

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
Plaintiff/Appellee,)
Vs.)
TONY SMITH,)
Defendant/Appellant.)

CASE NO. **09-0499**
On Appeal From Case No. CA-24246
from the Ninth District Court of Appeals

APPELLANT TONY SMITH'S MEMORANDUM IN SUPPORT OF
JURISDICTION

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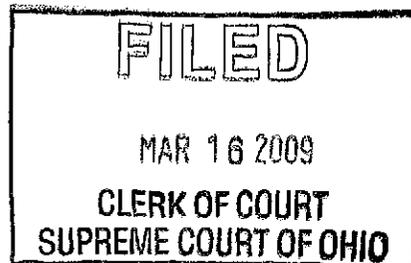


TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Explanation	1
Statement of Facts and Case	4
Proposition of Law One	4

The trial court erred in denying the Appellant's request for resentencing based on the Supreme Court of Ohio's holdings in *State v. Bezak* (2007), 114 Ohio St.3d 94, and *State v. Simpkins* (2008), 117 Ohio St.3d 420. Furthermore, the Ninth District Court erred in affirming the trial court's denial to resentence the Appellant.

Proposition of Law Two	6
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The trial court erred in refusing to resentence the Appellant must be re-sentenced pursuant to the holdings of *Kimbrough v. United States*, which recognizes that there is no logical or legal basis for the disparity of sentencing between crack and powder cocaine offenses. In addition, the Ninth District Court of Appeals erred in affirming the trial court's ruling in this matter.

Conclusion	15
Certificate of Service	15

TABLE OF AUTHORITIES

CASE LAW

Adamsky v. Buckeye Local School Dist. (1995), 73 Ohio St.3d 360.....	14
Kimbrough v. United States 128 S.Ct. 558, 169 L.Ed.2d 481.....	10
Klepper v. Ohio Bd. of Regents (1991), 59 Ohio St.3d 131.....	14
Rita v. United States, 551 U.S. ----, ----, 127 S.Ct. 2456 (2007).....	6
State v. Bezak (2007), 114 Ohio St.3d 94.....	5
State v. Bryant, 2nd Dist. No. 16809, 1998 Ohio App. Lexis 3308.....	14
State v. Ramey, Franklin App. No. 06AP-245, 2006-Ohio-6429.....	5
State v. Rodriguez (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347.....	5
State v. Simpkins, 117 Ohio St.3d 420.....	5

OTHER

United States Sentencing Commission, Special Report to	5
Congress: Cocaine and Federal Sentencing Policy 5, 12 (Feb.1995) available at http:// www. ussc. gov/ crack/ exec. htm	
United States Sentencing Commission, Special Report to	6
Congress: Cocaine and Federal Sentencing Policy 2 (Apr.1997), http:// www. ussc. gov/ r_ congress/ newcrack. pdf . least” to 20 to 1. 2002 Report viii	
United States Sentencing Commission, Report to	6
Congress: Cocaine and Federal Sentencing Policy iv (May 2002), available at http:// www. ussc. gov/ r_ congress/ 02 crack/ 2002crackrpt.pdf	
United States Sentencing Commission, Report to	7
Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at http:// www. ussc. gov/ r_ congress/ cocaine2007 at paragraph 19	

EXPLANATION AS TO WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION

In the matter at hand, there are two constitutional questions of great public and general interest which also involve substantial constitutional questions. The first question is whether an Ohio inmate can remain incarcerated even though his sentence is void because there was no mention of post release control during his sentencing hearing. The second constitutional question which also warrants great general and public interest is whether an inmate should be entitled to resentencing on cocaine offenses because there is no logical or legal basis for the disparity of sentencing between crack and powder cocaine offenses.

Regarding the first issue, Mr. Smith is an individual who was convicted in 2001 of several crack cocaine drug offenses. He was sentenced to a nineteen years in prison. However, he was not informed during his sentencing hearing that he would be subject to post release control upon his release. Recently, because he was never informed of PRC, Mr. Smith requested that he be resentenced based on this Court's holding in *State v. Jordan*. Shortly thereafter, this Court issued its decisions in *Bezak*, *Sarkozy*, and *Simpkins*.

Ultimately, the trial court refused to resentence Mr. Smith because of the, then recent, Ninth District holding in *State v. Price* which ruled that even if there is no mention of post release control during a plea and sentencing hearing, a request for resentencing must be denied because it is an untimely and successive petition for post conviction relief.

On appeal, the Ninth District disregarded this Court's ruling in *State v. Bezak* and *State v. Simpkins*. Furthermore, even though *Bezak* and *Simpkins* were cited in Mr. Smith's brief, the Ninth District indicated that Mr. Smith had given no reason as to why the court should disregard its former ruling in *State v. Price*.

Mr. Smith, or anyone under the jurisdiction of the Ninth District Court of Appeals, should not have different sentencing rules applied because they are under the jurisdiction of the Ninth District Court of Appeals which has chosen to disregard this Court's rulings in *Bezak* and *Simpkins*. Furthermore and equally important, is that Mr. Smith, and others like him, should be notified at his sentencing hearing of all the penalties to be suffered as a result of his/their conviction/s. He was not told of PRC, nor the serious implications if he violates the terms of PRC.

Mr. Smith, and others similarly situated, have a constitutional right to be informed of the penalties they will receive for breaking the law. Such uncertainty is unfair and a substantial breach of his constitutional right to due process. Furthermore, equally egregious is the fact that Mr. Smith, and others similarly situated, have a right to be treated equally and similarly as other individuals under different legal jurisdictions within Ohio.

Therefore, for the foregoing reasons and the reasons set forth below, Mr. Smith moves this Court to accept this case or order the Ninth District Court to comply with this Court's rulings in *Bezak* and *Simpkins*.

With respect to the second issue before this Court, Mr. Smith also requested to be resentenced by the trial court because he was sentenced for crack cocaine offenses which carry substantially longer sentences than powder cocaine offenses. Although it was previously believed that crack cocaine was much worse than powder cocaine, studies have shown that there are no scientific or medical reasons to justify the disparity.

Disparate treatment in sentencing between crack and powder cocaine users is not justified on the basis of the greater alleged addictiveness of crack. Research has proven that crack is not more addictive than powder cocaine. While there are differences in the manner in which the body absorbs base versus powder cocaine, since Cocaine hydrochloride (powder) can easily be

transformed into crack by combining it with baking soda and heat, it is irrational to apply a stiffer penalty between cocaine which is directly sold as crack, and cocaine which is sold in powder form but which can be treated by the consumer and easily transformed into crack.

Furthermore, there is no research to indicate that the use of crack cocaine creates more violent behavior than using powder cocaine. Studies have shown the contrary. Furthermore, research has not been able to validate a casual link between drug use and violence.

In addition, neither are excessive penalties for crack cocaine justified by its low price and accessibility. To apply draconian penalties for first time possession of crack on the basis of its low cost discriminates on the basis of class, especially in light of the fact that powder cocaine, in spite of its greater cost, is a drug abused more in this country. Furthermore, higher penalties for crack cocaine guarantee that small time street-level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy, which disproportionately impacts lower income people, is neither logical nor effective.

Based on the foregoing, and the reasons set forth below, Mr. Smith moves this Court to accept this case and proceed with briefing. In the alternative, Mr. Smith moves this Court to order that Mr. Smith be resentenced in accordance with this Court's holding in *Bezak* and *Simpkins*.

STATEMENT OF CASE AND FACTS

On March 29, 2001, a jury found the Appellant, TONY D. SMITH (hereinafter referred to as Mr. Smith) guilty of two counts of Possession of Cocaine, Major Drug Offender Specification, Having Weapons Under Disability, Illegal Manufacturing of Drugs, and Illegal Use/Possession of Drug Paraphernalia. The trial court sentenced Mr. Smith to a total of nineteen years incarceration. However, the trial court did not mention post release control during Mr.

Smith's sentencing hearing. Mr. Smith appealed his conviction; however, his conviction was affirmed.

On July 26, 2007, Mr. Smith filed a motion to be resentenced because he was not informed of post release control during his sentencing hearing based on *State v. Jordan (2006)*, 104 Ohio St.3d 21, and the trial court's failure to inform him properly of Post Release Control. The Appellee responded and conceded that Mr. Smith's sentence was void and that he must be resentenced per *State v. Bezak (2007)*, 114 Ohio St.3d 94.

The trial court ordered that Mr. Smith and his co-defendant, Omondo Varner, be conveyed back to Summit County for resentencing. On April 16, 2008, the Appellee changed its position on Mr. Smith's petition based on this Court's holding in *State v. Price*, 2008 WL 1700341, 2008 -Ohio- 1774, Ohio App. 9 Dist., April 14, 2008 (NO. 07CA0025). Based on the Ninth District case *State v. Price*, 9th Dist. No. 07CA0025, 2008-Ohio-1774, the trial court denied Mr. Smith's request for resentencing. On appeal, the Ninth District affirmed the trial court's decision and held that the trial court did not have jurisdiction to hear Mr. Smith's request because it was an untimely and successive petition for post conviction relief. The Ninth District disregarded this Court's ruling in *State v. Bezak* and *State v. Simpkins*. Mr. Smith remains incarcerated under a void sentence.

Mr. Smith timely appeals to the present court.

LAW AND ARGUMENT

PROPOSITION OF LAW ONE

The trial court erred in denying the Appellant's request for resentencing based on the Supreme Court of Ohio's holdings in *State v. Bezak (2007)*, 114 Ohio St.3d 94, and *State v. Simpkins (2008)*, 117 Ohio St.3d 420. Furthermore, the Ninth District Court erred in affirming the trial court's denial to resentence the Appellant.

A sentence which fails to notify the offender that he or she is subject to post release control is wholly unauthorized and void. *State v. Bezak* (2007), 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. “Because a sentence that does not conform to statutory mandates requiring the imposition of post release control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position as they were had there been no sentence” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (decided March 20, 2008), *Bezak*, supra at paragraph 13 citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223.

“A trial court retains jurisdiction to correct a void sentence and is authorized to do so when its error is apparent.” *State v. Simpkins* supra. Res Judicata does not act to bar a trial court from correcting the error. *State v. Simpkins*, supra, citing *State v. Ramey*, Franklin App. No. 06AP-245, 2006-Ohio-6429, at paragraph 12; *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347. Furthermore, re-sentencing a defendant to add a mandatory period of post release control that was not originally included in the sentence does not violate due process. *State v. Simpkins*, supra at paragraph 20 of syllabus.

“In cases in which a defendant is convicted of, or pleads guilty to, an offense for which post release control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have post release control imposed on the defendant unless the defendant has completed his sentence.” *State v. Simpkins*, supra at paragraph 1 of the Syllabus; “In such a re-sentencing hearing, the trial court may not merely inform the offender of the imposition of post release control and automatically re-impose the original sentence. Rather, the effect of vacating the trial court's original sentence is to place the parties in the same place as if there had been no sentence.” *State v. Bezak*, 114 Ohio St.3d at 95,

2007-Ohio-3250, 868 N.E.2d 961. Thus, the offender is entitled to a de novo sentencing hearing. Id.

In the matter at hand, Mr. Smith is currently incarcerated under a void sentence. The trial court refused to resentence him pursuant to the Ninth District's holding in *State v. Price*. The Ninth District affirmed the trial court's order indicating that Mr. Smith's request to be resentence is an untimely and successive request for post conviction relief.

As indicated above, Mr. Smith, or anyone under the jurisdiction of the Ninth District Court of Appeals, should not have different sentencing rules applied because they are under the jurisdiction of the Ninth District Court of Appeals which has chosen to disregard this Court's rulings in *Bezak* and *Simpkins*. Furthermore and equally important, is that Mr. Smith, and others like him, should be notified at his sentencing hearing of all the penalties to be suffered as a result of his/their conviction/s. He was not told of PRC, nor the serious implications if he violates the terms of PRC.

Wherefore, based on the foregoing, Mr. Smith moves this Court to accept the present case. In the alternative, Mr. Smith moves this Court to order the Ninth District Court of Appeals to comply with its rulings in *Bezak* and *Simkins*.

PROPOSITION OF LAW TWO

The trial court erred in refusing to resentence the Appellant must be re-sentenced pursuant to the holdings of *Kimbrough v. United States*, which recognizes that there is no logical or legal basis for the disparity of sentencing between crack and powder cocaine offenses. In addition, the Ninth District Court of Appeals erred in affirming the trial court's ruling in this matter.

Mr. Smith was convicted of offenses involving crack cocaine. Had he been convicted of offenses involving powder cocaine, his sentence would have much less than the nineteen years that he received.

Crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; the drug may also be mixed with water and injected. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 5, 12 (Feb.1995), available at [http:// www. ussc. gov/ crack/ exec. htm](http://www.ussc.gov/crack/exec.htm) (hereinafter 1995 Report). Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. *Id.*, at 14. The resulting solid is divided into single-dose “rocks” that users smoke. *Ibid.* The active ingredient in powder and crack cocaine is the same. *Id.*, at 9. The two forms of the drug also have the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high. *Id.*, at 15-19.

As indicated above and as this Court knows, although chemically similar, crack and powder cocaine are handled very differently for sentencing purposes. On the federal level, the 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy iv (May 2002), available at [http:// www. ussc. gov/ r_ congress/ 02 crack/ 2002crackrpt.pdf](http://www.ussc.gov/r_congress/02_crack/2002crackrpt.pdf) (hereinafter 2002 Report). This disparity in sentencing results in a major supplier of powder cocaine receiving a shorter sentence than a low-level dealer who buys powder from the supplier and then converts it to crack. See 1995 Report 193-194.

Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: “Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions.” 1995 Report 121. The United States Congress apparently believed that crack was

significantly more dangerous than powder cocaine and claimed that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular. See 2002 Report 90.

Based on the aforementioned assumptions, the U.S. 1986 Act adopted a "100-to-1 ratio" that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. The Act's five-year mandatory minimum applies to any defendant accountable for 5 grams of crack or 500 grams of powder, 21 U.S.C. § 841(b)(1)(B)(ii), (iii); its ten-year mandatory minimum applies to any defendant accountable for 50 grams of crack or 5,000 grams of powder, § 841(b)(1)(A)(ii), (iii).¹

Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity is generally unwarranted. Based on additional research and experience with the 100-to-1 ratio, the Commission concluded that the disparity "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." 2002 Report 91. In a series of reports, the Commission identified three problems with the crack/powder disparity.

¹ While the U.S. Congress was considering adoption of the 1986 Act, the United States Sentencing Commission was engaged in formulating the Sentencing Guidelines. Normally, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. See USSG § 1A.1, intro. comment., pt. A, ¶ 3. The Commission "modif[ie]d and adjust[ed] past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Rita v. United States*, 551 U.S. ----, ----, 127 S.Ct. 2456, 2464, 168 L.Ed.2d 203 (2007).

The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme. The Guidelines used a drug quantity table based on drug type and weight to set base offense levels for drug trafficking offenses. See USSG § 2D1.1(c). In setting offense levels for crack and powder cocaine, the Commission, in line with the 1986 Act, adopted the 100-to-1 ratio. The statute itself specifies only two quantities of each drug, but the Guidelines "go further and set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio." 1995 Report 1.

First, the Commission reported, the 100-to-1 ratio rested on assumptions about “the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.” *Ibid.*; see United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf (hereinafter 2007 Report) (ratio Congress embedded in the statute far “overstate[s]” both “the relative harmfulness” of crack cocaine, and the “seriousness of most crack cocaine offenses”).

Second, the Commission concluded that the crack/powder disparity was inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers. Drug importers and major traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers. See 1995 Report 66-67. But the 100-to-1 ratio can lead to the “anomalous” result that “retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced.” *Id.*, at 174.

Finally, the Commission stated that the crack/powder sentencing differential “fosters disrespect for and lack of confidence in the criminal justice system” because of a “widely-held perception” that it “promotes unwarranted disparity based on race.” 2002 Report 103. Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed “primarily upon black offenders.” *Ibid.*²

² The United States Sentencing Commission on several occasions has sought to achieve a reduction in the crack/powder ratio. In 1995, it proposed amendments to the Guidelines that would have replaced the 100-to-1 ratio with a 1-to-1 ratio. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed.Reg. 25075-25077 (1995). The United States Congress, acting pursuant to 28 U.S.C. § 994(p), rejected the amendments. See Pub.L. 104-38, § 1, 109 Stat. 334. Simultaneously, however, Congress directed the Commission to “propose

It is clear that there is no logical or justifiable reason for charging and sentencing an individual who possesses crack cocaine much longer than an individual who possesses or traffics in powder cocaine. Fortunately, the United States Supreme Court agreed in *Kimbrough v. United States* 128 S.Ct. 558, 169 L.Ed.2d 481.

In *US v. Kimbrough*, the United States Supreme Court recently addressed the disparity of sentences between crack versus powder cocaine and determined that trial courts could justifiably depart from the sentencing guidelines and justify such a departure on the basis of the disparity of sentences between crack versus powder cocaine.

In 2006, Federal District Court Judge Raymond A. Jackson,” sentenced Derrick Kimbrough, a Black Gulf War vet from Norfolk, Va., to what he believed a fairer punishment for selling both crack and powder, and possessing a firearm, calling the sentencing guidelines “ridiculous.” When Judge Jackson sentenced a crack dealer to 15 years in prison – instead of the mandatory minimum 19 to 22 years – he stirred a hornet’s nest over the role race plays in who goes to prison and for how long. Even though Kimbrough had much more powder than crack, it was crack that drew the lengthy sentence.

revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines.” § 2(a)(2), *id.*, at 335.

In response to this directive, the Commission issued reports in 1997 and 2002 recommending that Congress change the 100-to-1 ratio prescribed in the 1986 Act. The 1997 Report proposed a 5-to-1 ratio. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 2 (Apr.1997), http://www.ussc.gov/r_congress/newcrack.pdf. The 2002 Report recommended lowering the ratio “at least” to 20 to 1. 2002 Report viii. Neither proposal prompted congressional action.

The Commission’s most recent report, issued in 2007, again urged Congress to amend the 1986 Act to reduce the 100-to-1 ratio. This time, however, the Commission did not simply await congressional action. Instead, the Commission adopted an ameliorating change in the Guidelines. See 2007 Report 9. The alteration, which became effective on November 1, 2007, reduces the base offense level associated with each quantity of crack by two levels. See Amendments to the Sentencing Guidelines for United States Courts, 72 Fed.Reg. 28571-28572 (2007). This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. See *ibid.* Describing the amendment as “only ... a partial remedy” for the problems generated by the crack/powder disparity, the Commission noted that “[a]ny comprehensive solution requires appropriate legislative action by Congress.” 2007 Report 10.

Eventually, the cases made their ways to the United States Supreme Court which ruled in favor of the accused in *Kimbrough v. US*. In *Kimbrough*, the defendant was convicted of conspiracy to distribute powder and crack cocaine, and possession of a firearm in furtherance of a drug trafficking offense. At sentencing, Mr. Kimbrough faced a statutory mandatory 10 years for the crack and 5 years for the gun. The district court determined that Mr. Kimbrough's guideline range was 168-210 months for the crack, plus 60 months for the gun. Based, in part, on the disparity in sentences between crack and powder cocaine, the district court departed downward from the recommended guideline range, and imposed the mandatory 10 years for the crack, plus 5 years for the gun. The US government appealed and the Federal Fourth Circuit vacated the sentence based upon circuit precedent that a below-guideline sentence is *per se* unreasonable if based upon the crack/powder disparity. The Supreme Court granted *certiorari*.

Ultimately the *Kimbrough* Court held that the crack/powder disparity is an appropriate consideration for a district court in determining a sentence under 18 USC § 3553(a). The Court grounded its finding on the fact that the Sentencing Commission did not establish the 100:1 ratio between crack and powder punishments based on empirical data, as it did with other guideline provisions, but instead adopted the ratio based on the statutory, weight-driven, mandatory minimum and maximum sentences. Further, after the establishment of the 100:1 ratio, the Sentencing Commission repeatedly reported on its inequities, and encouraged Congress to act to change it. Thus, the Court concluded that a district court may consider any "unwarranted disparity created by the crack/powder ratio itself" in fashioning an appropriate sentence based upon the § 3553 factors.

In the *Kimbrough* case, the Court held that the district court imposed a reasonable sentence. Accordingly, the Fourth Circuit's ruling was reversed, and Mr. Kimbrough's reduced

sentence ordered by the trial court was reinstated. Shortly after the *Kimbrough* holding, the USSC met, conferred and ultimately published its decision that the *Kimbrough* holding should be applied retroactively to all effected federal prisoners. 19,600 federal prisoners will have their sentences reviewed and will likely be released earlier than originally ordered.

One may ask, “How does *Kimbrough* effect the State of Ohio?” To date, Ohio’s sentencing scheme still sentences Ohio crack cocaine offenders much harsher than powder cocaine offenders – unreasonably and unjustifiably.³ The following chart clearly reflects the disparity in sentences between crack and powder offenders mandated by Ohio law.

<u>POWDER</u>	<u>Felony Level</u>	<u>CRACK</u>	<u>Felony Level</u>
Less than 5 gms	F5	Less than 1 gm	F5
5 to 25 gms	F4	1 to 5 gms	F4
25 to 100 gms	F3	5 to 10 gms	F3
100 to 500 gms	F2	10 to 25 gms	F2
500 to 1000 gms	F1	25 to 100 gms	F1
1000+ gms	MDO	100+ gms	MDO

Ohio state law makes possession of only 25 grams of crack a first-degree felony, while it takes 500 grams -- or 20 times as much -- powder cocaine to trigger the same charge.

³ Several months ago, the Ohio Senate addressed the disparity of crack versus powder cocaine sentences faced by individuals accused of trafficking and/or possessing crack cocaine in Ohio. The Senate passed Senate Bill 73 which would eliminate the disparity in sentencing between crack and powder cocaine. Pursuant to Senate Bill 73, the sentences for powder cocaine would be raised to make the sentences as harsh as the sentences for crack cocaine. The measure is now before the Ohio House. However, no House Bill has passed to date. The Ohio Senate, by and through several of its members, has indicated that it does not believe that the passing of Senate Bill 73, will create even greater prison over crowding.

Furthermore, Ohio law mimics the federal law 100:1 ratio in the MDO range.⁴ Ohio law makes any cocaine sales offense an offense "for which there is a presumption of a prison term" and calls for mandatory minimum prison sentences for any cocaine sale of five grams or more of crack or 10 grams of powder cocaine. Even though, gram per gram, there is less cocaine in crack than there is in powder, Ohio and all other state governments continue to insist on charging and sentencing individuals who possess and/or traffic crack cocaine to much more time than those who possess and traffic in strictly powder cocaine.⁵ As the USSC and many studies have shown, this simply makes no sense and is not justified by any of the formerly cited misconceptions.

Ohio's cocaine laws, which result in an unreasonable and unfair disparity between the sentences and levels of felonies between crack and powder cocaine, are unconstitutional. Furthermore, there have been so many individuals who have been unconstitutionally and unfairly sentenced to much more time than individuals who were sentenced for the same thing – that being possessing and/or trafficking powder cocaine – just in a different form. Just as the federal laws have had a huge and negative impact on the African American race and culture, African Americans in Ohio are subject to the same disparity – by and through Ohio cocaine laws. African Americans – nationally and on this state level – are being subjected to unequal and unfair treatment.

Ohio cocaine law violates the Equal Protection Clauses of the United States and Ohio Constitutions. It is well established that a statutory classification that involves a suspect class or a fundamental right violates the Equal Protection Clauses of the Ohio and United States

⁴ If an Ohio defendant is convicted of possessing 100 or more grams of crack cocaine, he could be sentenced to as much as twenty years in prison. However, if that defendant possessed powder cocaine, the most prison time he could receive in Ohio would be eight years.

⁵ Crack cocaine is made by mixing powder cocaine, baking soda and water – boiling that mixture down to a solid and cracking the hard compounds into small "rocks." See <http://onemansblog.com/2007/02/21/how-crack-cocaine-is-made/>

Constitutions if the classification does not rationally related to a legitimate governmental interest. See *Klepper v. Ohio Bd. of Regents* (1991), 59 Ohio St.3d 131, 133, 570 N.E.2d 1124. Although Ohio cocaine laws do not expressly discriminate against any class of persons, said laws are therefore facially constitutional. See *State v. Bryant*, 2nd Dist. No. 16809, 1998 Ohio App. Lexis 3308. Because there is no fundamental right to possess cocaine or crack cocaine, Ohio's cocaine laws are constitutional if they bear a rational relationship to a legitimate governmental interest. Under this rational basis test, statutes would be upheld if they bear a rational relationship to a legitimate governmental interest. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361, 363, 653 N.E.2d 212.

Although Ohio cocaine laws may not be facially unconstitutional, what civil rights activist and advocates for racial equality have been arguing for over two decades is finally being recognized – **crack is only different from powder in form.** It is no more dangerous or addictive than powder cocaine. Ohio cocaine laws fall short in that **THERE IS NO RATIONAL BASIS FOR SENTENCING CRACK COCAINE OFFENDERS HARSHER THAN POWDER COCAINE OFFENDERS!** Ohio cocaine laws miserably fail the constitutionally mandated rational basis test and therefore, should be called what they are – unconstitutional! A remedy must be fashioned to stop this most egregious constitutional violation from continuing. Ohio law, per R.C. 2953.23 provides such a remedy.

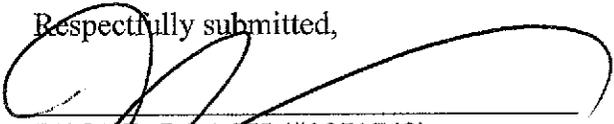
In the matter at hand, and finally after twenty years of the application of the unjustified disparity between crack and cocaine sentences, the United States Supreme Court recognized that the disparity existed and charged that it is unjustified and unfair in *Kimrough v. US*. Shortly after the holding in *Kimrough*, the United States Sentencing Commission - which dictates

sentencing policies and guidelines for the federal government - determined that the sentences of almost 20,000 federal prisoners should be amended and reduced – to correct an injustice.

Ohio, by and through its Courts, must now correct an injustice – or rather many many injustices. Furthermore, Courts must recognize the inevitable, that crack cocaine and powder are one and the same and only differ in form. To refuse to correct the injustice suffered by thousands of incarcerated Ohio citizens would result in a tragedy and the loss of thousands of years in human life, not to mention the enormous costs to Ohio tax payers. In addition, to uphold such sentences - which have resulted in severe racial discrimination - would equate to the thousands of individuals' continued suffering from that discrimination.

Mr. Smith is a victim of Ohio's sentencing statutes which require much lengthier sentences for individuals convicted of crack cocaine offenses compared to individual convicted of powder cocaine offenses. This injustice must be corrected. WHEREFORE, based on the foregoing, Mr. Smith moves this Court to accept the present case and address the injustices at hand.

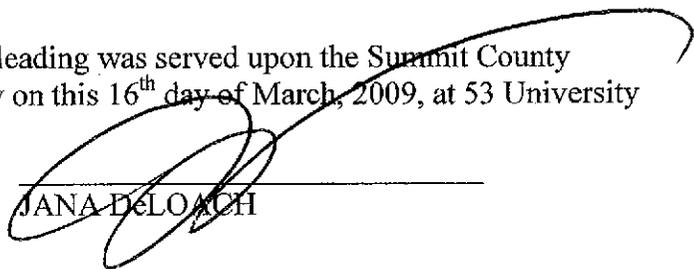
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served upon the Summit County Prosecutor's office by way of hand delivery on this 16th day of March, 2009, at 53 University Drive, Akron, Ohio 44308.



JANA DeLOACH

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
DANE H. MONTGOMERY
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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

TONY D. SMITH

and

OMONDO J. VARNER

Appellants

SUMMIT COUNTY
CLERK OF COURTS

C.A. Nos 24246 & 24247

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos CR 01 12 3343(A)
CR 01 12 3343(B)

DECISION AND JOURNAL ENTRY

Dated: January 28, 2009

SLABY, Judge.

{¶1} Defendants-Appellants, Omondo Varner and Tony Smith, appeal the judgments of the Summit County Court of Common Pleas that denied their respective motions for resentencing. We affirm.

{¶2} On December 26, 2001, Smith and Varner were indicted on charges of possession of cocaine in violation of R.C. 2925.11(A); illegal manufacture of drugs in violation of R.C. 2925.04(A); having weapons while under a disability in violation of R.C. 2923.13(A)(2)/(3); and illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1). Varner was also indicted on one charge of trafficking in cocaine in violation of R.C. 2925.03(A)(1) which was later dismissed. The case proceeded to jury trial with respect to both defendants, and both were found guilty. The trial court sentenced each to eighteen years of incarceration. Both

appealed, and this Court affirmed their convictions. *State v. Smith*, 9th Dist. No. 21069, 2003-Ohio-1306; *State v. Varner*, 9th Dist. No. 21056, 2003-Ohio-719.

{¶3} On March 15, 2006, Smith filed a pro se “petition to vacate or set aside void judgment pursuant to R.C. 2953.21,” arguing that the decision of the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, rendered his sentence void. The trial court construed his petition as an untimely petition for postconviction relief and denied it on June 15, 2006. Smith appealed that judgment, but voluntarily dismissed the appeal soon after it was filed.

{¶4} On July 26, 2007, Smith and Varner each filed a pro se petition for postconviction relief. These petitions argued that the trial court had failed to advise the defendants of postrelease control at the time of sentencing, and requested that the trial court correct their sentences. The State of Ohio responded to each petition by conceding error and, with respect to each, “submit[ted] that defendant is entitled to a new sentencing hearing on all offenses.” The trial court scheduled resentencing hearings for each defendant, and both were conveyed to the Lorain Correctional Institution to await resentencing. Prior to the April 22, 2008, hearing, the defendants filed sentencing memoranda that elaborated on their postrelease control claims and argued, for the first time, that the trial court was also required to resentence them pursuant to *Kimbrough v. United States* (2007), 552 U.S. _____, 128 S.Ct. 558.

{¶5} On April 14, 2008, this Court released its decision in *State v. Price*, 9th Dist. No. 07CA0025, 2008-Ohio-1774. Shortly thereafter, the State withdrew its earlier responses and urged the trial court, in reliance on *Price*, to cancel the resentencing hearings and deny Smith’s and Varner’s petitions as untimely motions for postconviction relief. On May 6, 2008, with respect to each defendant, the trial court “denie[d] the Defendant’s motion for resentencing.” Smith and Varner timely appealed. Because Smith and Varner have assigned the same errors,

their appeals have been consolidated for purposes of disposition. Their assignments of error are considered in reverse order.

ASSIGNMENT OF ERROR II

“The trial court erred in denying the [Defendants’] request for resentencing based on the Supreme Court of Ohio’s holdings in *State v. Bezak* (2007), 114 Ohio St.3d 94, [2007-Ohio-3250] and *State v. Simpkins* (2008), 117 Ohio St.3d 420[, 2008-Ohio-1197].”

{¶6} Smith’s and Varner’s second assignment of error is that the trial court erred by denying their motions for resentencing. They have argued that *Simpkins* entitled them to new sentencing hearings, but have not explained why this Court should disregard *Price*, 2008-Ohio-1774.

{¶7} In *Simpkins*, the Supreme Court of Ohio held that “In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” *Id.* at syllabus. In so holding, the Court noted its unwillingness to apply the doctrine of res judicata to collateral attacks on void sentences. *Id.* at ¶30.

{¶8} In *Price*, however, this Court considered a different issue. In that case, the defendant filed a motion for resentencing after his direct appeal. The defendant’s motion alleged that the trial court failed to advise him of his postrelease control obligations at sentencing. This Court concluded that his motion was properly classified as a petition for postconviction relief and was subject to the corresponding jurisdictional requirements:

“A motion that is not filed pursuant to a specific rule of criminal procedure ‘must be categorized by [the] court in order for the court to know the criteria by which the motion should be judged.’ ‘Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her

sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.’

“Despite its caption, Mr. Price’s motion for resentencing meets the definition of a petition for postconviction relief under Section 2953.21(A)(1) of the Ohio Revised Code. Mr. Price filed it subsequent to his direct appeal, claimed a denial of his constitutional rights, asked for a vacation of his sentence, and sought recognition that the trial court’s judgment is void. Mr. Price’s motion did not indicate that it was an application for a writ of habeas corpus under Section 2725.04 or meet the requirements of that section.” (Internal citations omitted.) *Price*, 2008-Ohio-1774, at ¶4-5.

As in *Price*, Smith and Varner filed their motions after their direct appeals, claimed a denial of their constitutional rights, asked the trial court to vacate their sentences, and maintained that those sentences were void. Despite their caption, the motions are properly classified as petitions for postconviction relief. See *id.* at ¶5.

{¶9} Smith’s and Varner’s motions are therefore subject to the jurisdictional requirements of R.C. 2953.21(A)(2), which provides that a petition for postconviction relief must be filed “no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication[.]” R.C. 2953.23(A)(1)(a) “prohibits the trial court from hearing an untimely or successive petition unless the petitioner ‘was unavoidably prevented’ from discovering the facts upon which he relies, or, after the 180 day time limit, ‘the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation[.]’” *State v. Smith*, 9th Dist. Nos. 07CA009220, 07CA009252, 2008-Ohio-3589, at ¶5, quoting R.C. 2953.23. See, also, *Price* at ¶6.

{¶10} The record in Smith’s and Varner’s direct appeals was filed on August 29, 2002. Their motions were filed almost five years later, well beyond the time limit set forth in R.C. 2953.21(A). In addition, Varner’s motion was his second petition for postconviction relief. See

R.C. 2953.23(A)(1)(a). Neither Smith nor Varner alleged that he was unavoidably prevented from discovering the facts upon which his petition relied, and the allegations in the petitions did not rest upon a right newly recognized by the United States Supreme Court. Consequently, the trial court lacked jurisdiction to consider the untimely and, with respect to Varner, successive, petitions. Smith's and Varner's second assignments of error are overruled.

ASSIGNMENT OF ERROR I

"The trial court erred in refusing to resentence the [Defendants] must be resented [sic] pursuant to the holdings of *Kimbrough v. United States*, which recognizes that there is no logical or legal basis for the disparity of sentencing between crack and powder cocaine offenses."

{¶11} Smith's and Varner's first assignments of error argue that the trial court was required to resentence them in response to the United States Supreme Court's opinion in *Kimbrough*, 552 U.S. , 128 S.Ct. 558. Smith and Varner raised these arguments for the first time in sentencing memoranda filed in the trial court on March 31, 2008. Assuming that this issue was presented to the trial court as an untimely petition for postconviction relief, we conclude that the jurisdictional requirements of R.C. 2953.21 were not satisfied.

{¶12} This Court recently considered the implications of *Kimbrough* and concluded that the case did not recognize a new federal or state right that applies retroactively. *State v. Horne*, 9th Dist. No. 24271, 2008-Ohio-6932. In *Horne*, we concluded:

"Horne, relying on *Kimbrough*, asserts that Ohio courts 'must [] correct an injustice' by resentencing crack cocaine offenders who were unjustly sentenced to more severe sentences than powder cocaine offenders. We find no merit in this contention. While the Supreme Court in *Kimbrough* discussed 'concerns about disparity in sentencing of powder cocaine versus crack cocaine at the federal level, it did not alter federal or state sentencing guidelines or statutes.' Accordingly, the Supreme Court's 2007 holding in *Kimbrough* does not apply to Horne's sentencing. Horne's case was not pending on direct appeal at the time *Kimbrough* was released. 'More importantly, *Kimbrough* did not modify or alter federal crack cocaine sentencing. As such, it does not mandate modification of [Horne's] sentence regardless of retroactive versus prospective application

arguments.' Rather, the Supreme Court held that pursuant to *United States v. Booker*, 543 U.S. 220, the cocaine guidelines, like all other guidelines, are advisory only. The Supreme Court found that the Fourth Circuit erred in essentially making mandatory the disparity in sentencing between crack and powder cocaine sentences. The Court determined that a district judge must include the sentencing guidelines range in the multitude of factors warranting consideration; it did not hold that the sentences were required to be the same." *Horne*, 2008-Ohio-6932, at ¶10, quoting *State v. Jackson*, 6th Dist. No. L-08-1098, 2008-Ohio-3700, at ¶10-11.

This Court declines to revisit our conclusion in *Horne*. Accordingly, because Smith's and Varner's petitions did not assert a right newly-recognized by the United States Supreme Court and did not demonstrate that they were unavoidably prevented from discovering the facts upon which the petitions relied, the trial court did not err in denying the petitions. Smith's and Varner's first assignments of error are overruled.

{¶13} Smith's and Varner's assignments of error are overruled. The judgments of the trial court are affirmed.

Judgments affirmed.

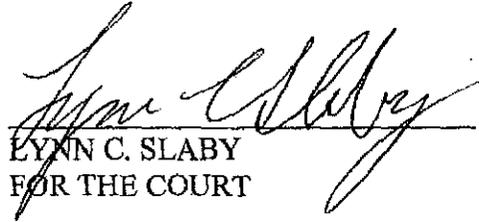
The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.


LYNN C. SLABY
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellants.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.