball star Len Bias. Bias scored 35 points against the number one team in the nation that night. Jenkins, *supra*. He solidified his second straight ACC player of the year award with that 35-point performance which included a steal and reserve dunk off an inbound pass. Derek Toney, *Remembering Len Bias*, June 15, 2006, *available at* <http://www.gazette.net>. Maryland beat North Carolina in 1986 because Len Bias willed it with his performance. After, the comparison between Bias and North Carolina standout, Michael Jordan seemed appropriate. Jenkins, *supra*.

The Boston Celtics made Len Bias the number two overall pick in the 1986 National Basketball Association draft. Keith Harriston and Sally Jenkins, *Maryland Basketball Star Len Bias*

Is Dead at 22, June 20, 1986, available at <http://www.washingtonpost.com>. Len Bias died of a cocaine overdose after flying back to Washington, D.C. from his signing/media day in Boston. Bill Simmons, *Still Haunted By Len Bias*, June 20, 2006 available at <http://espn.go.com>. Bias was seeing green, not just the green of the Celtics' uniform, but the green of a fresh contract with Boston and Reebok—he had his whole life ahead of him. *Id.* The news of Bias' death was a “where were you when Kennedy was shot” moment for all Boston/Maryland fans. *Id.* Most sports writers around the country agreed that Len Bias would have added a few more championships to the Boston Celtics of the 1980's, an extension of a dynasty in sports that never happened. *Id.*

When Bias' life was cut short that summer, it galvanized Washington into passing stricter mandatory minimum sentences for crack cocaine. Gene Wojciechowski, *Death Be Not Proud*, Los Angeles Times, June 23, 1991 available at <http://articles.latimes.com/1991-06-23>. Len Bias' death from a cocaine overdose also influenced the Sentencing Commission's creation of the 100-to-1 crack to cocaine ratio. *Id.* In the years since Len Bias's death, the Sentencing Commission has issued reports dispelling the reasons behind the 100-to-1 ratio, and in 2007 amended the Guideline range for crack cocaine. See Chris Gaspard, *Kimbrough and Gall: Taking Another “Crack” At Expanding Judicial Discretion Under The Federal Sentencing Guidelines*, 36 Peep. L. Rev. 757 (2009). These changes are a step in the right direction, but the state of the country's drug sentencing laws are *Still Haunted By Len Bias*.

II. State of the Law

In 2005, the Supreme Court changed federal sentencing policy forever when it held that the United States Sentencing Guidelines were advisory. *United States v. Booker*, 543 U.S. 220, 222 (2005). What followed was a line of cases challenging the drug sentences established by the Guidelines. In *Rita v. United States*, a decorated veteran petitioned for a sentence below the

Guideline range because of his ailing physical condition, military service, education, employment history, lack of substance abuse and mental and emotional health. *Rita v. United States*, 551 U.S. 338 (2007). The Fourth Circuit affirmed a sentence at the low end of the Guideline range stating that the Guidelines were, “presumptively reasonable.” *Id.* The Supreme Court agreed with the Fourth Circuit and affirmed Rita’s sentence. *Id.* at 346. However, the question of departures still remained.

In 2007, the Supreme Court finally weighed in on departures generally and the appellate review of those departures. In *Gall v. United States*, the Court held that federal appellate courts must use the abuse-of-discretion standard when reviewing sentences regardless of whether those sentences fall within the Guidelines. *Gall v. United States*, 552 U.S. 38 (2007). The Court also held that district courts must articulate justifications for a departure from the Guidelines. *Id.* at 45. The Court laid out a four-step procedure for district courts to follow when departing from the Guidelines. The district court must; 1) correctly calculate the applicable range under the Guidelines; 2) allow both sides the opportunity to argue for an appropriate sentence; 3) consider all the § 3553(a) factors to see if they support a requested sentence, and; 4) adequately explain the sentence chosen to provide for a meaning appellate review. *Id.* at 49.

The *Gall* decision set the stage for the Supreme Court to answer whether a district court should have the discretion to consider its own disagreement with the 100-to-1 crack cocaine ratio as a factor in departing from the Guideline ranges. *Kimbrough v. United States*, 552 U.S. 85 (2007). In *Kimbrough*, the Supreme Court held that a district court has the discretion to sentence outside the Guidelines range in crack cases if it finds that disparity between crack and powder cocaine results in a sentence “greater than necessary” to satisfy the objectives of the Guidelines. *Id.* at 91 (citing 18 U.S.C. § 3553(a)(2) (2006)). The Supreme Court reasoned that the 100-to-1 ratio was based on

“assumptions” about crack that was never warranted. *Id.* at 95-96. Therefore, the Supreme Court decided that it was appropriate for district courts to depart from the 100-to-1 ratio in certain circumstances.

Recently, in *Spears v. United States*, relying on its decision in *Kimbrough*, the Supreme Court held that in cases involving crack cocaine amounts, district courts have the authority to vary from the Guidelines predicated on policy disagreement only. *United States v. Spears*, 129 S. Ct. 840, 843 (2009). The Court determined that the district court can depart from the Guidelines simply on policy grounds, *regardless* of an individual determination that the Guidelines would produce an excessive sentence in a given case. *Id.*

A. Ohio

In the Northern District of Ohio, two district judges rejected the 100-to-1 ratio for a 1-to-1 ratio based on policy grounds. In *United States v. Terry*, the court sentenced the defendant to 18 months and 3 years of supervised release for three counts of distributing a total of 9.5 grams of cocaine base. *United States v. Terry*, Case No. 1:09 CR 0013. The court relied on *Kimbourgh* and *Spears* for the authority to decline, as a matter of policy, imposing the Guidelines’ 100-to-1 crack-to-powder cocaine ratio. *Id.* The presentence report recommended a sentence of 24 months which was the starting point of the court’s analysis. However, after careful consideration the court determined that “sound jurisprudential and policy reasons compel [it] to reject the Guidelines recommended administration of a 100-to-1 crack to powder ratio.” *Id.* Considering the § 3553 factors, the court rejected the presentence report’s recommended sentence “as predicated upon the unacceptable Guidelines sentencing disparity between crack and powder cocaine.” *Id.*

In *United States v. Griffin*, the defendant pled guilty to two counts of distributing crack cocaine and one count of distributing powder cocaine. *United States v. Griffin*, Case No. 5:09-CR-08.

In reaching its decision, the court considered the parties' arguments, the Guideline range, and other relevant § 3553 factors. *Id.* Specifically citing the "parsimony provision," the court sentenced the defendant to 33 months followed by 6 years of supervised release as a sentence "sufficient, but not greater than necessary." *Id.* quoting *United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006).

In *Griffin*, the court adopted a 1-to-1 crack-to-powder ratio as a matter of policy. *Id.* It reasoned that the Guidelines on cocaine offenses "do not exemplify the commission's exercise of its characteristic institutional role." *Id.* quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). Instead, the court reasoned, because the crack cocaine disparity was based on little proof that crack was more addictive than powder cocaine, it treated low-level crack dealers more harshly than high-level powder traffickers, and fostered disrespect for the criminal justice system, it could disregard the 100-to-1 ratio. *Id.*

The most interesting part of the *Griffin* decision was the court's concern with "disparity between the sentence imposed in this case and those imposed in other federal cases involving crack, where the 100-to-1 ratio is applied." *Id.* at 9. The court looked at the language of 18 U.S.C. § 3553(a)(6) to solve this problem. *Id.* The provision uses the term "similar conduct" instead of "similar offense," meaning that the court was not confined to look at sentences imposed for violations of federal law. *Id.* Consequently, the court looked to Ohio law to determine if there were any significant sentencing disparities. The defendant's conduct in Ohio was punishable by a mandatory prison term of one, two three, or four years. Ohio Rev. Code §§ 2925.03(C)(4)(d), 2929.14(A)(3), and 2929.14(C). The court said its 33 months sentence was within range permitted by Ohio law thus and no disparity existed between the defendant's sentence in this case and other criminals convicted in Ohio state courts for the same conduct. *Id.* at 10.

B. Nationally

United States v. Gully, 619 F. Supp. 2d 633 (N.D. Iowa 2009)

The court in *United States v. Gully*, was the first district court to address whether it had the discretion to impose a 1-to-1 crack-to-powder ratio in sentencing. Quoting the Supreme Court in *United States v. Spears*, the district court determined that it was “entitled to reject and vary categorically from the crack-cocaine Guidelines based on policy disagreements with those Guidelines.” *Id.* at 637. The court concluded that the “appropriate methodology is to use a 1:1 crack-to-powder ratio not just in an individual case or in a “mine-run” case, but in all ‘crack’ cases.” *Id.* at 644. The court said that the analysis of a sentence should begin with a calculating the 100:1 Guideline range and the 1:1 Guideline range. *Id.* Then, the court continued, enhance sentences for offenses that involve “weapons or bodily injury, or for other conduct warranting enhancement under 18 U.S.C. § 3553(a).” *Id.* Considering the § 3553(a) factors the court concluded that “84 months—more than twice the upper end of his alternative Guideline range based on a 1:1 ratio—was sufficient, but not greater than necessary in this case.” *Id.*

United States v. Lewis, 623 F. Supp. 2d 42 (D.D.C. 2009)

In *United States v. Lewis*, the defendant pled guilty to one count of distributing five grams or more of cocaine base and acknowledged at his plea hearing that he was accountable for more than 187.7 grams of cocaine base. After several sentencing hearing, each applying different ratios, the court finally adopted a 1:1 ratio for this case and all future crack offenses. *Id.* Here, the court quoted extensively from *Gully*, and adopted its reasoning and procedure in calculating sentences. *Id.*

United States v. Owens, 2009 WL 2485842 (W. D. Pa.)

In *United States v. Owens*, the defendant acknowledged responsibility for 103 grams of crack and 2,306 grams of powder cocaine. The defendant was able to exercise the “safety value” provision

in 18 U.S.C. § 3553(f) and was sentenced to 50 months. The court applied a 1:1 ratio.

United States v. Russell, 2009 WL 2485734 (W.D. Pa.)

In *United States v. Russell*, the defendant pleaded guilty to a four-count indictment acknowledging responsibility for 53.1 grams of crack. Under the 100-to-1 ratio, the applicable guideline range at sentencing was 87 to 108 months' imprisonment. After calculating the range under a 1-to-1 ratio, the defendant faced a sentence of 18 to 24 months imprisonment. However, Congressional minimum sentences forced the court to sentence the defendant to 60 months.

United States v. Medina, 2009 WL 2948325 (S.D. Cal.)

In *United States v. Medina*, the defendant pled guilty to conspiracy to distribute crack cocaine. The defendant's Guideline range was 51 to 63 months under the 100-to-1 crack to powder ratio. The defendant filed a motion for downward departure that was *unopposed* by the Government. The court sentenced the defendant to 30 months under a 1-to-1 ratio for the policy reasons stated in *United States v. Gully*.

Henderson v. United States, 660 F.Supp.2d 751 (E.D. La.)

In *Henderson v. United States*, the defendant pled guilty to four counts of distributing crack cocaine. During controlled buys, the defendant sold a variety of drugs to undercover agents. The court calculated the total converted weight of controlled substances. After the court made its calculation, the defendant took responsibility for 150.139 kilograms. The Guideline range for the total weight of controlled substance was 77-96 months. The court determined that under a 1-to-1 ratio the total quantity of controlled substance that the defendant was responsible for was 2.234 kilograms. Citing the policy reasons in *United States v. Gully*, the court rejected a 100-to-1 ratio and adopted a 1-to-1 crack to powder ratio. The Guideline range under the 1-to-1 ratio was 18 to 24 months, however because the defendant's criminal history was "simply off the charts" the court

determined that his criminal history warranted an upward variance. The defendant was sentenced to 72 months.

United States v. Carter, 2009 WL 2578958 (W.D. Va.)

In *United States v. Carter*, the defendant pled guilty to conspiracy to distribute 50 grams or more of crack. The court rejected the 100-to-1 ratio in the Guidelines because it “serves no legitimate purpose.” The defendant ultimately accepted responsibility for 147 grams of crack, and with various enhancements his Guideline range was 262-327 months under the 100-to-1 ratio. In adopting a 1-to-1 crack to powder ratio, the court sentenced the defendant to 144 months.

United States v. Luck, 2009 WL 2462192 (W.D. Va.)

In *United States v. Luck*, defendant was convicted of conspiracy to distribute more than 50 grams of crack. Under the 100-to-1 crack to powder ratio, with various enhancements the Guideline range was 360 months to life. The Guideline range under a 1-to-1 ratio was 262-327 months. Using the 1-to-1 ratio, the court sentenced the defendant to 288 months. The court stated that the crack to powder ratio, “serves no legitimate sentencing purpose.”

III. Tips for Probation Officers “The Eyes and Hears of the Court”

Has the change in the federal sentencing laws created a burden on the United States Probation Office? The holdings in *Gall*, *Kimbrough*, and *Spears* make it clear that probation officers now need to conduct a more thorough examination of the § 3553(a) factors in departure cases. But the question remains about how the change in the federal sentencing laws affected the role of probation officers.

Under the individualized sentencing model, the goal of the sentencing judge is to order individualized sentences that “fit the offender and not merely the crime.” *Williams v. New York*, 337 U.S. 241, 247-248, (1949). Therefore, sentencing judges must consider, “the fullest information possible concerning the defendant’s life and characteristics,” in determining an appropriate sentence.

Id. The Supreme Court said that probation reports are a good source of information because, “[p]robation workers making reports of the their investigations have not been trained to prosecute but to aid offenders.” *Id.* at 249. The Supreme Court when on to explain that the model report used in federal sentencing at the time included 13 categories; seven categories potentially contained mitigating information about the defendant (family history, home and neighborhood, education, religion, interests and activities, health, employment). *Id.* at 250 n. 15.

Williams v. New York was decided well before Congress established the Guidelines. However, the Guidelines have not changed the role of probation officers. *See, e.g., United States v. Espalin*, 350 F.3d 488 (6th Cir. 2003); *United States v. Washington*, 146 F.3d 219 (4th Cir. 1998); *United States v. Woods*, 907 F.2d 1540 (5th Cir. 1990); *United States v. Belgard*, 894 F.2d 1092 (9th Cir. 1990). In *United States v. Belgard*, the Ninth Circuit relied on *Williams* when it determined that probation officers were trained to aid offenders, and “[t]here [was] no reason to believe that the Guidelines have changed that.” *Id.* at 1098. Therefore, as far as federal courts are concerned, the role of probation officers was and still is to aid defendants.

However, under the Guidelines the purpose of sentencing shifted away from rehabilitation. *See* Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis. L. Rev. 679. This shift created a new role for probation officers. Probation officers were instructed by the Administrative Officer of the U.S. Courts, hereinafter (A.O.) that their role was no longer to investigate the social past of the defendants, but instead to apply the Guidelines to the facts of each case. Division of Probation, Admin. Office of the U.S. Courts, Pub. No. 107, Presentence Investigation Reports Under the Sentencing reform Act of 1984 (1987). Basically, the Guidelines mandated that probation officers ensure the proper Guideline sentence was applied, which was a far cry from their role as an “aid to the offender.” *See,*

Williams v. New York, 337 U.S. 241 (1949). This “role confusion” is compounded by the A.O.’s current presentence manual that requires probation officers to track down facts that are not included in plea agreements and reporting those discrepancies to the A.O. Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, Pub. 107, *The Presentence Investigation Report II-22* (Mar 2006) available at http://www.fd.org/pdf_lib/publication%20107.pdf.

It appears that the Guidelines put probation officers in a position that is juxtaposed to the role the Supreme Court had in mind in *Williams*. Instead of ‘aid to the offender’ the probation officer is in an independent role to prosecute the defender according to an independent investigation. However, when *Booker* made the Guidelines advisory, the A.O. added two sections to the standard presentence form inviting probation officers to change their focus. Section E requires probation officers to analyze reasons for departures and Section F requires officers to analyze sentencing factors listed under 18 U.S.C. § 3553(a). The new presentence reports require probation officers to include in their reports information concerning “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). A comprehensive investigation into the offender’s background could reveal a number of mitigating circumstances that the judge may take into consideration at the sentencing hearing. The investigation into mitigating factors can return to probation officers to their role as “aids to the offender.” *See Williams v. New York*.

However, discretion is the most important aspect of a probation officer’s investigation. In drafting a presentence report, probation officers review considerable documents related to an offender’s past, i.e. school records, employment, medical and mental health, interview defendants and case agents, and then condense the circumstances of a defendant’s life in a report to assist the judge in sentencing. Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46

No. 1 Crim. Law Bulletin ART 2 (2010). Probation officers use their discretion in determining, “what questions to ask, whom to talk to, and, ultimately, what to write in the report.” *Id.* at 201.

The most significant part of a probation officer’s job in the post-*Booker* era of sentencing is how to use their discretion in investigating mitigating circumstances. The A.O. should provide probation officers with training on how to investigate mitigating factors that are influential in sentencing. In the absence of any official training, probation officers should contact defense attorneys for evidence of mitigating factors as well as the prosecutor for evidence of aggravating factors.

IV. Conclusion

The Supreme Court in *Booker* and its progeny reinvigorated the sentencing process for the court, defense counsel and prosecutors. Defense attorneys can and should creatively and justifiably sleigh the specter of Len Bias still haunting the drug law guidelines by championing the §3553 factors to ensure a more just and fair sentence.