

1 THE ASSOCIATION OF THE
2 FEDERAL BAR OF NEW JERSEY

3 PRESENTS

4 THE

5
6 THIRTY-SECOND ANNUAL
7 UNITED STATES JUDICIAL
8 CONFERENCE
9 FOR THE DISTRICT OF NEW JERSEY

10
11 HOT TOPICS FROM TWOMBLY
12 AND BEYOND:
13 WHO CAN AFFORD JUSTICE - ACCESS
14 TO THE COURTS

15 and

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

19 Mayfair Farms
20 West Orange, New Jersey
21 March 13, 2008

22
23
24 Reported by: Howard A. Rappaport, CSR
25

1 MR. GREENBAUM: Good morning, everyone.
2 My name is Jeff Greenbaum. I am the president of the
3 Association of the Federal Bar.
4 On behalf of the Federal Bar, I would like
5 to welcome everyone to our 32nd United States
6 Judicial Conference of the District of New Jersey.
7 We have a very exciting program
8 scheduled for this morning, and to begin the day I
9 would like to introduce a representative of our
10 federal court, our Chief Judge will be here a little
11 later this morning to address us, but at this time I
12 would like to introduce United States District Judge
13 Katharine Hayden.
14 (Applause.)
15 JUDGE HAYDEN: On behalf of the judges,
16 we look forward to this event every year. I welcome
17 all of you. This is the 32nd annual meeting.
18 Judge Brown will be here and probably
19 give you our statistics and update between the two
20 seminars. It's going to be a great morning.
21 Welcome, everybody.
22 MR. GREENBAUM: Thank you, Judge Hayden.
23 I also want to say a few words about our
24 association's activities for this year, and encourage
25 you all who are not members of the association to

1 burdens are **not** placed on attorneys licensed in more
2 than one state.

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

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

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

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

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

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

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

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

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

20 In January of this year our MCLE
21 committee issued a report supporting mandatory
22 continuing legal education in New Jersey and setting
23 forth our vision of how that program should be
24 structured to make it mesh with those programs in
25 New York and in Pennsylvania so that additional

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

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

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

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

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

1	are going to give our annual pro bono award to all of	1	open and manage the newly created Trenton and Camden
2	our senior judges of our district, and that will be a	2	branch offices for the Federal Public Defender for
3	very special ceremony and I'm sure you will all want	3	the District of New Jersey, where he served as
4	to be there to be part of it.	4	assistant in charge until 1991.
5	Finally, before our program begins, I	5	Judge Hughes was the first career
6	want to thank our two program chairs, Karol Corbin	6	defender in the country to be appointed a
7	Walker and Lisa Rodriguez, for the truly wonderful	7	United States Magistrate.
8	job that they have done in putting together what I	8	I also understand that Judge Hughes was
9	know is going to be a wonderful program.	9	the first in New Jersey to convince a federal judge
10	With that said I want to turn it over	10	to find the sentencing guidelines unconstitutional, a
11	now to start our civil program, and I would like to	11	position that ultimately got that judge reversed.
12	introduce to you Lisa Rodriguez, partner in Trujillo,	12	Sitting to Judge Hughes' right is Allyn
13	Rodriguez and Richards, and she's also treasurer of	13	Lite. Allyn Lite is a senior member of the firm Lite,
14	our Association of the Federal Bar.	14	DePalma, Greenberg & Rivas. He served as the Clerk of
15	Lisa.	15	the District Court for the District of New Jersey from
16	(Applause.)	16	1982 to 1986.
17	MS. RODRIGUEZ: Thank you.	17	Mr. Lite is the author of New Jersey
18	Good morning everyone.	18	Federal Practice Rules formost commentary and
19	The first seminar, first panel today is,	19	annotations of the Local Rules published annually.
20	"Hot topics from Twombly and Beyond: Who can afford	20	He was also appointed as one of the ten
21	justice -- access to the courts."	21	original members of the United States District Court
22	By the time you get finished with the	22	lawyers advisory committee, on which he served for 11
23	topic, it's time to go home.	23	years.
24	Members of this panel, we are very	24	To Judge Simandle's left is Professor
25	fortunate to have today, really need no introduction,	25	Hartnett. Professor Hartnett was a former law clerk
	7		9
1	in my role as moderator that would leave me nothing	1	to Judge Lacey and Judge Cowen of the district court,
2	to do, so I will introduce them nonetheless.	2	and for Chief Judge Gibbons of the U.S. Court of
3	Sitting to my right is Judge Hayden.	3	Appeals for the Third Circuit.
4	Judge Hayden, after graduating from law school,	4	After his clerkships Professor Hartnett
5	clerked for New Jersey Supreme Court Justice Robert	5	practiced with the Federal Public Defender and the
6	Clifford. She also served as an Assistant	6	law firm of Robinson St. John and Wayne.
7	United States attorney.	7	He's presently on the faculty of
8	Judge Hayden was appointed to the	8	Seton Hall Law School since 1983, and has published
9	New Jersey Superior Court in 1991, serving as a trial	9	articles in the area of federal jurisdiction and
10	judge in the Family Part in the criminal division.	10	constitutional law.
11	Judge Hayden was appointed to the	11	In 1994 Professor Hartnett was named the
12	federal bench for the District of New Jersey in 1997	12	Richard J. Hughes professor for constitutional and
13	and sits in Newark.	13	public law and service.
14	Sitting to my left is Judge Simandle.	14	Next to Professor Hartnett is Anne
15	Judge Simandle has been a judge in this district	15	Patterson.
16	sitting in Camden since 1992.	16	Anne is a graduate of Cornell Law
17	Prior to becoming a judge,	17	School, and is among the top litigation attorneys in
18	Judge Simandle was a law clerk to the Honorable John	18	New Jersey. She's a partner in the law firm of
19	F. Gerry. He was an Assistant United States attorney	19	Riker, Danzig Scherer Hyland and Perretti, where her
20	for the state of New Jersey and was a Magistrate	20	work is concentrated on the pharmaceutical, tobacco
21	Judge for nine years.	21	and chemical industries.
22	Next to Judge Hayden is Judge Hughes.	22	Welcome. Thank you all for being here,
23	Judge Hughes was appointed a United States Magistrate	23	and I think we'll start with you, Professor Hartnett, on
24	Judge for the District of New Jersey in 1991.	24	what Twombly means to us today.
25	In 1976 Judge Hughes was appointed to	25	MR. HARTNETT: Thank you.

3 (Pages 6 to 9)

1	In Bell Atlantic versus Twombly in May	1	"has been questioned, criticized and explained away
2	of 2007, the Supreme Court held by vote of seven to	2	long enough and it's time to retire it."
3	two that an antitrust complaint alleging that major	3	If you get nothing else out of today, or
4	telecommunication providers engaged in parallel	4	at least nothing out of my remarks today, don't use
5	conduct unfavorable to competition could not withstand a	5	this language anymore. Don't use it in your briefs,
6	12(b)(6) motion to dismiss.	6	eliminate it from your boilerplate sitting in your
7	Stated that way, it's hardly a big deal,	7	word processing documents. If you rely on this
8	hardly surprising. Antitrust law has insisted that	8	language, you will be signaling to your adversary and
9	parallel conduct is not itself a violation of	9	signaling to the court that you are behind the times
10	Section 1 of the Sherman Act, and if that's all that	10	and arguing under an outdated standard.
11	the complaint alleged, the decision would hardly	11	These two aspects of Twombly plainly
12	warrant its being a headliner here.	12	reach beyond antitrust cases to all complaints. The
13	There are at least two, arguably three	13	requirement of showing a formulated recitation of the
14	and increasing, giving way to a lower courts reading of	14	elements depends on the claim and the insistence on
15	Twombly, that have much more impact on civil litigation	15	retiring the language from Connelly versus Gibson.
16	across the board in federal courts.	16	There is a third aspect of Twombly that
17	First, the complaint in Twombly did not	17	is deeply ambiguous, but given what lower courts have
18	simply detail parallel conduct. It alleged expressly	18	been doing with it may be not so ambiguous anymore,
19	in its 51st paragraph, "On information and belief,	19	at least within litigation in those lower courts.
20	the defendants have entered into a contract,	20	What is that third aspect? Well, the
21	combination or conspiracy to prevent competitive entry	21	court insisted in Twombly that the complaint allege
22	into their respective markets and have agreed not to	22	enough facts to state a claim to relief that is
23	compete with one another and have otherwise allocated	23	plausible on its face, and that the plaintiffs did
24	customers and markets to one another."	24	not, "nudge their claims across the line from
25	That is, there was an express allegation	25	conceivably to plausible," and therefore the complaint
1	in the complaint of a conspiracy, of an agreement.	11	must be dismissed.
2	But the courts didn't find this	2	Now, this requirement of plausibility
3	sufficient to state a claim. Why not?	3	might be best understood as an aspect of substantive
4	Well, the court emphasized that a	4	antitrust law. Because of the matter of substantive
5	complaint doesn't need detailed factual allegations	5	antitrust law, parallel conduct is quite compatible
6	to survive a 12(b)(6) motion, but it also emphasized	6	with behavior. The trial stage of antitrust cases
7	that Rule 8 requires that a complaint show that the	7	can't permit juries to infer conspiracies when such
8	pleader is entitled to relief. Thus, what the court	8	inferences are implausible.
9	called a formulated recitation of the elements of a	9	Similarly, at the summary judgment
10	cause of action will not do.	10	stage, plaintiff seeking damages for violation of
11	Instead, the complaint has to show	11	Section 1 of the Sherman Act has to present evidence
12	entitlement to relief, some factual allegations, not	12	that tends to exclude the possibility of independent
13	merely to give bare notice, the standard boilerplate	13	action, and in a sense you might read Twombly as an
14	of what a notice pleading under the Federal Rules is	14	antitrust case that brings those decisions onto the
15	about, but also to provide a ground on which the	15	pleading stage. What's required at trial, required
16	complaint rests.	16	at summary judgment, is also now required at
17	Secondly, the court concluded that the	17	pleading, that is, some factual context suggesting
18	famous language from Conley versus Gibson, that some of	18	agreement as opposed to independent action.
19	you can probably recite in your sleep, that is, that "A	19	Frankly, most of the time in the Twombly
20	complaint shall not be dismissed for failure to state a	20	opinion when the court discusses plausibility, it
21	claim unless it appears beyond doubt that the plaintiff	21	narrowly focused on the need to separate permissible
22	can prove no set of facts in support of his claim which	22	parallel conduct from unlawful agreement.
23	would entitle him to relief." That famous language has,	23	At one point indeed they note that, "The
24	"earned its retirement."	24	plaintiffs do not dispute the requirements of
25	The court concluded that this language	25	plausibility and the need for something more than

4 (Pages 10 to 13)

1 merely parallel behavior."

2 There are at least three reasons why we

3 have to be concerned about the plausibility

4 requirement of Twombly beyond antitrust cases.

5 First, there are several passages in

6 Twombly that seem to speak more broadly. These

7 passages appear to be edited in response to the

8 dissent, so they may be a little sloppy, but

9 nevertheless they are there.

10 There are parts of the opinion that seem

11 to be requiring plausibility in complaints without

12 tying that discussion in any way about tethering that

13 to antitrust law.

14 Second, when the Matsushita/Zenith case

15 had been decided back in 1986, the cases that brought

16 it to the summary judgment stage would have been

17 quite plausible to read that opinion as an antitrust

18 decision, but what happened shortly thereafter was it

19 became the first of the summary judgment trilogy,

20 along with Liberty Lobby and Celotex, that

21 revolutionized or at least made a significant shift

22 in federal summary judgment practice. That same

23 thing may well be true of Twombly.

24 The third reason, and perhaps the most

25 important on the ground reason why the plausibility

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

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

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

14 Litigators have traditionally, when in
15 that position, made allegations upon information and
16 belief, exactly what the plaintiff did in paragraph
17 51 of Twombly.

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

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

15

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

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

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

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

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

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

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

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

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

23 MS. RODRIGUEZ: Thank you, Professor
24 Hartnett.

25 Next is Anne Patterson, who is going to

1	talk about our court's response.	1	which there might be a variety of alternative
2	MS. PATTERSON: Thank you, Lisa.	2	inferences, which is what the Supreme Court had dealt
3	Not quite two years later, what does the	3	with in the Twombly case.
4	Supreme Court's requirement of the Conely versus Gibson	4	The Third Circuit did confirm that
5	standard mean for those of us who practice in	5	Twombly applies outside of the parameters of
6	the Third Circuit?	6	antitrust law. It stated that it applies to 12(b)(6)
7	Twombly is a young case, the law	7	motions in general, and that's obviously consistent
8	applying it is in an early stage, is developing	8	with many of the opinions that have -- that were
9	rapidly in all sorts of legal context.	9	mentioned by Professor Hartnett.
10	I think it's important to note that	10	The court commented, I think unusually,
11	Twombly will take on more meaning and more refinement	11	that Twombly was, "initially confusing," and
12	as it is applied to various areas of substantive law.	12	specifically identified the so-called plausibility
13	Last month brought the Third Circuit's	13	paradigm for evaluating the sufficiency of complaints
14	first detailed discussion of Twombly in the Phillips	14	as the confusing aspect of Twombly.
15	versus County of Allegheny case.	15	The court reiterated the language of
16	There have been a couple of other Third	16	Rule 8 is unchanged, but expressed some initial
17	Circuit cases that are simply mentioning Twombly, but	17	concern and confusion about the Supreme Court's test.
18	this is the first time that the Third Circuit has	18	Then the Third Circuit went on to
19	actually tackled the Twombly standard.	19	provide some illumination with respect to the Twombly
20	This was a Section 1983 action premised	20	standard. It concluded that Twombly stands for two
21	upon state created danger. What had happened in the	21	main principles:
22	Phillips case was a man was murdered after a 911 call	22	First, that Rule 8 requires a showing,
23	center employee, who were his former colleagues -- he	23	not just a blanket assertion of entitlement to
24	being a former 911 call center employee -- looked up	24	relief, and that the complaint's factual allegations
25	the information on someone that their former	25	must be enough to raise a right to relief above the
		19	21
1	colleague wanted to do harm to and improperly	1	so-called speculative level. In other words, a
2	provided that information to the man, who then	2	conclusory statement of the facts with a recitation
3	murdered the person that he was going after.	3	of the elements of the cause of action should not be
4	A supervisor in the 911 call center was	4	enough. The factual statement must rise above the
5	sued in addition to the co-workers because he	5	speculative level when you consider what the
6	contacted the wrong legal authorities, local legal	6	substantive law is applied to the particular claim.
7	authorities, and didn't suspend the appropriate	7	Second, while the Supreme Court had
8	people quickly enough to prevent the crime.	8	disavowed the now retired Conely versus Gibson language,
9	So in a supervisor's case it was an	9	the no set of facts language, it emphasized that it was
10	issue of omission, primarily. In the case of the	10	neither demanding a heightened pleading
11	co-workers, there were affirmative acts in checking	11	of specifics, nor imposing a probable requirement.
12	the guy's home address and giving that away,	12	The language is plausibility, but not probability.
13	resulting, apparently, in a murder.	13	The Third Circuit concluded that the
14	This was a state created danger case, an	14	essence of Twombly is the word "plausibility."
15	exception to the normal rule that the due process	15	Quoting the Supreme Court, the court noted that, "The
16	clause doesn't impose an affirmative obligation on	16	plaintiff must nudge his or her claims across the
17	the state to protect all of us.	17	line from conceivable to plausible to survive the
18	The primary issue there was whether the	18	12(b)(6) motion."
19	state actor had committed an affirmative act. The	19	What is plausibility? The court went on
20	fact pattern, while obviously a sad situation, was	20	to state that, "Stating a claim requires a complaint
21	relatively simple.	21	with enough factual matter taken as true, as has
22	This was obviously a setting very	22	always been the standard, to suggest a required
23	different from Twombly. It did not involve economic	23	element. This does not impose a probability
24	relationships, complex antitrust pattern of conduct.	24	requirement at the pleadings stage, but instead
25	It did not involve expert testimony and conduct as to	25	simply calls for enough facts to raise a reasonable

6 (Pages 18 to 21)

**66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 992-7650 Fax (973) 992-0666
1-888-444-DEPS
E-mail: reporters@rrdrcsr.com**

1 I think what a plaintiff's lawyer needs	1 that the court is going to say, well, because
2 to do more than anything else, before you bring a	2 interpretation B is interpretation A, which was what
3 case, do as complete and thorough an investigation as	3 the plaintiff has advocated, that we are going to
4 possible. When you draft your complaint, knowing	4 toss the case.
5 under Rule 8 you have to give sufficient notice of	5 As long as interpretation A is
6 the claim to the defendant, allege all of the facts	6 plausible, doesn't have to be likely, it's got to be
7 that you know. Don't hold anything back for tactical	7 plausible according to the Supreme Court, you're
8 reasons.	8 going to perhaps be able to get it by.
9 If you have documents, quote them, get	9 I think the problem that the Supreme
10 as much detail in the complaint as you can, because	10 Court recognized, which really hasn't been talked
11 you have to show under Twombly that you are entitled	11 about much this morning, but is throughout the
12 to relief under this theory that you have alleged.	12 opinion and in the dissent by Justice Stevens as
13 Now, both Professor Hartnett and Anne	13 well, is that in the antitrust context, the cost of
14 Patterson both mentioned the parts of Twombly that	14 the litigation is deemed to be so high that the court
15 say you have to plead more than just the elements of	15 wanted to look at a way, by using this new
16 the claim. You have to plead it in a way to apply	16 plausibility requirement, to allow courts or to
17 the known facts that you have to the elements and use	17 direct courts to make an analysis early on before all
18 that to show within the context of what you are	18 that cost had been expended.
19 pleading, to the extent possible, why that will	19 Clearly Twombly applies to cases beyond
20 entitle you to the relief you are requesting.	20 the antitrust context.
21 I have thought about what do you do when	21 One of the areas which hasn't been
22 you don't have all the information? Of course, in	22 mentioned, which I would like to mention for just a
23 the past you have always pleaded on information and	23 couple of minutes, is Twombly focuses on the cost of
24 belief. I think Professor Hartnett is right, that if	24 complex litigation. Among the most complex
25 you do that a good defendant's lawyer is going to	25 litigation that we have, particularly in this
27	29
1 say, well, Twombly says you can't plead on	1 district, and there is a lot of it, is patent
2 information and belief because it tossed out that	2 litigation.
3 antitrust case where that was the allegation.	3 The pleadings, notice pleading in patent
4 If you have to, you do it that way, but	4 litigation -- you can look at the form in your rule
5 I like Professor Hartnett's idea of saying, plead it	5 book -- the new Form 18, which is the form produced
6 in such a way using the language of Rule 11(b)(3),	6 by the rule makers in Washington that goes with the
7 that it is likely to lead to evidentiary support	7 Federal Rules, is five paragraphs long. It gives
8 after reasonable investigation.	8 bare notice, and I mean so bare that it's basically bare
9 That should be the code word for the	9 notice.
10 magistrate judges in this district to allow early	10 It basically says as follows. This is a
11 limited discovery. The real problem that arises is	11 patent infringement case. It cites -- put down who
12 when all of the detailed facts are in the hands of	12 the plaintiffs, the jurisdiction and venue is. You
13 the defendant, plaintiff's lawyer can still rely upon	13 say that a patent issued on a particular date. You
14 the fact that the law hasn't changed, that inferences	14 say who is the owner of the patent and you plead
15 are still going to be on the plaintiff's side on a	15 on information and belief that the defendant has gone
16 motion to dismiss under 12(b)(6).	16 ahead and engaged in some sort of drug -- in drug
17 The plausibility requirement, as I read	17 cases in particular, which there are many in this
18 the case, and I don't think others have said	18 district -- has engaged in an attempt to commercially
19 opposite, that it does not seem to require a	19 manufacture and sell the plaintiff's product and trying
20 balancing as to whether after the analysis by the	20 to get a generic drug on the market.
21 court the plaintiff's claim is more likely than not.	21 Then you get to the key paragraph, this
22 Only that it's plausible under the facts and in the	22 is the entire paragraph of the notice, the commercial
23 context as pleaded.	23 manufactured use offered to sell, the sale or
24 I don't think you are going to have a	24 importation of defendant's product would infringe one
25 situation where there is multiple interpretations	25 or more claims of the patent under 35 U.S.C. Section

8 (Pages 26 to 29)

<p>1 271. 2 Based on that, four years of litigation, 3 \$3 million dollars in discovery costs before you get 4 to the plaintiff disclosing which claims in the 5 patent are potentially infringed or alleged to be 6 infringed and what the terms are within those claims 7 and how they are defined. 8 I would suggest that a Twombly motion 9 made very early on in a patent case, if you are a 10 defendant in a patent case, to say to the court, 11 force the plaintiff to tell me which claims of the 12 patent are infringed and the definition of the claim 13 terms now, not three years down the road when you 14 have a Markman hearing and the court has to make that 15 determination, will short circuit a lot of that and a 16 lot of the discovery and get the case focused a lot 17 earlier. 18 If I was a plaintiff's lawyer in a 19 patent case, I would be very concerned about getting 20 that kind of motion and would want to put that 21 information in the complaint. Obviously the patentee 22 knows what the claim terms are, which claims have 23 been infringed, otherwise you couldn't file the 24 complaint under Rule 11. Therefore, get it on early 25 and don't wait.</p>	<p>1 least as an awareness of the United States Supreme 2 Court that spiraling costs of discovery and motion 3 practice -- and you should see some of the motions 4 that come into federal court, in boxes now -- but the 5 spiraling costs, we are pricing ourselves out of the 6 marketplace. 7 That's one thing everybody can agree 8 that Twombly stands for. I think New Jersey, if I do 9 say so myself on behalf of our judiciary, is well 10 suited to address, if the Bar takes advantage of it, 11 the costs involved with discovery and motion 12 practice. 13 For example, you all know that in 14 New Jersey the concept of R&Rs for 20 years has been 15 viewed as an unnecessary cost to the litigants to 16 build in a separate kind of level. So it's rare that 17 you get any R&Rs referred anymore. 18 In New Jersey you have, unlike some 19 other districts, what I call customized case 20 management. So that any case you have judicial 21 accessibility to come in and say that math to the 22 magistrate judge, look it, we would like to file a 23 Twombly motion and what for? 24 Let me illustrate, unless I misread the 25 Phillips case, and it won't be the first case I</p>
<p>1 I think that it is going to be up to the 2 magistrate judges in particular in the district to 3 try to come to grips with these early motions, 4 because otherwise I foresee that defendants are going 5 to make this motion routinely to try to knock cases 6 out. 7 MAGISTRATE JUDGE HUGHES: Just to follow 8 up on Lisa's introduction, I won't identify the judge 9 who declared the sentencing guidelines 10 unconstitutional, but I will say he's one of the most 11 respected judges in the district, and as you will 12 learn from the next session about Booker, he was only 13 about 20 years ahead of the curve. 14 With respect to Twombly, let me start 15 out by saying that I think -- this is my personal 16 view -- Twombly is the most unfortunate name for a 17 case since the Third Circuit decision in Pansy. 18 My feeling is if -- from a client 19 relations and court relations point of view, if 20 you're asking for a Miranda hearing or a Markman 21 hearing, you are dealing from strength. 22 If you ask for a Twombly hearing, you 23 better have something good to say about that. 24 I think that Allyn and the other 25 speakers are right. If you view Twombly at the very</p>	<p>1 misread, but it strikes me as whatever Phillips said, 2 what happened was there was a decision by the 3 district court that was appealed and the dismissal 4 was appealed. There is this huge discussion about 5 Twombly and what it means. 6 The end result, it was remanded back to 7 the district court because the district judge didn't 8 allow the plaintiff to amend the complaint. 9 I'm a great believer, lawyers are to 10 earn a living, but in that Phillips case you are able 11 to engage the fees charged in the appeal, the fees 12 charged in the remand, and we don't have any kind of 13 substantive decision as to whether the case has 14 plausibility or heft, or whatever it has, you can see 15 how this could be a problem for your clients. 16 I think you should take advantage of the 17 magistrate judge, the Rule 16 conference, and discuss 18 Twombly. I think that if, as Allyn said, you will 19 allow certain discovery to take place and then file a 20 motion, that would offset the two-year discovery 21 period. 22 He and I were talking earlier about the 23 abuse of the discovery system, and again a very 24 practical illustration. Somebody came in this summer 25 and said they read somewhere that the average cost of</p>

9 (Pages 30 to 33)

1	the most rudimentary federal deposition with two	1	ago from the Eastern District of Pennsylvania, a case
2	lawyers is about \$7500 when you add in the legal	2	called -- write this down, this is a cautionary tale
3	fees, the loss of productivity of the two parties and	3	for all -- GMAC Bank versus HTFC Corp., 2008 West
4	the deponent and the stenographic costs.	4	Law, 542, 386, February 29, 2008.
5	If you realize the Federal Rules presume	5	It has to do with conduct at a
6	10 depositions on either side, you have an idea of	6	deposition. It resulted in \$30,000 worth of
7	how much money you could be spending in deposition	7	sanctions to the deponent witness and his lawyer for
8	discovery.	8	taking a 12-hour deposition over two days and turning
9	So I think courts are very sensitive to	9	it into a circus in which, as the court notes, it's a
10	the fact that discovery has to be controlled	10	contract case, the word "contract" is mentioned 14
11	somewhat, and you can't let it just run wild. I	11	times, the F word is used 173 times in a deposition.
12	think that a Twombly motion may be something that you	12	It is entertaining as far as that goes.
13	could do early on.	13	What one can really learn is how to comport yourself
14	I also think, on the other hand -- and	14	at a deposition, because the court went out of its
15	the district judges I'm sure would respond to this --	15	way to commend the lawyer taking the deposition for
16	the last thing as a defense counsel that I think I	16	going above and beyond the call of duty before he
17	would want is to file a Twombly motion and have a	17	finally ended it after two days. Cost 30,000 bucks.
18	judge deny it, say, no, no, let the other guy amend	18	That's discovery abuse. Just wanted to point that
19	the complaint and then come back again and then deny	19	out to you.
20	that because we haven't had discovery.	20	MAGISTRATE JUDGE HUGHES: Lisa, I don't
21	In other words, you are just charging	21	want to take the other speakers' time, but the way
22	your client a lot of money and not getting a final	22	that you can handle something like that, and my
23	result one way or the other.	23	experience, I don't know about my colleagues, is that
24	If you use the case management to time	24	one of the great discovery abuses and cost of
25	the motion practice so that it's meaningful and, you	25	building devices is not necessarily written discovery

35	1 know, the other side can't say we haven't had enough	37	1 or E discovery or all this other stuff, it's
2	time, we haven't amended the complaint and so forth,	2	deposition discovery, where people will -- I tell
3	I think you will serve your client much better, and I	3	people, they say we want to do more than one day.
4	think the courts will respond substantively if you	4	Look it, if you found Hitler in
5	have that kind of approach to it.	5	Argentina, I would only give you three days with him.
6	And I think all the magistrate	6	You really have to limit it. I suspect
7	judges in each of the vicinages are very sensitive to	7	that, you know, you should take advantage of the
8	the fact that, you know, costs are out of control.	8	judge to do this.
9	The great irony, I suspect, of the	9	In Trenton we have -- I know Judge
10	Twombly case, in that antitrust case, is that the two	10	Bongiovanni and I have a lot of depositions take
11	parties involved there had more money, were well	11	place in the courthouse. It is a beautiful place and
12	healed to engage in litigation, which in civil rights	12	we have all the room in the world and geographically
13	cases I can guarantee it's not the same situation.	13	it's good, but believe me, the deposition will be
14	So there is no one size fits all answer	14	over much quicker and with far fewer problems than if
15	to this, and I think that in New Jersey we are geared	15	you do it in somebody's law office.
16	to treat each case individually and give you a	16	I urge you if you have a problem
17	customized schedule if you will ask for it. That's	17	deposition on the horizon like the judge in
18	all I have to say.	18	Pennsylvania had, don't hesitate to call us up and
19	MR. LITE: Lisa, can I add one thing?	19	see if we can arrange to have it in the courthouse.
20	MS. RODRIGUEZ: Yes.	20	MS. RODRIGUEZ: Thank you.
21	MR. LITE: Judge Hughes was talking	21	Judge Hayden, Judge Simandle, how about
22	about costs of depositions and the potential for	22	this? Is Twombly something that is limiting access
23	depositions to abuse the discovery process.	23	to the court?
24	I don't know how many of you saw the	24	JUDGE SIMANDLE: To me Twombly presents
25	opinion that came down a week ago, a week and a half	25	a geometry problem almost. We hear about the need to

10 (Pages 34 to 37)

<p>1 raise the right of relief above the speculative 2 level, and so there is a verticality to what Twombly 3 is doing.</p> <p>4 We hear about claims across the line from 5 conceivable to plausible, so there is horizontal 6 component to it.</p> <p>7 We also note that plausibility doesn't 8 mean probable, because we are told in the opinion 9 that we are not to weigh probability and we are not 10 to touch upon credibility.</p> <p>11 So when I thought of these constraints, 12 in thinking of it like an algebra problem, I found 13 myself somewhere on the line extending from head 14 scratching to bewilderment.</p> <p>15 In preparing for the panel it forced me 16 to think about some of these things, and ultimately I 17 don't think that Twombly is going to limit access to 18 the courts.</p> <p>19 I understand that plaintiffs advocates 20 will express fear or foreboding from it, and 21 inundation of Twombly motions was predicted.</p> <p>22 Well, we are eight months after Twombly 23 now and I haven't seen the inundation yet. In fact, 24 I haven't seen it cited yet. Maybe this conference 25 will change that and defense advocates may hail it as</p>	<p>1 is unchanged after Twombly.</p> <p>2 I looked at the form complaints that are 3 part of the Rules of Civil Procedure, and I think 4 it's instructed to do so.</p> <p>5 I asked myself the question, how many of 6 these form complaints are good after Twombly and how 7 many are inadequate?</p> <p>8 I'm sure you have looked at them. They 9 are really sketchy. Allyn is right, even the most 10 complex cases can be described in five paragraphs in the 11 form complaint.</p> <p>12 I don't think that there is a form 13 complaint other than perhaps Form 18, the one for 14 patents, that would not -- or a complaint, would not 15 survive Twombly scrutiny. It is not that the form is 16 bad, it is the context in which it has to be viewed.</p> <p>17 I think that access to the courts also 18 is going to depend upon judges giving advocates a 19 chance to advocate their positions. This is where 20 oral argument comes in.</p> <p>21 I would predict an enlargement of oral 22 argument, not just because this esteemed association 23 has rightly, in my view, asked for judges to grant 24 oral argument more frequently, but also I think the 25 contours of Twombly and that sort of motion practice</p>
<p>1 long overdue recognition that too many claims are 2 surviving 12(b)(6) that have no merit.</p> <p>3 I think for a couple of reasons that 4 Twombly has to be viewed in context, and Twombly 5 can't be read out of the mainstream of other cases 6 from the Supreme Court and the Third Circuit that 7 have addressed similar issues.</p> <p>8 I also think that the response may vary 9 among judges. That shouldn't be surprising. A judge 10 who feels overburdened by too many cases that seem 11 marginal and non-meritorious may well apply stricter 12 scrutiny.</p> <p>13 A young lawyer who feels everybody 14 should have their day in court and they should hash 15 this out as best you can before ever bringing the 16 gavel down on somebody might be more permissive and 17 apply a standard that is a little different than the 18 day before Twombly was decided.</p> <p>19 The access to the court depends on the 20 judge and how should a judge respond.</p> <p>21 In my view, Twombly leaves unchanged the 22 standard, and it is repeated in most cases that come 23 after Twombly that pleadings should be interpreted so 24 as to do substantial justice. Doing substantial 25 justice is the Rule 8(f) standard, and that standard</p>	<p>1 cry out for it.</p> <p>2 Plaintiffs should have an opportunity to 3 spell out the plausibility of their pleading. How do 4 the allegations suggest a reasonable expectation that 5 discovery will reveal evidence supporting the 6 essential elements?</p> <p>7 The defendant likewise should have the 8 opportunity to accurately portray what those elements 9 are and how they are not addressed or not met and 10 couldn't reasonably be anticipated to be met in this 11 case.</p> <p>12 Papers are one thing. A lot of motions 13 are decided on papers. But the opportunity for the 14 judge to ask questions and for the advocates to 15 respond is almost always illuminating.</p> <p>16 I think this is particularly true, now 17 that we have been told in probably no fewer than six 18 Third Circuit opinions that we are to automatically 19 permit a plaintiff to amend the pleadings in a 20 12(b)(6) motion. If there is the 12(b)(6) motion 21 filed, the Third Circuit has not met its order in 22 saying there should be an opportunity to amend, and 23 in one case saying even if it's not requested.</p> <p>24 Pragmatically I find that a difficult 25 task to do as a judge. How do you fold in the</p>

11 (Pages 38 to 41)

<p>1 opportunity to amend into motion practice if it's not 2 requested?</p> <p>3 Where it is requested, I find it easier 4 to deal with.</p> <p>5 There are a lot of times when if the 6 advocates were to call each other on the phone before 7 a 12(b)(6) motion is filed, and if the defense 8 attorney were to say, I have a problem with such and 9 such element of your pleadings and I'm going to file 10 a 12(b)(6) motion, then perhaps it would be 11 correctable, or perhaps the plaintiff's attorney 12 would throw in the towel and say, I can't meet that 13 element and so file your motion.</p> <p>14 The worst thing is, I think, has been 15 alluded to it, has seriatim 12(b)(6) motions 16 interspersed with motions to amend. The best way to 17 address that is through the case management process 18 that either party can request.</p> <p>19 You don't have to wait for a scheduled 20 conference. In our district, by definition you ought 21 to have a scheduling conference before a 12(b)(6) 22 motion is filed. Scheduling conferences are 23 generally scheduled after the answer is filed. You 24 don't file an answer until your 12(b)(6) has been 25 denied, I guess.</p>	<p>1 that looks like a plausible claim when the elements 2 are there.</p> <p>3 In answer to Lisa's question, I think 4 that we are still writing the book on how Twombly is 5 going to be interpreted. It will be up to the judges 6 aided by good advocacy on all sides. I think we have 7 some good tools to prevent the chamber of horrors, 8 either the cascade of Twombly motions or using 9 Twombly as some sort of premature summary judgment 10 motion. I don't predict that is going to be 11 happening.</p> <p>12 I look forward to any questions. Thank 13 you.</p> <p>14 JUDGE HAYDEN: I'm going to take the 15 opposite side of that.</p> <p>16 Judge Simandle and I had agreed when we 17 spoke on the phone, but I guess I am just reacting to 18 what I'm hearing today. When we hear other people 19 talk -- and Judge Simandle was eloquent about going 20 from head scratching to bewildered -- I mean, moving 21 from plausible, or to plausible from non-merely 22 conceivable, but we don't have to think about 23 probability or credibility. I mean, that is 24 metaphysics brought to a whole new level.</p> <p>25 I just think of sitting there, either in</p>
<p>1 It should be and can be requested at an 2 earlier date in each of the three courthouses. 3 Magistrate judges are both into that. That's for 4 working out this sort of a problem.</p> <p>5 I think we also realized that Twombly 6 itself is contextual. But in this district it 7 shouldn't be too much of a surprise. We have had a 8 RICO case order for a long time, and we have a RICO 9 case order not only because usually fraud is involved 10 and 9(b) requires fraud to be pled with 11 particularity, but also the elements of RICO are 12 tricky.</p> <p>13 We had a decade or two of unsuccessful 14 RICO civil complaints, and this was meant to be a 15 guidance for practitioners. It saved a round of 16 motion practice.</p> <p>17 If you have a good RICO case order, then 18 what you have is something that will stand up, not 19 only a 12(b)(6) motion, but also a motion for a more 20 definite statement.</p> <p>21 I would like to hear any reactions that 22 you have as to the success of that effort that the 23 court made in the RICO case statement to help to 24 crystallize the allegations in the pleadings. When 25 you read a RICO case statement, you have something</p>	<p>1 chambers weeping or on the bench weeping, and just 2 say, golly, now I know why I went to law school and I 3 really should have been a dentist.</p> <p>4 It's really a lawyer's fun house and a 5 litigant's nightmare, and I'm not sure from those 6 stats that we heard that in the civil rights context 7 we don't have a problem through it.</p> <p>8 I wanted to ask Professor Hartnett 9 something. What did you mean by discretionary 10 justice?</p> <p>11 MR. HARTNETT: That with the decline in the 12 number of trials, coupled with quite discretionary 13 control over case management and discovery pressures 14 for alternative resolution, as regards settlement in 15 particular, an awful lot of what ultimately is 16 decided in cases turns on lots of trial court 17 discretionary calls.</p> <p>18 JUDGE HAYDEN: Exactly what I thought 19 you meant.</p> <p>20 MR. HARTNETT: If we move in the 21 direction of tempering Twombly through the device of 22 allowing limited discovery with regard to particular 23 narrowed elements, those are going to be 24 discretionary calls rather than straight legal calls, 25 and therefore we'll move even more in that direction,</p>

12 (Pages 42 to 45)

<p>1 toward increasing discretionary trial judge's power.</p> <p>2 JUDGE HAYDEN: That is one of those</p> <p>3 terms that doesn't quite define itself until you put</p> <p>4 some meat in it that goes along with another term</p> <p>5 called non-trial dispositions, which are apparently</p> <p>6 the vehicle for discretionary justice.</p> <p>7 Non-trial dispositions in civil rights</p> <p>8 cases are far higher statistically from the last</p> <p>9 measurement that was done than in other areas, which</p> <p>10 means that pre-Twombly we had an awful lot of this</p> <p>11 going on where the case was snuffed out not because</p> <p>12 of settlement, but because of a non-trial</p> <p>13 disposition, either through summary judgment or a</p> <p>14 motion to dismiss.</p> <p>15 If your stats are correct, then we are</p> <p>16 kind of seeing that movement given more life by the</p> <p>17 ability to use Twombly.</p> <p>18 The good side of that is the Phillips</p> <p>19 case which arose out of a 1983 case. The good side</p> <p>20 of that, I think Judge Simandle gave plaintiffs bar a</p> <p>21 tool, and I think the judges, a place to go by</p> <p>22 saying, hey, if you look at your form pleading and</p> <p>23 you think of that as kind of a framework for where</p> <p>24 you're going, you can sort of hang things on that and</p> <p>25 see where you go by fleshing it out with some facts,</p>	<p>1 give oral argument if the case is before me.</p> <p>2 You manage the case depending on what</p> <p>3 each -- if there is a bona fide Twombly motion. I'm</p> <p>4 not quite sure what that is yet because I haven't had</p> <p>5 one, but I think that a lot of times in antitrust</p> <p>6 cases you will bifurcate the antitrust portion</p> <p>7 because that is hugely expensive to prepare, on both</p> <p>8 sides, that kind of case.</p> <p>9 If you are going to have a, for example,</p> <p>10 a civil rights case, I think it happens all the time,</p> <p>11 is you will, rather than have the defendants file a</p> <p>12 motion right at the outset -- and incidentally, you</p> <p>13 can answer and then have a Rule 16 conference and set</p> <p>14 up a 12(b)(6) motion or whatnot, and I think that's</p> <p>15 the cost effective way to do it.</p> <p>16 A lot of times in civil rights cases you</p> <p>17 will arrange a motion practice after the plaintiff's</p> <p>18 deposition, hear what he or she has to say, and let</p> <p>19 her have her mini day in court, so to speak, and have</p> <p>20 her say, and then maybe, then you would file a</p> <p>21 motion.</p> <p>22 Civil rights cases are a little</p> <p>23 different because you have qualified immunity and</p> <p>24 other things that you do not have in other types of</p> <p>25 cases.</p>
<p>47</p> <p>1 some kind of rigor. In other words, that we can use</p> <p>2 statistically -- not statistically, but not</p> <p>3 formulating either, but to construct a complaint so</p> <p>4 that we can defend the complaint.</p> <p>5 The other way to defend a complaint is</p> <p>6 to look at Rule 8, and again Judge Simandle gave us a</p> <p>7 key, which is that pleadings must be construed so as</p> <p>8 to do justice. You kind of back your judge into a</p> <p>9 corner if you are yelling about that, because then we</p> <p>10 have to come back at you and say we are dismissing</p> <p>11 because we are doing justice as opposed to, oh.</p> <p>12 Now, where do we do that all?</p> <p>13 Judge Simandle again gave us a clue. Oral argument.</p> <p>14 I do agree, and reluctantly or not, probably a lot of</p> <p>15 our colleagues would agree, that if Twombly takes</p> <p>16 hold, particularly in the little guy cases, the</p> <p>17 individual versus the organization, the IBO case as</p> <p>18 opposed to the OVO case, then oral argument becomes</p> <p>19 the place where this happens.</p> <p>20 Now, do we chuck that into what John is</p> <p>21 talking about? Where would oral argument happen</p> <p>22 given good case management? How do you see that</p> <p>23 fitting in, if in fact it looks like it might be a</p> <p>24 divining tool that makes some sense?</p> <p>25 MAGISTRATE JUDGE HUGHES: I can only</p>	<p>49</p> <p>1 The answer is to, at the Rule 16</p> <p>2 conference, have some effective plan if you are a</p> <p>3 defendant and you want to file a motion. Quite</p> <p>4 frankly, it's America. You file as many motions as</p> <p>5 you want. It is just a question of not having it</p> <p>6 denied without prejudice to do over after some event.</p> <p>7 That's the one thing that you don't want</p> <p>8 to have to tell your client, that the judge thought</p> <p>9 it was premature, and I'm sorry I charged you 25,000</p> <p>10 for the motion, but we are going to have to do it</p> <p>11 again in six months.</p> <p>12 As I said, the mechanism is there with</p> <p>13 the system in New Jersey if the Bar takes advantage</p> <p>14 of it.</p> <p>15 JUDGE HAYDEN: I think that in terms of</p> <p>16 that moment when you are in front of the district</p> <p>17 court judge for oral argument, whether it's the civil</p> <p>18 rights case or the great big antitrust case that</p> <p>19 really has been worked up, do take advantage of it.</p> <p>20 We are increasingly aware, because you</p> <p>21 have been pounding us over the head, that you want</p> <p>22 oral argument.</p> <p>23 I remember Bruce Goldstein telling a</p> <p>24 wonderful story about -- during his months of</p> <p>25 recovery -- are you here, Bruce? Is he around?</p>

13 (Pages 46 to 49)

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

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

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

1 there were ambiguities in the pleadings, one view of
2 which didn't support claims of antitrust violations,
3 that didn't spill over to Stevenson. It didn't spill
4 over at all. And the Third Circuit reiterated that
5 in that case the district court had erred by not
6 reading the context of the entire complaint, which
7 was fairly detailed.

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

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

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

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

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

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

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

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

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

24 If you think that's what happened in
25 Twombly itself in regard to the antitrust case, that

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

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

12 MS. RODRIGUEZ: A question here?

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

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

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

14 (Pages 50 to 53)

<p>1 money before they even know what's at issue?</p> <p>2 There is a problem here that maybe we</p> <p>3 need to go back to the rules committee, because</p> <p>4 everyone says they are not changing the standard, but</p> <p>5 8(a) says a short, plain statement of the claim</p> <p>6 entitles you to relief.</p> <p>7 There is something wrong with that</p> <p>8 approach.</p> <p>9 JUDGE SIMANDLE: I think that someone in</p> <p>10 that case must not have read the court of</p> <p>11 proportionality that is in the rules. There is a</p> <p>12 very powerful way to curb discovery abuse, and in</p> <p>13 fact to punish discovery that goes outside of those</p> <p>14 bounds. It shouldn't require \$3 million to find out</p> <p>15 what the claims are. It ought to require one piece</p> <p>16 of paper, a contention interrogatory, and get a judge</p> <p>17 to order that the plaintiff answer it, if not at the</p> <p>18 very first months of the case, then very shortly</p> <p>19 thereafter.</p> <p>20 The tools are there. It is up to the</p> <p>21 advocate to argue for it, to apply them and to bring</p> <p>22 them to the judge's attention so that whether it's a</p> <p>23 magistrate judge or a district judge, so that the</p> <p>24 litigation can be shaped right from the get-go.</p> <p>25 In this district we are proud of putting</p>	<p>1 In cases of infringement of an article</p> <p>2 manufactured, Rule 11 requires that you inspect that</p> <p>3 device before filing an infringement case. You ought</p> <p>4 to know which claims of the patent are infringed, not</p> <p>5 come in like I've had, somebody with 62 claims, and</p> <p>6 claims they are all infringed, notwithstanding the</p> <p>7 fact that they are from very broad to very narrow</p> <p>8 claims.</p> <p>9 Judge Hughes is right. In the very</p> <p>10 beginning of the case there ought to be a statement</p> <p>11 of issue infringement, direct, contributory or</p> <p>12 induced, or inducement with some factual basis that</p> <p>13 defines broadly the claims.</p> <p>14 Secondly, at the case management</p> <p>15 conference, at minimum there should be identification</p> <p>16 of the claims that are infringed with a statement</p> <p>17 reading those claims on the accused device.</p> <p>18 The only situation that it does not</p> <p>19 apply to is a method claim where the method may be</p> <p>20 practiced by the defendant in camera, and you really</p> <p>21 have very little on what that method is.</p> <p>22 To spend, as I have done, three years</p> <p>23 trying to find out, really, which claims were being</p> <p>24 litigated is just out of the question.</p> <p>25 A VOICE: I was wondering how the panel</p>
<p>55</p> <p>1 the resources up front in case management. We have</p> <p>2 every opportunity to meet with a magistrate judge or</p> <p>3 a district judge to that matter, especially in a</p> <p>4 complex case.</p> <p>5 Since Twombly is contextual, don't pass</p> <p>6 up the opportunity to do so.</p> <p>7 MAGISTRATE JUDGE HUGHES: Jeff, case</p> <p>8 management, five years ago the conventional wisdom in</p> <p>9 my experience was that we would schedule Markman</p> <p>10 hearings towards the close of discovery.</p> <p>11 The patent bar is very resilient, and</p> <p>12 now the customary approach is if not do the Markman</p> <p>13 submission early on, at least have preliminary</p> <p>14 exchange of claim construction charge just to find</p> <p>15 out where we are going before we get heavily involved</p> <p>16 in discovery.</p> <p>17 There are all sorts of mechanisms to</p> <p>18 offset that spending \$3 million to get to the end of</p> <p>19 the road.</p> <p>20 MR. BAIN: As to Twombly, there has</p> <p>21 already been judicial criticism to form a team.</p> <p>22 There is a recent case that says, for example, if</p> <p>23 you're going to plead infringement under the doctrine</p> <p>24 of equivalence, that better be pled up front before</p> <p>25 the start of the case.</p>	<p>57</p> <p>1 would address that category of claims, where</p> <p>2 plaintiff typically claimed all the facts are within</p> <p>3 the defendant's possession.</p> <p>4 For example, take your basic tortious</p> <p>5 interference claim, it is alleged that there is</p> <p>6 intention and malice and that kind of thing.</p> <p>7 How would the panel address that post</p> <p>8 Twombly in terms of allowing it to go forward, not</p> <p>9 allowing it to go forward, that kind of treatment,</p> <p>10 those claims?</p> <p>11 JUDGE SIMANDLE: Even under fraud, 9(b),</p> <p>12 we know that malice doesn't have to be pled with</p> <p>13 specificity. So I think that a claim that alleges a</p> <p>14 state of mind is enough to state it, and you have to</p> <p>15 be able to show it at that earliest stage, just from</p> <p>16 the test of Rule 9(b).</p> <p>17 I don't think it would be any different</p> <p>18 with regard to any other sort of tort. I think that</p> <p>19 pleading malice should be sufficient. Any pleading</p> <p>20 though is complained by Rule 11, and words like</p> <p>21 malice or racist or whatever can't be just thrown</p> <p>22 around.</p> <p>23 JUDGE HAYDEN: I can certainly see a</p> <p>24 fight about that from the defense bar.</p> <p>25 MS. PATTERSON: That is something</p>

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1	that -- I think there are big differences in a fraud	1	JUDGE HAYDEN: We have magistrate judges
2	claim in that regard and a tortious interference	2	who can parse the kind of discovery that's needed to
3	claim. It certainly raises a special issue that I	3	get the case ramped up to where you can do it.
4	don't think the case law post Twombly has yet	4	Also embedded in what Professor Hartnett
5	addressed.	5	said is a wonderful concept called the judicial
6	MR. HARTNETT: I think what Twombly is	6	notice. I don't think Twombly should ever wipe that
7	trying to do is to separate out the notions of	7	out.
8	specificity from notions of plausibility. Maybe	8	When we are talking about plausibility
9	that's just witical and metaphysical, but that's what	9	and all this other kind of stuff, if you get the
10	I think the courts are trying to do.	10	judge's attention, if there is a story there, if
11	The best I can suggest in getting a	11	there is a fact there that just changes that story to
12	handle on plausibility, maybe this is just too	12	the point where you're over the line, that's the old
13	obvious to say, plausibility depends on what base	13	pushing over the line.
14	line assumptions with the way the world usually	14	It is just the problem with Twombly, in
15	works.	15	my opinion, is so much gas to this whole thing and
16	If there is a car accident, we usually	16	kind of keeps a meritorious case that is not
17	think that probably somebody did something, not that	17	rigorously presented from getting off the ground.
18	it happens all the time, but that's a reasonable base	18	That means we have to be better lawyers
19	line assumption.	19	and better judges, and there is nothing wrong with
20	Going to the opposite extreme in	20	that.
21	Twombly, you see people engaged in behavior that is	21	MS. RODRIGUEZ: Thank you, panel. I
22	perfectly consistent with their own self-interest	22	think we have reached the end of our time.
23	about a conspiracy, but we don't think that too often	23	(Applause.)
24	that is going to be instead explained by a	24	(Recess.)
25	conspiracy.	25	MR. GREENBAUM: We do have a wonderful
	59		61
1	Some level of plausibility turns on what	1	second program that we need to get started on. I'm
2	is a judge's base line assumption about the ordinary	2	personally looking forward to this next program.
3	operation of the world. Part of the Twombly	3	To start it, I would like to introduce a
4	arguments are going to have to be, if you think the	4	moderator, Karol Corbin Walker. Karol is a partner
5	judge's understanding or expectations about base line	5	in LeClairRyan. She's a trustee of our association,
6	assumptions, about the way the world works are	6	and I introduce Karol.
7	different, I think you might be addressing those.	7	MS. WALKER: Thanks, Jeff.
8	One, with regard to the forms. Rule 84	8	Good morning.
9	specifically says that the forms suffice. I believe	9	All right, everybody is ready for the
10	that was an amendment, I think in the '40s, I don't	10	next panel, which is sentencing guidelines dealing
11	remember exactly, it went to overcome some decisions	11	with Booker and its progeny.
12	not treated by them. If you got a case that fits the	12	We have a wonderful panel assembled here
13	forms, Rule 84 tells you that is sufficient.	13	today representing the judiciary, representing the
14	Lastly, with regard to case management,	14	prosecutorial side and the defense side.
15	back to the earlier question, I don't know if it	15	Most of the individuals here, actually,
16	happened yet in this district, but it's starting to	16	all the individuals on the panel really need no
17	happen in other districts, a defendant saying the	17	introduction. I'll give a short one with respect to
18	point of Twombly is to avoid expensive discovery.	18	each of them.
19	Therefore, until you rule on my Twombly motion, all	19	First, to my immediate left we have
20	discovery should be stayed.	20	Judge Irenas, who was appointed to the United States
21	Those arguments are beginning to be	21	District Court for the District of New Jersey in
22	made. Given the emphasis in Twombly, avoiding the	22	1992. He then went on senior status in 2002.
23	costs of discovery, that's not a crazy argument. I	23	Prior to that he was a partner at
24	don't want to be endorsing it, but it's not a crazy	24	McCarter & English for many years.
25	argument.	25	Judge Irenas also has been an adjunct

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<p>1 faculty professor at Rutgers Camden School of Law.</p> <p>2 Immediately to my right is Judge Anne</p> <p>3 Thompson, who was appointed to the District Court for</p> <p>4 the District of New Jersey in 1979. She was a chief</p> <p>5 judge from 1994 through 2001.</p> <p>6 Prior to that she had the distinction in</p> <p>7 1975 of becoming the first female and the first</p> <p>8 African-American prosecutor when Governor Byrne</p> <p>9 appointed her to be prosecutor of Mercer County.</p> <p>10 She went on senior status in 2002.</p> <p>11 Next to my left, to the left of Judge</p> <p>12 Irenas, we have Alexander Booth, who is a named</p> <p>13 partner in Brownstein Booth and Associates in</p> <p>14 Union City. He has been a partner there for several</p> <p>15 decades -- not that he's that old -- but over 27</p> <p>16 years.</p> <p>17 Alex, prior to his private practice days</p> <p>18 where he focuses on criminal law and municipal law,</p> <p>19 he had been a public defender in Hudson County, in</p> <p>20 Union County. He had also been involved with the</p> <p>21 Legal Services of Hudson County as board president,</p> <p>22 and on the board for over 25 years.</p> <p>23 To Judge Thompson's right is Rich</p> <p>24 Coughlin, who is the Federal Public Defender in</p> <p>25 New Jersey. He started with the Public Defender's</p>	<p>1 First we are going to hear from</p> <p>2 Judge Irenas, who is going to talk a little bit about</p> <p>3 how did Booker come about, what are the issues that</p> <p>4 we are dealing with as a result of Booker.</p> <p>5 Judge Irenas.</p> <p>6 JUDGE IRENAS: I've been asked to</p> <p>7 discuss with you briefly how we got to where we are</p> <p>8 today with Booker.</p> <p>9 Back when Judge Thompson and Harold</p> <p>10 Ackerman and Judge Debevoise came on the bench,</p> <p>11 judges were judges. We are talking real judges.</p> <p>12 You have a bank robbery statute. You</p> <p>13 committed a bank robbery, the sentence would be a</p> <p>14 maximum of 30 years.</p> <p>15 You tried the defendant, the defendant</p> <p>16 gets convicted. If Judge Ackerman did it, the trial</p> <p>17 might take half a day. If he had been convicted, now</p> <p>18 it came time to sentence. That would be in the</p> <p>19 afternoon.</p> <p>20 The statute said up to 30 years. And it</p> <p>21 turned out he had nine children, came from a broken</p> <p>22 home, it was a very sad case. The judge would look</p> <p>23 at it, 27 years. 27 years. No appeal.</p> <p>24 It was well-established by the Supreme</p> <p>25 Court that you could not review that sentence for its</p>
<p>1 office in 1985 and became the Public Defender in</p> <p>2 1997, I believe. So he's been in that position for</p> <p>3 11 years. Prior to that he was an Assistant Deputy</p> <p>4 Attorney General for New Jersey.</p> <p>5 To Alex's left we have Cathy Waldor, who</p> <p>6 I think has the distinct honor of being one of the</p> <p>7 very few females in New Jersey who has focused on</p> <p>8 criminal defense work for more than 30 years.</p> <p>9 In addition to her focus on the criminal</p> <p>10 defense bar, she's a past president of the New Jersey</p> <p>11 Association of Criminal Defense Lawyers, and she's a</p> <p>12 named partner in the law of Waldor Carlesimo in</p> <p>13 Manasquan, New Jersey.</p> <p>14 To Richard's right is Amy Winkelman, who</p> <p>15 is the chief of the criminal division of the</p> <p>16 U.S. Attorney's office here in New Jersey, where she</p> <p>17 supervises over 60 AUSAs and prosecutes a variety of</p> <p>18 criminal cases.</p> <p>19 Prior to her government service, Amy was</p> <p>20 an associate with then Clapp and Eisenberg, and prior</p> <p>21 to that an associate with the law firm of Palmer and</p> <p>22 Dodge in Massachusetts, and before that she clerked</p> <p>23 for the district court in Massachusetts.</p> <p>24 That it is our panel, just to give you a</p> <p>25 little bit of history about each of them.</p>	<p>1 reasonableness. It was simply an unreviewable</p> <p>2 sentence.</p> <p>3 Now, on the other hand, did the person</p> <p>4 serve 27 years? Did he serve anything like 27 years?</p> <p>5 The answer was, of course, no.</p> <p>6 Under most state and federal statutes</p> <p>7 you became eligible for parole, I think as a general</p> <p>8 rule, probably after about a third of your sentence</p> <p>9 was served. I think there were individual statutes</p> <p>10 where it was less, sometimes more. If you put a rule</p> <p>11 of thumb, you served about a third and you became</p> <p>12 eligible for parole.</p> <p>13 You went before the Parole Board, not</p> <p>14 only what you did before you went to jail, your</p> <p>15 criminal history and what was your institutional</p> <p>16 adjustment. Then a decision would be made to be</p> <p>17 paroled.</p> <p>18 So it was really, in a sense, a</p> <p>19 relatively simple system. You had very few appellate</p> <p>20 decisions on the reasonableness of the sentence,</p> <p>21 because that just wasn't reviewable, just plain</p> <p>22 wasn't reviewable.</p> <p>23 In the Booker decision, in Scalia's</p> <p>24 opinion, the part of his opinion that was the dissent</p> <p>25 reported out that there was no appeal generally on</p>

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<p>1 reasonableness pre Booker -- excuse me, pre 2 guidelines.</p> <p>3 This made many people unhappy on two 4 basic grounds. First, there was the complaint that 5 there was no uniformity. An ounce of marijuana in 6 Nebraska was a drug scourge, and a drug sentence 7 might be 10 years.</p> <p>8 A kilo in Miami, well, why do we even 9 prosecute this? And yet it would be the same crime 10 with the same kind of person. There was a feel that 11 there was a total lack of uniformity.</p> <p>12 Then there was this concept of truth in 13 sentencing. The paper would write, Judge Ackerman 14 gives 27 years to bank robber. Then they find out 15 that he was on the street in four, five years because 16 he was paroled. That's not fair. That's dishonest 17 where you are deceiving the public.</p> <p>18 Congress put its collective head 19 together and they came up with the Sentencing Reform 20 Act of 1984, actually, but it didn't become effective 21 until November 1st, October 31st, 1987.</p> <p>22 The sentencing guidelines created the 23 Sentencing Commission, of course, which developed the 24 so-called sentencing guidelines.</p> <p>25 In your material that you got, and all</p>	<p>1 brandished, was a gun possessed?</p> <p>2 An endless number of categories. For 3 certain crimes, was a position of trust abused? Did 4 the person have special skill or knowledge? Was he a 5 minor participant? Was he between a minor and a 6 minimal participant? There were different 7 adjustments for that.</p> <p>8 Did he use a gun in connection with a 9 drug offense?</p> <p>10 Well, the gun was locked in a locked box 11 in his closet while he was selling drugs on the front 12 stoop of his house. Did he use a gun in connection 13 with that drug transaction?</p> <p>14 What it really meant is the judge now 15 got involved in fact finding. Actually, they started 16 finding facts.</p> <p>17 Under what standard of proof? Beyond a 18 reasonable doubt you say? No. Preponderance of the 19 evidence.</p> <p>20 Also introduced a very interesting 21 concept, relevant conduct. You can be convicted of 22 one bank robbery and your sentence could be based on 23 nine other bank robberies that you didn't -- were not 24 charged with in the indictment, for instance. All 25 kinds of conduct got brought in.</p>
<p>1 of you that have practiced criminal law have seen it 2 a million times, came out ultimately with a grid like 3 this. In the eighth grade we learned that there was 4 an X axis and a Y axis.</p> <p>5 The X axis, horizontal axis was the 6 criminal history. How bad was the offender? The 7 guidelines had all kind of ways of computing just how 8 bad he or she was in assigning a category of one to 9 six.</p> <p>10 On the Y axis, the vertical axis, you 11 have what's called the offense level. How serious 12 was the crime, from one to 43?</p> <p>13 You go with the axis that if you had a 14 criminal history three, an offense level 18, you look 15 and say, aha, you get 33 to 41 months, 33 to 41 16 months.</p> <p>17 By the way, the Parole Commission out 18 the window. It exists for pre guideline, but no 19 longer exists for guideline sentencing.</p> <p>20 No parole, maximum time you get off your 21 sentence is about 11 or 12 percent based on good time 22 served in prison. That's it.</p> <p>23 It not quite as simple as that, because 24 you compute the offense level, well, that required a 25 book. If you had a bank robbery, was a gun</p>	<p>1 And finally the Court of Appeals are now 2 back in business in the criminal law. They were put 3 back in business.</p> <p>4 Where you might see one or two cases a 5 year on sentencing, now you had hundreds and hundreds 6 and hundreds. Why? Well, they gave lip service to 7 the deference of the district court.</p> <p>8 They said if the guideline range was 37 9 to 46 and you sentenced within that range, there was 10 no appeal.</p> <p>11 They then said if the range was more 12 than 24 months from top to bottom, if you said why 13 you sentenced within the range, like he was a bad 14 guy, so I gave him the top of the range, or he had a 15 young family at home, so I gave him the bottom line, 16 that was unappealable.</p> <p>17 They also introduced the concept of a 18 departure, a departure in the sentence outside the 19 range for certain factors.</p> <p>20 I'm going to go in depth with it, but 21 for the most part, factors that judges traditionally 22 considered, family circumstance, your upbringing, 23 economic status, those kind of things, the guidelines 24 discouraged departures.</p> <p>25 The departure that became overwhelmingly</p>

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<p>1 most popular and loved and approved by everybody was 2 squealing -- cooperating, excuse me, cooperating with 3 the government.</p> <p>4 The phrase 5K1.1 entered the lexicon, 5 5K1.1.</p> <p>6 So overwhelmingly most departures 7 downward, of course, were for cooperating with the 8 government.</p> <p>9 The guidelines had other effects. If 10 you pled guilty, you automatically got a two level 11 reduction in your offense level, and most of the time 12 a three level reduction, almost always, in rare 13 exceptions would you get a third point, making 14 pleading very attractive.</p> <p>15 Also it had the effect of handing the 16 government a pretty powerful tool in what I will call 17 its charging decisions. In deciding how to charge an 18 offense, the government could very importantly effect 19 your exposure to sentence, a strong inducement to 20 plead.</p> <p>21 For instance, in drug offenses, which 22 make up, I don't know the statistics, but I'm sure 23 it's 40, 50, 60 percent of the criminal cases in the 24 federal system, the guidelines made the quantity and 25 type of drugs the linchpin for determining your</p>	<p>1 Once again now we have appellate review, 2 18 United States Code 3742.F. The government could 3 review the guideline calculations, and you suddenly 4 had hundreds and hundreds, if not thousands of 5 appellate cases deciding whether the trial judge 6 correctly calculated the guidelines.</p> <p>7 Was there a gun brandished? Was it a 8 position of trust? Was it a minimal role?</p> <p>9 Also appealable were departures, not the 10 decision not to depart, that normally was not 11 appealable, so long as you understood that you had a 12 right to depart.</p> <p>13 Your decision not to depart was not 14 appealable. But if you did depart, the 15 reasonableness of that departure was now reviewable.</p> <p>16 So now we have a regime where the trial 17 judge is capping very significantly, and where the 18 appellate courts are now knee deep, or I should say 19 neck deep in appellate review of sentencing 20 decisions.</p> <p>21 Well, then comes a case out of 22 New Jersey, a New Jersey State cause called Apprende. 23 New Jersey adopts a state statute that 24 says for certain categories of crime, assaults, 25 murders, things like that sort, that if you are race</p>
<p>1 sentence. 71</p> <p>2 There is a famous 2D1.1 in which you 3 have a table starting with the type of drug, starting 4 with the most serious all the way down depending on 5 the type of drug and the amount of drug.</p> <p>6 Now, for many drug dealers, people who 7 engaged in drugs, they engaged in multiple 8 transactions, and depending on how the government 9 charges it can effect your sentence by a great deal.</p> <p>10 If a person makes a plea deal with the 11 government, the government says, okay, we'll agree 12 with you in advance that we are going to charge you 13 with only 50 grams of cocaine, that can be a 14 relatively, in the scheme of things, a modest 15 sentence.</p> <p>16 But if you go to trial and you are 17 convicted, let's say, of an offense of more than five 18 kilograms of cocaine, we are going to prove at 19 sentencing that you actually were involved with 5,000 20 kilograms of cocaine, and we'll do it by a 21 preponderance of the evidence, by the way, not by 22 beyond a reasonable doubt, and your sentence will 23 double or triple.</p> <p>24 So the government, in its charging 25 decision, was handed a very powerful tool.</p>	<p>1 based, ethnically based, what we call a hate crime, 2 your sentence can be doubled, actually. 73</p> <p>3 However, that was treated not as an 4 element of a new offense, but rather as a sentencing 5 factor. It was the trial judge, not the jury, that 6 decided whether the crime was motivated by racial 7 hatred or ethnic hatred or things like that.</p> <p>8 Well, it went up to the United States 9 Supreme Court. They said there is something called 10 the Constitution of the United States. That says if 11 you're going to be convicted, the jury has to do it 12 beyond a reasonable doubt.</p> <p>13 They said that if the crime of killing 14 was racially motivated, that was an element of the 15 crime, not a sentencing factor, and a jury would have 16 to find that. It could not be found by a judge by 17 any standard. It had to be found by a jury.</p> <p>18 Shortly thereafter there was a case of 19 Blakely v. Washington which involved a state 20 sentencing guideline, State of Washington, not the 21 federal, where on a kidnapping charge which had a 22 normal guideline range, I can't remember, 40 or 50 23 months, the trial judge found, not the jury, but the 24 trial judge found an aggravating factor.</p> <p>25 Based on this aggravating factor</p>

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1 basically doubled the sentence. That was found to be 2 unconstitutional. 3 Once again they said, no, no, if you're 4 going to, under those guidelines, double the usual 5 sentence based on certain facts, the jury had to find 6 those facts, not the trial judge. 7 That leads us to the now famous case of 8 United States versus Booker. 9 The Booker defendant was charged with 10 selling, possessing, or possessing with intent to 11 sell more than 50 grams of crack cocaine base. 12 It goes to the jury, and the jury was 13 given evidence that Booker had 92 grams of crack in a 14 backpack or something like that, and he's convicted. 15 He goes for sentencing, and under the 16 sentencing guidelines he's facing, my recollection 17 was 210 to 262, 210 to 262. 18 However, the government introduces 19 evidence that in fact he had dealt not just with the 20 92 grams of crack in his backpack, but another 250 21 plus grams elsewhere. 22 Now, in either case the statutory 23 maximum was life, the statutory minimum was 10, 24 whether it was 350 grams or more than 50 grams, it 25 was still the same maximum sentence.	1 they want to uphold them. 2 You have a dissent by Breyer, the 3 Stevens opinion says, of course, that the guidelines 4 were unconstitutional, they are infringing on the 5 right to trial by jury. 6 Judge Ginsburg joins on the majority 7 opinion with Stevens, joins that opinion, creating a 8 majority. Breyer and his three companions draw a 9 dissent. That's only half the problem. 10 What do you do for a remedy? What are 11 we going to do? Now that it's unconstitutional, how 12 do we deal with it? 13 Even prior to Booker, some judges 14 anticipated Booker, would actually set certain kind 15 of guidelines to the jury. 16 Judge Simandle had a case, even pre 17 Booker, he would take a guideline issue, the amount 18 of drugs or some other issue relevant to sentencing, 19 and rather than make a decision himself, he sent it 20 to the jury. 21 After the verdict came he would send it 22 back to the jury to get a decision. He was kind of 23 anticipating that the result of Booker and an earlier 24 case, Jones, where they anticipated that result. He 25 actually sent it to the jury.
1 Under the guidelines, because the table 2 went by amount, he suddenly went from a minimum of 3 210 to 360 to life. It was 30 years to life. 4 The judge, by a preponderance of the 5 evidence, finds that in fact he was involved with, I 6 don't remember the exact number, but it was 300 some 7 odd grams of crack, sentences him, very generous 8 judge, however, sentences him to 360 months. 9 By the way, the guideline uses months. 10 The defendants don't feel as bad. If you say 20 11 years, they get very upset. If you say 240 months, 12 then they say, thank you, judge. That was one of the 13 innovations. 14 I notice the Supreme Court actually 15 referred to it as 30 years. They wanted to make it 16 seem more serious. 17 That's the facts of Booker. Booker is 18 unhappy, appeals, gets to the Supreme Court. I got 19 to mention, a very strange alignment here. 20 You have four judges, Stevens, Scalia, 21 Souter and Thomas, an unlikely foursome, feel very 22 strongly that the guidelines were unconstitutional. 23 Conviction should be reversed. 24 The four judges, Breyer, Rehnquist, 25 Kennedy, Alito think the guidelines are just fine, so	75 1 One of the results might have been send 2 all those guideline decisions, of which there were 3 hundreds, send each of them to the jury for decision. 4 Breyer didn't like that idea. His idea 5 was, all we'll do is make the guidelines advisory. 6 We'll make them just one factor out of many that have 7 to be considered by the judge. 8 Well, Judge Ginsburg decided she liked 9 his remedy better than the other ones. She joins the 10 prior group on the remedy. We have no idea why that 11 split. 12 So we have the spectacle of the four 13 judges declaring the guidelines unconstitutional, but 14 the four judges who thought the guidelines were 15 constitutional decide what the remedy is, Judge 16 Ginsburg joining that group. 17 So we wind up with four opinions. We 18 have Stevens' majority, Stevens dissent, Breyer's 19 majority, Breyer's dissent, creates a world of 20 Booker. 21 So what Booker says, it says, all right, 22 we now turn to 3553 A, factors to be considered in 23 imposing sentence. Well, one of these factors would, 24 of course, be the guidelines. 25 Then you have factors like seriousness

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1 of the offense, promote respect for the law, provide	1 months?
2 for just punishment, the nature and circumstances of	2 Provide just punishment. Well, what is
3 the offense, the history and characteristics of the	3 just punishment? Four months, six months, 23 months?
4 defendant.	4 I don't know. No metrics to any of these factors.
5 That's the one beloved of defense	5 What is the parsimony principle? No
6 attorneys. They will write a hundred page brief.	6 sentence shall be longer than necessary to achieve
7 They will ignore all the other nine factors, but	7 the goals of sentencing. That's the parsimony
8 the history and characteristics of the defendant, you	8 principle. I get it in every brief, the parsimony.
9 know, poor childhood, abusive parents, on and on, man	9 MS. WALDOR: Sufficient but not greater.
10 of the year for the Red Cross, three tours in Vietnam	10 JUDGE IRENAS: Judge, this defendant has
11 and on and on and on.	11 learned his or her lesson, maybe a couple of months
12 Deterrence, general deterrence, specific	12 would help, but beyond that you don't need that.
13 deterrence, and then the guideline.	13 That's the parsimony principle.
14 The second thing he did, he now said,	14 Well, there are no numbers to that, yet
15 however, it was the intent of the Sentencing Reform	15 the guidelines are there. There is a range of
16 Act was to have appellate review.	16 numbers.
17 Now, sentences, discretionary sentences of	17 Statistics have shown that even after
18 the judge, are reviewable for reasonableness. For 200	18 Booker the guidelines have carried very significant
19 years the discretion of the trial judge on sentence was	19 weight. The number of sentences outside the
20 not reviewable for reasonableness, now in a way that we	20 guidelines post Booker, there has been some change,
21 are somewhat	21 but it hasn't been as significant as you think. It
22 back to that system in part, about you they are	22 is measured in a couple of percentage points for the
23 reviewable for reasonableness.	23 most part. Not a huge change. Not surprising to me.
24 The Third Circuit under Booker has said	24 When you are sitting there with all
25 that the process you follow -- you must follow is as	25 these factors, and then you have a number, the number
<hr/>	
1 follows, and I think almost every Circuit adopted	1 is going to carry greater weight than a lot of those
2 this in one form or another.	2 factors.
3 You first do a guideline determination,	3 Statistics also showed -- well,
4 just as you would have under the Sentencing Reform	4 statistics were prepared by defense organizations.
5 Act. In other words, you view the guidelines just	5 Should I give them that weight? Yeah.
6 the way you always did, all that jurisprudence still	6 Two that struck me, at least, that if a
7 exists.	7 judge varied under Booker above the guidelines for
8 You then decide motions for departure	8 which he went up, the guidelines say 30 months, I'm
9 under the guidelines just the way you would have had	9 going to give you 60 months, and defendants appeal of
10 there been no Booker. You file a 5K1. You come up	10 that upward variance were generally and almost close
11 with a guideline number after departure.	11 to overwhelmingly unsuccessful. Judges were
12 Then, step three, you now take that	12 sustained.
13 number, consider it as a factor and apply all these	13 If the judge went down, in other words,
14 other factors and come up with your final sentence.	14 varied below the guidelines, and the government
15 If you vary from that guideline, that is	15 appealed, the government was often successful in
16 now called a Booker variance. We don't call it a	16 setting aside the sentence, that it was below the
17 departure. Departure is you know the guidelines,	17 guidelines, on the grounds that it was unreasonable.
18 variance is under Booker. There is still appellate	18 Those results varied sharply from
19 review of that.	19 circuit to circuit. For some reason the Eighth
20 One thing has been fairly clear.	20 Circuit had a disproportionate number of appeals on
21 Statistics show even under Booker the guidelines	21 that issue and they did not like downward variances
22 carry extraordinary weight. Not surprising. You	22 much at all. Nationwide those statistics are pretty
23 have all these factors.	23 sharp.
24 Deterrence to criminal conduct. Does	24 And so that judges, including an unnamed
25 that mean three months? Nine months, 11 months? 27	25 judge who happens to also be on this panel, whoever

21 (Pages 78 to 81)

<p>1 that might be, found out the circuit's somewhat</p> <p>2 dislike for downward variances.</p> <p>3 I'm going to leave you now, and you are</p> <p>4 all going to be grateful for that, I guess, with just</p> <p>5 to mention that a few cases have come out which have</p> <p>6 changed, or we think will change the landscape of</p> <p>7 Booker, the Kimbro case, and I'm going to leave it</p> <p>8 to others to explore that. Thank you very much.</p> <p>9 (Applause.)</p> <p>10 MS. WALKER: Thank you, Judge.</p> <p>11 Next Judge Thompson is going to talk</p> <p>12 about the judicial discretion with respect to the</p> <p>13 advisory nature of the guidelines and the progeny</p> <p>14 that followed Booker.</p> <p>15 JUDGE THOMPSON: As mentioned by Karol</p> <p>16 Corbin Walker, I was appointed in the wild, wild west</p> <p>17 era, it has been referred to, when the guidelines</p> <p>18 were not in existence, when the judge looked to the</p> <p>19 statute book and determined what the maximum was, and</p> <p>20 knew that he or she had from probation all the way up</p> <p>21 to the maximum.</p> <p>22 We have the guidelines era when the</p> <p>23 guidelines were to be fixed and a rather mandatory</p> <p>24 range for which a judge must apply the sentencing</p> <p>25 privileges and prerogatives and duties.</p>	<p>1 an era of deciding, what do the guidelines mean?</p> <p>2 What is the significance of the guidelines?</p> <p>3 There are these Supreme Court cases, and</p> <p>4 I will start with Rita. You have that in your</p> <p>5 material, then Kimbro and Gall in December of 2007.</p> <p>6 Rita was an interesting case.</p> <p>7 Mr. Victor Rita was convicted by a jury of perjury,</p> <p>8 obstruction of justice, making false statements,</p> <p>9 convictions obtained on all counts.</p> <p>10 The judge at sentencing looked to the</p> <p>11 guidelines -- and, by the way, this was a Fourth</p> <p>12 Circuit case. The judge made a determination as to</p> <p>13 exactly what the guideline range was, a very accurate</p> <p>14 assessment taking into consideration all the factors</p> <p>15 that are a part of that, and decided that the</p> <p>16 guideline range of 33 to 41 months was quite</p> <p>17 reasonable.</p> <p>18 And also took some consideration of the</p> <p>19 fact that this was a man with a 25 year military</p> <p>20 history, perhaps some consideration of the fact that</p> <p>21 the man had been in law enforcement himself in a</p> <p>22 previous life, and perhaps even some health problems</p> <p>23 that he had.</p> <p>24 He imposed a 33 month sentence and the</p> <p>25 defendant appealed, appealed because his attorney had</p>
<p>83</p> <p>1 In some ways, many judges thought of the</p> <p>2 guidelines era as sort of comforting, because the</p> <p>3 judge knew that there was this fixed grid, there were</p> <p>4 the guidelines exceptions, there were specified</p> <p>5 upward and downward departures, and the guidelines</p> <p>6 framework somehow lessened the anxiety of imposing a</p> <p>7 just sentence.</p> <p>8 Now we are beyond the guideline regimen</p> <p>9 of necessity, and now we are in the age of</p> <p>10 discretion.</p> <p>11 As Judge Irenas just mentioned, let's go</p> <p>12 through what it is now the judge must do. First, the</p> <p>13 judge must still calculate the guideline sentence,</p> <p>14 and that is still rather exacting, because if there</p> <p>15 was an error in the calculation or the computation of</p> <p>16 the guideline range, the guideline specification,</p> <p>17 then that in and of itself can be a reversible error.</p> <p>18 After calculating and computing the</p> <p>19 guidelines specifications, computing the sentence</p> <p>20 under the guidelines, then the judge must determine</p> <p>21 departures, the downward departures, the upward</p> <p>22 departures, whatever the request on either side has</p> <p>23 been, and what the judge considers to be applicable.</p> <p>24 Then, third, there are the 3553(a)</p> <p>25 factors under Title 18. That now has brought us to</p>	<p>85</p> <p>1 sought a departure, had sought, or at least a</p> <p>2 variance.</p> <p>3 The Fourth Circuit looked at the</p> <p>4 sentence and thought, well, the minimum of the</p> <p>5 guideline range, certainly that's a reasonable</p> <p>6 sentence, affirmed.</p> <p>7 Mr. Rita sought review by the Supreme</p> <p>8 Court of the United States, and the Supreme Court, in</p> <p>9 a decision in June of 2007, determined that a</p> <p>10 sentence within the guidelines was a reasonable</p> <p>11 sentence and that Mr. Rita had no basis for</p> <p>12 complaining, and that when a district judge's</p> <p>13 discretionary sentence in a particular case accords</p> <p>14 with the sentence the U.S. Guidelines provides, the</p> <p>15 Court of Appeals may have presumed the sentence is</p> <p>16 reasonable.</p> <p>17 Justice Souter dissented, by the way, in</p> <p>18 a very interesting discussion, what that could mean</p> <p>19 and where that could lead in terms of a lack of</p> <p>20 exercise of discretion.</p> <p>21 Following that we have Kimbro and Gall,</p> <p>22 both significant cases with regard to the judge's</p> <p>23 discretion, both December 10th, 2007.</p> <p>24 Let's look at Kimbro first, because</p> <p>25 that's the crack cocaine case, kind of you know there</p>

22 (Pages 82 to 85)

<p>1 has been this struggle, this conflict, the discussion</p> <p>2 for years about the disparity, the one hundred to one</p> <p>3 disparity between crack cocaine and powder cocaine in</p> <p>4 the guidelines.</p> <p>5 Judges have struggled, the Sentencing</p> <p>6 Commission has sought from time to time to get</p> <p>7 Congress to adjust and to make more equal this ratio,</p> <p>8 this disparity.</p> <p>9 There was a judge in the Fourth Circuit</p> <p>10 in Kimbro who when called upon to impose sentence,</p> <p>11 determined that he would take -- he or she would take</p> <p>12 consideration of this disparity between the treatment</p> <p>13 of crack cocaine and powdered cocaine, use that as a</p> <p>14 discretionary factor, and imposed a sentence which</p> <p>15 that judge felt was no greater than necessary to</p> <p>16 serve the objectives of sentencing under 355(a), took</p> <p>17 that into consideration, imposed a sentence. Did not</p> <p>18 impose a sentence that the guidelines would have</p> <p>19 required.</p> <p>20 The Fourth Circuit reversed, said you</p> <p>21 can't do that. You can't be concerned with the</p> <p>22 disparity between crack cocaine and powdered cocaine</p> <p>23 in imposing sentence, Mr. Or Mrs. District Judge.</p> <p>24 You can't exercise your discretion in that way.</p> <p>25 The Supreme Court of the United States,</p>	<p>1 into consideration all the factors which had been</p> <p>2 brought to his attention, and then facing a guideline</p> <p>3 calculation, a range of 30 to 35 months, the judge</p> <p>4 imposed probation of 36 months.</p> <p>5 I like that case, Judge Irenas, if you</p> <p>6 know why.</p> <p>7 Of course, when that came to the Eighth</p> <p>8 Circuit, that was reversed. The Court of Appeals</p> <p>9 believes that that sentence was not reasonable, there</p> <p>10 were no extraordinary circumstances in that case,</p> <p>11 there was no reason why Mr. Gall should have received</p> <p>12 that kind of benefit.</p> <p>13 Interestingly, on that fateful day,</p> <p>14 December 10, 2007, the Supreme Court of the</p> <p>15 United States found that while the extent of the</p> <p>16 difference between a particular sentence and the</p> <p>17 recommended guideline sentence is relevant, the Court</p> <p>18 of Appeals must review all sentences, whether inside,</p> <p>19 just outside or significantly outside the guideline</p> <p>20 range, but must review it under a differential abuse</p> <p>21 of discretion standard.</p> <p>22 The Supreme Court majority felt that the</p> <p>23 judge who had imposed sentence on Mr. Gall had been</p> <p>24 reasonable, the fact that he had stopped using drugs,</p> <p>25 that he had self-corrected, self-rehabilitated his</p>
<p>1 December 10, 2007, said that's perfectly reasonable,</p> <p>2 and that the Court of Appeals is supposed to be</p> <p>3 looking to determine whether there is an abuse of</p> <p>4 discretion. Abuse of discretion is another way of</p> <p>5 saying a reasonable sentence, reinstated.</p> <p>6 Now, what about Gall? Gall is an</p> <p>7 interesting case, because Gall, there is something</p> <p>8 attractive about the rehabilitated offender.</p> <p>9 Mr. Gall was selling ecstasy when he was</p> <p>10 a student, I believe it was at the University of</p> <p>11 Iowa, and was part of a conspiracy, enterprise,</p> <p>12 selling ecstasy.</p> <p>13 But he reformed. He withdrew from the</p> <p>14 conspiracy. I don't know exactly how he withdrew,</p> <p>15 but it seems to be pretty definitive that he withdrew</p> <p>16 from that conspiracy. He reformed. He stopped using</p> <p>17 drugs, graduated, went out and started working</p> <p>18 construction, became quite successful in construction</p> <p>19 work and was doing very well.</p> <p>20 Lo and behold, a somewhat delayed</p> <p>21 prosecution resulted in his being indicted for his</p> <p>22 drug activity rather a long time after his criminal</p> <p>23 act.</p> <p>24 The judge who sentenced Mr. Gall looked</p> <p>25 at the guidelines, calculated the guidelines, took</p>	<p>1 life, that he had given up rather definitively his</p> <p>2 participation in the ecstasy distribution activity</p> <p>3 years ago, did no longer seem to need the benefit of</p> <p>4 institutional correction, the judge's sentence was</p> <p>5 reasonable. Exercise of discretion.</p> <p>6 Now, those three cases, Rita, Gall,</p> <p>7 Kimbro, are the big cases that our courts and I'm</p> <p>8 sure the defense attorneys are citing in memoranda to</p> <p>9 the judge on sentencing day.</p> <p>10 I don't know if I should just mention,</p> <p>11 in addition, our own case within the Third Circuit,</p> <p>12 the Williams case recently, a little to the side.</p> <p>13 But it's an important case because that</p> <p>14 case has to do with under the present regime a</p> <p>15 defense attorney and client who entered into a plea</p> <p>16 agreement and the government has negotiated that plea</p> <p>17 agreement very carefully and specifically, and Judge</p> <p>18 Sloviter, on appeal from the government's appeal,</p> <p>19 Judge Sloviter, for the Third Circuit, found that a</p> <p>20 plea agreement in the criminal sphere can be a</p> <p>21 contract, a contract just as we think of a contract</p> <p>22 that must be enforced specifically in the civil</p> <p>23 sphere.</p> <p>24 So federal court sentencing is an</p> <p>25 interesting and evolving matter. I will be here for</p>

23 (Pages 86 to 89)

<p>1 questions, but I think that's all I'll say now.</p> <p>2 (Applause.)</p> <p>3 MS. WALKER: Thank you, Judge Thompson.</p> <p>4 Next we are going to hear from Amy</p> <p>5 Winkelman, who is going to talk about plea</p> <p>6 agreements, the practice, and one's obligation under</p> <p>7 those agreements.</p> <p>8 Amy.</p> <p>9 MS. WINKELMAN: Thank you.</p> <p>10 I'm going to pick up where Judge</p> <p>11 Thompson left off and talk a little bit about the</p> <p>12 Williams case which changed the focus to some extent</p> <p>13 from the cases that the judges have discussed here</p> <p>14 today, to focus on the discretion of district court</p> <p>15 judges and what role the appeals court would play in</p> <p>16 reviewing those decisions, and focus more on the</p> <p>17 parties and agreements reached by the government and</p> <p>18 defense in the plea agreement context.</p> <p>19 So let me talk a little bit about the</p> <p>20 Williams case that Judge Thompson touched on which</p> <p>21 was handed down by the Third Circuit on the very last</p> <p>22 day of last year, sort of a New Year's present for</p> <p>23 those of us on the prosecution side of the aisle.</p> <p>24 It was an appeal from a sentencing --</p> <p>25 the appeal was brought by the government, which we</p>	<p>1 The plea agreement between the</p> <p>2 government and the defense was executed in March of</p> <p>3 2005. This was a couple of months after the Booker</p> <p>4 decision came down in January of 2005.</p> <p>5 I will tell you that during that period</p> <p>6 of time there was a lot of work in our office, in the</p> <p>7 U.S. Attorney's office, and I also know much</p> <p>8 discussion in the defense bar about what a plea</p> <p>9 practice was going to look like after Booker.</p> <p>10 The plea agreement that was executed</p> <p>11 between the defendant Boynton Williams and the U.S.</p> <p>12 Attorney's office in that case was a product of that</p> <p>13 discussion. It's largely the same form plea</p> <p>14 agreement that we use now.</p> <p>15 There were some critical terms in that</p> <p>16 plea agreement. It contains a stipulation at the end</p> <p>17 of the agreement that went through a calculation of</p> <p>18 the guidelines. This was very typical, I mean, it</p> <p>19 was, I think, almost always used in the pre Booker</p> <p>20 and pre Blakely sentencing practice.</p> <p>21 This particular post Booker plea</p> <p>22 agreement did have a calculation of what we called</p> <p>23 the total guideline offense level. It happened to be</p> <p>24 in that case a level 33.</p> <p>25 Then there were some other key</p>
<p>1 don't typically do, and as many of you know, it is</p> <p>2 nothing that we are allowed to do if we wanted to</p> <p>3 even if on a regular basis.</p> <p>4 The appeal was based on a case in which</p> <p>5 the district court judge in imposing sentence had in</p> <p>6 fact both departed from the guideline range and also</p> <p>7 varied from the guideline range under the Booker</p> <p>8 case.</p> <p>9 The appeal was sought not based on the</p> <p>10 judge's conduct, it was not a challenge to the</p> <p>11 calculation by the judge to the guidelines or that</p> <p>12 the judge's decision in departing downward was</p> <p>13 unreasonable.</p> <p>14 It was based instead on the government's</p> <p>15 argument, ultimately successful, that the defendant</p> <p>16 had breached the plea agreement reached between the</p> <p>17 defense and the government.</p> <p>18 Let me give you a little bit of</p> <p>19 background. I don't know why all these cases seem to</p> <p>20 be crack cocaine cases, but this one too was a crack</p> <p>21 cocaine case.</p> <p>22 In this case the defendant pled guilty</p> <p>23 to possession of crack cocaine with intent to</p> <p>24 distribute. It actually involved over 300 grams of</p> <p>25 crack cocaine.</p>	<p>1 provisions that I think everyone who practices in</p> <p>2 this area ought to know about our form plea</p> <p>3 agreement. In this type of form plea agreement, it</p> <p>4 provided that it recognized, first, that the</p> <p>5 guidelines were not binding on the district court,</p> <p>6 recognizing that they were now advisory.</p> <p>7 Notwithstanding that fact, the parties</p> <p>8 agreed in writing in this plea agreement that as to</p> <p>9 what the total guidelines level applicable to the</p> <p>10 offense was, in this case 33, and they also agreed</p> <p>11 that the court should sentence within that guideline</p> <p>12 range, in a range that would result in the X and Y</p> <p>13 access, the level 33 to the defendant's criminal</p> <p>14 history score.</p> <p>15 It also provided, I'm going to quote</p> <p>16 here, that "Neither party will argue the imposition</p> <p>17 of a sentence outside the guidelines range that</p> <p>18 results from the agreed total guidelines offense</p> <p>19 level," basically agreeing that neither side was</p> <p>20 going to seek a variance on the part of the</p> <p>21 government. The government was not going to seek to</p> <p>22 vary upward from the guideline range agreed upon and</p> <p>23 the defendant would not seek to vary downward.</p> <p>24 There was one other critical provision</p> <p>25 on this topic in the stipulated section of the plea</p>

24 (Pages 90 to 93)

<p>1 agreement, and it provided, "The parties agree not to 2 seek or argue for any upward or downward departure or 3 any upward or downward adjustment not set forth 4 herein. The parties further agree that a sentence 5 within the guidelines range that results from the 6 agreed total guidelines offense level, that 33, is 7 reasonable."</p> <p>8 This is what we think of as the Booker 9 waiver. Frankly, that's what it is in this type of 10 plea agreement.</p> <p>11 In exchange for a number of things, not 12 the least of which was the government taking a firm 13 position on how the guidelines applied in this 14 particular case, the defendant was giving up his 15 right to make the arguments under Booker and under 16 3553(a), seeking a variance from the guideline.</p> <p>17 There are other important bargaining and 18 give and take in any plea agreement, and in this case 19 the government agreed that if the defendant would 20 plead guilty to one count based on possession with 21 intent to distribute the crack cocaine, that further 22 charges would not be brought against the defendant.</p> <p>23 In this particular case, as the Third 24 Circuit recognized in its decision, there was a real 25 trade-off here. There were additional charges that</p>	<p>1 report came out, breached the plea agreement, first 2 in a memo submitted to the court in advance of the 3 sentencing proceeding. In that memo the defense 4 counsel didn't challenge the calculation of the 5 sentencing guideline level, but asked the court to, 6 first, depart downward on a number of grounds which 7 will be familiar to any of us who practice in the 8 area, that the criminal history category was over 9 represented, that the defendant had certain health 10 issues, the defendant had important family 11 responsibilities, and that he was a product of a 12 broken home and had less guidance himself as a child.</p> <p>13 So he sought a departure and he sought a 14 variance under the Booker decision and the factors in 15 3553(a). He asked the court to impose a sentence of 16 120 months, well below the range provided by the 17 applicable guidelines offense level that had been 18 agreed on, and, frankly, below -- the sentence of 120 19 months wasn't even possible under any version of the 20 level 33, even if his criminal history category had 21 been the lowest it could possibly be.</p> <p>22 The AUSA responded by letter noting to 23 the court that this is not consistent with the terms 24 of the plea agreement, that the defendant had 25 promised not to make such arguments, but at the</p>
<p>1 the government could have brought in that case. 95</p> <p>2 The plea agreement foreclosed the 3 government from seeking to prosecute the defendant of 4 possession of firearms in connection with the 5 offense, because pursuant to the search as part of 6 the investigation, the defendant was found to possess 7 a number of firearms.</p> <p>8 He was also a previously convicted felon 9 at the time, so we could have prosecuted him as well, 10 and we could also have filed the much feared double 11 letter under 21 U.S.C. 85I, because he had been 12 previously convicted of a drug offense.</p> <p>13 Basically, as the Third Circuit found, 14 instead of the 10 year statutory minimum that the 15 defendant faced under this plea agreement, he could 16 have looked at a statutory minimum of 25 years, and 17 that's not discretionary. So there was a real 18 trade-off in this case.</p> <p>19 The probation department prepared a 20 presentence report and they agreed with the parties 21 that sentencing time was 33, and also there was a 22 level three resulting in a range of 168 to 210 23 months.</p> <p>24 What ultimately resulted in the appeal 25 here was that the defendant, after the presentence</p>	<p>1 sentencing hearing defense counsel nevertheless made 97 2 those arguments again, from which it appears the 3 district court took into consideration because the 4 district court imposed the sentence requested by the 5 defendant, which was a sentence of 120 months.</p> <p>6 That was the set of facts before the 7 Third Circuit when they took up the Williams case, 8 and they addressed for the first time the legal 9 standard for review as to an alleged breach of the 10 plea agreement by the defense.</p> <p>11 Of course, all of us know that there is 12 a rich history of law on what happens when the 13 government breaches a plea agreement. It's no small 14 thing when the government enters into an agreement 15 with the defendant. Obviously the government has 16 tremendous bargaining power in a situation like that, 17 and every Assistant U.S. Attorney is held to a very 18 high standard to comply with the terms of the plea 19 agreement and to keep the promises made in that 20 agreement.</p> <p>21 There is a rich body of law on what 22 happens when the government breaches or appears to 23 breach a plea agreement. But this was the first time 24 that our Court of Appeals took up the issue of what 25 happens when the defendant breaches.</p>

25 (Pages 94 to 97)

<p>1 The Third Circuit, as Judge Thompson 2 intimated earlier, looked to the court on the 3 government's breach, looked to the fact that courts 4 traditionally look at plea agreements from the 5 perspective of contract law principles, that a plea 6 agreement is a contract between the government and 7 the defense, and that there are some special 8 circumstances with plea agreements based on the 9 government's very substantial bargaining power, and 10 the fact that the defendant is giving up important, 11 including constitutional rights, in agreeing to plead 12 guilty and reaching a plea agreement with the 13 government.</p> <p>14 This is contract law in a separate 15 claim, but still contract principles.</p> <p>16 In that context, any ambiguities in the 17 contract are construed against the government, and 18 that is fair.</p> <p>19 Under contract principles the 20 obligations do run both ways, and the defendant as 21 well as the government must comply with terms and 22 conditions.</p> <p>23 In going through this analysis, the 24 Third Circuit recognizes that this is a bargained for 25 document. There is trading between the defense and</p>	<p>1 breach upon a preponderance of the evidence, and also 2 the ambiguity of the cracks in this case a plea 3 agreement, will be construed against the government.</p> <p>4 The reason why this was a welcome gift 5 to our office is that the court went on to look at 6 the specific provisions of our plea agreement and to 7 say that there were really no ambiguity in those 8 terms, that the stipulations, and I quote here, "The 9 stipulations in the agreement unambiguously 10 prohibited Williams from making downward departure 11 motions."</p> <p>12 It really laid out that this document 13 that we had really struggled with precisely sent the 14 message that we meant to send, and that if a 15 defendant is going to reap the benefit of that 16 bargain, he's going to be held to its costs as well.</p> <p>17 The other thing that the Williams case 18 did was to address what is the remedy for a breach 19 when the defense has breached the plea agreement? 20 What is the remedy?</p> <p>21 The Third Circuit reviewed some cases in 22 other districts that talked about the different 23 options, the choice that the aggrieved party has in 24 addressing the breach, and that in theory the 25 government can move to rescind the plea agreement and</p>
<p style="text-align: right;">99</p> <p>1 the government. They also noted that the defendant 2 generally benefits from entering into the plea 3 agreement, and that there are trade-offs inherent 4 that benefit the defendant.</p> <p>5 The ultimate holding -- I should say the 6 court also addressed the issue of what would happen 7 if it's found the defendant could breach the plea 8 agreement essentially with impunity?</p> <p>9 The court pointed out quite 10 appropriately that if it failed to enforce a plea 11 agreement against a breaching defendant, it would 12 undermine the entire plea bargaining system, would 13 render plea agreements really unworkable from the 14 government's perspective, and that would really have 15 a terrible impact on the criminal justice system, 16 which we all know depends on the -- in fact, a 17 majority of cases pleading out based on plea 18 agreements worked out between the defense and the 19 government.</p> <p>20 The holding of the Williams case is that 21 the court will apply the same standard of review as 22 the appeals court in considering a defendant's breach 23 of a plea agreement as it had applied in cases of the 24 government's breach. A de novo standard of review is 25 a burden placed upon the government to prove the</p>	<p style="text-align: right;">101</p> <p>1 ask the court for a ruling that by the defendant's 2 breach, the plea agreement is no longer in existence.</p> <p>3 In theory, that would free the 4 government up to bring charges that it had agreed not 5 to bring, or maybe even conduct an ongoing 6 investigation to flesh out some aspect of the 7 defendant's conduct that we had agreed to let lie.</p> <p>8 Frankly, that's another aspect of the 9 plea practice.</p> <p>10 The other option is specific 11 performance, to remand the case to the district court 12 for resentencing. That's an option that the 13 government sought in Williams and was granted by the 14 Third Circuit.</p> <p>15 In remanding the case in the Williams 16 context, the Third Circuit also granted the 17 government's request to remand for resentencing to a 18 different district judge. In finding that a 19 different judge would need to conduct the 20 resentencing, the Third Circuit emphasized that this 21 was no negative reflection on the district judge who 22 originally conducted the sentencing. It was really 23 under the lines of you can't unring the bell.</p> <p>24 The district court judge having been 25 influenced, or even an appearance having been</p>

26 (Pages 98 to 101)

<p>1 created that he was influenced by these arguments 2 made in breach of the plea agreement, it was 3 appropriate to send the case back to a different 4 judge to take a look at the situation from the 5 beginning with a clean slate and not be influenced by 6 those improper arguments.</p> <p>7 It was also gratifying to see in the 8 Third Circuit discussion there was a recognition that 9 in no way did the plea agreement that had been 10 crafted by the government and agreed to by the 11 defendant in any way try to restrict the district 12 court's discretion to sentence under the Booker 13 decision and with the application of the 3553(a) 14 factors as our judges have discussed here today. It 15 was not an attempt to limit the judge's discretion, 16 but it was a bargained for exchange, an agreement 17 between the parties to limit what the parties could 18 argue to the court at the time of sentencing.</p> <p>19 I'm sure I've already spoke too long, 20 but I want to make a couple of observations about our 21 plea practice out of the U.S. Attorney's office going 22 forward.</p> <p>23 First, I want to say that the type of 24 plea agreement that was in play in the Williams case 25 is not the only kind of plea agreement that we will</p>	<p>1 the kind of plea agreements that we had in the 2 Williams case with the detailed stipulation and the 3 waiver of the Booker rights.</p> <p>4 Without those agreements, where they are 5 appropriate in individual cases, we can get into 6 situations which are essentially mini trials, where 7 there are really contested issues of fact and both 8 sides will have to bring witnesses and go to great 9 lengths and take up a great deal of the court's time 10 to establish fact that we could stipulate to.</p> <p>11 I submit that it is in everyone's 12 interest to do that.</p> <p>13 The stipulated plea agreement also 14 provides some certainty for the defendant as well as 15 the government, and it sets a ceiling. Once the 16 government has stipulated to certain calculations, 17 maybe agreed not to pursue certain things like an 18 adjustment for abuse of position of trust or 19 vulnerable victim, we are bound by that. The victim 20 and defense counsel know that we have set a ceiling. 21 We are not going above that ceiling.</p> <p>22 Speaking from my own personal 23 experience, it is a very rare occasion for the judge 24 to go above a guideline calculation that has been 25 agreed to by both the defense and the government. So</p>
<p>1 enter into with defendants. We do not require a 2 defendant in every case, you know, that in order to 3 reach a plea agreement with us, you must enter into 4 this detailed guidelines calculation and waive your 5 rights under Booker.</p> <p>6 We do say, now that we have nice case 7 law to back us up, that if you're going to decide to 8 go that route, you're going to have to stick to that. 9 There are other forms of plea agreements that we will 10 agree to enter into.</p> <p>11 At the other extreme is that we won't 12 agree on any factors as to sentencing and leave all 13 of those up for argument at the time of the 14 sentencing hearing before the judge.</p> <p>15 There is an intermediate step that we 16 use as well where we will agree to stipulate as to 17 certain factual issues, most typically drug weight, 18 or another really big one is amount of loss, which is 19 a complicated issue in many cases, that is often in 20 the interest of both parties to come to an agreement 21 as to what is the loss amount figure.</p> <p>22 I want to put in a plug before I get 23 overwhelmed or outnumbered by the defense attorneys on 24 the panel, about why it is useful to both the 25 government and the defense to continue to enter into</p>	<p>1 it really does typically set a ceiling.</p> <p>2 I hope that if you take anything away 3 from my comments here today, it is that it is often 4 worth the defense's time and in the defense's 5 interest to enter into these detailed stipulation 6 plea agreements. That's my pitch.</p> <p>7 Thank you. 8 (Applause.) 9 MS. WALKER: Thank you, Amy. 10 Next, Rich Coughlin is going to talk 11 about the pitfalls of plea agreements and 12 negotiations as well.</p> <p>13 MR. COUGHLIN: Actually, I'm going to 14 talk a little bit about Booker and Kimbro and Gall as 15 well in this context.</p> <p>16 Before Booker, when the guidelines were 17 mandatory, a friend of mine who was a federal 18 defender in Sacramento, used to half joke, if you 19 were trying a lot of cases in federal court, you are 20 committing malpractice.</p> <p>21 It was understood by that, that that 22 sort of was a shorthand reference to the reality, 23 that in the federal court you've got, particularly 24 pre Booker, the strength of the government's case, 25 which is often overwhelming, and in addition to that,</p>

27 (Pages 102 to 105)

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

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

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

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

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

1 guidelines are advisory, and that that's the role
2 that they should have.

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

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

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

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

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

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

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

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

24 The Supreme Court has been clear in
25 Jones, in Apprendi, in Blakely, in Booker, that the

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

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

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

28 (Pages 106 to 109)

1	That's what Kimbro and Gall and Rita have	1	stipulation.
2	made clear, and have tried to, in shifting the focus	2	In other circumstances, fact
3	of the sentencing.	3	stipulations as to what the circumstances were that
4	Having said that, that should influence,	4	you can agree on, they are perfectly appropriate, and
5	one would think, what happens at the end of a trial	5	the other alternative, of course, is either an open
6	and influence the decision to go to trial?	6	plea or a plea to the indictment and then deal with
7	Perhaps now that the U.S. Attorney	7	the sentencing issues as they arise.
8	doesn't have quite so much decision making authority	8	I think that the theme here, the
9	over how the case is going to end up in terms of the	9	message, the post Booker message to courts and to
10	sentence, and if your client is acquitted of some	10	litigants is that the courts, the district courts
11	conduct, the guidelines then under Supreme Court	11	should have a chance to be judges again and to do
12	precedent have indicated for the Fifth Amendment,	12	what was anticipated when the Sentencing Reform Act
13	acquitted conduct could come back in, that unless you	13	was enacted and when the Sentencing Commission
14	are going to win everything, you would be sentenced	14	developed the guidelines, was to respond to and
15	as if you were convicted of everything.	15	consider the experience of district court judges in
16	That there are some new reasons to	16	sentencing and to take that experience into
17	challenge that expectation and that outcome, and that	17	consideration in changing the guidelines as they went
18	there might be more reasons to at least be somewhat	18	on.
19	less fearful of going to trial.	19	The idea that everything, every offense,
20	Having said that, no matter what effect	20	every offender needs to go to jail for longer and
21	Kimbro and Gall have had on the government's power of	21	longer time, to the point where we now have one out
22	sentencing, the power to determine the sentence and	22	of every 99 adults in America in jail, is something
23	the trial penalty, they don't have any effect on the	23	that has just pushed the system so far, to such an
24	first consideration, which is the strength of the	24	extreme end that it can no longer be sustained.
25	government's case, and more often than not in the	25	As the court pointed out in Gall, just as
	111		113
1	vast majority of cases you will continue to see	1	under sentencing undermines respect to the courts and
2	guilty pleas because the -- it is in the defendant's	2	the law, over sentencing does as well.
3	best interest. They understand that, and it is in	3	These opinions give the district courts
4	the government's interest to dispose of cases through	4	an opportunity to go back to doing what is expected,
5	reasonable plea agreements.	5	and that is to sentence individuals, look at them,
6	The experience that my office has had	6	consider who they are, what they did, and determine
7	with the U.S. Attorney in this district has largely	7	what the appropriate punishment is.
8	been positive in that regard. The assistants are	8	(Applause.)
9	willing to listen to mitigating evidence, to consider	9	MS. WALKER: Since we are running out of
10	alternatives in negotiating pleas. In many cases, in	10	time, we are going to have the defense bar condensed
11	not all circumstances, are you going to be able to	11	version with respect to presentence process. That
12	agree on how the guidelines should play out.	12	will be by Cathy Waldor. And right after Cathy, Alex
13	I think that after Kimbro and Gall, that	13	Booth will give the concluding part of our program,
14	the presumption -- the government presumption is that	14	which will be condensed with respect to nuances from
15	you take the guideline plea and agree to how the	15	the defense perspective. Since we do have several
16	guidelines are going to play out and what the issues	16	defense counsel here versus on the prosecutorial
17	are going to be.	17	side, we are condensing that part.
18	That presumption is not one that we are	18	MS. WALDOR: Alex and I are going to
19	going to accept. There are certainly instances where	19	tango instead of sitting here and talking about
20	you need to do that in the best interest of your	20	cases. I will be very brief.
21	client. If you are avoiding an enhancement as done	21	I want to say that there is obviously
22	in Williams, if you are avoiding mandatory minimum of	22	more room for defense participation. I don't think
23	some kind, if you are negotiating about loss or drug	23	you will see changes that big. I think we have to
24	weight in a way that's favorable to you, or if you're	24	litigate many, many issues yet.
25	cooperating, you're probably going to have to eat the	25	On your client's behalf, talk about

29 (Pages 110 to 113)

<p>1 metaphysical, the sentencing process is just -- what 2 do you tell a client? What is my sentence going to 3 be?</p> <p>4 Well, we had a hard enough time with the 5 guidelines. We say, somewhere between here and here, 6 and maybe we get a departure and maybe we don't.</p> <p>7 Now we say to a client, well, if you 8 plead guilty, you can get anything.</p> <p>9 Can you tell me, can you predict my 10 sentence? No, I really can't. So just let's plead 11 guilty.</p> <p>12 That being said, you have to participate 13 in the process fully. That's from the guilty plea 14 you need to take your client to the presentence 15 interview. We all know the presentence interview has 16 to do with finances, offense conduct. Never, ever 17 let your client talk to the probation people about 18 the offense conduct. You will surely lose your extra 19 credit points for acceptance of responsibility.</p> <p>20 I want to hand in something written.</p> <p>21 The probation department probably likes that better.</p> <p>22 Probation also starts the report with 23 the 355 considerations. When you interview with your 24 client and the probation people, you want to start 25 highlighting these various Booker variance things.</p>	<p>1 You are not in violation of this</p> <p>2 Williams case where a plea is a contract. Discuss 3 your client generally, discuss your client's 4 characteristics. And the judge is not held to this 5 Williams contract deal. Let the judge make decisions 6 based upon a general memo, and if the judge decides 7 to depart or to follow a variance, the judge can do 8 that. That way you are not in violation of this 9 Williams case where you voided your plea bargain 10 because you violated a contract.</p> <p>11 Outside of that I give it to Alex.</p> <p>12 MR. BOOTH: I knew when I signed up to 13 this thing that it would be a mop up assignment. 14 Judging by the panel, I would be able to say my time 15 is up, which is pretty much true.</p> <p>16 The Williams case, I think the attorney 17 in that case put in his pretrial memo totally 18 contrary to the agreement that he wanted a variance, 19 that he wanted a departure. There was an obvious 20 breach of the agreement.</p> <p>21 The judge, on the other hand, if you 22 don't put it in your memo, as Cathy said, put the 23 facts of the guy's life in there and you keep your 24 fingers crossed that the judge will ask you, what 25 about this, what about that?</p>
<p>115</p> <p>1 Talk about the family, the client, you know, any out 2 of the heartland or extraordinary circumstances that 3 you may address in your own presentence memo.</p> <p>4 By the way, when you do a presentence 5 memo, please don't put it on ECF. I see a lot of 6 people just are filing them. They are confidential. 7 Please, paper is still allowed for certain things.</p> <p>8 Don't file electronically your presentence memo. And 9 your presentence memo, of course, should forget about 10 the guidelines because we don't really care about 11 them. Everybody knows how to figure them out.</p> <p>12 This notion that the first level is the 13 guideline, I think you need to reeducate the bench 14 and the U.S. Attorney's office. The first level is 15 355.3 or personal traits, characteristics, something 16 different about the client, different about their 17 family. Let's put the guidelines in the third place.</p> <p>18 If you signed a memo, and I think Alex 19 will get into this, a plea memo that forbids you from 20 making a variance or a departure, which most of them 21 do, by the way, what you want to do, and we discussed 22 this in our telephone conversation, Judge, and I've 23 been doing this for years anyhow, is just do a 24 presentence memo that doesn't say I want a departure, 25 I want a variance.</p>	<p>117</p> <p>1 Frankly, the judge has a duty to 2 exercise discretion. I believe the attorney would 3 have a duty to answer the judge despite what the plea 4 agreement contract says. I can't believe the courts 5 won't eventually come to that same conclusion.</p> <p>6 I went to law school in the late '60s, 7 the era of Earl Warren was still with us, and the 8 pendulum was moving to the rehabilitation side of 9 sentencing. We were taught that eventually it's just 10 this way, and it goes to the punishment and 11 deterrence side and generally goes back and forth.</p> <p>12 Since I've been out of law school it 13 stopped and switched, but it's going off the charts 14 that way.</p> <p>15 In the mid '80s, the end of parole and 16 the advance of the guidelines changed the world and 17 it made life as a criminal defense attorney somewhat 18 frustrating. And I thought I would end this by 19 giving you this story of a case that I had.</p> <p>20 We went to trial. The trial judge, 21 eventual sentencing judge, has already been referred 22 to today, one of the old school, and by no means he's 23 a soft judge, in fact the contrary is true.</p> <p>24 My client was involved with importing 25 approximately 35 tons of marijuana. He winds up with</p>

30 (Pages 114 to 117)

1 a sentence of six years. This is by a tough judge.
2 He went to federal prison, and a couple
3 of months after he got there he called me up to come
4 up and represent him at his parole hearing. His
5 parole date was set 24 months after his
6 incarceration. He went home a happy man.
7 If he had been sentenced under the
8 guidelines, he probably would be getting out around
9 who knows when. That's how much the guidelines and
10 the absence of parole changed the system.
11 It went from 24 months to a minimum of
12 235 months for the same exact conduct.
13 The Gall case, making judges judges
14 again, as Judge Irenas said, and giving power to
15 judges, maybe there is a change in the wind and maybe
16 we don't want a society where one in every hundred
17 adult men are in prison.
18 Amy, watch out.
19 (Applause.)
20 MS. WALKER: Thank you. We now invite
21 everyone to go downstairs so we can honor our senior
22 judges with the pro bono award presentation and to
23 hear our wonderful luncheon speaker. Thank you.
24 ---
25

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