THE ASSOCIATION OF THE
FEDERAL BAR OF NEW JERSEY

PRESENTS

THE

THIRTY-SECOND ANNUAL
UNITED STATES JUDICIAL
CONFERENCE
FOR THE DISTRICT OF NEW JERSEY

HOT TOPICS FROM TWOMBLY AND BEYOND: WHO CAN AFFORD JUSTICE - ACCESS TO THE COURTS

and

SENTENCING GUIDELINES IN THE FEDERAL COURT: THE IMPACT OF BOOKER AND ITS PROGENY

Mayfair Farms
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MR. GREENBAUM: Good morning, everyone. My name is Jeff Greenbaum. I am the president of the Association of the Federal Bar.

On behalf of the Federal Bar, I would like to welcome everyone to our 32nd United States Judicial Conference of the District of New Jersey.

We have a very exciting program scheduled for this morning, and to begin the day I would like to introduce a representative of our federal court, our Chief Judge will be here a little later this morning to address us, but at this time I would like to introduce United States District Judge Katharine Hayden.

(Applause.)

JUDGE HAYDEN: On behalf of the judges, we look forward to this event every year. I welcome all of you. This is the 32nd annual meeting.

Judge Brown will be here and probably give you our statistics and update between the two seminars. It's going to be a great morning.

Welcome, everybody.

MR. GREENBAUM: Thank you, Judge Hayden.

I also want to say a few words about our association's activities for this year, and encourage you all who are not members of the association to

join, and those who are to encourage others and your colleagues to also consider membership.

We are now in the middle of a very active year. We have expanded our committee structure so that we now have many people hard at work to pursue the interests of those who practice before our federal courts and to weigh in on important issues that are important to our federal court.

So we began last summer immediately passing a resolution supporting the sorely needed raises for our federal judges, and legislation to make that a realty is now progressing through Congress.

In November of this last year we passed a resolution decrying the condition of federal prisoners in the Passaic County Jail. Since that time efforts have been taken to relocate those prisoners to more suitable jail facilities.

In January of this year our MCLE committee issued a report supporting mandatory continuing legal education in New Jersey and setting forth our vision of how that program should be structured to make it mesh with those programs in New York and in Pennsylvania so that additional burdens are not placed on attorneys licensed in more than one state.

Also in January we passed a resolution seeking to encourage our federal judges to hold more frequent oral argument on substantive motions. That resolution will be discussed very shortly later in this program.

In February we submitted comments to the advisory committee on civil rules in Washington on a proposed rule to protect from discovery draft expert reports and attorney expert communications.

If that rule passes, it will bring Federal Rule 26 in line with New Jersey's 2002 court rule change which put New Jersey in the forefront for a change of that nature, and to deal with the practical realities facing practitioners in dealing with experts.

In November we held two programs entitled, "Navigating the federal courts in an age of technology, from E discovery to E trials, discovering electronic evidence and how to use it at trial."

We had one of those programs right here in Mayfair Farms and another one in Camden, furthering our interests of reaching out to all parts of the state because we are one association.

On May 22nd we are going to co-sponsor a program with several groups, including our newly formed Third Circuit Bar Association. The program will be on appellate advocacy, and it will be at the New Jersey State Bar Association meeting in Atlantic City.

Finally, we are going to end our year with our annual Brennan Dinner that again will be here on June 4th honoring two distinguished members of our federal family.

We have also improved our communications with our members. We now have an active web site, and most recently we have been running a list search, and hopefully you also received an e-mail as recently as a week ago announcing this program. We hope to use that more frequently to communicate with our members.

So we have a lot going on, and with an expanded membership we hope we can do even more, so please help us.

At this time I want to turn to our program, and before I turn it over to our two program chairs, I want to remind everyone to please stay for our lunch because we have a wonderful speaker who will speak on the Supreme Court appointment process, and we also have a very special ceremony in which we

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are going to give our annual pro bono award to all of our senior judges of our district, and that will be a very special ceremony and I'm sure you will all want to be there to be part of it.

Finally, before our program begins, I want to thank our two program chairs, Karol Corbin Walker and Lisa Rodriguez, for the truly wonderful job that they have done in putting together what I know is going to be a wonderful program.

With that said I want to turn it over now to start our civil program, and I would like to introduce to you Lisa Rodriguez, partner in Trujillo, Rodriguez and Richards, and she's also treasurer of our Association of the Federal Bar.

Lisa.

(Applause.)

MS. RODRIGUEZ: Thank you.

Good morning everyone.

The first seminar, first panel today is, "Hot topics from Twombly and Beyond: Who can afford justice -- access to the courts."

By the time you get finished with the topic, it's time to go home.

Members of this panel, we are very fortunate to have today, really need no introduction,

in my role as moderator that would leave me nothing to do, so I will introduce them nonetheless.

Sitting to my right is Judge Hayden. Judge Hayden, after graduating from law school, clerked for New Jersey Supreme Court Justice Robert Clifford. She also served as an Assistant United States attorney.

Judge Hayden was appointed to the New Jersey Superior Court in 1991, serving as a trial judge in the Family Part in the criminal division.

Judge Hayden was appointed to the federal bench for the District of New Jersey in 1997 and sits in Newark.

Sitting to my left is Judge Simandle. Judge Simandle has been a judge in this district sitting in Camden since 1992.

Prior to becoming a judge, Judge Simandle was a law clerk to the Honorable John F. Gerry. He was an Assistant United States attorney for the state of New Jersey and was a Magistrate Judge for nine years.

Next to Judge Hayden is Judge Hughes. Judge Hughes was appointed a United States Magistrate Judge for the District of New Jersey in 1991.

In 1976 Judge Hughes was appointed to open and manage the newly created Trenton and Camden branch offices for the Federal Public Defender for the District of New Jersey, where he served as assistant in charge until 1991.

Judge Hughes was the first career defender in the country to be appointed a United States Magistrate.

I also understand that Judge Hughes was the first in New Jersey to convince a federal judge to find the sentencing guidelines unconstitutional, a position that ultimately got that judge reversed.

Sitting to Judge Hughes' right is Allyn Lite. Allyn Lite is a senior member of the firm Lite, DePalma, Greenberg & Rivas. He served as the Clerk of the District Court for the District of New Jersey from 1982 to 1986.

Mr. Lite is the author of New Jersey Federal Practice Rules formost commentary and annotations of the Local Rules published annually.

He was also appointed as one of the ten original members of the United States District Court lawyers advisory committee, on which he served for 11 years.

To Judge Simandle's left is Professor Hartnett. Professor Hartnett was a former law clerk

to Judge Lacey and Judge Cowen of the district court, and for Chief Judge Gibbons of the U.S. Court of Appeals for the Third Circuit.

After his clerkships Professor Hartnett practiced with the Federal Public Defender and the law firm of Robinson St. John and Wayne.

He's presently on the faculty of Seton Hall Law School since 1983, and has published articles in the area of federal jurisdiction and constitutional law.

In 1994 Professor Hartnett was named the Richard J. Hughes professor for constitutional and public law and service.

Next to Professor Hartnett is Anne Patterson.

Anne is a graduate of Cornell Law School, and is among the top litigation attorneys in New Jersey. She's a partner in the law firm of Riker, Danzig Scherer Hyland and Perretti, where her work is concentrated on the pharmaceutical, tobacco and chemical industries.

Welcome. Thank you all for being here, and I think we'll start with you, Professor Hartnett, on what Twombly means to us today.

MR. HARTNETT: Thank you.

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In Bell Atlantic versus Twombly in May of 2007, the Supreme Court held by vote of seven to two that an antitrust complaint alleging that major telecommunication providers engaged in parallel conduct unfavorable to competition could not withstand a 12(b)(6) motion to dismiss.

Stated that way, it's hardly a big deal, hardly surprising. Antitrust law has insisted that parallel conduct is not itself a violation of Section 1 of the Sherman Act, and if that's all that the complaint alleged, the decision would hardly warrant its being a headliner here.

There are at least two, arguably three and increasing, giving way to a lower courts reading of Twombly, that have much more impact on civil litigation across the board in federal courts.

First, the complaint in Twombly did not simply detail parallel conduct. It alleged expressly in its 51st paragraph, "On information and belief, the defendants have entered into a contract, combination or conspiracy to prevent competitive entry into their respective markets and have agreed not to compete with one another and have otherwise allocated customers and markets to one another."

That is, there was an express allegation

in the complaint of a conspiracy, of an agreement.

But the courts didn't find this sufficient to state a claim. Why not?

Well, the court emphasized that a complaint doesn't need detailed factual allegations to survive a 12(b)(6) motion, but it also emphasized that Rule 8 requires that a complaint show that the pleader is entitled to relief. Thus, what the court called a formulated recitation of the elements of a cause of action will not do.

Instead, the complaint has to show entitlement to relief, some factual allegations, not merely to give bare notice, the standard boilerplate of what a notice pleading under the Federal Rules is about, but also to provide a ground on which the complaint rests.

Secondly, the court concluded that the famous language from Conley versus Gibson, that some of you can probably recite in your sleep, that is, that "A complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." That famous language has, "earned its retirement."

The court concluded that this language "has been questioned, criticized and explained away long enough and it's time to retire it."

If you get nothing else out of today, or at least nothing out of my remarks today, don't use this language anymore. Don't use it in your briefs, eliminate it from your boilerplate sitting in your word processing documents. If you rely on this language, you will be signaling to your adversary and signaling to the court that you are behind the times and arguing under an outdated standard.

These two aspects of Twombly plainly reach beyond antitrust cases to all complaints. The requirement of showing a formulated recitation of the elements depends on the claim and the insistence on retiring the language from Connelly versus Gibson.

There is a third aspect of Twombly that is deeply ambiguous, but given what lower courts have been doing with it may be not so ambiguous anymore, at least within litigation in those lower courts.

What is that third aspect? Well, the court insisted in Twombly that the complaint allege enough facts to state a claim to relief that is plausible on its face, and that the plaintiffs did not, "nudge their claims across the line from conceivably to plausible," and therefore the complaint

must be dismissed.

Now, this requirement of plausibility might be best understood as an aspect of substantive antitrust law. Because of the matter of substantive antitrust law, parallel conduct is quite compatible with behavior. The trial stage of antitrust cases can't permit juries to infer conspiracies when such inferences are implausible.

Similarly, at the summary judgment stage, plaintiff seeking damages for violation of Section 1 of the Sherman Act has to present evidence that tends to exclude the possibility of independent action, and in a sense you might read Twombly as an antitrust case that brings those decisions onto the pleading stage. What's required at trial, required at summary judgment, is also now required at pleading, that is, some factual context suggesting agreement as opposed to independent action.

Frankly, most of the time in the Twombly opinion when the court discusses plausibility, it narrowly focused on the need to separate permissible parallel conduct from unlawful agreement.

At one point indeed they note that, "The plaintiffs do not dispute the requirements of plausibility and the need for something more than

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merely parallel behavior."

There are at least three reasons why we have to be concerned about the plausibility requirement of Twombly beyond antitrust cases.

First, there are several passages in Twombly that seem to speak more broadly. These passages appear to be edited in response to the dissent, so they may be a little sloppy, but nevertheless they are there.

There are parts of the opinion that seem to be requiring plausibility in complaints without tying that discussion in any way about tethering that to antitrust law.

Second, when the Matsushita/Zenith case had been decided back in 1986, the cases that brought it to the summary judgment stage would have been quite plausible to read that opinion as an antitrust decision, but what happened shortly thereafter was it became the first of the summary judgment trilogy, along with Liberty Lobby and Celotex, that revolutionized or at least made a significant shift in federal summary judgment practice. That same thing may well be true of Twombly.

The third reason, and perhaps the most important on the ground reason why the plausibility

requirement is important, even if the opinion best read treats plausibility as an element of antitrust law, and that's simply that a majority of lower courts around the country have refused to read the plausibility requirement in Twombly as limited to antitrust cases.

In a moment Anne will be discussing how the Court of Appeal for the Third Circuit addressed this issue.

I will note simply with regard to this that the major Third Circuit opinion of Phillips, at least in my mind, shares a good deal of the ambiguity of Twombly itself.

A couple of thoughts on where we might go from here. First, if plausibility is now a requirement across the board, it's important to note that that requirement will apply differently in different substantive areas of the law, particularly depending on how accessible or complex that area of the law is or the facts in a typical case in that area of the law.

Plausibility is sort of a negligence case that is sketched out in Form 10 of the Federal Rules of Civil Procedure, might be relatively easy to find plausibility, or claims of unlawful discrimination based on a factual sketch of a firing

that Twombly goes out of its way to not say it's overruling or claims of deliberate indifference based on a factual sketch of a prisoner's serious untreated medical needs.

Plausibility depends not simply on the particular factual allegations of the case, but how complex the area of the law is, how familiar the area of the law is.

Second, the huge concern seems to be about Twombly, or perhaps why someone thought it, is what do you do? What if you are a claimant who simply lacks the evidence to plead which Twombly requires without first getting discovery?

Litigators have traditionally, when in that position, made allegations upon information and belief, exactly what the plaintiff did in paragraph 51 of Twombly.

It might be useful to retire this language along with the language of Connelly versus Gibson, and instead use the language of Rule 11(b)(3) that is specifically identifying such allegations, "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Some of you may say that's incredibly formalistic. What's the difference? Maybe that's

right to suggest it may focus attention, both your own, your adversary's and the court's attention on that key issue.

That sort of focus might make it easier to convince a magistrate judge to allow some limited discovery in advance of the 12(b)(6) motion, or at least in advance of the decision on 12(b)(6) motion, and we will be hearing more about that, possibly, I suspect, a little bit later, and perhaps debate about whether that de-fangs Twombly or actually guts Twombly.

Finally, if this is the route we go, that is, a requirement of plausibility across the board aided by the possibility of some pre-motion discovery, there is a real risk, I suggest, of even more discretionary justice than we already have.

In this connection I'll conclude by noting the one empirical study that I have seen to date about the impact of Twombly has concluded the only set of cases, the only set of cases in which it has made a statistically significant impact is on the dismissal rate in civil rights cases.

MS. RODRIGUEZ: Thank you, Professor Hartnett.

Next is Anne Patterson, who is going to

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talk about our court's response.

MS. PATTERSON: Thank you, Lisa.

Not quite two years later, what does the Supreme Court's requirement of the Conely versus Gibson standard mean for those of us who practice in the Third Circuit?

Twombly is a young case, the law applying it is in an early stage, is developing rapidly in all sorts of legal context.

I think it's important to note that Twombly will take on more meaning and more refinement as it is applied to various areas of substantive law.

Last month brought the Third Circuit's first detailed discussion of Twombly in the Phillips versus County of Allegheny case.

There have been a couple of other Third Circuit cases that are simply mentioning Twombly, but this is the first time that the Third Circuit has actually tackled the Twombly standard.

This was a Section 1983 action premised upon state created danger. What had happened in the Phillips case was a man was murdered after a 911 call center employee, who were his former colleagues -- he being a former 911 call center employee -- looked up the information on someone that their former

colleague wanted to do harm to and improperly provided that information to the man, who then murdered the person that he was going after.

A supervisor in the 911 call center was sued in addition to the co-workers because he contacted the wrong legal authorities, local legal authorities, and didn't suspend the appropriate people quickly enough to prevent the crime.

So in a supervisor's case it was an issue of omission, primarily. In the case of the co-workers, there were affirmative acts in checking the guy's home address and giving that away, resulting, apparently, in a murder.

This was a state created danger case, an exception to the normal rule that the due process clause doesn't impose an affirmative obligation on the state to protect all of us.

The primary issue there was whether the state actor had committed an affirmative act. The fact pattern, while obviously a sad situation, was relatively simple.

This was obviously a setting very different from Twombly. It did not involve economic relationships, complex antitrust pattern of conduct. It did not involve expert testimony and conduct as to which there might be a variety of alternative inferences, which is what the Supreme Court had dealt with in the Twombly case.

The Third Circuit did confirm that Twombly applies outside of the parameters of antitrust law. It stated that it applies to 12(b)(6) motions in general, and that's obviously consistent with many of the opinions that have -- that were mentioned by Professor Hartnett.

The court commented, I think unusually, that Twombly was, "initially confusing," and specifically identified the so-called plausibility paradigm for evaluating the sufficiency of complaints as the confusing aspect of Twombly.

The court reiterated the language of Rule 8 is unchanged, but expressed some initial concern and confusion about the Supreme Court's test.

Then the Third Circuit went on to provide some illumination with respect to the Twombly standard. It concluded that Twombly stands for two main principles:

First, that Rule 8 requires a showing, not just a blanket assertion of entitlement to relief, and that the complaint's factual allegations must be enough to raise a right to relief above the

so-called speculative level. In other words, a conclusory statement of the facts with a recitation of the elements of the cause of action should not be enough. The factual statement must rise above the speculative level when you consider what the substantive law is applied to the particular claim.

Second, while the Supreme Court had disavowed the now retired Conely versus Gibson language, the no set of facts language, it emphasized that it was neither demanding a heightened pleading of specifics, nor imposing a probable requirement. The language is plausibility, but not probability.

The Third Circuit concluded that the essence of Twombly is the word "plausibility." Quoting the Supreme Court, the court noted that, "The plaintiff must nudge his or her claims across the line from conceivable to plausible to survive the 12(b)(6) motion."

What is plausibility? The court went on to state that, "Stating a claim requires a complaint with enough factual matter taken as true, as has always been the standard, to suggest a required element. This does not impose a probability requirement at the pleadings stage, but instead simply calls for enough facts to raise a reasonable

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expectation that discovery will reveal evidence of the necessary elements."

Now, in the context of this 911 case, this Section 1983 case had before it its analysis under that substantive law was relatively simple. That law principle is what the court leaves us with. There must be enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.

Now, that general standard obviously will take on greater meaning as more case law develops. In your materials is a summary of some of the district court cases from our district which have applied Twombly, obviously very recently because the case is so new. It has been applied to securities cases, antitrust, RICO, negligence.

It was applied to a case that is a particular favorite of mine, probably should be of all of us, where a guy alleged that because he had six lawyers who failed to win his case, they had all committed malpractice. We can all agree that that is a case that should fail under Twombly.

There are more and more settings where this is taking on meaning.

Just a couple of practical

considerations for practitioners. As you develop your complaint, as you look at the complaint that your client has been served with, Twombly may have its strongest impact and factual pattern which can give rise to numerous interpretations, which was in fact the case in Twombly. You had economic behavior that was subject to the number of different interpretations, the majority of which the court concluded were innocuous.

The court's view was, why jump to one possible remote conclusion that there was illegal conduct going on?

Consider as you evaluate your cause of action or evaluate a complaint that you have to answer what discovery can or cannot do to fortify that complaint. Where will you be after the discovery, be it relatively simple, be it years long discovery that is extremely expensive?

If the facts are about where they are going to end up being because of the nature of the cause of action when the complaint is filed, then you have a good argument under Twombly as a defendant to -- that we will go through the process of discovery if a 12(b)(6) motion is denied and we will end up exactly where we are today, a couple of hundred thousand dollars later.

So that creates a good argument under Twombly.

On the other hand, if it's simply impossible for the facts to be developed early on, that creates a good argument for the plaintiff.

Again, focus on the expense of discovery. How complicated, how expensive, how difficult will discovery be?

I think we will be hearing a little bit later in this panel about how case management can deal with certain expense problems and can streamline the process of discovery in some cases.

Obviously that's not the case for every single cause of action. There are cases in which if the discovery is undertaken, it is going to be complicated, it is going to be expensive.

We are to sum up in the very early stages of the development of an important principle of law. Twombly needs to be considered. Twombly and the Twombly progeny that are in the substantive area in which your case lies needs to be considered, before that complaint is filed needs to be considered to determine on whether a motion will be filed.

The law is developing rapidly. By the

time we are here next year at the Judicial Conference, we are going to find that there is significantly more guidance available for practitioners. Thank you.

(Applause.)

MS. RODRIGUEZ: I'm going to invite anyone that has questions to feel free to raise them and just give us more further work.

Next is Allyn Lite.

Can you tell us what the practical impact has been for the plaintiff's attorney as a result of Twombly?

MR. LITE: Well, I think that the Supreme Court in Twombly said that it was not creating a heightened pleading standard.

If you are a plaintiff's lawyer, I think you take that as a good sign.

I think what Anne said, that the cases that are being dismissed, namely civil rights cases, is a bad sign.

I think that Twombly raises all sorts of problems for plaintiffs. I think that the courts are going to be potentially inundated with Twombly motions to dismiss based upon how lawyers are reading the new standards, the plausibility standards.

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I think what a plaintiff's lawyer needs to do more than anything else, before you bring a case, do as complete and thorough an investigation as possible. When you draft your complaint, knowing under Rule 8 you have to give sufficient notice of the claim to the defendant, allege all of the facts that you know. Don't hold anything back for tactical reasons.

If you have documents, quote them, get as much detail in the complaint as you can, because you have to show under Twombly that you are entitled to relief under this theory that you have alleged.

Now, both Professor Hartnett and Anne Patterson both mentioned the parts of Twombly that say you have to plead more than just the elements of the claim. You have to plead it in a way to apply the known facts that you have to the elements and use that to show within the context of what you are pleading, to the extent possible, why that will entitle you to the relief you are requesting.

I have thought about what do you do when you don't have all the information? Of course, in the past you have always pleaded on information and belief. I think Professor Hartnett is right, that if you do that a good defendant's lawyer is going to

say, well, Twombly says you can't plead on information and belief because it tossed out that antitrust case where that was the allegation.

If you have to, you do it that way, but I like Professor Hartnett's idea of saying, plead it in such a way using the language of Rule 11(b)(3), that it is likely to lead to evidentiary support after reasonable investigation.

That should be the code word for the magistrate judges in this district to allow early limited discovery. The real problem that arises is when all of the detailed facts are in the hands of the defendant, plaintiff's lawyer can still rely upon the fact that the law hasn't changed, that inferences are still going to be on the plaintiff's side on a motion to dismiss under 12(b)(6).

The plausibility requirement, as I read the case, and I don't think others have said opposite, that it does not seem to require a balancing as to whether after the analysis by the court the plaintiff's claim is more likely than not. Only that it's plausible under the facts and in the context as pleaded.

I don't think you are going to have a situation where there is multiple interpretations that the court is going to say, well, because interpretation B is interpretation A, which was what the plaintiff has advocated, that we are going to toss the case.

As long as interpretation A is plausible, doesn't have to be likely, it's got to be plausible according to the Supreme Court, you're going to perhaps be able to get it by.

I think the problem that the Supreme Court recognized, which really hasn't been talked about much this morning, but is throughout the opinion and in the dissent by Justice Stevens as well, is that in the antitrust context, the cost of the litigation is deemed to be so high that the court wanted to look at a way, by using this new plausibility requirement, to allow courts or to direct courts to make an analysis early on before all that cost had been expended.

Clearly Twombly applies to cases beyond the antitrust context.

One of the areas which hasn't been mentioned, which I would like to mention for just a couple of minutes, is Twombly focuses on the cost of complex litigation. Among the most complex litigation that we have, particularly in this

district, and there is a lot of it, is patent litigation.

The pleadings, notice pleading in patent litigation -- you can look at the form in your rule book -- the new Form 18, which is the form produced by the rule makers in Washington that goes with the Federal Rules, is five paragraphs long. It gives bare notice, and I mean so bare that it's basically bare notice.

It basically says as follows. This is a patent infringement case. It cites -- put down who the plaintiffs, the jurisdiction and venue is. You say that a patent issued on a particular date. You say who is the owner of the patent and you plead on information and belief that the defendant has gone ahead and engaged in some sort of drug -- in drug cases in particular, which there are many in this district -- has engaged in an attempt to commercially manufacture and sell the plaintiff's product and trying to get a generic drug on the market.

Then you get to the key paragraph, this is the entire paragraph of the notice, the commercial manufactured use offered to sell, the sale or importation of defendant's product would infringe one or more claims of the patent under 35 U.S.C. Section

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271.

Based on that, four years of litigation, $3 million dollars in discovery costs before you get to the plaintiff disclosing which claims in the patent are potentially infringed or alleged to be infringed and what the terms are within those claims and how they are defined.

I would suggest that a Twombly motion made very early on in a patent case, if you are a defendant in a patent case, to say to the court, force the plaintiff to tell me which claims of the patent are infringed and the definition of the claim terms now, not three years down the road when you have a Markman hearing and the court has to make that determination, will short circuit a lot of that and a lot of the discovery and get the case focused a lot earlier.

If I was a plaintiff's lawyer in a patent case, I would be very concerned about getting that kind of motion and would want to put that information in the complaint. Obviously the patentee knows what the claim terms are, which claims have been infringed, otherwise you couldn't file the complaint under Rule 11. Therefore, get it on early and don't wait.

I think that it is going to be up to the magistrate judges in particular in the district to try to come to grips with these early motions, because otherwise I foresee that defendants are going to make this motion routinely to try to knock cases out.

MAGISTRATE JUDGE HUGHES: Just to follow up on Lisa's introduction, I won't identify the judge who declared the sentencing guidelines unconstitutional, but I will say he's one of the most respected judges in the district, and as you will learn from the next session about Booker, he was only about 20 years ahead of the curve.

With respect to Twombly, let me start out by saying that I think -- this is my personal view -- Twombly is the most unfortunate name for a case since the Third Circuit decision in Pansy.

My feeling is if -- from a client relations and court relations point of view, if you're asking for a Miranda hearing or a Markman hearing, you are dealing from strength.

If you ask for a Twombly hearing, you better have something good to say about that.

I think that Allyn and the other speakers are right. If you view Twombly at the very least as an awareness of the United States Supreme Court that spiraling costs of discovery and motion practice -- and you should see some of the motions that come into federal court, in boxes now -- but the spiraling costs, we are pricing ourselves out of the marketplace.

That's one thing everybody can agree that Twombly stands for. I think New Jersey, if I do say so myself on behalf of our judiciary, is well suited to address, if the Bar takes advantage of it, the costs involved with discovery and motion practice.

For example, you all know that in New Jersey the concept of R&Rs for 20 years has been viewed as an unnecessary cost to the litigants to build in a separate kind of level. So it's rare that you get any R&Rs referred anymore.

In New Jersey you have, unlike some other districts, what I call customized case management. So that any case you have judicial accessibility to come in and say that math to the magistrate judge, look it, we would like to file a Twombly motion and what for?

Let me illustrate, unless I misread the Phillips case, and it won't be the first case I misread, but it strikes me as whatever Phillips said, what happened was there was a decision by the district court that was appealed and the dismissal was appealed. There is this huge discussion about Twombly and what it means.

The end result, it was remanded back to the district court because the district judge didn't allow the plaintiff to amend the complaint.

I'm a great believer, lawyers are to earn a living, but in that Phillips case you are able to engage the fees charged in the appeal, the fees charged in the remand, and we don't have any kind of substantive decision as to whether the case has plausibility or heft, or whatever it has, you can see how this could be a problem for your clients.

I think you should take advantage of the magistrate judge, the Rule 16 conference, and discuss Twombly. I think that if, as Allyn said, you will allow certain discovery to take place and then file a motion, that would offset the two-year discovery period.

He and I were talking earlier about the abuse of the discovery system, and again a very practical illustration. Somebody came in this summer and said they read somewhere that the average cost of

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the most rudimentary federal deposition with two lawyers is about $7500 when you add in the legal fees, the loss of productivity of the two parties and the deponent and the stenographic costs.

If you realize the Federal Rules presume 10 depositions on either side, you have an idea of how much money you could be spending in deposition discovery.

So I think courts are very sensitive to the fact that discovery has to be controlled somewhat, and you can't let it just run wild. I think that a Twombly motion may be something that you could do early on.

I also think, on the other hand -- and the district judges I'm sure would respond to this -- the last thing as a defense counsel that I think I would want is to file a Twombly motion and have a judge deny it, say, no, no, let the other guy amend the complaint and then come back again and then deny that because we haven't had discovery.

In other words, you are just charging your client a lot of money and not getting a final result one way or the other.

If you use the case management to time the motion practice so that it's meaningful and, you

know, the other side can't say we haven't had enough time, we haven't amended the complaint and so forth, I think you will serve your client much better, and I think the courts will respond substantively if you have that kind of approach to it.

And I think all the magistrate judges in each of the vicinages are very sensitive to the fact that, you know, costs are out of control.

The great irony, I suspect, of the Twombly case, in that antitrust case, is that the two parties involved there had more money, were well healed to engage in litigation, which in civil rights cases I can guarantee it's not the same situation.

So there is no one size fits all answer to this, and I think that in New Jersey we are geared to treat each case individually and give you a customized schedule if you will ask for it. That's all I have to say.

MR. LITE: Lisa, can I add one thing?

MS. RODRIGUEZ: Yes.

MR. LITE: Judge Hughes was talking about costs of depositions and the potential for depositions to abuse the discovery process.

I don't know how many of you saw the opinion that came down a week ago, a week and a half ago from the Eastern District of Pennsylvania, a case called -- write this down, this is a cautionary tale for all -- GMAC Bank versus HTFC Corp., 2008 West Law, 542, 386, February 29, 2008.

It has to do with conduct at a deposition. It resulted in $30,000 worth of sanctions to the deponent witness and his lawyer for taking a 12-hour deposition over two days and turning it into a circus in which, as the court notes, it's a contract case, the word "contract" is mentioned 14 times, the F word is used 173 times in a deposition.

It is entertaining as far as that goes. What one can really learn is how to comport yourself at a deposition, because the court went out of its way to commend the lawyer taking the deposition for going above and beyond the call of duty before he finally ended it after two days. Cost 30,000 bucks. That's discovery abuse. Just wanted to point that out to you.

MAGISTRATE JUDGE HUGHES: Lisa, I don't want to take the other speakers' time, but the way that you can handle something like that, and my experience, I don't know about my colleagues, is that one of the great discovery abuses and cost of building devices is not necessarily written discovery

or E discovery or all this other stuff, it's deposition discovery, where people will -- I tell people, they say we want to do more than one day.

Look it, if you found Hitler in Argentina, I would only give you three days with him.

You really have to limit it. I suspect that, you know, you should take advantage of the judge to do this.

In Trenton we have -- I know Judge Bongiovanni and I have a lot of depositions take place in the courthouse. It is a beautiful place and we have all the room in the world and geographically it's good, but believe me, the deposition will be over much quicker and with far fewer problems than if you do it in somebody's law office.

I urge you if you have a problem deposition on the horizon like the judge in Pennsylvania had, don't hesitate to call us up and see if we can arrange to have it in the courthouse.

MS. RODRIGUEZ: Thank you.

Judge Hayden, Judge Simandle, how about this? Is Twombly something that is limiting access to the court?

JUDGE SIMANDLE: To me Twombly presents a geometry problem almost. We hear about the need to

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raise the right of relief above the speculative level, and so there is a verticality to what Twombly is doing.

We hear about claims across the line from conceivable to plausible, so there is horizontal component to it.

We also note that plausibility doesn't mean probable, because we are told in the opinion that we are not to weigh probability and we are not to touch upon credibility.

So when I thought of these constraints, in thinking of it like an algebra problem, I found myself somewhere on the line extending from head scratching to bewilderment.

In preparing for the panel it forced me to think about some of these things, and ultimately I don't think that Twombly is going to limit access to the courts.

I understand that plaintiffs advocates will express fear or foreboding from it, and inundation of Twombly motions was predicted.

Well, we are eight months after Twombly now and I haven't seen the inundation yet. In fact, I haven't seen it cited yet. Maybe this conference will change that and defense advocates may hail it as

long overdue recognition that too many claims are surviving 12(b)(6) that have no merit.

I think for a couple of reasons that Twombly has to be viewed in context, and Twombly can't be read out of the mainstream of other cases from the Supreme Court and the Third Circuit that have addressed similar issues.

I also think that the response may vary among judges. That shouldn't be surprising. A judge who feels overburdened by too many cases that seem marginal and non-meritorious may well apply stricter scrutiny.

A young lawyer who feels everybody should have their day in court and they should hash this out as best you can before ever bringing the gavel down on somebody might be more permissive and apply a standard that is a little different than the day before Twombly was decided.

The access to the court depends on the judge and how should a judge respond.

In my view, Twombly leaves unchanged the standard, and it is repeated in most cases that come after Twombly that pleadings should be interpreted so as to do substantial justice. Doing substantial justice is the Rule 8(f) standard, and that standard is unchanged after Twombly.

I looked at the form complaints that are part of the Rules of Civil Procedure, and I think it's instructed to do so.

I asked myself the question, how many of these form complaints are good after Twombly and how many are inadequate?

I'm sure you have looked at them. They are really sketchy. Allyn is right, even the most complex cases can be described in five paragraphs in the form complaint.

I don't think that there is a form complaint other than perhaps Form 18, the one for patents, that would not -- or a complaint, would not survive Twombly scrutiny. It is not that the form is bad, it is the context in which it has to be viewed.

I think that access to the courts also is going to depend upon judges giving advocates a chance to advocate their positions. This is where oral argument comes in.

I would predict an enlargement of oral argument, not just because this esteemed association has rightly, in my view, asked for judges to grant oral argument more frequently, but also I think the contours of Twombly and that sort of motion practice

cry out for it.

Plaintiffs should have an opportunity to spell out the plausibility of their pleading. How do the allegations suggest a reasonable expectation that discovery will reveal evidence supporting the essential elements?

The defendant likewise should have the opportunity to accurately portray what those elements are and how they are not addressed or not met and couldn't reasonably be anticipated to be met in this case.

Papers are one thing. A lot of motions are decided on papers. But the opportunity for the judge to ask questions and for the advocates to respond is almost always illuminating.

I think this is particularly true, now that we have been told in probably no fewer than six Third Circuit opinions that we are to automatically permit a plaintiff to amend the pleadings in a 12(b)(6) motion. If there is the 12(b)(6) motion filed, the Third Circuit has not met its order in saying there should be an opportunity to amend, and in one case saying even if it's not requested.

Pragmatically I find that a difficult task to do as a judge. How do you fold in the

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opportunity to amend into motion practice if it's not requested?

Where it is requested, I find it easier to deal with.

There are a lot of times when if the advocates were to call each other on the phone before a 12(b)(6) motion is filed, and if the defense attorney were to say, I have a problem with such and such element of your pleadings and I'm going to file a 12(b)(6) motion, then perhaps it would be correctable, or perhaps the plaintiff's attorney would throw in the towel and say, I can't meet that element and so file your motion.

The worst thing is, I think, has been alluded to it, has seriatim 12(b)(6) motions interspersed with motions to amend. The best way to address that is through the case management process that either party can request.

You don't have to wait for a scheduled conference. In our district, by definition you ought to have a scheduling conference before a 12(b)(6) motion is filed. Scheduling conferences are generally scheduled after the answer is filed. You don't file an answer until your 12(b)(6) has been denied, I guess.

It should be and can be requested at an earlier date in each of the three courthouses. Magistrate judges are both into that. That's for working out this sort of a problem.

I think we also realized that Twombly itself is contextual. But in this district it shouldn't be too much of a surprise. We have had a RICO case order for a long time, and we have a RICO case order not only because usually fraud is involved and 9(b) requires fraud to be pled with particularity, but also the elements of RICO are tricky.

We had a decade or two of unsuccessful RICO civil complaints, and this was meant to be a guidance for practitioners. It saved a round of motion practice.

If you have a good RICO case order, then what you have is something that will stand up, not only a 12(b)(6) motion, but also a motion for a more definite statement.

I would like to hear any reactions that you have as to the success of that effort that the court made in the RICO case statement to help to crystallize the allegations in the pleadings. When you read a RICO case statement, you have something that looks like a plausible claim when the elements are there.

In answer to Lisa's question, I think that we are still writing the book on how Twombly is going to be interpreted. It will be up to the judges aided by good advocacy on all sides. I think we have some good tools to prevent the chamber of horribles, either the cascade of Twombly motions or using Twombly as some sort of premature summary judgment motion. I don't predict that is going to be happening.

I look forward to any questions. Thank you.

JUDGE HAYDEN: I'm going to take the opposite side of that.

Judge Simandle and I had agreed when we spoke on the phone, but I guess I am just reacting to what I'm hearing today. When we hear other people talk -- and Judge Simandle was eloquent about going from head scratching to bewildered -- I mean, moving from plausible, or to plausible from non-merely conceivable, but we don't have to think about probability or credibility. I mean, that is metaphysics brought to a whole new level.

I just think of sitting there, either in

chambers weeping or on the bench weeping, and just say, golly, now I know why I went to law school and I really should have been a dentist.

It's really a lawyer's fun house and a litigant's nightmare, and I'm not sure from those stats that we heard that in the civil rights context we don't have a problem through it.

I wanted to ask Professor Hartnett something. What did you mean by discretionary justice?

MR. HARTNETT: That with the decline in the number of trials, coupled with quite discretionary control over case management and discovery pressures for alternative resolution, as regards settlement in particular, an awful lot of what ultimately is decided in cases turns on lots of trial court discretionary calls.

JUDGE HAYDEN: Exactly what I thought you meant.

MR. HARTNETT: If we move in the direction of tempering Twombly through the device of allowing limited discovery with regard to particular narrowed elements, those are going to be discretionary calls rather than straight legal calls, and therefore we'll move even more in that direction,

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toward increasing discretionary trial judge's power.

JUDGE HAYDEN: That is one of those terms that doesn't quite define itself until you put some meat in it that goes along with another term called non-trial dispositions, which are apparently the vehicle for discretionary justice.

Non-trial dispositions in civil rights cases are far higher statistically from the last measurement that was done than in other areas, which means that pre-Twombly we had an awful lot of this going on where the case was snuffed out not because of settlement, but because of a non-trial disposition, either through summary judgment or a motion to dismiss.

If your stats are correct, then we are kind of seeing that movement given more life by the ability to use Twombly.

The good side of that is the Phillips case which arose out of a 1983 case. The good side of that, I think Judge Simandle gave plaintiffs bar a tool, and I think the judges, a place to go by saying, hey, if you look at your form pleading and you think of that as kind of a framework for where you're going, you can sort of hang things on that and see where you go by fleshing it out with some facts,

some kind of rigor. In other words, that we can use statistically -- not statistically , but not formulating either, but to construct a complaint so that we can defend the complaint.

The other way to defend a complaint is to look at Rule 8, and again Judge Simandle gave us a key, which is that pleadings must be construed so as to do justice. You kind of back your judge into a corner if you are yelling about that, because then we have to come back at you and say we are dismissing because we are doing justice as opposed to, oh.

Now, where do we do that all? Judge Simandle again gave us a clue. Oral argument. I do agree, and reluctantly or not, probably a lot of our colleagues would agree, that if Twombly takes hold, particularly in the little guy cases, the individual versus the organization, the IBO case as opposed to the OVO case, then oral argument becomes the place where this happens.

Now, do we chuck that into what John is talking about? Where would oral argument happen given good case management? How do you see that fitting in, if in fact it looks like it might be a divining tool that makes some sense?

MAGISTRATE JUDGE HUGHES: I can only give oral argument if the case is before me.

You manage the case depending on what each -- if there is a bona fide Twombly motion. I'm not quite sure what that is yet because I haven't had one, but I think that a lot of times in antitrust cases you will bifurcate the antitrust portion because that is hugely expensive to prepare, on both sides, that kind of case.

If you are going to have a, for example, a civil rights case, I think it happens all the time, is you will, rather than have the defendants file a motion right at the outset -- and incidentally, you can answer and then have a Rule 16 conference and set up a 12(b)(6) motion or whatnot, and I think that's the cost effective way to do it.

A lot of times in civil rights cases you will arrange a motion practice after the plaintiff's deposition, hear what he or she has to say, and let her have her mini day in court, so to speak, and have her say, and then maybe, then you would file a motion.

Civil rights cases are a little different because you have qualified immunity and other things that you do not have in other types of cases.

The answer is to, at the Rule 16 conference, have some effective plan if you are a defendant and you want to file a motion. Quite frankly, it's America. You file as many motions as you want. It is just a question of not having it denied without prejudice to do over after some event.

That's the one thing that you don't want to have to tell your client, that the judge thought it was premature, and I'm sorry I charged you 25,000 for the motion, but we are going to have to do it again in six months.

As I said, the mechanism is there with the system in New Jersey if the Bar takes advantage of it.

JUDGE HAYDEN: I think that in terms of that moment when you are in front of the district court judge for oral argument, whether it's the civil rights case or the great big antitrust case that really has been worked up, do take advantage of it.

We are increasingly aware, because you have been pounding us over the head, that you want oral argument.

I remember Bruce Goldstein telling a wonderful story about -- during his months of recovery -- are you here, Bruce? Is he around?

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It's a wonderful story. He says he was walking, and all of a sudden what made him just get into life again was just thinking of standing in front of a court arguing a case, and just that is all part of all of you, is having in your bones the desire to stand there at the podium, whether you are new and your heart is racing, or you're a veteran and your blood is boiling, the bottom line is you are ready to roll.

There is a tension, I see, between the metaphysical quality of Twombly, which I think lends itself to reams of just witical prose or Talmudic prose, and can put a horse to sleep, and not get a judge any further down the line and telling the story in court and giving the judge something to work with at a motion like that.

We are all up to the task, and I think Twombly either is going to get further refined or defined out of existence. I think it's with us, but I do think something that impinges on how justice is done -- and I would take home with you, I certainly am -- that term "discretionary justice" is sort of do your own rumination about whether or not this is all going to be, "this" meaning litigation, and then the important seeking of relief is going to be denied to

the point where we are talking like Twombly talks or Phillips talks. Or we have the enlivened kind of interaction between judges and lawyers that oral argument provides.

JUDGE SIMANDLE: Yes, I agree with a lot of what you're saying.

There is one aspect that I would raise a cautionary flag.

If Twombly is used to dismiss a civil rights complaint at an inordinate rate, then I think that's a misapplication of not only Twombly, but Third Circuit precedence that we now have.

In the Stevenson case, for instance, that was decided about two months after Twombly, Stevenson versus Carol is reported at 495 F.3d 62, in that case the District Court had thrown out cases by three inmates in a Delaware prison and the Third Circuit applying Twombly restored the case, reversed the dismissal, and also in the Third Circuit in that case they had the opportunity to resolve some ambiguities in the pleadings in a manner that would have been unfavorable to the plaintiffs. They didn't do so.

If you think that's what happened in Twombly itself in regard to the antitrust case, that there were ambiguities in the pleadings, one view of which didn't support claims of antitrust violations, that didn't spill over to Stevenson. It didn't spill over at all. And the Third Circuit reiterated that in that case the district court had erred by not reading the context of the entire complaint, which was fairly detailed.

I think that that, too, is premised on the Supreme Court's own case in Leatherman, Leatherman decided in 1993 that is still good law.

In Leatherman you may recall that many Court of Appeals around the country had imposed a so-called heightened pleading standards for civil rights complaints that had been engrafted judicially upon the Rule 8(a) pleading requirement.

The theory behind that heightened standard had been that someone is entitled to greater notice if they are being accused of constitutional violation, and it ought to be spelled out more.

Leatherman is instructive today, because Leatherman restored the complaint that had been dismissed in the lower courts. It held that there is not a particularity requirement for civil rights pleadings, and it also said that if the rule makers wanted to add such pleadings to the list under 9(b),

it could be right there with cross-complaint and others, that they can do it, but judges shouldn't do it by judicial interpretation.

For me, whatever the effect of Twombly may be, there are cases like Leatherman where the Supreme Court specifically spoke to the other areas of law, and those cases, as far as I'm aware, are still good law. The Supreme Court never said that the Leatherman case permissive standard, I'll call it, has been somehow questioned or let alone overturned.

MS. RODRIGUEZ: A question here?

MR. GREENBAUM: I don't want to except from this comment, the civil rights area, which may be very well entitled to protected status.

I want to go back to what Allyn said earlier about a case where $3 million was spent in a patent case before you knew what the claims were.

There is something wrong with the system where both parties have to spend that kind of money before you even know what's at stake. I don't know that it's a plaintiff's oriented question or a defense oriented question, but one more of a system question, if there is something wrong with that kind of a system where people have to spend that kind of

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money before they even know what's at issue?

There is a problem here that maybe we need to go back to the rules committee, because everyone says they are not changing the standard, but 8(a) says a short, plain statement of the claim entitles you to relief.

There is something wrong with that approach.

JUDGE SIMANDLE: I think that someone in that case must not have read the court of proportionality that is in the rules. There is a very powerful way to curb discovery abuse, and in fact to punish discovery that goes outside of those bounds. It shouldn't require $3 million to find out what the claims are. It ought to require one piece of paper, a contention interrogatory, and get a judge to order that the plaintiff answer it, if not at the very first months of the case, then very shortly thereafter.

The tools are there. It is up to the advocate to argue for it, to apply them and to bring them to the judge's attention so that whether it's a magistrate judge or a district judge, so that the litigation can be shaped right from the get-go.

In this district we are proud of putting

the resources up front in case management. We have every opportunity to meet with a magistrate judge or a district judge to that matter, especially in a complex case.

Since Twombly is contextual, don't pass up the opportunity to do so.

MAGISTRATE JUDGE HUGHES: Jeff, case management, five years ago the conventional wisdom in my experience was that we would schedule Markman hearings towards the close of discovery.

The patent bar is very resilient, and now the customary approach is if not do the Markman submission early on, at least have preliminary exchange of claim construction charge just to find out where we are going before we get heavily involved in discovery.

There are all sorts of mechanisms to offset that spending $3 million to get to the end of the road.

MR. BAIN: As to Twombly, there has already been judicial criticism to form a team. There is a recent case that says, for example, if you're going to plead infringement under the doctrine of equivalence, that better be pled up front before the start of the case.

In cases of infringement of an article manufactured, Rule 11 requires that you inspect that device before filing an infringement case. You ought to know which claims of the patent are infringed, not come in like I've had, somebody with 62 claims, and claims they are all infringed, notwithstanding the fact that they are from very broad to very narrow claims.

Judge Hughes is right. In the very beginning of the case there ought to be a statement of issue infringement, direct, contributory or induced, or inducement with some factual basis that defines broadly the claims.

Secondly, at the case management conference, at minimum there should be identification of the claims that are infringed with a statement reading those claims on the accused device.

The only situation that it does not apply to is a method claim where the method may be practiced by the defendant in camera, and you really have very little on what that method is.

To spend, as I have done, three years trying to find out, really, which claims were being litigated is just out of the question.

A VOICE: I was wondering how the panel

would address that category of claims, where plaintiff typically claimed all the facts are within the defendant's possession.

For example, take your basic tortious interference claim, it is alleged that there is intention and malice and that kind of thing.

How would the panel address that post Twombly in terms of allowing it to go forward, not allowing it to go forward, that kind of treatment, those claims?

JUDGE SIMANDLE: Even under fraud, 9(b), we know that malice doesn't have to be pled with specificity. So I think that a claim that alleges a state of mind is enough to state it, and you have to be able to show it at that earliest stage, just from the test of Rule 9(b).

I don't think it would be any different with regard to any other sort of tort. I think that pleading malice should be sufficient. Any pleading though is complained by Rule 11, and words like malice or racist or whatever can't be just thrown around.

JUDGE HAYDEN: I can certainly see a fight about that from the defense bar.

MS. PATTERSON: That is something

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that -- I think there are big differences in a fraud claim in that regard and a tortious interference claim. It certainly raises a special issue that I don't think the case law post Twombly has yet addressed.

MR. HARTNETT: I think what Twombly is trying to do is to separate out the notions of specificity from notions of plausibility. Maybe that's just witical and metaphysical, but that's what I think the courts are trying to do.

The best I can suggest in getting a handle on plausibility, maybe this is just too obvious to say, plausibility depends on what base line assumptions with the way the world usually works.

If there is a car accident, we usually think that probably somebody did something, not that it happens all the time, but that's a reasonable base line assumption.

Going to the opposite extreme in Twombly, you see people engaged in behavior that is perfectly consistent with their own self-interest about a conspiracy, but we don't think that too often that is going to be instead explained by a conspiracy.

Some level of plausibility turns on what is a judge's base line assumption about the ordinary operation of the world. Part of the Twombly arguments are going to have to be, if you think the judge's understanding or expectations about base line assumptions, about the way the world works are different, I think you might be addressing those.

One, with regard to the forms. Rule 84 specifically says that the forms suffice. I believe that was an amendment, I think in the '40s, I don't remember exactly, it went to overcome some decisions not treated by them. If you got a case that fits the forms, Rule 84 tells you that is sufficient.

Lastly, with regard to case management, back to the earlier question, I don't know if it happened yet in this district, but it's starting to happen in other districts, a defendant saying the point of Twombly is to avoid expensive discovery. Therefore, until you rule on my Twombly motion, all discovery should be stayed.

Those arguments are beginning to be made. Given the emphasis in Twombly, avoiding the costs of discovery, that's not a crazy argument. I don't want to be endorsing it, but it's not a crazy argument.

JUDGE HAYDEN: We have magistrate judges who can parse the kind of discovery that's needed to get the case ramped up to where you can do it.

Also embedded in what Professor Hartnett said is a wonderful concept called the judicial notice. I don't think Twombly should ever wipe that out.

When we are talking about plausibility and all this other kind of stuff, if you get the judge's attention, if there is a story there, if there is a fact there that just changes that story to the point where you're over the line, that's the old pushing over the line.

It is just the problem with Twombly, in my opinion, is so much gas to this whole thing and kind of keeps a meritorious case that is not rigorously presented from getting off the ground.

That means we have to be better lawyers and better judges, and there is nothing wrong with that.

MS. RODRIGUEZ: Thank you, panel. I think we have reached the end of our time.

(Applause.)

(Recess.)

MR. GREENBAUM: We do have a wonderful

second program that we need to get started on. I'm personally looking forward to this next program.

To start it, I would like to introduce a moderator, Karol Corbin Walker. Karol is a partner in LeClairRyan. She's a trustee of our association, and I introduce Karol.

MS. WALKER: Thanks, Jeff.

Good morning.

All right, everybody is ready for the next panel, which is sentencing guidelines dealing with Booker and its progeny.

We have a wonderful panel assembled here today representing the judiciary, representing the prosecutorial side and the defense side.

Most of the individuals here, actually, all the individuals on the panel really need no introduction. I'll give a short one with respect to each of them.

First, to my immediate left we have Judge Irenas, who was appointed to the United States District Court for the District of New Jersey in 1992. He then went on senior status in 2002.

Prior to that he was a partner at McCarter & English for many years.

Judge Irenas also has been an adjunct

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faculty professor at Rutgers Camden School of Law.

Immediately to my right is Judge Anne Thompson, who was appointed to the District Court for the District of New Jersey in 1979. She was a chief judge from 1994 through 2001.

Prior to that she had the distinction in 1975 of becoming the first female and the first African-American prosecutor when Governor Byrne appointed her to be prosecutor of Mercer County.

She went on senior status in 2002.

Next to my left, to the left of Judge Irenas, we have Alexander Booth, who is a named partner in Brownstein Booth and Associates in Union City. He has been a partner there for several decades -- not that he's that old -- but over 27 years.

Alex, prior to his private practice days where he focuses on criminal law and municipal law, he had been a public defender in Hudson County, in Union County. He had also been involved with the Legal Services of Hudson County as board president, and on the board for over 25 years.

To Judge Thompson's right is Rich Coughlin, who is the Federal Public Defender in New Jersey. He started with the Public Defender's

office in 1985 and became the Public Defender in 1997, I believe. So he's been in that position for 11 years. Prior to that he was an Assistant Deputy Attorney General for New Jersey.

To Alex's left we have Cathy Waldor, who I think has the distinct honor of being one of the very few females in New Jersey who has focused on criminal defense work for more than 30 years.

In addition to her focus on the criminal defense bar, she's a past president of the New Jersey Association of Criminal Defense Lawyers, and she's a named partner in the law of Waldor Carlesimo in Manasquan, New Jersey.

To Richard's right is Amy Winkelman, who is the chief of the criminal division of the U.S. Attorney's office here in New Jersey, where she supervises over 60 AUSAs and prosecutes a variety of criminal cases.

Prior to her government service, Amy was an associate with then Clapp and Eisenberg, and prior to that an associate with the law firm of Palmer and Dodge in Massachusetts, and before that she clerked for the district court in Massachusetts.

That it is our panel, just to give you a little bit of history about each of them.

First we are going to hear from Judge Irenas, who is going to talk a little bit about how did Booker come about, what are the issues that we are dealing with as a result of Booker.

Judge Irenas.

JUDGE IRENAS: I've been asked to discuss with you briefly how we got to where we are today with Booker.

Back when Judge Thompson and Harold Ackerman and Judge Debevoise came on the bench, judges were judges. We are talking real judges.

You have a bank robbery statute. You committed a bank robbery, the sentence would be a maximum of 30 years.

You tried the defendant, the defendant gets convicted. If Judge Ackerman did it, the trial might take half a day. If he had been convicted, now it came time to sentence. That would be in the afternoon.

The statute said up to 30 years. And it turned out he had nine children, came from a broken home, it was a very sad case. The judge would look at it, 27 years. 27 years. No appeal.

It was well-established by the Supreme Court that you could not review that sentence for its

reasonableness. It was simply an unreviewable sentence.

Now, on the other hand, did the person serve 27 years? Did he serve anything like 27 years? The answer was, of course, no.

Under most state and federal statutes you became eligible for parole, I think as a general rule, probably after about a third of your sentence was served. I think there were individual statutes where it was less, sometimes more. If you put a rule of thumb, you served about a third and you became eligible for parole.

You went before the Parole Board, not only what you did before you went to jail, your criminal history and what was your institutional adjustment. Then a decision would be made to be paroled.

So it was really, in a sense, a relatively simple system. You had very few appellate decisions on the reasonableness of the sentence, because that just wasn't reviewable, just plain wasn't reviewable.

In the Booker decision, in Scalia's opinion, the part of his opinion that was the dissent reported out that there was no appeal generally on

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reasonableness pre Booker -- excuse me, pre guidelines.

This made many people unhappy on two basic grounds. First, there was the complaint that there was no uniformity. An ounce of marijuana in Nebraska was a drug scourge, and a drug sentence might be 10 years.

A kilo in Miami, well, why do we even prosecute this? And yet it would be the same crime with the same kind of person. There was a feel that there was a total lack of uniformity.

Then there was this concept of truth in sentencing. The paper would write, Judge Ackerman gives 27 years to bank robber. Then they find out that he was on the street in four, five years because he was paroled. That's not fair. That's dishonest where you are deceiving the public.

Congress put its collective head together and they came up with the Sentencing Reform Act of 1984, actually, but it didn't become effective until November 1st, October 31st, 1987.

The sentencing guidelines created the Sentencing Commission, of course, which developed the so-called sentencing guidelines.

In your material that you got, and all

of you that have practiced criminal law have seen it a million times, came out ultimately with a grid like this. In the eighth grade we learned that there was an X axis and a Y axis.

The X axis, horizontal axis was the criminal history. How bad was the offender? The guidelines had all kind of ways of computing just how bad he or she was in assigning a category of one to six.

On the Y axis, the vertical axis, you have what's called the offense level. How serious was the crime, from one to 43?

You go with the axis that if you had a criminal history three, an offense level 18, you look and say, aha, you get 33 to 41 months, 33 to 41 months.

By the way, the Parole Commission out the window. It exists for pre guideline, but no longer exists for guideline sentencing.

No parole, maximum time you get off your sentence is about 11 or 12 percent based on good time served in prison. That's it.

It not quite as simple as that, because you compute the offense level, well, that required a book. If you had a bank robbery, was a gun

brandished, was a gun possessed?

An endless number of categories. For certain crimes, was a position of trust abused? Did the person have special skill or knowledge? Was he a minor participant? Was he between a minor and a minimal participant? There were different adjustments for that.

Did he use a gun in connection with a drug offense?

Well, the gun was locked in a locked box in his closet while he was selling drugs on the front stoop of his house. Did he use a gun in connection with that drug transaction?

What it really meant is the judge now got involved in fact finding. Actually, they started finding facts.

Under what standard of proof? Beyond a reasonable doubt you say? No. Preponderance of the evidence.

Also introduced a very interesting concept, relevant conduct. You can be convicted of one bank robbery and your sentence could be based on nine other bank robberies that you didn't -- were not charged with in the indictment, for instance. All kinds of conduct got brought in.

And finally the Court of Appeals are now back in business in the criminal law. They were put back in business.

Where you might see one or two cases a year on sentencing, now you had hundreds and hundreds and hundreds. Why? Well, they gave lip service to the deference of the district court.

They said if the guideline range was 37 to 46 and you sentenced within that range, there was no appeal.

They then said if the range was more than 24 months from top to bottom, if you said why you sentenced within the range, like he was a bad guy, so I gave him the top of the range, or he had a young family at home, so I gave him the bottom line, that was unappealable.

They also introduced the concept of a departure, a departure in the sentence outside the range for certain factors.

I'm going to go in depth with it, but for the most part, factors that judges traditionally considered, family circumstance, your upbringing, economic status, those kind of things, the guidelines discouraged departures.

The departure that became overwhelmingly

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most popular and loved and approved by everybody was squealing -- cooperating, excuse me, cooperating with the government.

The phrase 5K1.1 entered the lexicon, 5K1.1.

So overwhelmingly most departures downward, of course, were for cooperating with the government.

The guidelines had other effects. If you pled guilty, you automatically got a two level reduction in your offense level, and most of the time a three level reduction, almost always, in rare exceptions would you get a third point, making pleading very attractive.

Also it had the effect of handing the government a pretty powerful tool in what I will call its charging decisions. In deciding how to charge an offense, the government could very importantly effect your exposure to sentence, a strong inducement to plead.

For instance, in drug offenses, which make up, I don't know the statistics, but I'm sure it's 40, 50, 60 percent of the criminal cases in the federal system, the guidelines made the quantity and type of drugs the linchpin for determining your

sentence.

There is a famous 2D1.1 in which you have a table starting with the type of drug, starting with the most serious all the way down depending on the type of drug and the amount of drug.

Now, for many drug dealers, people who engaged in drugs, they engaged in multiple transactions, and depending on how the government charges it can effect your sentence by a great deal.

If a person makes a plea deal with the government, the government says, okay, we'll agree with you in advance that we are going to charge you with only 50 grams of cocaine, that can be a relatively, in the scheme of things, a modest sentence.

But if you go to trial and you are convicted, let's say, of an offense of more than five kilograms of cocaine, we are going to prove at sentencing that you actually were involved with 5,000 kilograms of cocaine, and we'll do it by a preponderance of the evidence, by the way, not by beyond a reasonable doubt, and your sentence will double or triple.

So the government, in its charging decision, was handed a very powerful tool.

Once again now we have appellate review, 18 United States Code 3742.F. The government could review the guideline calculations, and you suddenly had hundreds and hundreds, if not thousands of appellate cases deciding whether the trial judge correctly calculated the guidelines.

Was there a gun brandished? Was it a position of trust? Was it a minimal role?

Also appealable were departures, not the decision not to depart, that normally was not appealable, so long as you understood that you had a right to depart.

Your decision not to depart was not appealable. But if you did depart, the reasonableness of that departure was now reviewable.

So now we have a regime where the trial judge is capping very significantly, and where the appellate courts are now knee deep, or I should say neck deep in appellate review of sentencing decisions.

Well, then comes a case out of New Jersey, a New Jersey State cause called Apprende.

New Jersey adopts a state statute that says for certain categories of crime, assaults, murders, things like that sort, that if you are race

based, ethnically based, what we call a hate crime, your sentence can be doubled, actually.

However, that was treated not as an element of a new offense, but rather as a sentencing factor. It was the trial judge, not the jury, that decided whether the crime was motivated by racial hatred or ethnic hatred or things like that.

Well, it went up to the United States Supreme Court. They said there is something called the Constitution of the United States. That says if you're going to be convicted, the jury has to do it beyond a reasonable doubt.

They said that if the crime of killing was racially motivated, that was an element of the crime, not a sentencing factor, and a jury would have to find that. It could not be found by a judge by any standard. It had to be found by a jury.

Shortly thereafter there was a case of Blakely v. Washington which involved a state sentencing guideline, State of Washington, not the federal, where on a kidnapping charge which had a normal guideline range, I can't remember, 40 or 50 months, the trial judge found, not the jury, but the trial judge found an aggravating factor.

Based on this aggravating factor

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basically doubled the sentence. That was found to be unconstitutional.

Once again they said, no, no, if you're going to, under those guidelines, double the usual sentence based on certain facts, the jury had to find those facts, not the trial judge.

That leads us to the now famous case of United States versus Booker.

The Booker defendant was charged with selling, possessing, or possessing with intent to sell more than 50 grams of crack cocaine base.

It goes to the jury, and the jury was given evidence that Booker had 92 grams of crack in a backpack or something like that, and he's convicted.

He goes for sentencing, and under the sentencing guidelines he's facing, my recollection was 210 to 262, 210 to 262.

However, the government introduces evidence that in fact he had dealt not just with the 92 grams of crack in his backpack, but another 250 plus grams elsewhere.

Now, in either case the statutory maximum was life, the statutory minimum was 10, whether it was 350 grams or more than 50 grams, it was still the same maximum sentence.

Under the guidelines, because the table went by amount, he suddenly went from a minimum of 210 to 360 to life. It was 30 years to life.

The judge, by a preponderance of the evidence, finds that in fact he was involved with, I don't remember the exact number, but it was 300 some odd grams of crack, sentences him, very generous judge, however, sentences him to 360 months.

By the way, the guideline uses months. The defendants don't feel as bad. If you say 20 years, they get very upset. If you say 240 months, then they say, thank you, judge. That was one of the innovations.

I notice the Supreme Court actually referred to it as 30 years. They wanted to make it seem more serious.

That's the facts of Booker. Booker is unhappy, appeals, gets to the Supreme Court. I got to mention, a very strange alignment here.

You have four judges, Stevens, Scalia, Souter and Thomas, an unlikely foursome, feel very strongly that the guidelines were unconstitutional. Conviction should be reversed.

The four judges, Breyer, Rehnquist, Kennedy, Alito think the guidelines are just fine, so they want to uphold them.

You have a dissent by Breyer, the Stevens opinion says, of course, that the guidelines were unconstitutional, they are infringing on the right to trial by jury.

Judge Ginsburg joins on the majority opinion with Stevens, joins that opinion, creating a majority. Breyer and his three companions draw a dissent. That's only half the problem.

What do you do for a remedy? What are we going to do? Now that it's unconstitutional, how do we deal with it?

Even prior to Booker, some judges anticipated Booker, would actually set certain kind of guidelines to the jury.

Judge Simandle had a case, even pre Booker, he would take a guideline issue, the amount of drugs or some other issue relevant to sentencing, and rather than make a decision himself, he sent it to the jury.

After the verdict came he would send it back to the jury to get a decision. He was kind of anticipating that the result of Booker and an earlier case, Jones, where they anticipated that result. He actually sent it to the jury.

One of the results might have been send all those guideline decisions, of which there were hundreds, send each of them to the jury for decision.

Breyer didn't like that idea. His idea was, all we'll do is make the guidelines advisory. We'll make them just one factor out of many that have to be considered by the judge.

Well, Judge Ginsburg decided she liked his remedy better than the other ones. She joins the prior group on the remedy. We have no idea why that split.

So we have the spectacle of the four judges declaring the guidelines unconstitutional, but the four judges who thought the guidelines were constitutional decide what the remedy is, Judge Ginsburg joining that group.

So we wind up with four opinions. We have Stevens' majority, Stevens dissent, Breyer's majority, Breyer's dissent, creates a world of Booker.

So what Booker says, it says, all right, we now turn to 3553 A, factors to be considered in imposing sentence. Well, one of these factors would, of course, be the guidelines.

Then you have factors like seriousness

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of the offense, promote respect for the law, provide for just punishment, the nature and circumstances of the offense, the history and characteristics of the defendant.

That's the one beloved of defense attorneys. They will write a hundred page brief. They will ignore all the other nine factors, but the history and characteristics of the defendant, you know, poor childhood, abusive parents, on and on, man of the year for the Red Cross, three tours in Vietnam and on and on and on.

Deterrence, general deterrence, specific deterrence, and then the guideline.

The second thing he did, he now said, however, it was the intent of the Sentencing Reform Act was to have appellate review.

Now, sentences, discretionary sentences of the judge, are reviewable for reasonableness. For 200 years the discretion of the trial judge on sentence was not reviewable for reasonableness, now in a way that we are somewhat back to that system in part, about you they are reviewable for reasonableness.

The Third Circuit under Booker has said that the process you follow -- you must follow is as

follows, and I think almost every Circuit adopted this in one form or another.

You first do a guideline determination, just as you would have under the Sentencing Reform Act. In other words, you view the guidelines just the way you always did, all that jurisprudence still exists.

You then decide motions for departure under the guidelines just the way you would have had there been no Booker. You file a 5K1. You come up with a guideline number after departure.

Then, step three, you now take that number, consider it as a factor and apply all these other factors and come up with your final sentence.

If you vary from that guideline, that is now called a Booker variance. We don't call it a departure. Departure is you know the guidelines, variance is under Booker. There is still appellate review of that.

One thing has been fairly clear. Statistics show even under Booker the guidelines carry extraordinary weight. Not surprising. You have all these factors.

Deterrence to criminal conduct. Does that mean three months? Nine months, 11 months? 27 months?

Provide just punishment. Well, what is just punishment? Four months, six months, 23 months? I don't know. No metrics to any of these factors.

What is the parsimony principle? No sentence shall be longer than necessary to achieve the goals of sentencing. That's the parsimony principle. I get it in every brief, the parsimony.

MS. WALDOR: Sufficient but not greater.

JUDGE IRENAS: Judge, this defendant has learned his or her lesson, maybe a couple of months would help, but beyond that you don't need that. That's the parsimony principle.

Well, there are no numbers to that, yet the guidelines are there. There is a range of numbers.

Statistics have shown that even after Booker the guidelines have carried very significant weight. The number of sentences outside the guidelines post Booker, there has been some change, but it hasn't been as significant as you think. It is measured in a couple of percentage points for the most part. Not a huge change. Not surprising to me.

When you are sitting there with all these factors, and then you have a number, the number

is going to carry greater weight than a lot of those factors.

Statistics also showed -- well, statistics were prepared by defense organizations. Should I give them that weight? Yeah.

Two that struck me, at least, that if a judge varied under Booker above the guidelines for which he went up, the guidelines say 30 months, I'm going to give you 60 months, and defendants appeal of that upward variance were generally and almost close to overwhelmingly unsuccessful. Judges were sustained.

If the judge went down, in other words, varied below the guidelines, and the government appealed, the government was often successful in setting aside the sentence, that it was below the guidelines, on the grounds that it was unreasonable.

Those results varied sharply from circuit to circuit. For some reason the Eighth Circuit had a disproportionate number of appeals on that issue and they did not like downward variances much at all. Nationwide those statistics are pretty sharp.

And so that judges, including an unnamed judge who happens to also be on this panel, whoever

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that might be, found out the circuit's somewhat dislike for downward variances.

I'm going to leave you now, and you are all going to be grateful for that, I guess, with just to mention that a few cases have come out which have changed, or we think will change the landscape of Booker, the Kimbro case, and I'm going to leave it to others to explore that. Thank you very much.

(Applause.)

MS. WALKER: Thank you, Judge.

Next Judge Thompson is going to talk about the judicial discretion with respect to the advisory nature of the guidelines and the progeny that followed Booker.

JUDGE THOMPSON: As mentioned by Karol Corbin Walker, I was appointed in the wild, wild west era, it has been referred to, when the guidelines were not in existence, when the judge looked to the statute book and determined what the maximum was, and knew that he or she had from probation all the way up to the maximum.

We have the guidelines era when the guidelines were to be fixed and a rather mandatory range for which a judge must apply the sentencing privileges and prerogatives and duties.

In some ways, many judges thought of the guidelines era as sort of comforting, because the judge knew that there was this fixed grid, there were the guidelines exceptions, there were specified upward and downward departures, and the guidelines framework somehow lessened the anxiety of imposing a just sentence.

Now we are beyond the guideline regimen of necessity, and now we are in the age of discretion.

As Judge Irenas just mentioned, let's go through what it is now the judge must do. First, the judge must still calculate the guideline sentence, and that is still rather exacting, because if there was an error in the calculation or the computation of the guideline range, the guideline specification, then that in and of itself can be a reversible error.

After calculating and computing the guidelines specifications, computing the sentence under the guidelines, then the judge must determine departures, the downward departures, the upward departures, whatever the request on either side has been, and what the judge considers to be applicable.

Then, third, there are the 3553(a) factors under Title 18. That now has brought us to an era of deciding, what do the guidelines mean? What is the significance of the guidelines?

There are these Supreme Court cases, and I will start with Rita. You have that in your material, then Kimbro and Gall in December of 2007.

Rita was an interesting case. Mr. Victor Rita was convicted by a jury of perjury, obstruction of justice, making false statements, convictions obtained on all counts.

The judge at sentencing looked to the guidelines -- and, by the way, this was a Fourth Circuit case. The judge made a determination as to exactly what the guideline range was, a very accurate assessment taking into consideration all the factors that are a part of that, and decided that the guideline range of 33 to 41 months was quite reasonable.

And also took some consideration of the fact that this was a man with a 25 year military history, perhaps some consideration of the fact that the man had been in law enforcement himself in a previous life, and perhaps even some health problems that he had.

He imposed a 33 month sentence and the defendant appealed, appealed because his attorney had

sought a departure, had sought, or at least a variance.

The Fourth Circuit looked at the sentence and thought, well, the minimum of the guideline range, certainly that's a reasonable sentence, affirmed.

Mr. Rita sought review by the Supreme Court of the United States, and the Supreme Court, in a decision in June of 2007, determined that a sentence within the guidelines was a reasonable sentence and that Mr. Rita had no basis for complaining, and that when a district judge's discretionary sentence in a particular case accords with the sentence the U.S. Guidelines provides, the Court of Appeals may have presumed the sentence is reasonable.

Justice Souter dissented, by the way, in a very interesting discussion, what that could mean and where that could lead in terms of a lack of exercise of discretion.

Following that we have Kimbro and Gall, both significant cases with regard to the judge's discretion, both December 10th, 2007.

Let's look at Kimbro first, because that's the crack cocaine case, kind of you know there

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has been this struggle, this conflict, the discussion for years about the disparity, the one hundred to one disparity between crack cocaine and powder cocaine in the guidelines.

Judges have struggled, the Sentencing Commission has sought from time to time to get Congress to adjust and to make more equal this ratio, this disparity.

There was a judge in the Fourth Circuit in Kimbro who when called upon to impose sentence, determined that he would take -- he or she would take consideration of this disparity between the treatment of crack cocaine and powdered cocaine, use that as a discretionary factor, and imposed a sentence which that judge felt was no greater than necessary to serve the objectives of sentencing under 355(a), took that into consideration, imposed a sentence. Did not impose a sentence that the guidelines would have required.

The Fourth Circuit reversed, said you can't do that. You can't be concerned with the disparity between crack cocaine and powdered cocaine in imposing sentence, Mr. Or Mrs. District Judge. You can't exercise your discretion in that way.

The Supreme Court of the United States,

December 10, 2007, said that's perfectly reasonable, and that the Court of Appeals is supposed to be looking to determine whether there is an abuse of discretion. Abuse of discretion is another way of saying a reasonable sentence, reinstated.

Now, what about Gall? Gall is an interesting case, because Gall, there is something attractive about the rehabilitated offender.

Mr. Gall was selling ecstasy when he was a student, I believe it was at the University of Iowa, and was part of a conspiracy, enterprise, selling ecstasy.

But he reformed. He withdrew from the conspiracy. I don't know exactly how he withdrew, but it seems to be pretty definitive that he withdrew from that conspiracy. He reformed. He stopped using drugs, graduated, went out and started working construction, became quite successful in construction work and was doing very well.

Lo and behold, a somewhat delayed prosecution resulted in his being indicted for his drug activity rather a long time after his criminal act.

The judge who sentenced Mr. Gall looked at the guidelines, calculated the guidelines, took into consideration all the factors which had been brought to his attention, and then facing a guideline calculation, a range of 30 to 35 months, the judge imposed probation of 36 months.

I like that case, Judge Irenas, if you know why.

Of course, when that came to the Eighth Circuit, that was reversed. The Court of Appeals believes that that sentence was not reasonable, there were no extraordinary circumstances in that case, there was no reason why Mr. Gall should have received that kind of benefit.

Interestingly, on that fateful day, December 10, 2007, the Supreme Court of the United States found that while the extent of the difference between a particular sentence and the recommended guideline sentence is relevant, the Court of Appeals must review all sentences, whether inside, just outside or significantly outside the guideline range, but must review it under a differential abuse of discretion standard.

The Supreme Court majority felt that the judge who had imposed sentence on Mr. Gall had been reasonable, the fact that he had stopped using drugs, that he had self-corrected, self-rehabilitated his

life, that he had given up rather definitively his participation in the ecstasy distribution activity years ago, did no longer seem to need the benefit of institutional correction, the judge's sentence was reasonable. Exercise of discretion.

Now, those three cases, Rita, Gall, Kimbro, are the big cases that our courts and I'm sure the defense attorneys are citing in memoranda to the judge on sentencing day.

I don't know if I should just mention, in addition, our own case within the Third Circuit, the Williams case recently, a little to the side.

But it's an important case because that case has to do with under the present regime a defense attorney and client who entered into a plea agreement and the government has negotiated that plea agreement very carefully and specifically, and Judge Sloviter, on appeal from the government's appeal, Judge Sloviter, for the Third Circuit, found that a plea agreement in the criminal sphere can be a contract, a contract just as we think of a contract that must be enforced specifically in the civil sphere.

So federal court sentencing is an interesting and evolving matter. I will be here for

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questions, but I think that's all I'll say now.

(Applause.)

MS. WALKER: Thank you, Judge Thompson.

Next we are going to hear from Amy Winkelman, who is going to talk about plea agreements, the practice, and one's obligation under those agreements.

Amy.

MS. WINKELMAN: Thank you.

I'm going to pick up where Judge Thompson left off and talk a little bit about the Williams case which changed the focus to some extent from the cases that the judges have discussed here today, to focus on the discretion of district court judges and what role the appeals court would play in reviewing those decisions, and focus more on the parties and agreements reached by the government and defense in the plea agreement context.

So let me talk a little bit about the Williams case that Judge Thompson touched on which was handed down by the Third Circuit on the very last day of last year, sort of a New Year's present for those of us on the prosecution side of the aisle.

It was an appeal from a sentencing -- the appeal was brought by the government, which we

don't typically do, and as many of you know, it is nothing that we are allowed to do if we wanted to even if on a regular basis.

The appeal was based on a case in which the district court judge in imposing sentence had in fact both departed from the guideline range and also varied from the guideline range under the Booker case.

The appeal was sought not based on the judge's conduct, it was not a challenge to the calculation by the judge to the guidelines or that the judge's decision in departing downward was unreasonable.

It was based instead on the government's argument, ultimately successful, that the defendant had breached the plea agreement reached between the defense and the government.

Let me give you a little bit of background. I don't know why all these cases seem to be crack cocaine cases, but this one too was a crack cocaine case.

In this case the defendant pled guilty to possession of crack cocaine with intent to distribute. It actually involved over 300 grams of crack cocaine.

The plea agreement between the government and the defense was executed in March of 2005. This was a couple of months after the Booker decision came down in January of 2005.

I will tell you that during that period of time there was a lot of work in our office, in the U.S. Attorney's office, and I also know much discussion in the defense bar about what a plea practice was going to look like after Booker.

The plea agreement that was executed between the defendant Boynton Williams and the U.S. Attorney's office in that case was a product of that discussion. It's largely the same form plea agreement that we use now.

There were some critical terms in that plea agreement. It contains a stipulation at the end of the agreement that went through a calculation of the guidelines. This was very typical, I mean, it was, I think, almost always used in the pre Booker and pre Blakely sentencing practice.

This particular post Booker plea agreement did have a calculation of what we called the total guideline offense level. It happened to be in that case a level 33.

Then there were some other key

provisions that I think everyone who practices in this area ought to know about our form plea agreement. In this type of form plea agreement, it provided that it recognized, first, that the guidelines were not binding on the district court, recognizing that they were now advisory.

Notwithstanding that fact, the parties agreed in writing in this plea agreement that as to what the total guidelines level applicable to the offense was, in this case 33, and they also agreed that the court should sentence within that guideline range, in a range that would result in the X and Y access, the level 33 to the defendant's criminal history score.

It also provided, I'm going to quote here, that "Neither party will argue the imposition of a sentence outside the guidelines range that results from the agreed total guidelines offense level," basically agreeing that neither side was going to seek a variance on the part of the government. The government was not going to seek to vary upward from the guideline range agreed upon and the defendant would not seek to vary downward.

There was one other critical provision on this topic in the stipulated section of the plea

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agreement, and it provided, "The parties agree not to seek or argue for any upward or downward departure or any upward or downward adjustment not set forth herein. The parties further agree that a sentence within the guidelines range that results from the agreed total guidelines offense level, that 33, is reasonable."

This is what we think of as the Booker waiver. Frankly, that's what it is in this type of plea agreement.

In exchange for a number of things, not the least of which was the government taking a firm position on how the guidelines applied in this particular case, the defendant was giving up his right to make the arguments under Booker and under 3553(a), seeking a variance from the guideline.

There are other important bargaining and give and take in any plea agreement, and in this case the government agreed that if the defendant would plead guilty to one count based on possession with intent to distribute the crack cocaine, that further charges would not be brought against the defendant.

In this particular case, as the Third Circuit recognized in its decision, there was a real trade-off here. There were additional charges that

the government could have brought in that case.

The plea agreement foreclosed the government from seeking to prosecute the defendant of possession of firearms in connection with the offense, because pursuant to the search as part of the investigation, the defendant was found to possess a number of firearms.

He was also a previously convicted felon at the time, so we could have prosecuted him as well, and we could also have filed the much feared double letter under 21 U.S.C. 851, because he had been previously convicted of a drug offense.

Basically, as the Third Circuit found, instead of the 10 year statutory minimum that the defendant faced under this plea agreement, he could have looked at a statutory minimum of 25 years, and that's not discretionary. So there was a real trade-off in this case.

The probation department prepared a presentence report and they agreed with the parties that sentencing time was 33, and also there was a level three resulting in a range of 168 to 210 months.

What ultimately resulted in the appeal here was that the defendant, after the presentence report came out, breached the plea agreement, first in a memo submitted to the court in advance of the sentencing proceeding. In that memo the defense counsel didn't challenge the calculation of the sentencing guideline level, but asked the court to, first, depart downward on a number of grounds which will be familiar to any of us who practice in the area, that the criminal history category was over represented, that the defendant had certain health issues, the defendant had important family responsibilities, and that he was a product of a broken home and had less guidance himself as a child.

So he sought a departure and he sought a variance under the Booker decision and the factors in 3553(a). He asked the court to impose a sentence of 120 months, well below the range provided by the applicable guidelines offense level that had been agreed on, and, frankly, below -- the sentence of 120 months wasn't even possible under any version of the level 33, even if his criminal history category had been the lowest it could possibly be.

The AUSA responded by letter noting to the court that this is not consistent with the terms of the plea agreement, that the defendant had promised not to make such arguments, but at the

sentencing hearing defense counsel nevertheless made those arguments again, from which it appears the district court took into consideration because the district court imposed the sentence requested by the defendant, which was a sentence of 120 months.

That was the set of facts before the Third Circuit when they took up the Williams case, and they addressed for the first time the legal standard for review as to an alleged breach of the plea agreement by the defense.

Of course, all of us know that there is a rich history of law on what happens when the government breaches a plea agreement. It's no small thing when the government enters into an agreement with the defendant. Obviously the government has tremendous bargaining power in a situation like that, and every Assistant U.S. Attorney is held to a very high standard to comply with the terms of the plea agreement and to keep the promises made in that agreement.

There is a rich body of law on what happens when the government breaches or appears to breach a plea agreement. But this was the first time that our Court of Appeals took up the issue of what happens when the defendant breaches.

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The Third Circuit, as Judge Thompson intimated earlier, looked to the court on the government's breach, looked to the fact that courts traditionally look at plea agreements from the perspective of contract law principles, that a plea agreement is a contract between the government and the defense, and that there are some special circumstances with plea agreements based on the government's very substantial bargaining power, and the fact that the defendant is giving up important, including constitutional rights, in agreeing to plead guilty and reaching a plea agreement with the government.

This is contract law in a separate claim, but still contract principles.

In that context, any ambiguities in the contract are construed against the government, and that is fair.

Under contract principles the obligations do run both ways, and the defendant as well as the government must comply with terms and conditions.

In going through this analysis, the Third Circuit recognizes that this is a bargained for document. There is trading between the defense and

breach upon a preponderance of the evidence, and also the ambiguity of the cracks in this case a plea agreement, will be construed against the government.

The reason why this was a welcome gift to our office is that the court went on to look at the specific provisions of our plea agreement and to say that there were really no ambiguity in those terms, that the stipulations, and I quote here, "The stipulations in the agreement unambiguously prohibited Williams from making downward departure motions."

It really laid out that this document that we had really struggled with precisely sent the message that we meant to send, and that if a defendant is going to reap the benefit of that bargain, he's going to be held to its costs as well.

The other thing that the Williams case did was to address what is the remedy for a breach when the defense has breached the plea agreement? What is the remedy?

The Third Circuit reviewed some cases in other districts that talked about the different options, the choice that the aggrieved party has in addressing the breach, and that in theory the government can move to rescind the plea agreement and

the government. They also noted that the defendant generally benefits from entering into the plea agreement, and that there are trade-offs inherent that benefit the defendant.

The ultimate holding -- I should say the court also addressed the issue of what would happen if it's found the defendant could breach the plea agreement essentially with impunity?

The court pointed out quite appropriately that if it failed to enforce a plea agreement against a breaching defendant, it would undermine the entire plea bargaining system, would render plea agreements really unworkable from the government's perspective, and that would really have a terrible impact on the criminal justice system, which we all know depends on the -- in fact, a majority of cases pleading out based on plea agreements worked out between the defense and the government.

The holding of the Williams case is that the court will apply the same standard of review as the appeals court in considering a defendant's breach of a plea agreement as it had applied in cases of the government's breach. A de novo standard of review is a burden placed upon the government to prove the

ask the court for a ruling that by the defendant's breach, the plea agreement is no longer in existence.

In theory, that would free the government up to bring charges that it had agreed not to bring, or maybe even conduct an ongoing investigation to flesh out some aspect of the defendant's conduct that we had agreed to let lie.

Frankly, that's another aspect of the plea practice.

The other option is specific performance, to remand the case to the district court for resentencing. That's an option that the government sought in Williams and was granted by the Third Circuit.

In remanding the case in the Williams context, the Third Circuit also granted the government's request to remand for resentencing to a different district judge. In finding that a different judge would need to conduct the resentencing, the Third Circuit emphasized that this was no negative reflection on the district judge who originally conducted the sentencing. It was really under the lines of you can't unring the bell.

The district court judge having been influenced, or even an appearance having been

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created that he was influenced by these arguments made in breach of the plea agreement, it was appropriate to send the case back to a different judge to take a look at the situation from the beginning with a clean slate and not be influenced by those improper arguments.

It was also gratifying to see in the Third Circuit discussion there was a recognition that in no way did the plea agreement that had been crafted by the government and agreed to by the defendant in any way try to restrict the district court's discretion to sentence under the Booker decision and with the application of the 3553(a) factors as our judges have discussed here today. It was not an attempt to limit the judge's discretion, but it was a bargained for exchange, an agreement between the parties to limit what the parties could argue to the court at the time of sentencing.

I'm sure I've already spoke too long, but I want to make a couple of observations about our plea practice out of the U.S. Attorney's office going forward.

First, I want to say that the type of plea agreement that was in play in the Williams case is not the only kind of plea agreement that we will

enter into with defendants. We do not require a defendant in every case, you know, that in order to reach a plea agreement with us, you must enter into this detailed guidelines calculation and waive your rights under Booker.

We do say, now that we have nice case law to back us up, that if you're going to decide to go that route, you're going to have to stick to that. There are other forms of plea agreements that we will agree to enter into.

At the other extreme is that we won't agree on any factors as to sentencing and leave all of those up for argument at the time of the sentencing hearing before the judge.

There is an intermediate step that we use as well where we will agree to stipulate as to certain factual issues, most typically drug weight, or another really big one is amount of loss, which is a complicated issue in many cases, that is often in the interest of both parties to come to an agreement as to what is the loss amount figure.

I want to put in a plug before I get overwhelmed or outnumbered by the defense attorneys on the panel, about why it is useful to both the government and the defense to continue to enter into the kind of plea agreements that we had in the Williams case with the detailed stipulation and the waiver of the Booker rights.

Without those agreements, where they are appropriate in individual cases, we can get into situations which are essentially mini trials, where there are really contested issues of fact and both sides will have to bring witnesses and go to great lengths and take up a great deal of the court's time to establish fact that we could stipulate to.

I submit that it is in everyone's interest to do that.

The stipulated plea agreement also provides some certainty for the defendant as well as the government, and it sets a ceiling. Once the government has stipulated to certain calculations, maybe agreed not to pursue certain things like an adjustment for abuse of position of trust or vulnerable victim, we are bound by that. The victim and defense counsel know that we have set a ceiling. We are not going above that ceiling.

Speaking from my own personal experience, it is a very rare occasion for the judge to go above a guideline calculation that has been agreed to by both the defense and the government. So

it really does typically set a ceiling.

I hope that if you take anything away from my comments here today, it is that it is often worth the defense's time and in the defense's interest to enter into these detailed stipulation plea agreements. That's my pitch.

Thank you.

(Applause.)

MS. WALKER: Thank you, Amy.

Next, Rich Coughlin is going to talk about the pitfalls of plea agreements and negotiations as well.

MR. COUGHLIN: Actually, I'm going to talk a little bit about Booker and Kimbro and Gall as well in this context.

Before Booker, when the guidelines were mandatory, a friend of mine who was a federal defender in Sacramento, used to half joke, if you were trying a lot of cases in federal court, you are committing malpractice.

It was understood by that, that that sort of was a shorthand reference to the reality, that in the federal court you've got, particularly pre Booker, the strength of the government's case, which is often overwhelming, and in addition to that,

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the government has almost exclusive control in a lot of respects over what the sentence was in terms of determining what the guidelines were based on your charging decisions, based on adjustments and so forth that would be used to determine what your sentence was.

The trial decision, the decision whether to go to trial was largely influenced by what sort of negotiations the government was willing to engage in as an inducement for you to plead guilty.

The control that they would have over that process, both on a plea and at sentencing, which as it played out resulted in a lot of people who went to trial ending up with sentences that were extraordinarily different than what they would have been had they pled guilty.

That came to be referred to as the trial penalty where you weren't just losing your acceptance of responsibility point, maybe getting a little hit for going to trial, you were going from a sentence that was life interrupting to, often, life ending based on the decision to exercise your Sixth Amendment right to go to trial.

One of the reasons for that -- it might seem a little bit unbalanced up here with three

defense lawyers and Amy by herself -- but to temper your sympathy a little bit, when you keep in mind that from the beginning the Justice Department has had a representative on the Sentencing Commission.

They have used that position, and it's reflected in the exclusively upward trend of the guidelines that has occurred over the years in terms of raising sentencing ranges, raising base offense levels, adding adjustments along the way, all of which were designed to increase the sentence at the end of the day. It is in that context that the criminal cases play out.

Before you extend too much sympathy to Amy, I suggest that you keep that in mind, that a lot of the government's work has been done over the years through its position on the Sentencing Commission.

Now, the question after Booker is, well, how is this going to play out? There is language in Booker suggesting that this is -- that the remedy is going to be a sham, that the guidelines are going to be followed up anyway, and that there would be no need for Rita, Kimbro and Gall if that had not come to pass.

The Supreme Court has been clear in Jones, in Apprendi, in Blakely, in Booker, that the guidelines are advisory, and that that's the role that they should have.

Nevertheless, the Circuit Courts of Appeal, the district court in applying the guidelines and in applying Booker, the numbers, the language, all indicated that the guidelines were often a starting point and the ending point, and that lip service was being paid to the rest of 3553, including the parsimony section that the Supreme Court in Kimbro and Gall expressly endorsed and said that that is the role of district court judge. That is the search that should be occurring.

It is in that context that the district courts are to evaluate an individual who stands before them for sentencing.

They said that in reminding district courts that that is their responsibility as opposed to the role of the Circuit Court, to determine whether the actual sentence is reasonable, which is a broader range of possibilities than what the search is for a district court judge in finding a sentence that is sufficient, but not greater than necessary to meet the purposes of sentencing.

To remind district courts, they went back to a decision in Coon versus the United States

where they said it has been uniform and consistent in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in human failings that sometimes mitigate, sometimes magnify the crime and the punishment to ensue.

The point of that is to remind courts and litigants that it's an individual who is being sentenced and that the guidelines are a collectivist sort of approximation.

The court went on to note that some guidelines have less weight than other guidelines, that the notion that they are the wisdom of experience, that they reflect a history of judges and the collective experience that they have had in sentencing individual defendants to particular crime is not necessarily true for a lot of these guidelines sections, that they are instead the result of Department of Justice initiatives, of suggestions from Congress, of approximations and estimates that the Sentencing Commission has developed on its own. That therefore some guidelines have less weight than others. In any case, in any sentencing, it's the individual and the offense that needs to be the focus of the court.

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That's what Kimbro and Gall and Rita have made clear, and have tried to, in shifting the focus of the sentencing.

Having said that, that should influence, one would think, what happens at the end of a trial and influence the decision to go to trial?

Perhaps now that the U.S. Attorney doesn't have quite so much decision making authority over how the case is going to end up in terms of the sentence, and if your client is acquitted of some conduct, the guidelines then under Supreme Court precedent have indicated for the Fifth Amendment, acquitted conduct could come back in, that unless you are going to win everything, you would be sentenced as if you were convicted of everything.

That there are some new reasons to challenge that expectation and that outcome, and that there might be more reasons to at least be somewhat less fearful of going to trial.

Having said that, no matter what effect Kimbro and Gall have had on the government's power of sentencing, the power to determine the sentence and the trial penalty, they don't have any effect on the first consideration, which is the strength of the government's case, and more often than not in the

vast majority of cases you will continue to see guilty pleas because the -- it is in the defendant's best interest. They understand that, and it is in the government's interest to dispose of cases through reasonable plea agreements.

The experience that my office has had with the U.S. Attorney in this district has largely been positive in that regard. The assistants are willing to listen to mitigating evidence, to consider alternatives in negotiating pleas. In many cases, in not all circumstances, are you going to be able to agree on how the guidelines should play out.

I think that after Kimbro and Gall, that the presumption -- the government presumption is that you take the guideline plea and agree to how the guidelines are going to play out and what the issues are going to be.

That presumption is not one that we are going to accept. There are certainly instances where you need to do that in the best interest of your client. If you are avoiding an enhancement as done in Williams, if you are avoiding mandatory minimum of some kind, if you are negotiating about loss or drug weight in a way that's favorable to you, or if you're cooperating, you're probably going to have to eat the stipulation.

In other circumstances, fact stipulations as to what the circumstances were that you can agree on, they are perfectly appropriate, and the other alternative, of course, is either an open plea or a plea to the indictment and then deal with the sentencing issues as they arise.

I think that the theme here, the message, the post Booker message to courts and to litigants is that the courts, the district courts should have a chance to be judges again and to do what was anticipated when the Sentencing Reform Act was enacted and when the Sentencing Commission developed the guidelines, was to respond to and consider the experience of district court judges in sentencing and to take that experience into consideration in changing the guidelines as they went on.

The idea that everything, every offense, every offender needs to go to jail for longer and longer time, to the point where we now have one out of every 99 adults in America in jail, is something that has just pushed the system so far, to such an extreme end that it can no longer be sustained.

As the court pointed out in Gall, just as

under sentencing undermines respect to the courts and the law, over sentencing does as well.

These opinions give the district courts an opportunity to go back to doing what is expected, and that is to sentence individuals, look at them, consider who they are, what they did, and determine what the appropriate punishment is.

(Applause.)

MS. WALKER: Since we are running out of time, we are going to have the defense bar condensed version with respect to presentence process. That will be by Cathy Waldor. And right after Cathy, Alex Booth will give the concluding part of our program, which will be condensed with respect to nuances from the defense perspective. Since we do have several defense counsel here versus on the prosecutorial side, we are condensing that part.

MS. WALDOR: Alex and I are going to tango instead of sitting here and talking about cases. I will be very brief.

I want to say that there is obviously more room for defense participation. I don't think you will see changes that big. I think we have to litigate many, many issues yet.

On your client's behalf, talk about

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metaphysical, the sentencing process is just -- what do you tell a client? What is my sentence going to be?

Well, we had a hard enough time with the guidelines. We say, somewhere between here and here, and maybe we get a departure and maybe we don't.

Now we say to a client, well, if you plead guilty, you can get anything.

Can you tell me, can you predict my sentence? No, I really can't. So just let's plead guilty.

That being said, you have to participate in the process fully. That's from the guilty plea you need to take your client to the presentence interview. We all know the presentence interview has to do with finances, offense conduct. Never, ever let your client talk to the probation people about the offense conduct. You will surely lose your extra credit points for acceptance of responsibility.

I want to hand in something written. The probation department probably likes that better.

Probation also starts the report with the 355 considerations. When you interview with your client and the probation people, you want to start highlighting these various Booker variance things.

You are not in violation of this Williams case where a plea is a contract. Discuss your client generally, discuss your client's characteristics. And the judge is not held to this Williams contract deal. Let the judge make decisions based upon a general memo, and if the judge decides to depart or to follow a variance, the judge can do that. That way you are not in violation of this Williams case where you voided your plea bargain because you violated a contract.

Outside of that I give it to Alex.

MR. BOOTH: I knew when I signed up to this thing that it would be a mop up assignment. Judging by the panel, I would be able to say my time is up, which is pretty much true.

The Williams case, I think the attorney in that case put in his pretrial memo totally contrary to the agreement that he wanted a variance, that he wanted a departure. There was an obvious breach of the agreement.

The judge, on the other hand, if you don't put it in your memo, as Cathy said, put the facts of the guy's life in there and you keep your fingers crossed that the judge will ask you, what about this, what about that?

Talk about the family, the client, you know, any out of the heartland or extraordinary circumstances that you may address in your own presentence memo.

By the way, when you do a presentence memo, please don't put it on ECF. I see a lot of people just are filing them. They are confidential. Please, paper is still allowed for certain things. Don't file electronically your presentence memo. And your presentence memo, of course, should forget about the guidelines because we don't really care about them. Everybody knows how to figure them out.

This notion that the first level is the guideline, I think you need to reeducate the bench and the U.S. Attorney's office. The first level is 355.3 or personal traits, characteristics, something different about the client, different about their family. Let's put the guidelines in the third place.

If you signed a memo, and I think Alex will get into this, a plea memo that forbids you from making a variance or a departure, which most of them do, by the way, what you want to do, and we discussed this in our telephone conversation, Judge, and I've been doing this for years anyhow, is just do a presentence memo that doesn't say I want a departure, I want a variance.

Frankly, the judge has a duty to exercise discretion. I believe the attorney would have a duty to answer the judge despite what the plea agreement contract says. I can't believe the courts won't eventually come to that same conclusion.

I went to law school in the late '60s, the era of Earl Warren was still with us, and the pendulum was moving to the rehabilitation side of sentencing. We were taught that eventually it's just this way, and it goes to the punishment and deterrence side and generally goes back and forth.

Since I've been out of law school it stopped and switched, but it's going off the charts that way.

In the mid '80s, the end of parole and the advance of the guidelines changed the world and it made life as a criminal defense attorney somewhat frustrating. And I thought I would end this by giving you this story of a case that I had.

We went to trial. The trial judge, eventual sentencing judge, has already been referred to today, one of the old school, and by no means he's a soft judge, in fact the contrary is true.

My client was involved with importing approximately 35 tons of marijuana. He winds up with

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a sentence of six years. This is by a tough judge.

He went to federal prison, and a couple of months after he got there he called me up to come up and represent him at his parole hearing. His parole date was set 24 months after his incarceration. He went home a happy man.

If he had been sentenced under the guidelines, he probably would be getting out around who knows when. That's how much the guidelines and the absence of parole changed the system.

It went from 24 months to a minimum of 235 months for the same exact conduct.

The Gall case, making judges judges again, as Judge Irenas said, and giving power to judges, maybe there is a change in the wind and maybe we don't want a society where one in every hundred adult men are in prison.

Amy, watch out.

(Applause.)

MS. WALKER: Thank you. We now invite everyone to go downstairs so we can honor our senior judges with the pro bono award presentation and to hear our wonderful luncheon speaker. Thank you.

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