SENTENCING SYNTHETIC CANNABINOID OFFENDERS: "NO COGNIZABLE BASIS"

Brad Gershel*

Application of the United States Sentencing Commission Guidelines ("Guidelines") to smokable synthetic cannabinoids ("SSC") produces distinct but familiar inequities in the criminal justice system. Calling to mind the crack-to-cocaine disparity that belied the rights of countless defendants, the federal government has yet to rectify a Guidelines rule that was promulgated without scientific basis or empirical support.[1] As prosecutions for SSC accelerate—and in the absence of swift and meaningful reform—federal courts will continue to sentence defendants via a base-offense range that was never justified.

SSC, often referred to as "K2" or "Spice," are designer drugs intended to mimic the "high" of tetrahydrocannabinol ("THC").[2] The most common method of delivery is "potpourri"—a mixture of a synthetic cannabinoid and inert plant material intended to be smoked. There is no question SSC is dangerous. In August 2015, then-New York City Police Commissioner Bill Bratton described SSC as "weaponized marijuana," potentially making users "totally crazy," exhibiting "superhuman strength" and becoming "impervious to pain."[3] In 2015, poison centers reported 3572 calls and fifteen deaths related to the drug; "a 229% increase from the 1,085 calls during the same January–May period in 2014."[4] In short order, use of SSC has given birth to a public health crisis[5] and both

* Associate, Ballard Spahr LLP. J.D., Emory University School of Law.

[1] *See* United States v. Malone, 828 F.3d 331, 338 (5th Cir. 2016) (affirming application of the Guidelines rule despite experts' testimony that the rule has no scientific basis). "As we have said before, '[e]mpirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them.'" *Id.* (alteration in original).

[2] Both SSC and THC (the psychoactive ingredient found in marijuana) have the effect of binding to and activating the brain's CB_1 receptor. Liana Fatoore & Walter Fratta, *Beyond THC: The New Generation of Cannabinoid Designer Drugs*, 5 FRONTIERS BEHAV. NEUROSCI., Sept. 2011, at 3.

[3] *Bratton: Synthetic Marijuana Gives Homeless Users 'Superhuman Strength,' Makes Them 'Impervious to Pain,'* CBS NEW YORK (Aug. 14, 2015), http://newyork.cbslocal.com/2015/08/04/bratton-synthetic-marijuana-gives-homeless-users-superhuman-strength-makes-them-impervious-to-pain/.

[4] Royal Law, Josh Scier, Colleen Martin, Arthur Chang & Amy Wolkin, *Notes from the Field: Increase in Reported Adverse Health Effects Related to Synthetic Cannabinoid Use—United States, January–May 2015*, CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT (June 12, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6422a5.htm.

[5] *See* Eli Rosenberg & Nate Schweber, *33 Suspected of Overdosing on Synthetic Marijuana in Brooklyn*, N.Y. TIMES (July 12. 2016), http://www.nytimes.com/2016/07/13/nyregion/k2-synthetic-marijuana-overdose-in-

federal and state legislatures and law enforcement agencies have prioritized cracking down on the drug.[6] Federal regulation of the drug reached its apex in 2012, when Congress permanently placed SSC into Schedule I of the Controlled Substances Act.[7]

Despite the drug's highest classification in the federal drug schedule (alongside heroin), it remains unlisted in the Guidelines.[8] In its place, judges must determine the Guidelines-recommended sentence by the marijuana-equivalency ratio[9] for SSC's most closely related controlled substance.[10] In short, judges must make factual findings to determine

---

brooklyn.html?_r=0 ("In 2015, New York City had more than 6,000 emergency room visits involving the drug and two deaths, according to the health department."); Melissa Pamer, *Synthetic Marijuana Creating 'Public Health Crisis' in Skid Row: LAFD Medical Director*, KTLA 5 (Aug. 22, 2016, 1:53 PM), http://ktla.com/2016/08/22/lafd-again-responds-to-skid-row-for-multipatient-incident-likely-involving-illicit-substance/.

[6] *E.g.*, Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Defendant-Appellant at 22, United States v. Lababneh, No. 15-2070-cr, 2016 WL 1612979 (2d Cir. Apr. 22, 2016) ("In January 2014, the U.S. Drug Enforcement Administration ('DEA') launched an initiative targeting the possession and distribution of synthetic drugs, leading to over 150 arrests in 29 states within several months," and "[i]n September 2015, the DEA, Department of Homeland Security, New York Police Department, and New York City Sheriff's Office raided 80 locations throughout New York City, indicting and arresting a number of individuals in connection with synthetic marijuana.").

[7] Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 126 Stat. 1130, 1130–32 (2012) (to be codified at 21 U.S.C. § 812). Schedule I controlled substances are defined as having no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse. 21 U.S.C. § 812(b)(1) (2012).

[8] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c), cmt. n. 8(D) (U.S. SENTENCING COMM'N 2015). Under the Guidelines, a narcotic offender's base offense level is determined by reference to either the Drug Quantity Table ("DQT") or Drug Equivalency Table ("DET"), which recommend a base offense level by reference to weight-based quantities of specified controlled substances. Neither the DQT nor the DET includes all known controlled substances; merely those more commonly used.

[9] U.S.S.G. § 2D1.1 cmt. n.6. Under the Guidelines, a controlled substance not listed in either the DQT or DET must be converted into a corresponding quantity of its organic counterpart.

[10] *Id.* The Guidelines specifically state that

> In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following: (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline; (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline; (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a

whether a controlled substance referenced in the Guidelines is "substantially similar" to SSC's chemical structure, pharmacology and potency level.[11] Here, the government routinely argues that SSC is most closely related to *pure* THC.[12] Under the Guidelines, the marijuana-equivalency ratio of pure THC to marijuana is 1:167 (the "Ratio").[13] In other words, each gram of SSC at issue is sentenced as 167 grams of marijuana.

At first blush, one might assume that the Ratio was promulgated with a strict rationale that, *inter alia*, lays a groundwork for the "167" figure. On its face, the figure implies that one gram of marijuana contains 0.6% THC. Yet, for marijuana commonly distributed at the time the Ratio was initially enacted, THC percentages were closer to 4.7% per gram of marijuana, with today's yields hovering near 14% of THC per gram of marijuana.[14] To be sure, the Guidelines indicate that drug equivalences "do not necessarily reflect" a dosage based on its "pharmacological equivalent."[15] However, this note likely refers to equivalences decided by Congress, as was the case with the 1:100 crack-to-cocaine ratio.[16]

With this in mind, the Commission failed to support the Ratio with any explanatory note or scientific data.[17] Sadly, given the agency's tenuous obligations under the Administrative Procedure Act ("APA"),[18] it largely

---

> substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

Id.

[11] *Id.*

[12] *See generally K2/Spice*, DRUGS OF ABUSE: A DEA RESOURCE GUIDE, 2015, at 64 ("K2 and Spice are just two of the many trade names or brands for synthetic designer drugs that are intended to mimic THC…"); Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Defendant-Appellant at 2, United States v. Lababneh, No. 15-2070-cr, 2016 WL 1612979 (2d Cir. Apr. 22, 2016) (in preparing defendant's presentence investigation report, the Department of Probation described an SSC as a chemical compound that mimics THC); United States v. Ramos, 814 F.3d 910, 914 (8th Cir. 2016) (the government called an expert to testify that SSC is substantially similar to THC); United States v. Hossain, No. 15-cr-14034, 2016 WL 70583, at *2 (S.D. Fla. Jan. 5, 2016) ("[t]he government argued, with the support of Dr. Trecki, that [a SSC] is most closely related … to 'THC'").

[13] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 8, § 2D1.1 cmt. n.8.

[14] Fidelia Cascini, Carola Aiello & GianLuca Di Tanna, *Increasing Delta-9-Tetrahydrocannabinol (Δ-9-THC) Content in Herbal Cannabis Over Time: Systematic Review and Meta-Analysis*, 5 CURRENT DRUG ABUSE REVS. 32, 32–40 (2012).

[15] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 8, § 2D1.1 cmt. n.8(B).

[16] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841(b)(1) (1988)).

[17] *See, e.g.*, United States v. Hossain, No. 15-cr-14034, 2016 WL 70583, at *5 (S.D. Fla. Jan. 5, 2016) ("I find it troubling that there does not seem to be any reason behind the 1:167 ratio . . . It appears to have been included in the first set of Guidelines in 1987, with no published explanation.").

[18] Kate Smith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*,

failed to provide explanations or supporting empirical data for *any* of the rules it published.[19] To be sure, while the Commission is subject to the APA's notice and comment requirements,[20] the statute's judicial review provisions do not apply to the Commission's published rules,[21] and from its creation until 1996, the Commission worked without rules to govern its own internal practices and procedures.[22] Unfortunately, the absence of internal procedures and judicial review created an environment that manifested a stark departure from traditional rulemaking.[23] For these reasons, the Commission has been the subject of withering criticism[24] for drafting "administrative diktats."[25]

The problems associated with the absence of explanatory content and judicial review are further compounded by the political and social context within which the Guidelines were drafted. By the 1980s, faith in indeterminate sentencing and the theory of rehabilitating defendants gave way to "limited" retribution, or a belief that punishments should be

---

91 NW. U. L. REV. 1247, 1271 n.98 (1997).

[19] *Id.* at 1256 n.29, 1271 ("[T]he Commission has never sought to explain or justify the particular factors it chose as relevant (and not relevant) to sentence severity . . . Neither in proposing particular guidelines nor in ultimately promulgating them does the Commission explain *why* it is doing what it does."); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 535 (2007) ("Without social scientific studies, much less an adequate explanation, the Commission invented entirely new criteria for sentencing . . . There were minimal hearings, little or no legislative history.").

[20] 28 U.S.C. § 994(x) (2006) (applying the informal rulemaking procedures of the APA, codified at 5 U.S.C. § 553 (1988), to the Commission).

[21] *See* United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991) (holding that the Commission is exempt from the APA's judicial review provisions).

[22] *See* Rules for Practice and Procedure, 61 Fed. Reg. 52,825 (Oct. 8, 1996); Rules for Practice and Procedure, 61 Fed. Reg. 39,493 (July 29, 1996).

[23] *See, e.g.*, Ronald F. Wright, *Amendments in the Route to Sentencing Reform*, CRIMINAL JUSTICE ETHICS, Winter/Spring 1994, at 58, 64 ("While most rulemaking agencies provide thorough explanations of their final rules, including the factual evidence supporting the rule . . . the commission's explanations for its final guidelines are strikingly terse and conclusory."); Smith & Cabranes, *supra* note 18, at 1271 ("Neither in proposing particular guidelines nor in ultimately promulgating them does the Commission explain *why* it is doing what it does"); Gertner, *supra* note 19, at 535 ("Without social scientific studies, much less an adequate explanation, the Commission invented entirely new criteria for sentencing . . . There were minimal hearings, little or no legislative history.").

[24] Smith & Cabranes, *supra* note 18, at 1256 n.29, 1271 ("[T]he Commission has never sought to explain or justify the particular factors it chose as relevant (and not relevant) to sentence severity . . . Neither in proposing particular guidelines nor in ultimately promulgating them does the Commission explain *why* it is doing what it does"); Gertner, *supra* note 19, 535 (2007) ("Without social scientific studies, much less an adequate explanation, the Commission invented entirely new criteria for sentencing . . . There were minimal hearings, little or no legislative history").

[25] Kate Smith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1271 (1997).

commensurate with the seriousness of the crime.[26] As "tough-on-crime" talk percolated throughout all levels of government, the Commission drafted a set of decidedly pro-prosecution rules with sentences that were far more punitive than ever before.[27] The resulting explosion in federal incarceration rates in the decades that followed[28] has inspired some recent significant reforms.[29] For example, in 2014, the Justice Department announced an initiative to "encourage" qualifying federal inmates to petition for a commutation,[30] with the selective criteria aimed at non-violent drug offenders who, under today's sentencing regime, would likely have received a substantially lower sentence.[31] As of October 28, 2016, the Obama Administration granted 583 commutation petitions in 2016 alone, a figure that more than doubles the total number of commutations granted from the years 1967 through 2014.[32] In spite of these developments, the Ratio remains untouched and, given the uptick in prosecutions involving the drug and recent political discourse at the state and federal level,[33] is likely to remain a non-priority.

Given the Ratio's lack of scientific and empirical support, it is disconcerting that the government advocates so strongly for its application. In the first instance, however, it is far from settled whether SSC is fairly classified as *pure* THC. As described above, because SSC is not specifically referenced in the Guidelines, to establish a defendant's

---

[26] *See, e.g.*, S. REP. NO. 98-225, at 38 (1983) ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.").

[27] *See* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, Or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 701 (2010) (noting the guidelines were far more punitive than past sentencing and based on "limited" and "skewed" data); Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 610 (2005).

[28] *See* Mauer, *supra* note 27, at 610.

[29] David Cole, *Turning the Corner on Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 27, 29–30 (2011).

[30] James M. Cole, U.S. Deputy Attorney Gen., Remarks as Planned for Delivery at the Press Conference Announcing the Clemency Initiative (April 23, 2014).

[31] *Id.*

[32] *Clemency Statistics*, U.S. DEP'T OF JUST. (updated Jan. 3, 2017), https://www.justice.gov/pardon/clemency-statistics.

[33] In response to the rise of overdoses over the summer months of 2016, see *Bratton*, *supra*, note 3. *See also* CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 4; Rosenberg & Schweber, *supra* note 5, elected officials have declared a public health crisis and proposed new legislation aimed at curbing its use; *see also e.g.*, Press Release from Sen. Chuck Schumer, Dem., N.Y. (July 29, 2016) *available at* https://www.schumer.senate.gov/newsroom/press-releases/with-dangerous-k2-sales-popping-up-in-the-finger-lakes-and-the-southern-tier-schumer-introduces-new-legislation-to-make-chemicals-in-k2-drug-illegal-recent-scourge-in-binghamton-and-upstate-ny-demands-action-to-cripple-chemists-that-cook-up-batches-of-deadly-synthetic-drugs.

base offense level, courts are mandated to consider a three-factor inquiry to find SSC's most closely related controlled substance already referenced in the Guidelines.[34] With respect to the first factor (parity of chemical structures), the government does not dispute that SSC and THC are chemically dissimilar.[35] With respect to the second factor (parity of pharmacological effects), the government's rationale hinges on "drug discrimination studies" that evaluate the interaction of THC and SSC in laboratory animals.[36] Based on the results of these studies, SSC and THC affect the central nervous system in a substantially similar way; both substances produce a euphoric effect, cause heart palpitations and have the potential to cause hallucinations, psychoses and severe agitation.[37] However, in at least two instances, a defendant has challenged these studies on grounds that they are unreliable.[38] In one of these instances, the Fifth Circuit was presented with the argument that, pursuant to Circuit precedent, animal studies cannot provide meaningful insight into the effects of human users.[39] Ultimately, the court distinguished its prior decision on grounds that the case at bar dealt with factfinding at *sentencing*, and not trial. Given that, under the Guidelines, the standard for admitting evidence at sentencing is "substantially lower" than at trial,[40] animal studies may provide sufficient indicia of reliability to form a basis of fact.[41]

As at least one federal judge has noted, equating SSC with *pure* THC runs afoul of the plain language of the Guidelines.[42] In particular, THC is

---

[34] *See supra* note 8.

[35] *E.g.*, United States v. Ramos, 814 F.3d 910, 918 (8th Cir. 2016) ("[S]ynthetic cannabinoids do not have a chemical structure similar to either THC or marijuana."); United States v. Hossain, No. 15-cr-14034, 2016 WL 70583, at *5 (S.D. Fla. Jan. 5, 2016) (acknowledging same).

[36] *See, e.g.*, Transcript of Evidentiary Hearing held on January 14, 2014 at 28:16, United States v. John Tebbetts, No. 12-cr-567 (N.D.N.Y. 2014); *Hossain*, 2016 WL 70583, at *2.

[37] *See, e.g.*, Transcript of Evidentiary Hearing held on January 23, 2015 at 75:23; United States v. Mary Ramos, No. 13-cr-2034 (N.D. Iowa 2015).

[38] *Hossain*, 2016 WL 70583; United States v. Malone, 828 F.3d 331, 336 (5th Cir. 2016).

[39] *Malone*, 828 F.3d at 336.

[40] U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (U.S. SENTENCING COMM'N 2004).

[41] *Malone*, 828 F.3d at 336–37.

[42] United States v. Ramos, 814 F.3d 910, 923–24 (8th Cir. 2016) (Bright, J., concurring in part and dissenting in part). Judge Bright took issue with the majority's view that plant material should not be considered in conjunction with SSC, given its description in the CSA as SSC and not SSC "potpourri." In particular, this view rests upon three words in the third factor of the "substantially similar" test: namely the words "the controlled substance." For Judge Bright, limiting the interpretation of the statute to three words does not take into account "the language and design of the [Guidelines] as a whole. In the context of this factor, the Guidelines clearly state that consideration of plant material should be given when assessing which THC-based controlled substance is "most closely related" to a THC analogue. *Id.*

listed as *both* an individual controlled substance and as the psychoactive ingredient for a distinct number of controlled substances.[43] Critically, the distinction between these substances (which informs the corresponding base-offense level) is the *amount of apparent plant material.*[44] A controlled substance that contains "less" plant material is conferred a smaller base-offense range, whereas a substance that contains "more" plant material is conferred a larger one.[45] As described earlier, SSC is traditionally distributed as potpourri (a mixture of a synthetic cannabinoid *and* inert plant material) and, as recently as 2011, was described by the DEA as having similar "psychological effects" to those of marijuana.[46] Yet, in every published federal case that has dealt with this question, the government has argued (and the courts have agreed) that SSC is substantially similar to, *e.g.*, *pure* THC (a chemical substance that contains no plant material).[47] These decisions are grounded, in part, on the isolation of SSC from the plant material contained in the potpourri.[48] In this vein, just as THC is the active ingredient in marijuana, SSC is the active ingredient in potpourri, and spraying SSC onto inert plant material "would not change [SSC]'s nature, character, or potency."[49]

To be sure, some courts have upheld the Ratio, but this does not detract from the argument that the Ratio itself is unsupported by reasoning or empirical data. *Ramos* and *Malone* were decisions merely affirming lower courts' classifications of SSC as THC upon a review of *clear error*, and during a stage of litigation with relaxed evidentiary standards.[50] As Judge

---

[43] *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) n.H (U.S. SENTENCING COMM'N 2015) (Hashish defined as a resinous substance of cannabis that includes THC *and at least two* additional substances) (emphasis added), *with* Schedules of Controlled Substances, 21 C.F.R. § 1308.11(d)(31) (2016) (Tetrahydrocannabinols listed as a distinct Schedule I substance).

[44] The marijuana equivalency ratio under U.S SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.8(D) (U.S. SENTENCING COMM'N 2015) increases as the amount of plant material decreases. For example, marijuana (listed under *id.* as 1:1 ratio) is described as "all parts of the plant Cannabis sativa L," 21 U.S.C. § 802(16); Cannabis Resin or Hashish (listed under U.S SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.8(D) (U.S. SENTENCING COMM'N 2015) as 1:5 ratio) contains "fragments of plant material," § 2D1.1(c) n.H; and Hashish Oil (listed under § 2D1.1 cmt. n.8(D) as 1:50 ratio) is described as "essentially free of plant material," § 2D1.1(c) n.H.

[45] U.S SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.8(D) (U.S. SENTENCING COMM'N 2015)

[46] *Drugs of Abuse: A DEA Resource Guide*, DEP'T OF JUSTICE, DRUG ENF'T AGENCY 64–65 (2011) https://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf.

[47] *E.g.*, United States v. Ramos, 814 F.3d 910, 919 (8th Cir. 2016); United States v. Carlson, 810 F.3d 544, 556 (8th Cir. 2016); United States v. Malone, 828 F.3d 331(5th Cir. 2016); United States v. Hossain, No. 15-cr-14034, 2016 WL 70583, at *4 (S.D. Fla. Jan. 5, 2016).

[48] *See, e.g.*, *Ramos*, 814 F.3d at 918.

[49] *Id.* at 919.

[50] *Ramos*, 814 F.3d at 919 (finding no "clear error" in the district court's calculation using a 1:167 marijuana-equivalency ratio); *Malone*, 828 F.3d at 336–37 (holding that

Middlebrooks noted in a separate opinion where she departed from the Ratio, "a sentence based on a range that seems to have no cognizable basis is not just."[51] In lieu of promulgating SSC-specific base-offense ranges that cater to the unique characteristics and considerations of the substance, federal courts have,[52] and will likely continue[53] to impose astoundingly lengthy terms of incarceration. Unless and until there is an act of either Congress or the Commission to promulgate reasonable SSC-specific base-offense levels, defendants will be left at the mercy of judges who may or may not give deference to this rationally devoid rule.

---

the district court's ruling on THC's most closely related controlled substance is a factual finding and that "[t]he appropriate standard regarding the admissibility of evidence at sentencing is substantially lower than that governing admissibility at trial.").

[51] *Hossain*, 2016 WL 70583 at *5.

[52] *See*, *e.g.*, *Malone*, 828 F.3d at 331 (affirming a 117-month sentence of incarceration based upon the Ratio, despite a concession from the government that there is no underlying scientific basis).

[53] A simple but significant indicium is that, despite the now-discretionary status of the Guidelines, most sentences continue to fall within the recommended range. *See* Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *see also* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and Blind Spot" Biases In Federal Sentencing: a Modest Solution For Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 521 (2014) ("The gravitational pull of the Guidelines appears to be so strong that the change from mandatory to advisory Guidelines has had little to no impact on the average length of federal sentences."). Additionally, as a sentence imposed within the Guidelines range is entitled to a presumption of reasonableness, little recourse may be found on appeal. *See* Rita v. United States, 551 U.S. 338, 338 (2007).