fd.org
Defender Services Office
TRAINING DIVISION

Login

Search

Training Events | Program Materials and Videos | Criminal Defense Topics | Litigation Support | Capital Defense Training | Employment

The Defender Services Office Training Division furthers the right to effective assistance of counsel by providing training and other resources to attorneys appointed under the Criminal Justice Act.

HOTLINE
for CJA Attorneys
800-788-9908

Training Events

TECHNIQUES IN ELECTRONIC CASE MANAGEMENT

REGISTER HERE

SEPTEMBER 06 - 08, 2018

MINNEAPOLIS, MINNESOTA

Upcoming Training Events

2018 AUG 30
WEBINAR: DIMAYA PART 4: ANALYZING DIMAYA'S IMPACT ON IMMIGRATION CASES (LIVE REPEAT)
Registration Closed

2018 SEP 5 - 7
APPELLATE WRITING WORKSHOP FOR FEDERAL DEFENDERS
Washington, District of Columbia

2018 SEP 27 - 28
NON-CAPITAL HABEAS CONFERENCE
New Orleans, Louisiana
Register Here
Final Agenda

2018 OCT 18 - 20
TRAIN THE TRAINERS WORKSHOP
Baltimore, Maryland
Register Here
Draft Agenda | Financial Assistance Application

ALL TRAINING

Latest News

August 27, 2018
Ninth Circuit Holds California Robbery Is Not A Crime Of Violence

August 3, 2018
DC Circuit Holds Residual Clause of 18 U.S.C. § 924(c) Unconstitutionally Vague Post Dimaya

July 2, 2018
Ninth Circuit Rejects Use Of Statements In Co-Conspirator's Plea Agreement To Determine A Defendant's Drug-Quantity Liability

July 2, 2018
Supreme Court Grants Certiorari In Double Jeopardy Case To Examine Convictions By "Separate Sovereigns"

June 25, 2018
Supreme Court Issues Fractured Decision On Double Jeopardy

ALL NEWS

Featured Criminal Defense Topics

Sentencing Resources
Materials that will help you argue for the best sentence possible for your clients.

Immigration Consequences of Conviction
Important resources for representing noncitizens in any case.

Immigration & Offenses Involving Noncitizens
Defenses and sentencing arguments in illegal re-entry and illegal entry, harboring, smuggling, and transporting cases.

ALL TOPICS

CJA Practitioner Resources

- Federal Defender Office Blogs, Websites, and Defender Directory
- CJA Panel Attorney District Representatives
- CJA Guidelines
- CJA Forms/Vouchers
- CJA Compensation Rates & Maximums
- Supreme Court Advocacy Assistance

ALL RESOURCES

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
DEFENDER STAFF PROGRAMS			
Community Defender Organization Board Leadership Meeting	Discusses common leadership and management issues and challenges and strategies for addressing them.	Oct. 21-23, 2018 San Diego, CA	45
Orientation Seminar for New Assistant Federal Defenders	Focuses on a basic introduction to federal criminal law for new assistant federal defenders.	Nov 5-9, 2018	120
Federal Defender Conference	Conference for heads of offices	Feb. 27-28, 2019 San Diego, CA	130
Federal Defender Supervisory Leadership Training	Addresses leadership skills for federal defender office managers and supervisors including non-attorney supervisors.	April 2019 Las Vegas, NV	250
Federal Defender Capital Habeas Unit Conference	Addresses office and case management practices, as well as substantive capital habeas issues.	April 3-5, 2019 Mobile, Alabama	175
Computer Systems Administrators Conference	Focuses on the effective use of technology in federal defender office administration and litigation support.	April/May 2019	170
National Seminar for Federal Defenders	Designed for assistant federal defenders with a minimum of three years' experience and focuses on a mix of federal substantive and procedural law topics, ethics, technology, trial tactics, and sentencing issues.	May 28-31, 2019 Detroit, MI	500
Case Opening Training (2 trainings)	Training for defender staff on opening of new cases in accordance with Chapter 18.	May & June 2019	85
Administrative Officer Conference	Addresses issues of office management and administration, including related national policies.	July 16-17, 2019 Chicago, IL	120
Sentencing Strategy Session	Designed for federal and community defender, this session brings one person from each Defender office to discuss trends in sentencing.	Sept 2019	70

**Where dates and locations are confirmed, that information is provided. Consult fd.org for updated program dates and locations. Specific inquiries about any of the programs on this list can be directed to the Training Division at 800-788-9908 (toll-free hotline) or 202-502-2900.*

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
PANEL REPRESENTATIVES			
National Panel Attorney District Representatives Conference	A gathering of the panel representatives from each district to address policies and issues of national interest to the program and panel attorneys.	March 1-2, 2019 San Diego, CA	130
PROGRAMS FOR FDO STAFF AND PRIVATE CJA PRACTITIONERS			
Train the Trainers Workshop	This workshop is intended to expand the pool of educated and experienced faculty available for national and local CJA training programs. It addresses and has participants apply principles of adult learning, elements of effective training design, and persuasive presentation techniques.	October 18-20, 2018 Baltimore, MD	40
Andrea Taylor Sentencing Advocacy Workshop I	This hands-on workshop focuses on the elements of effective, persuasive sentencing advocacy.	November 15-17, 2018 Los Angeles, CA	70
Winning Strategies I (Regional)	This general federal criminal law seminar covers a variety of substantive, procedural, sentencing, and trial strategy issues specific to the region.	December 6-8, 2018 San Diego, CA	200
Winning Strategies II & Fundamentals I	This general federal criminal law seminar covers a variety of substantive, procedural, sentencing, and trial strategy issues, and often includes a "Fundamentals" day for those new to federal practice.	January 2019	200
Race in the Federal Criminal Court	This seminar educates CJA panel attorneys and defender staff about the many ways race impacts the administration of justice in federal court and provides them with strategies to combat racial injustice in the criminal justice system.	February 7-9, 2019 Charlotte, NC	200

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
Andrea Taylor Sentencing Advocacy Workshop II	This hands-on workshop focuses on the elements of effective, persuasive sentencing advocacy.	March 2019	70
Techniques in Electronic Case Management Workshop II	This hands-on workshop focuses on addressing e-discovery challenges in federal criminal cases, and teaches concepts and techniques to better organize, search and analyze digital case materials.	March 2019	70
Trial Skills Workshop	Hands-on workshop focusing on specific areas of trial practice.	April 2019	60
Federal Defender Investigator & Paralegal Seminar	This program addresses numerous topics such as sentencing mitigation, records collection, the use of technology, document organization and management, forensics, BOP, interviewing, report writing and more. A component of the seminar will focus on topics addressing issues for interpreters as well	April 2019	250
Winning Strategies III & Fundamentals Seminar II	This general federal criminal law seminar covers a variety of substantive, procedural, sentencing, and trial strategy issues, and often includes a "Fundamentals" day for those new to federal practice.	May or June 2019	200
National Forensics College	This joint program with NACDL and Cardozo School of Law trains attorneys, both trial and post-conviction, on a variety of forensic topics, and facilitates the strategic litigation of forensic issues nationwide.	June 2019	135
The Paralegal and Investigator Skills Workshop	This is a hands-on program providing intensive training in several skills (e.g., interviewing, writing, case management/organization, locating records and witnesses, analyzing documents) that are essential to the daily work of paralegals and investigators in federal defender offices or assigned to CJA panel cases	June 2019	70

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
Non-Capital Sentencing Mitigation Skills	This workshop presents a hands-on method on the development of non-capital mitigation and its integration into persuasive sentencing advocacy. Through plenary and small group sessions, participants will further their understanding on non-capital mitigation evidence and the skills necessary to effectively interview for mitigation; investigate, collect and analyze records; and write reports and/or sentencing memorandum to present mitigation at sentencing.	July 2019	45
Federal CJA Trial Skills Academy	The Academy is a hands-on, skills-based workshop that focuses on (1) the use of an advocacy process to facilitate development of a persuasive, fact-based theory and supporting themes, and (2) the advocacy skills necessary to persuasively advance that theory and those themes.	July 20-26, 2019 Indianapolis, IN *(tentative)*	66
Law and Technology: Electronic Courtroom Presentation	Focuses on the use of modern technology to improve the persuasiveness of courtroom presentations.	July or August 2019	70
Multi-Track Federal Criminal Defense Seminar/Persuasive Writing	This seminar typically presents practitioners with more in-depth training on several criminal defense topics. The Persuasive Writing Workshop is held three days prior to the start of the Multi-Track Seminar. It makes use of brainstorming and principles of storytelling and persuasion to craft fact driven written advocacy that persuasively integrates the facts of one's case with relevant legal principles in a way that enhances the chances of winning.	August 2019 (Writing Workshop) August 2019 (Multi-Track)	175
Andrea Taylor Sentencing Advocacy Workshop III	This hands-on workshop focuses on the elements of effective, persuasive sentencing advocacy.	September 2019	70
Law and Technology: Techniques in Electronic Case Management III	This hands-on workshop focuses on addressing e-discovery challenges in federal criminal cases, and teaches concepts and techniques to better organize, search and analyze digital case materials.	September 2019	70

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
Trial Skills Workshop	Hands-on workshop focusing on specific areas of trial practice.	September 2019	60
DEATH PENALTY			
Federal Death Penalty Strategy-FD PRC	This training is intended for more experienced federal capital CJA attorneys assigned to represent persons charged with or convicted of federal capital offenses and covers, among other topics, mental health, race-related issues, voir dire, and case budgeting, as well as issues related to developing mitigation evidence.	November 7-9, 2018 Tampa, FL	200
Capital Mitigation Skills Workshop *(2 offerings)*	This workshop presents a hands-on approach to the development of capital mitigation evidence and its integration into persuasive sentencing phase advocacy. The workshop is for capital mitigation specialists, attorneys, and other professionals who perform this work under the CJA.	January 17-20, 2019 *(tentative dates)* Austin, TX and May 2019 Kansas City, MO	36
Federal Death Penalty Resource Counsel Authorized Cases (ACT I & II) *(2 offerings)*	This program brings together trial teams within a region that have authorized capital cases to train and brainstorm on trial skills and strategies.	January 27-29, 2019 Atlanta, GA (ACT I) June 2019 (ACT II)	45
16th National Seminar on the Development and Integration of Mitigation Evidence	This seminar addresses a variety of aspects related to the discovery, investigation, development, and effective use of sentencing mitigation evidence.	March 14-17, 2019 Philadelphia, PA	200
The National Seminar on Forensics Evidence and the Criminal Law	This program will assemble some of the nation's foremost scientific and legal experts to discuss what progress has been made since the landmark report on forensic science deficiencies by the National Research Council of the National Academy of Sciences in 2009.	April 2019	200

FY 2019 Authorized DSO Training Events and Conferences*

TYPE OF PROGRAM AND TITLE	PROGRAM DESCRIPTION	DATES & LOCATION	ESTIMATED ATTENDANCE
Section 2255 Authorized Cases Training	This program involves training and consultation with practitioners with capital cases in 2255 proceedings. Participants are trained within the context of the facts and circumstances of their existing cases.	May 16-18, 2019 *(tentative)*	35
The Anthony G. Amsterdam Supreme Court Advocacy Institute (SCOTUS)	The goal of this training initiative, designed by Professor Amsterdam, is to improve the quality of strategic planning and advocacy on behalf of death-sentenced inmates in the Supreme Court of the United States and in the process of obtaining or avoiding Supreme Court review.	June 2019	48
Capital Habeas Institute (NITA/Amsterdam)	This post-conviction skills seminar uses a combination of lectures and small group exercises to teach participants how to effectively handle common habeas claims	July 2019	48
Annual National Federal Habeas Corpus Seminar	This program, the only one of its kind, focuses on representation in capital habeas cases *in toto*. Habeas experts discuss issue identification, investigation, factual and legal development and presentation of claims, the use of mitigation and mental health experts, and substantive and procedural habeas corpus jurisprudence.	August 2019	200
Symposium on Race and Ethnicity for Defense Lawyers	This program, for capital defense attorneys and federal defender attorneys, addresses a variety of issues related to race and ethnicity in the criminal justice system.	September 2019	80
Defense Initiated Victim Outreach I	This program addresses the use of victim outreach by defense teams in capital cases.	TBD	15
Defense Initiated Victim Outreach II	This program addresses the use by defense teams in capital cases of the practice of victim outreach.	TBD	15

Litigation Support

CJA Panel Attorney Software Discounts

There are several litigation support programs available to CJA Panel members at a discounted rate or at no cost. Below is a brief description of the software and the current pricing information for these programs:

Box.com:

Box.com is a private cloud repository that allows users to store, access, share, and transfer electronic files and documents. The service includes a number of security features, and encrypts all data while it is transmitted to their repository and while it is stored in the cloud. Users can store an unlimited number of files, for their own use or to share with others, without having to use remote access to office computers. Defense teams can use different devices (such as computers, tablets, or smartphones) to access case data anywhere they can connect to the internet. The National Litigation Support Team (NLST) will work directly with each defense team to set up their cloud case folders, and to provide ongoing support of their use of Box.com.

If you are interested in using Box.com for a multi-defendant case, or have further questions, please contact either **Kalei Achiu** (kalei_achiu@fd.org or 510-250-6310) or **Alex Roberts** (alex_roberts@fd.org or 510-637-1955).

CaseMap (CaseMap / TimeMap / DocManager) Bundle:

CaseMap is a fact and case organization and analysis tool that allows users to track and organize case information regarding facts, persons, documents, and issues in one database. Documents relevant to the case are linked to the database which allows end users to quickly search, sort and filter case information. Various PDF reports including fact chronologies, lists of persons, issues and documents can be easily produced which give snapshots of critical case information. Users can embed into the PDF reports the source documents that have been linked to the database to allow sharing of key information with people who may not have access to the database.

TimeMap creates case related visual timelines. The program allows users to create a variety of timelines useful for courtroom presentations, team and client meetings and as courtroom exhibits.

DocManager is a near native imager viewer specifically designed for CaseMap. It allows users to review and annotate documents linked to the database without having to open the source file, making it easier and faster to navigate through the documents.

For inquiries contact **casemapcja@lexisnexis.com** (email) for assistance and questions. Make sure to mention which organization you are associated with (either a federal public/community defender office or that a CJA attorney) and that you are interested in the CaseMap / DocManager / TimeMap bundle at the special discounted rate. Due to the ongoing popularity and interest of federal public/community defender offices and the CJA panel in these software programs, LexisNexis has agreed to extend the offer of the CaseMap / DocManager / TimeMap bundle to defender offices and CJA panel attorneys at a **special reduced price of $638.00.** Besides the significantly reduced price, defender offices and CJA panel attorneys will not have to pay annual maintenance or subscription fees to receive technical support and to obtain upgrades of the CaseMap software for as long as we can continue the national maintenance agreement with LexisNexis.

Casepoint:

Casepoint is an online document review platform that allows multiple defense teams to access the same database using their internet browser. Casepoint is designed to assist attorneys and their staff in organizing, managing and analyzing large volumes of discovery. Case materials are located in one central repository and easily reviewed, tagged and accessed by all defense teams from wherever they are as long as they have an internet connection. Casepoint includes computerized early case assessment, technology assisted review (TAR), cloud analytics, data processing and a fully hosted review platform. Some key features of Casepoint include the ability to maintain private notes in a multi-defendant case that cannot be seen by other legal teams on the case, universal bulk tagging, filtering, and annotation which can be shared by all legal teams; review of e-discovery without changing any of the underlying background information; and native and near native viewers.

If you have any questions regarding the utilization of CasePoint please contact **Kelly Scribner** (kelly_scribner@fd.org or 510-637-1952).

dtSearch Desktop:

dtSearch is a popular search and retrieval program, and it is the search engine utilized in well known computer programs such as Forensic Tool Kit (FTK, a computer forensic tool), CaseMap and Adobe Acrobat Pro. This type of program is a useful tool to assist legal teams in searching discovery, creating brief banks, and viewing different file types (including non-PDF files) even if you don't have the associated application. We have a limited number of licenses available for CJA panel attorneys to use for free (a $200 value).

To obtain the software, please fill out a dtSearch Request Form located at: **http://nlsblog.org/2014/03/25/dtsearch-desktop**/

TrialDirector 6.8:

TrialDirector 6.8 is a trial presentation software for attorneys and litigation support professionals. It allows users to organize and load exhibits, transcripts, graphics, audio or video files into a database and easily view, manage, and present them in the courtroom at a moment's notice by typing a shortcut ID or via a bar code scanner. Live, in front of jurors, users can pull up and magnify key sections of the documents, compare documents side by side, play audio or video clips, or play video depositions with transcripts scrolling below the video. This tool is very useful for cross-examination of witnesses to impeach or bolster a witness.

To purchase TrialDirector 6.8, contact James Orcutt at iPro Tech (**jorcutt@iprotech.com**). Inform him that you are a CJA attorney and that you would like to purchase the TrialDirector 6.8 software at the special CJA rate. iPro Tech offers CJA panel attorneys **TrialDirector 6.8** at a 50% discount, currently $397.50, plus a

mandatory software maintenance fee of $159, for a total of **$556.50** (compared to the regular price of $954 for a license and maintenance).

Litigation Support

- What is Litigation Support?
- The Language of Litigation Support
- I Have Electronic Data... Now What?
- Who is the National Litigation Support Team?
- Coordinating Discovery Attorneys
- Direct Assistance for CJA Panel
- **CJA Panel Attorney Software Discounts**
- Joint Electronic Technology Working Group (JETWG)
- Resource Materials
- Litigation Support Blog

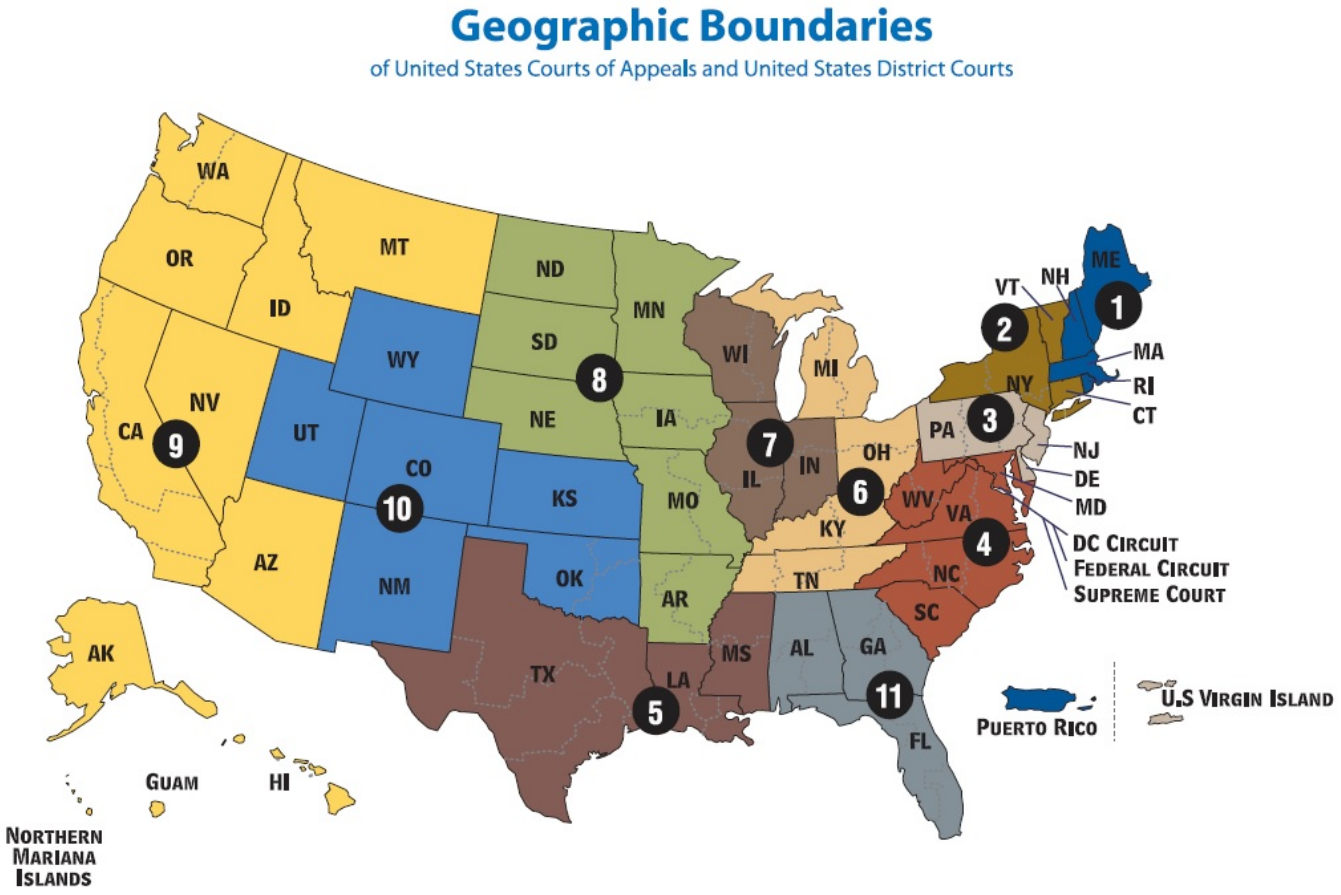
Defender Services Office Training Division
Administrative Office of the United States Courts
One Columbus Circle, N.E. Suite 4-200
Washington, DC 20544

Phone: (202) 502-2900
Hotline: (800) 788-9908
Fax: (202) 502-2911

fd.org
Defender Services Office
TRAINING DIVISION

CJA Practitioner Resources

We have gathered on this page links to additional resources available to you. These resources include: connecting you to defenders and CJA panel attorneys in your district and nationwide; pointing you to blogs that update the law in your Circuit; providing you quick access to information on getting paid (for both your services and the assistance of experts); informing you of CJA guidelines, compensation rates, and case budgeting; connecting you to available assistance with Supreme Court litigation; and highlighting standards for effective representation. Check back in the future for additional resources.



- Federal Defender Office Websites and Blogs

- Federal Defender Directory
- CJA Panel Attorney District Representatives
- CJA Guidelines
- CJA Forms/Vouchers
- CJA Compensation Rates & Maximums
- Case Budgeting
- Funding for Expert, Investigative & Other Services
- Model Plan for Implementation and Administration of the Criminal Justice Act
- Federal Adaptation of NLADA Performance Guidelines in CJA Cases
- CJA Study Website
- National CJA Voucher Reference Tool
- CJA Panel Resource Counsel Program
- Supreme Court Advocacy Assistance

Defender Services Office Training Division
Administrative Office of the United States Courts
One Columbus Circle, N.E. Suite 4-200
Washington, DC 20544

Phone: (202) 502-2900
Hotline: (800) 788-9908
Fax: (202) 502-2911

Sentencing By the Statute
Amy Baron-Evans[1]
April 27, 2009 (revised 12/21/10)

Over the past four years, the Supreme Court has given judges the power to impose sentences that are not greater than necessary to satisfy the statutory purposes of sentencing, to consider *all* of the characteristics of the offender and circumstances of the offense, to reject advisory guidelines that are not based on national sentencing data and empirical research, and to serve their function in the constructive evolution of responsible guidelines. *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The Court really means it. *See Spears v. United States*, 129 S. Ct. 840 (Jan. 21, 2009); *Nelson v. United States*, 129 S. Ct. 890 (Jan. 26, 2009).

On February 10 and 11, 2009, the Sentencing Commission held the first in a series of regional hearings seeking input on how the new sentencing system is working and what might be done to improve it. It may surprise some to know that judges and probation officers greatly prefer the new system. Judges, probation officers and defense counsel all felt that sentencing is still too guideline-centric and not being approached according to the governing sentencing statute: § 3553(a). This was attributed variously to the minutiae of the guidelines taking too much time and effort, the Sentencing Commission's guideline-centric Manual and trainings, judges' lack of experience in sentencing according to sentencing purposes, probation officers' adherence to the guidelines, and defense counsel's poor job in educating judges.

The point, however, is that all of the participants want to see *Booker* and its progeny more fully implemented. Judges *do* see that the guidelines make no sense in a great many cases. But most judges on the bench today have never sentenced without mandatory guidelines. They are not experienced in sentencing according to sentencing purposes and are accustomed to numbers calculated by probation officers. Defense counsel should seize the opportunity to guide judges to a sentence based on § 3553(a), as suggested by the Supreme Court's cases. If defense counsel does not argue for a non-guideline sentence, the judge is not required to give a lengthy explanation for a guideline sentence.[2] *Rita*, 127 S. Ct. at 2468. But the judge must address all nonfrivolous arguments for a non-guideline sentence under § 3553(a). If the judge rejects such arguments, the judge must "go further and explain why he has rejected those arguments."[3] *Id*. If the judge accepts such arguments and "imposes a sentence outside the Guidelines, the judge will

[1] Thanks to Paul J. Hofer, Jennifer Coffin, Louise Arkel and Peter Goldberger for their contributions to this paper.

[2] "Since [the defendant] did not make any argument to the contrary, the court did not need to explain why it did not find a non-guideline sentence necessary." *United States v. Looney*, 532 F.3d 392, 396 (5th Cir. 2008).

[3] The "district court gave absolutely no reason for imposing the 210-month [guideline] sentence," though the defendant made arguments relating to several 3553(a) factors. *United States v. Narvaez*, 2008 WL 2924534 (11th Cir. 2008).

explain why he has done so." *Id.* More "significant justification" under § 3553(a) is required for a major variance than for a minor one. *Gall*, 128 S. Ct. at 597. Where do these "significant justifications" come from? It is "not incumbent on the District Court Judge to raise," much less develop, "every conceivably relevant issue on his own initiative." *Id*. at 599.

Part I of this paper argues that we should refocus the sentencing decision to the statutory sentencing purposes and the parsimony principle, briefly reviews the purposes and some of the other factors, and offers some suggestions (by no means comprehensive) on what kinds of facts and considerations may be relevant to each purpose. Part II discusses "consideration" of the advisory guideline range and what role, if any, sentencing purposes and empirical evidence of past practice have played in the guidelines' development. Part III discusses deconstruction of the guideline range and construction of a purpose-driven sentence. Part IV argues, based on the Sentencing Reform Act, past practice and empirical research, that the first question in every case in which prison is not statutorily required should be whether probation will suffice, not how long the defendant should be imprisoned. Part V offers suggestions for objective support for the specific non-guideline sentence you propose. Part VI works through some examples.

In a few districts, defense counsel report that some judges *never* impose a below-guideline sentence and, if anything, impose an above-guideline sentence. They question whether the kinds of arguments suggested in this paper are useful to them since they must often argue *for* the guideline sentence. These arguments, however, should be used to educate judges that the guideline sentence is greater than necessary, and that a below-guideline sentence is sufficient.

Table of Contents

I. Which sentence is sufficient, but not greater than necessary, to satisfy the purposes set forth in § 3553(a)(2)?.....3
   - A. Begin with the Statutory Framework.……3
   - B. Nature and Circumstances of the Offense and History and Characteristics of the Defendant……..4
   - C. Sentencing Purposes……4
     1. Seriousness of the Offense, Respect for Law, Just Punishment…..5
     2. Deterrence to Criminal Conduct……..7
     3. Protection of the Public from Further Crimes of the Defendant…10
     4. Rehabilitation in the Most Effective Manner…….11
     5. U.S. Probation's View of the § 3553(a)(2) Purposes…….12
   - D. Kinds of Sentences Available……12
   - E. Consideration of *Unwarranted* Disparities……13

II. "Considering" the Advisory Guideline Range……...13
   - A. Sentencing Purposes?.....14
   - B. Empirical Evidence of Past Practice?.....17

III. Deconstructing the Guidelines/Constructing a Purpose-Driven Sentence…….18

IV. First Question: Is Prison Necessary to Satisfy Retribution, Deterrence or Protection of the Public, or Would Probation Satisfy Those Purposes and Promote Rehabilitation, if needed?.....24

V. Objective, Well-Reasoned Support for Non-Guideline Sentences.……...31

A. Sever and/or Reweigh the Flawed Guideline Provision……..……...32
B. Use Empirical Data of Past Practice……..36
C. Use Current Data……45
1. Average Sentences……45
2. Median Reductions from the Guideline Minimum……46
3. Risk of Recidivism……46
VI. Examples……..……...50

APPENDIX……59

I. Which sentence is sufficient, but not greater than necessary, to satisfy the purposes set forth in § 3553(a)(2)?

Defense counsel should refocus the sentencing framework from "guidelines or a variance *from* the guidelines" to the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *Kimbrough*, 128 S. Ct. at 570. True, "the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter." *Nelson*, 129 S. Ct. at 891-92. The judge's obligation to "correctly calculate" the guideline range "first," however, means only that the judge should resolve disputes about guideline facts and application issues at the outset. Sentencing memoranda and arguments should frame the sentencing decision according to the statutory structure of § 3553(a).

A. Begin with the Statutory Framework.

The statute governing sentencing requires the district court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that provision. 18 U.S.C. § 3553(a). Those purposes are:

> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). In fashioning a sentence that complies with the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing," *Kimbrough*, 128 S. Ct. at 570, the judge must consider a broad

range of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant. *See* 18 U.S.C. § 3553(a)(1)–(7).

B. Nature and Circumstances of the Offense and History and Characteristics of the Defendant

In most cases, begin with the defendant's story. How did he get here? Why is this offense not the whole story of the capacities and character of this person? These are the facts that you will use to show that a lengthy prison term is not "necessary" to satisfy just punishment, to prevent further crimes by this defendant, to provide rehabilitation in the most effective manner.

Section 3553(a)(1) is a "broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" *Gall*, 128 S. Ct. at 596 n.6. It is not limited, and may not be limited, by the Commission's restrictive policy statements regarding what a judge may not consider. As Justice Stevens put it, the Commission "has not developed any standards or recommendations" for many individual characteristics, but "[t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider," even though they are "not ordinarily considered" under the guidelines. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring). In *Gall*, the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy, or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs. *Id*. at 598-602. In approving the sentence and the factors upon which it was based, the Court made no mention of the Commission's conflicting policy statements.

C. Sentencing Purposes

One judge has framed the purposes of sentencing as follows:

> Deterrence, incapacitation, and rehabilitation are prospective and societal – each looks forward and asks: What amount and kind of punishment will help make society safe? In contrast, retribution imposes punishment based upon moral culpability and asks: What penalty is needed to restore the offender to moral standing within the community?

United States v. Cole, slip op., 2008 WL 5204441 *4 (N. D. Ohio Dec. 11, 2008).

Below is a very brief review of the purposes of sentencing. It touches on only a small portion of the criminological literature and is not meant to be comprehensive. For an overview of what works and what doesn't in preventing crime, *see* Doris Layton MacKenzie, *Criminal Justice and Crime Prevention*, Chapter 9, *What Works, What Doesn't, What's Promising*: *A Report to the United States Congress Prepared for the National Institute of Justice*, http://www.ncjrs.gov/works/chapter9.htm.

1. Seriousness of the Offense, Respect for Law, Just Punishment

Section 3553(a)(2)(A) requires the judge to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." A sentence that is excessive in light of the seriousness of the offense promotes disrespect for law and provides unjust punishment.

The purposes set forth in § 3553(a)(2)(A) are generally referred to, collectively, as "retribution," which has been defined as follows:

> First, retributive, or "just deserts," theory considers only the defendant's past actions, not his or her probable future conduct or the effect that the punishment might have on crime rates or otherwise. Second, retribution examines the actor's degree of **blameworthiness** for his or her past actions, focusing on the offense being sentenced. . . . Third, the degree of blameworthiness of an offense is generally assessed according to **two kinds of elements**: the **nature and seriousness of the harm caused or threatened** by the crime; and the **offender's degree of culpability in committing the crime, in particular, his degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity**.

Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005) (emphasis supplied).

Thus, the seriousness of the offense may be lessened, for example, if the crime was victimless or was not violent. *See* 28 U.S.C. § 994(j) (prison is generally inappropriate in "cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," while some term of imprisonment is generally appropriate for "a person convicted of a crime of violence that results in serious bodily injury"). The offense should be considered less serious if restitution was made in whole or in part, if the defendant's motives were not at all or not entirely egregious, if the defendant's knowledge or intent was diminished, if the offense was the result of a disadvantaged upbringing, abuse or neglect, poverty, addiction or mental illness, or if the defendant's role or gain from the offense was comparatively minor. The guidelines do not generally take account of such matters, and many of the Commission's policy statements explicitly prohibit or discourage their consideration.

The offense may be more or less serious depending on "the community view of the gravity of the offense" or the "public concern generated by the offense." 28 U.S.C. § 994(c)(4), (5). For example, in *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), the judge recognized that the guideline range of 360 months to life, the result of guideline increases stemming from highly publicized major frauds such as Enron, defied common sense in the comparatively run of the mill securities fraud case before him, and imposed a sentence of 60 months.

Congress recognized that "community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense." *See* S. Rep. No 98-225 at 170 (1983). For example, in some communities, guns are a way of life; in others, they are a physical threat to the community.[4] The First Circuit recently upheld an above-guideline sentence in a firearms trafficking case based on the seriousness of the offense and the need for specific and general deterrence in light of "an epidemic of handgun violence in communities within this district." *See United States v. Politano*, 522 F.3d 69, 72 (1st Cir. 2008). The Second Circuit could not agree that a similar above-guideline sentence was warranted by the seriousness of the offense, but upheld the sentence based on a greater than average need for general deterrence of firearms trafficking in New York City. *See United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).

In 2006, after the offenses at issue in *Politano* and *Cavera*, the Sentencing Commission promulgated a 4-level enhancement for firearms trafficking, broadly defined to reach the sale, trade or gift of two or more guns. *See* USSG § 2K2.1(b)(5). The Commission recognized that the enhancement would sweep in rural offenders, but believed it would prevent urban gun violence.[5] A judge may well conclude that firearms offenses are not so serious in a rural area. Moreover, the beliefs of the First and Second Circuits and the Commission regarding general deterrence may not be well-founded, as explained in the next section.

Regardless of community norms, widely varying circumstances in the possession of a gun bear on the seriousness of the offense in ways the guidelines generally do not recognize. *See, e.g., United States v. Hill*, __ F.3d __, 2009 WL 1052947 *6 (7th Cir. 2009); *United States v. Williams*, 403 F.3d 1188, 1198-1200 (10th Cir.2005).

2. Deterrence to Criminal Conduct

Section 3553(a)(2)(B) requires the judge to consider "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct."

After reviewing empirical evidence regarding the continuing increase in the number of drug and child pornography offenders despite the war on each and stiff federal sentences, one judge concluded that "there is not a sliver of evidence in this sentencing record remotely supporting the notion that harsher punishment would reduce the flow of child pornography on the Internet. . . . This does not mean that [the defendant] should not receive a lengthy sentence for his criminal conduct, but it does mean that the sentence should not be longer simply to satisfy

---

[4] For other examples, *see, e.g.*, Charles P. Sifton, *Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions*, 5 Fed. Sent'g Rep. 303 (1993); Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 Fed. Sent'g Rep. 306 (1993); Vincent L. Broderick, *Local Conditions: Local Factors in Sentencing*, 5 Fed. Sent'g Rep. 314 (1993).

[5] USSC, Public Hearing at 205-08 (Mar. 15, 2006) (discussing but not resolving how to take urban and rural concerns into account), http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf. The amendment was announced with a statement that it would target urban gun violence.

an objective that, while laudable, is not being achieved according to any empirical or other evidence in this case or, for that matter, empirical evidence in any other case or source that I am aware of." *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1103-04 (N.D. Iowa 2009).

Indeed, while many believe that the higher the sentence, the greater the effect in deterring others, the empirical research shows no relationship between sentence length and deterrence. The general research finding is that "deterrence works," in the sense that there is less crime with a criminal justice system than there would be without one. But the question for the judge is "marginal deterrence," *i.e.*, whether any particular quantum of punishment results in increased deterrence and thus decreased crime. Here the findings are uniformly negative: there is no evidence that increases in sentence length reduce crime through deterrence. Current empirical research on general deterrence shows that while *certainty* of punishment has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006).[6]

In one of the best studies of specific deterrence, which involved federal white collar offenders (presumably the most rational of potential offenders) in the pre-guideline era, no difference in deterrence was found even between probation and imprisonment. *See* David Weisburd et. al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).[7] That is, offenders given terms of probation were no more or less likely to reoffend than those given prison sentences.

In a very recent study of drug offenders sentenced in the District of Columbia, researchers tracked over a thousand offenders whose sentences varied substantially in terms of prison and probation time. Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, __ Criminology ___ (forthcoming 2009).[8] The results showed that variations in prison and probation time "have no detectable effect on rates of re-arrest." "Those assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame." In other words, "at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior." *Id.*

Typical of the findings on general deterrence are those of the Institute of Criminology at Cambridge University. *See* Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999).[9] The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. It

---

[6] This article is available on Westlaw.

[7] This article is available at any good library.

[8] An electronic copy is available at: http://ssrn.com/abstract=1477673.

[9] A summary of these findings is available at http://members.lycos.co.uk/lawnet/SENTENCE.PDF.

examined the effects of changes to both the *certainty* and the *severity* of punishment. While significant correlations were found between the certainty of punishment and crime rates, the "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance." The report concludes that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."

The reason for this is that potential criminals are not generally aware of penalties for their prospective crimes, do not believe they will be apprehended and convicted, and simply do not consider sentence consequences in the manner one might expect of rational decision makers. Tonry, *Purposes and Functions of Sentencing*, *supra*, at 28-29. A recent review of this issue concluded: "There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms." Gary Kleck, et al, *The Missing Link in General Deterrence Theory*, 43 Criminology 623 (2005).[10]

For certain types of offenses, there are additional reasons that severity does not deter. "[S]erious sexual and violent crimes are generally committed under circumstances of extreme emotion, often exacerbated by the influence of alcohol or drugs." Tonry, *Purposes and Functions of Sentencing*, *supra*. "[F]or many crimes including drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducing to the crime." *Id*. Drug crimes are "uniquely insensitive to the deterrent effects of sanctions," because, as many studies of drug marketing have shown, "[m]arket niches created by the arrest of dealers are . . . often filled within hours." *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime and Justice: A Review of Research 102 (2009). "[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 134 (Nov. 2004) (hereinafter "Fifteen Year Review").

The Commission itself has found that "[t]here is no correlation between recidivism and guidelines' offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar. While surprising at first glance, this finding should be expected. The guidelines' offense level is not intended or designed to predict recidivism." *See* USSC, Measuring Recidivism at 15, http://www.ussc.gov/publicat/Recidivism_General.pdf.

The research results were confirmed by state law enforcement officials at the Commission's recent hearing. Chief John Timoney of the Miami Police Department testified that the deterrent effect of the federal system is not its high sentences but the certainty that any punishment will ensue. Captain Larry Casterline of the High Point, North Carolina, Police Department testified that he does use the federal system to deter others. He brings in would-be offenders, sits them down, and shows them, in writing, that a particular offender with the same

[10] This article is available at any good library.

record as theirs was sentenced to federal prison for X years. Absent such unusual efforts to inform potential offenders of the specific sentence someone like them received, general deterrence is not advanced by severity.

Another problem with justifying punishment as a means to deter others, besides its ineffectiveness, is that it is immoral to punish one person merely to promote deterrence of others. "Juridicial punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never be dealt with merely as a means subservient to the purpose of another." Immanuel Kant, The Science of Right 195 (W. Hastie trans., 1790).

Balancing the ineffectiveness of and ethical problems with general deterrence against the financial costs to society of imprisoning an individual ($25,895 per year),[11] may lead the judge to conclude that general deterrence is not a good reason for a lengthy prison term. *See United States v. Cole*, slip op., 2008 WL 5204441 *6-7 (N. D. Ohio Dec. 11, 2008).

It is interesting to note that Probation's Monograph 107 does not include any questions about general deterrence, but addresses only specific deterrence, *see* Appendix, which is really part of the need to "protect the public from further crimes of the defendant."

3. Protection of the Public from Further Crimes of the Defendant

Section 3553(a)(2)(C) requires the judge to consider "the need for the sentence imposed . . . to protect the public from further crimes of the defendant." This purpose has to do with both the defendant's risk of recidivism and the danger posed by the defendant, if any. It "is particularly important for those offenders whose criminal histories show repeated serious violations of the law." S. Rep. No. 98-225 at 76 (1983). It is not so important for first offenders, for those who have little risk of recidivism, for those whose prior offenses are relatively minor or non-violent, or for those who have a strong potential for rehabilitation, perhaps through appropriate treatment they have never received.

For example, "[w]here the particular defendant convicted of a child pornography offense has a low potential for recidivism, particularly where that low potential is well informed by expert evaluations and the defendant's post-arrest conduct, the defendant has no significant prior criminal history, and where the defendant appears genuinely remorseful about his crimes and aware of the harm that they cause, several courts have found little need to impose a full guideline sentence to protect the public." *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1112 (N.D. Iowa 2009) (Bennett, J.). As another judge wrote:

---

[11] Costs of Imprisonment Far Exceed Supervision Costs (May 12, 2009), available at http://www.uscourts.gov/News/NewsView/09-05-12/Costs_of_Imprisonment_Far_Exceed_Supervision_Costs.aspx.

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

United States v. Perella, 273 F. Supp. 2d 162, 164 (D. Mass. 2003) (Gertner, J.).

Of all of the purposes of sentencing, the need to protect the public from further crimes of the defendant is the one of greatest practical concern, and also the most capable of being measured. Judges should often be encouraged to impose probation or a below-guideline sentence in light of this purpose. *See, e.g., United States v. Hanson*, 561 F. Supp. 2d 1004, 1010 (E.D. Wis. 2008) (Commission sought to increase penalties for offenders who had a history of sexually exploiting or abusing minors and posed a greater risk of recidivism, but this was based on a study of offenders in 1994 and 1995, while most offenders today have no such histories).

The Commission has published studies on recidivism showing that certain aspects of the guidelines overstate the risk of recidivism and that a number of factors that the guidelines prohibit or deem not ordinarily relevant are good predictors of reduced recidivism. *See* Part V.C.3, *infra*; *see, e.g., Cavera*, 550 F.3d at 186 (judge took account of "lesser need for specific deterrence" because of "the inverse relationship between age and recidivism"). The Commission has stated: "If, as the data indicate, abstinence from illicit drug use, or high school completion, reduces recidivism rates, then rehabilitation programs to reduce drug use or to earn high school diplomas may have high cost-benefit values."[12]

There are studies on the risk of recidivism, with and without treatment, for certain kinds of offenders.[13] The guidelines, which recommend prison in most cases even for first offenders, do not generally recognize differences in risk of recidivism or the efficacy of rehabilitation. *See* Part III, IV.

4. Rehabilitation in the Most Effective Manner

Section 3553(a)(2)(D) requires the judge to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other

[12] *See* USSC, Measuring Recidivism at 15-16, http://www.ussc.gov/publicat/Recidivism_General.pdf.

[13] *See, e.g.*, Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, June 1, 2008, 20 Fed. Sent. R. 357, 2008 WL 4702697 (Vera Inst.Just.) (citing numerous studies on sex offender recidivism).

correctional treatment in the most effective manner." As explained in Part IV, Congress directed the courts and the Commission to use probation to accomplish rehabilitation as long as prison was not necessary to accomplish some other purpose of sentencing, and recognized that probation would often satisfy the other purposes of sentencing whether or not rehabilitation was needed. Based on current knowledge at the time of the Sentencing Reform Act, Congress believed that prison was not rehabilitative. Today, there is substantial evidence that prison, by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders, leads to increased recidivism,[14] and that community treatment programs are more effective in reducing recidivism than prison treatment programs.[15]

5. U.S. Probation's View of the § 3553(a)(2) Purposes

The section of U.S. Probation's Monograph 107 that deals with the probation officer's sentencing recommendation (which is secret in many districts), sets forth § 3553(a) in its entirety, then states that "[a]ny sentence recommended must be 'sufficient, but not greater than necessary, to comply with' the statutory sentencing purposes," then includes a non-exhaustive list of questions "designed to stimulate and inform the process" in relation to each sentencing purpose. *See* Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005. Many of these questions are helpful. For example, "What were the motivations of the defendant for committing the offense?" "Does the defendant pose a physical danger to the community at large?" "Is the defendant amenable to treatment?" "What does this defendant need to keep from re-offending? What is the best place for the defendant to receive that assistance: prison or the community?" Some of the questions, however, may suggest that going to trial, not cooperating with law enforcement, or having a poor "attitude toward the system" warrant more punishment.

Based on reports from the field, it does not appear that very many probation officers are following this guidance. It is reproduced in the Appendix.

D. Kinds of Sentences Available

Judges must now consider all of "the kinds of sentences available" by statute, § 3553(a)(3), even if the "kinds of sentence . . . established [by] the guidelines" permit or encourage only prison. *See Gall*, 128 S. Ct. at 602 & n.11. Probation is authorized by statute for a broad range of offenses and offenders, *i.e.*, for any offense with a statutory maximum below 25

---

[14] *See* Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589 (2007).

[15] For example, the Washington State Institute for Public Policy found that community drug treatment reduces recidivism by 9.3%, while prison drug treatment programs reduce recidivism by only 5.7%, and that treatment-oriented intensive supervision reduces recidivism by 16.7%. *See Washington State Institute for Public Policy, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exh. 4 at p. 9 (October 2006), available at http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

years so long as probation is not expressly precluded and the defendant is not sentenced to prison for a non-petty offense at the same time. *See* 18 U.S.C. § 3561(a); 18 U.S.C. § 3559(a).

Further, the "kind of sentence" available is not just about prison versus halfway house versus home confinement versus probation. It includes whether and where "educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D), is available. The "kind" of sentence available in prison may not provide adequate medical care.[16] For example, a diabetic may not have sufficient access to insulin, or a methamphetamine addict may not receive dental care. Prison may deprive the defendant (and society) of successful sex offender treatment by separating him from his current therapist.[17] The defendant may be able to receive needed treatment for drug or alcohol addiction more quickly and effectively in the community.[18]

E. Consideration of *Unwarranted* Disparities

Section 3553(a)(6) requires the judge to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." "Disparity gets its content from the purposes of sentencing. Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account differences among offenders that are relevant to our purposes and priorities." Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 442 (2006).

Defendants with similar records convicted of similar conduct vary widely in their culpability, risk of recidivism, dangerousness, and rehabilitation needs. Judges must now take account of these variations, and uniformity for its own sake is no longer the goal of the sentencing system. *See Kimbrough*, 128 S. Ct. at 574 ("some departures from uniformity were a necessary cost of the remedy we adopted."). Judges must now consider the need to avoid unwarranted similarities among defendants who are not similarly situated, as well as unwarranted disparities among defendants who are similarly situated. *See Gall*, 128 S. Ct. at 600 (approving of the judge's "consider[ation of] the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated") (emphasis in original). And the judge must consider "any unwarranted disparity created by the [guideline] itself." *Kimbrough*, 128 S.

---

[16] *See, e.g., United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005); *United States v. Martin*, 363 F.3d 25, 49-50 & n.39 (1st Cir. 2004); *United States v. Derbes*, 369 F.3d 579, 581-83 (1st Cir. 2004); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000).

[17] *See United States v. Duhon*, 541 F3d 391 (5th Cir. 2008).

[18] BOP has long waiting lists for RDAP, such that those who get in do not receive the full one-year reduction. Further, those convicted of being a felon-in-possession, no matter how non-violent, are ineligible for the one-year RDAP reduction. Those who received the two-level weapon enhancement under the drug guidelines are ineligible, thus excluding many who were convicted of a drug offense in which a gun was merely possessed or accessible to someone other than the defendant. Anyone with certain crimes of violence in his criminal history, no matter how old, *e.g.*, a 30-year-old bar fight, is ineligible for the reduction.

Ct. at 574; *see also id.* at 575 (approving judge's consideration of the fact that the guideline "itself created an unwarranted disparity within the meaning of § 3553(a)").

II. "Considering" the Advisory Guideline Range

After recounting the important circumstances of the offense and characteristics of the offender, § 3553(a)(1), explaining the relevant sentencing purposes, § 3553(a)(2), and noting the kinds of sentences available, § 3553(a)(3), address the guidelines' recommended sentence. At that point, you can argue (1) for the guideline sentence, (2) that the case is outside the so-called "heartland" to which the Commission intended the guideline to apply, (3) that the individual circumstances of the offense or characteristics of the defendant warrant a different sentence than the guidelines recommend, (4) that the guideline sentence itself reflects an unsound judgment in light of the purposes of sentencing and is not based on national sentencing data or empirical research, or (5) that the case warrants a different sentence regardless. *Rita*, 127 S. Ct. at 2463, 2465, 2467-68; *Gall*, 128 S. Ct. at 598-602; *Kimbrough*, 128 S. Ct. at 575.

A. Sentencing Purposes?

The Sentencing Commission has not adopted any theory of punishment based on sentencing purposes and has not explained its guidelines. Accordingly, judges and lawyers at the regional hearing urged the Commission to include in each guideline what purpose or purposes the guideline is meant to serve and on what basis the Commission concluded that the guideline would serve that purpose or those purposes.

As a matter of historical fact, most guidelines are based on the wishes of the Department of Justice (DOJ) and its allies in Congress.[19] DOJ has actively lobbied the Commission and Congress for lengthier sentences on the theory that heavy penalties are needed to coerce cooperation and guilty pleas,[20] or to sufficiently motivate prosecutors.[21] Congress, to express

---

[19] "In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission." Fifteen Year Review at xvii. "To date the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that are also mentioned in the SRA." *Id.* at 77.

[20] *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (Feb. 2005) ("prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power," and listing numerous examples of the Department requesting more stringent sentencing laws and guidelines because it would make prosecutors' jobs easier).

[21] For example, DOJ claimed that the prospect of a sentence without imprisonment was insufficient to motivate AUSAs to bring intellectual property cases. In support of a "trafficking" enhancement in § 2K2.1 based on two firearms, DOJ argued that firearms "traffickers" traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to "merit" the expenditure of resources to prosecute them. *See* DOJ Written Testimony at 3-4 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

disapproval of crimes in the news, enacted mandatory minimums, increased statutory maximums, and issued directives to the Commission. Thus, the guidelines for the vast majority of defendants sentenced in federal court were based on congressional actions, guideline amendments initiated by DOJ, and concerns about what would be acceptable to DOJ and its advocates in Congress, rather than on the purposes of sentencing and other factors in § 3553(a) that judges are bound to consider.[22]

The Commission would likely say that the guidelines are based on the "seriousness of the offense" as expressed by Congress. Indeed, in its amicus brief in support of the government in *Rita*, it said that "[i]t cannot be the case that a sentence is unreasonably high under Congress's parsimony provision when Congress itself elsewhere made the choice for severity."[23] As its primary example, it explained that it "chose to 'link the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences,'" and that "[h]ad the Commission 'given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization,' then sentences under the Guidelines would not have reflected the seriousness of the offense as determined by Congress's mandatory minimum sentences."[24] This explanation utterly fails to recognize that the Commission was created as an independent expert body in order to avoid the influence of politics, and that when it acts as a junior varsity Congress, it raises the separation of powers problem that most troubled the Supreme Court in *Mistretta v. United States*, 488 U.S. 361 (1987), *i.e.*, that the Commission is "located" in the Judicial Branch, that the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship," and that "that reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Id.* at 407.

In any event, the guidelines express offense seriousness in terms of "harm," theoretically measurable in grams, dollars, number of victims, and the like, and then translated to a number of points and ultimately an often excessive number of months and years. At the same time, the guidelines generally ignore, exclude or minimize the offender's degree of culpability,[25] and explicitly prohibit, discourage or limit consideration of many factors that bear directly on culpability, risk of recidivism, and the need for or accomplishment of rehabilitation.[26]

---

[22] *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

[23] Brief for the United States Sentencing Commission as *Amicus Curiae* in Support of Respondent, *Claiborne v United States* and *Rita v. United States* in the Supreme Court of the United States, Nos. 06-5618 & 06-5754 (January 22, 2007), at pp. 19-20.

[24] *Id*. at 20.

[25] Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker at 9-10 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

[26] *See, e.g.*, USSG §§ 5H1.1 (age); 5H1.2 (education or vocational skills); 5H1.3 (mental and emotional conditions); 5H1.4 (drug or alcohol abuse, gambling addiction, physical condition, including physique),

In 1999, Commission staff reported that average time served had doubled since the guidelines' inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively.[27] That same year, Justice Breyer gave a speech in which he criticized the "false precision" created by the guidelines, and called upon the Commission to "know when to stop," to "act[] forcefully to diminish significantly the number of offense characteristics," to "broaden[] the scope of certain offense characteristics, such as 'role in the offense,'" and to move in the direction of "greater judicial discretion" in order to provide "fairness and equity in the individual case."[28] Instead, with few exceptions,[29] the Commission has continued to amend the guidelines in a "one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules."[30]

Perhaps the Commission will now review and revise the guidelines in response to judicial decisions, as contemplated in the Sentencing Reform Act and as expected by the Supreme Court.[31] Defense counsel can move this evolution along by giving judges the reasons for a non-

---

5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.7 & 5K2.0 (d)(3) (role in the offense), 5H1.11 (military, civic, charitable or public service; employment-related contributions; prior good works), 5H1.12 (lack of guidance as a youth, disadvantaged upbringing), 5K2.0(d)(2) (acceptance of responsibility), 5K2.0(d)(5) (fulfillment of restitution obligations "only" to the extent required by law), 5K2.10 (victim provocation in a non-violent offense), 5K2.12 (financial difficulties and economic pressures on a trade or business), 5K2.13 (diminished capacity caused by voluntary use of drugs or other intoxicants, etc.), 5K2.16 (voluntary disclosure in connection with investigation or prosecution), 5K2.19 (post-sentencing rehabilitation efforts), 5K2.20 (aberrant behavior if serious bodily injury or death, used a firearm or other dangerous weapon, convicted of a serious drug offense, more than one criminal history point or any prior uncountable criminal history).

[27] Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

[28] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *10-11 (Jan./Feb. 1999).

[29] For example, the Commission reduced the crack guidelines by two levels (because it had set the guidelines two levels higher than the mandatory minimum), instituted a mitigating role cap (which was later limited), reduced the base offense level for some of the predicates under the illegal re-entry guideline, and reduced the maximum base offense level from 43 to 38 for drug trafficking.

[30] *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). *See also* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

[31] The Supreme Court has now repeatedly recognized the Commission's capacity to base the guidelines on careful study, research and consultation, and invited the Commission to exercise that characteristic institutional role:

> The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying

guideline sentence expressed in terms of sentencing purposes, sentencing data, and empirical research.

B. Empirical Evidence of Past Practice?

Some of the suggestions in Parts IV and V are based in whole or in part on empirical evidence of sentencing practice in the pre-guidelines era. Why is this relevant? The Commission has said that it used empirical evidence of past practice as a proxy for sentencing purposes in developing the guidelines because the Commissioners could not agree on which sentencing purposes should predominate. *See* USSG, Ch. 1 Pt. A(3); *see also* Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988). According to the Supreme Court, this reliance on past practice is one of two primary reasons that the guidelines may reflect a rough approximation of sentences that might achieve the purposes of sentencing. *Rita*, 127 S. Ct. at 2464-65; *Gall*, 128 S. Ct. at 594 & n.2; *Kimbrough*, 128 S. Ct. at 567. The other primary reason is that the Commission has the capacity (and the duty) to review and revise the guidelines in response to judicial decisions, sentencing data and research, and comment from the criminal justice community. *See Rita*, 128 S. Ct. at 2464-65; 28 U.S.C. §§ 994(o), § 991(b)(1)(C) & (2).

Justice Breyer has explained the Commission's use of past practice in formulating an answer to the question, "How long a prison term should attach to each guideline category?"

> We found typical past practice by asking probation officers to analyze more than 10,000 cases. These analyses, along with data from 100,000 other cases, were entered into the commission's computers and used to determine what factors typically accounted for more or less time actually served. We then used this data to create a rough draft of categories and subcategories, and to assign prison time to each.

See Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *3 (Vera Inst. Just.) (Feb. 1, 1999).

The Commission's past practice study is contained in U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987) (hereinafter "Supplementary Report"), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf. As we will see, the guidelines for most offenses are significantly higher than average past practice. Indeed, the guidelines were

---

> the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 127 S. Ct. at 2464.

designed by excluding the extensive use of probation under past practice, and by increasing prison sentences above past practice at the outset and through subsequent amendments. Nonetheless, given the fact that the Commission claims to have used past practice as a proxy for sentencing purposes and the fact that the Supreme Court has embraced this claim, past practice surely qualifies as an objective and valid basis for a non-guideline sentence.

III. Deconstructing the Guidelines/Constructing a Purpose-Driven Sentence

Judges are now invited to consider arguments that the applicable guidelines fail properly to reflect § 3553(a) considerations, reflect an unsound judgment, do not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita*, 127 S. Ct. at 2465. Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 128 S. Ct. at 570 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 127 S. Ct. at 2463.

Whether a judge may draw any useful advice from a guideline depends first on whether the Commission, in promulgating or amending it, acted in "the exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 575. As described in *Rita*, the exercise of this role has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and experts in the field. *Rita*, 127 S. Ct. at 2464-65. Where a guideline was not developed based on this "empirical data and national experience," it is not an abuse of discretion to conclude that it "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575. *See also Spears*, 129 S. Ct. 843-44 ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."). There is *dicta* in *Kimbrough* suggesting that a disagreement based solely on the judge's "view" that a guideline did not comport with § 3553(a) might be subject to "closer review" than an "outside the heartland" departure or variance, but it was unnecessary to consider this possibility because it has no application to guidelines that "do not exemplify the Commission's exercise of its characteristic institutional role," *i.e.*, were not based on empirical data and national experience. *Kimbrough*, 128 S. Ct. at 574-75; *Spears*, 129 S. Ct. at 843.

The courts' ability to impose a non-guideline sentence based solely on a policy disagreement with the guideline itself applies to all guidelines, not just the crack guidelines. This principle did not originate in *Kimbrough*, but in language applicable to all guidelines in cases preceding *Kimbrough* and in *Kimbrough* itself. It began in *Cunningham v. California*, 549 U.S. 270 (2007), where the Court recognized that the ability of judges to sentence outside the guideline range based solely on general policy objectives, without any factfinding anchor, is necessary to avoid a Sixth Amendment violation. *Id*. at 279-81. Then, in *Rita*, the Court held that because the guidelines may not be presumed reasonable at sentencing, sentencing judges are permitted to find that the guidelines sentence itself fails properly to reflect § 3553(a) considerations, that the guidelines reflect an unsound judgment, or that the guidelines do not generally treat certain defendant characteristics in the proper way. 127 S. Ct. at 2465, 2468.

Finally, in *Kimbrough*, the Court reiterated that a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless," *id*. at 570, quoting *Rita*, 127 S. Ct. at 2465, and thus, "courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines." *Id*. at 570, quoting Brief of the United States at 16. Because "the cocaine Guidelines, like all other Guidelines, are advisory only," *id*. at 564, a conclusion that a sentencing judge was barred from disagreeing with the crack guidelines in a "mine-run case" was error because it rendered the guidelines "effectively mandatory." *Id*. at 575. Both *Kimbrough* and *Gall* referred to the drug guidelines generally as not having been based on empirical data, *see Kimbrough*, 127 S. Ct. at 575; *Gall*, 127 S. Ct. at 594 n.2, and *Rita* made clear that judges may disagree with any guideline. *See* 127 S. Ct. at 2465, 2468.

Thus, the courts' ability to disagree as a matter of policy with the guidelines necessarily applies to all guidelines.[32] Most courts of appeals, and numerous district courts, have held that judges are free to disagree with any of the guidelines, including guidelines that emanate from congressional actions.[33]

---

[32] *See United States v. Shah*, 294 Fed. Appx. 951, 955 (5th Cir. 2008) ("Even prior to the decisions in *Gall* and *Kimbrough*, the Supreme Court had already recognized that a district court could impose a sentence that varied from the advisory guideline range based solely on policy considerations, including disagreements with the Guidelines," citing *Rita*); *United States v. Williams*, 517 F.3d 801, 809-10 (5th Cir. 2008) ("The Supreme Court reiterated in *Kimbrough* what it had conveyed in *Rita v. United States*, which is that as a general matter, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.").

[33] *See United States v. Mondragon-Santiago*, __ F.3d __, 2009 WL 782894 (5th Cir. Mar. 26, 2009) (§ 2L1.2); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (all guidelines); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc) (all guidelines); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008) (all guidelines); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008) (fast track); *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008) (computer enhancement under § 2G1.3); *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008) (career offender); *United States v. Tankersley*, 537 F.3d 1100 (9th Cir. 2008) (all guidelines); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008) (all guidelines); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track and all guidelines); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008) (all guidelines); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Marshall*, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008) (career offender); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008) (all guidelines); *United States v. Nincehelser*, 2009 WL 872441 (D. Neb. Mar. 30, 2009) (methamphetamine); *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009) (child pornography); *United States v. Lenagh*, 2009 WL 296999 (D. Neb. Feb. 6, 2009) (white collar crimes); *United States v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009) (all drug guidelines); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008) (over-emphasis on drug quantity, under-emphasis on minimal role); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008) (second degree murder guideline); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008) (child pornography); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008) (child pornography); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008) (child

There is, however, one appeals court decision holding that the career offender guideline binds the courts because it is based on a directive from Congress to the Commission. *See United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009); *but see United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008). Three appeals courts continue to insist that courts cannot disagree with the disparity created by the fast track departure because the disparity was authorized by Congress. *See United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008); *but see United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

These decisions are poorly reasoned and may not last long.[34] Indeed, if they were right, judges could not disagree with almost any guideline, as most of them were directed in one way or another by Congress. *See* Congressional Directives to Sentencing Commission 1988-2008 (identifying at least 75 distinct guidelines and policy statements which were promulgated or amended, some repeatedly, in response to congressional directives),[35] www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf. The guidelines would then have to

---

pornography); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008) (child pornography); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008) (child pornography); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008 (child pornography); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (fraud guideline); *United States v. Grober*, 595 F.Supp.2d 382 (D. N.J. 2008) (child pornography); *United States v. Doktor***,** slip op., 2008 WL 5334121 (M.D.Fla. Dec. 19, 2008) (child pornography); *United States v. Johnson*, 588 F.Supp.2d 997 (S.D. Iowa 2008) (child pornography); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008) (child pornography); *United States v. Horn*, 590 F. Supp. 2d 976 (M.D. Tenn. 2008) (Commission's failure to include in § 1B1.10 for retroactive application Amendment 709 amending the definition of "related cases" under § 4A1.2(a)(2) was unsound).

[34] The Solicitor General has been ordered to respond to petitions for certiorari in the Fifth Circuit's cases forbidding judges from disagreeing with the disparity created by the Attorney General's fast track policies. A petition for rehearing en banc has been filed in *Vazquez*, *see* http://www.fd.org/pdf_lib/Vazquez%20Petition%20for%20Rehg%20En%20Banc.pdf, and a petition for certiorari will be filed if necessary.

[35] These are USSG §§ 2A1.2, 2A1.3, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2A6.2, 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2C1.8, 2D1.1, 2D1.2, 2D1.10, 2D1.11, 2D1.12, 2D2.3, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G3.1, 2H3.1, 2H4.1, 2H4.2, 2J1.2, 2K1.4, 2K2.1, 2K2.24, 2L1.1, 2L1.2, 2L2.1, 2M5.1, 2M5.2, 2P1.2, 2R1.1, 2T4.1, 2X7.1, 3A1.1, 3A1.2, 3A1.4, 3B1.3, 3B1.4, 3B1.5, 3C1.4, 3E1.1, 4A1.1, 4A1.3, 4B1.5, 5C1.2, 5D1.2, 5E1.1, 5H1.4, 5H1.6, 5H1.6, 5H1.7, 5H1.8, 5K2.0, 5K2.10, 5K2.12, 5K2.13, 5K2.15, 5K2.17, 5K2.20, 5K2.22, 5K3.1, 8B1.1, 8B2.1. There have also been several amendments in response to increased statutory maxima or new mandatory minimums without any accompanying directive. *See, e.g.*, USSG, App. C., Amend. Nos. 652, 655 (Nov. 1, 2003) & 663 (Nov. 1, 2004) (four additional guidelines, USSG §§ 2A1.4, 2A1.5, 2A2.1, and 2Q1.4, amended in response to increases in statutory maxima); *id*. Amend. No. 677 (Nov. 1, 2005) (promulgating USSG § 2B1.6 in response to a new mandatory minimum).

be struck down on both Sixth Amendment and Separation of Powers grounds. *See* 2G2.2 Reply to Government at 20-23, http://www.fd.org/pdf_lib/2G2.2%20Reply%20to%20Govt.pdf; Appellant's Brief Regarding Number of Images Enhancement, http://www.fd.org/pdf_lib/mistretta%20redacted.pdf. The Department of Justice has wisely conceded that courts are free to disagree with the career offender guideline, as the statute from which it emanated, 28 U.S.C. § 994(h), is directed to the Commission, not the courts. *See* http://www.fd.org/pdf_lib/Funk%20Letter%20from%20Govt%2003-14-08.pdf; http://www.fd.org/pdf_lib/Gov%20Funk_01-09.pdf.

As noted above, rarely do the guidelines reflect the Commission's study of pre-guideline sentencing practice, nor do most guidelines reflect the Commission's exercise of judgment as an expert, research-based agency unfettered by politics. Using empirical research, in some cases research undertaken at the Commission itself, you can readily show that the guideline range was not developed based on national sentencing data or empirical research and that it recommends a sentence that is greater than necessary to satisfy § 3553(a)'s objectives. This type of critique, carefully developed, should convince judges to question the wisdom of the guidelines' recommendations and lead to sentences that better reflect the statutory purposes. In fact, you can develop an evidentiary basis for a non-guidelines sentence that is stronger than anything the Commission has developed in support of the recommended guideline range.

The Commission itself has conducted studies that have not been incorporated into the Guidelines but upon which judges can and should rely. In addition to the reports on crack cocaine sentencing, the Commission's Fifteen Year Review identifies serious problems with the career offender guideline, the relevant conduct rules, the drug guidelines generally, and various forms of disparity that have increased under the Guidelines, most notably racial disparity and hidden disparities caused by the government's practices as permitted and encouraged by the Guidelines.[36] It has published three reports on recidivism, acknowledging that the criminal history rules were never based on empirical evidence and identifying numerous factors that predict reduced recidivism which are not included in the Guidelines and factors that do not predict recidivism which are included in the Guidelines.[37] Judges can and should rely on these extra-guideline findings to impose non-guideline sentences that better comply with § 3553(a).[38]

---

[36] Fifteen Year Review at 47-55, 76, 82, 91, 94, 102-06, 111-15, 117, 122, 131-35, 140-42.

[37] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005).

[38] *See United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (relying on *Fifteen Year Report*'s discussion of career offender guideline to impose non-guideline sentence); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (relying on *Fifteen Year Report* to point out disparities arising from government's unilateral power to reward cooperation, contrasting restrictions on aberrant conduct guideline with recidivism reports); *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants

There are many areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include studies on brain development by the National Institutes of Health and others,[39] research showing the efficacy and cost savings of drug treatment, education and job training over lengthy incarceration in reducing crime,[40] reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value,[41] research on the adverse impact of incarceration on children and families,[42] analyses of the suitability of members of immigrant populations for

---

over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Ali*, Crim. No. 1:05-5, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006) (imposing non-guideline sentence, citing recidivism reports).

[39] Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows "that the region of the brain that inhibits risky behavior is not fully formed until age 25").

[40]Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, Health Services Res., 41(1), 192-213 (2006) (for every $1 spent on drug treatment, $7 is saved in general social savings, primarily in reduced offending and also in medical care); Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 Law & Contemp. Probs. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, January 2007 (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

[41] U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (Feb. 1994), available at *http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf*; The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at *http://www.sentencingproject.org/pdfs/incarceration-crime.pdf*; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999); Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/Aug. 1994).

[42] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children* (Dec. 2001), presented at U.S. Dep't of Health and Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (2002) (discussing impact of parental incarceration on children and benefits of alternatives to incarceration); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001) (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); Patricia M. Wald, *"What About the Kids?': Parenting Issues in Sentencing*, 8 Fed. Sent. Rep. 137 (1995) (discussing growing body of research showing that children fare better in their parents' care than in foster

intermediate sanctions,[43] reports on the efficacy of victim mediation as an alternative to incarceration,[44] and studies demonstrating that contrary to myth, recidivism rates for sex offenders are lower than in the general criminal population, and that community treatment for sex offenders is effective.[45]

District court judges have wide latitude in determining whether empirical or other expert evidence is reliable and relevant, subject to deferential review. *See Cavera*, 550 F.3d at 196 n.15; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

For further assistance in making these arguments, see (1) *Introduction and "How To" Guide to Deconstructing the Guidelines*, (2) *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker (relevant conduct, drugs, immigration, fraud, firearms, criminal history, over-use of prison), *http://www.fd.org/pdf_lib/EvansStruggle.pdf*, and (3) the papers, sentencing memos and briefs on the Deconstruction page of fd.org (career offender, child pornography, firearms, probation, relevant conduct, tax), http://www.fd.org/odstb_SentencingResource3.htm#DECONS.

IV. First Question: Is Prison Necessary to Satisfy Retribution, Deterrence or Protection of the Public, or Would Probation Satisfy Those Purposes and Promote Rehabilitation, if needed?

The Commission has just issued a new report which states:

---

care or elsewhere).

[43] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338, 353 (2005).

[44] Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001) (explaining ancient concept of "restorative justice" as alternative to incarceration, citing numerous studies examining its effectiveness in criminal context); *see also, e.g.*, James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998) (collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had significantly lower recidivism rates), *available at* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

[45] U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration); F.S. Berlin, *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcomes*, 12 Am. J. of Forensic Psych. 3 (1991) (documenting effectiveness of community treatment for sex offenders).

> Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.[46]

The report also confirms that non-prison alternatives are under-used in federal court.[47]

Congress authorizes probation for a broad range of offenses and offenders, *i.e.*, for any offense with a statutory maximum below 25 years so long as probation is not expressly precluded and the defendant is not sentenced to prison for a non-petty offense at the same time. *See* 18 U.S.C. § 3561(a); 18 U.S.C. § 3559(a). The Guidelines Manual does contain the "in/out" question that courts should be asking in every case in which prison is not required. It states:

> The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

USSG, Chapter 5, Part B - Probation, Introductory Commentary.

But this goes unnoticed because it is located in a Part entitled "Probation" and the guidelines recommend against probation in most cases. The court can impose a within-guideline sentence of straight probation only at levels 1 through 8 (0 to 6 months). The within-guideline sentence is at least intermittent confinement, community confinement, or home detention at levels 9 and 10 (1 to 12 months), is at least half prison at levels 11 and 12 (8 to 16 months), and is prison only at level 13 or greater (12 months to life). The U.S. Probation Monograph, which states that "[o]fficers should consider the appropriateness of any available alternatives before deciding to recommend a term of imprisonment," goes unnoticed for the same reason.[48] The Commission's recent report confirms "that sentencing zone ultimately determines whether

---

[46] USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009), http://www.ussc.gov/general/20090206_Alternatives.pdf.

[47] In 2007, just under 18% of federal offenders who are U.S. citizens fell into Zones A, B, or C of the Sentencing Table, making them eligible for a within-guidelines sentence other than straight prison. *Id.* tbl. 5. Of that small number, only 38% were sentenced to probation only, while the rest were sentenced to some term of confinement. *Id.* at 5 & tbl 5.

[48] Publication 107 at II-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

offenders are sentenced to alternatives. Specifically, guideline offense level and Criminal History Category, alone or in combination, are the principal factors determining whether an offender receives an alternative sentence."[49]

Judges must now consider *all* of "the kinds of sentences available" by statute, § 3553(a)(3), even if the "kinds of sentence . . . established [by] the guidelines" permit or encourage only prison. *See Gall v. United States*, 128 S. Ct. 586, 602 & n.11 (2007). Judges can feel confident in imposing a non-prison sentence based on past practice, the Sentencing Reform Act, the Commission's own research, and other credible research.

Under past practice, the threshold question in most cases was *whether* to impose a sentence of imprisonment.[50] The relevant considerations were whether public safety required incarceration, what the defendant's risk of recidivism was, what his treatment and medical needs were, and what collateral effects imprisonment would have on family and employment. While only 7.7% of defendants receive a sentence of straight probation today,[51] approximately 38% of defendants were sentenced to straight probation in 1984,[52] with the rate varying by offense category: 18% for robbery, 21% for drug offenses, 31% for offenses against the person, 37% for firearms offenses, 41% for immigration offenses, 57% for tax offenses, 59% for fraud, 60% for property offenses, and 64% for burglary. *See* Supplementary Report, Table 2 at 68.

Congress expected that the threshold question in most cases would continue to be whether probation was sufficient or whether prison was necessary. It instructed judges as follows:

> The court, in determining *whether* to impose a term of imprisonment, and, *if* a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a) (emphasis supplied). "This section specifies the factors to be considered by a sentencing judge in determining *whether* to impose a term of imprisonment and, *if* a term is to be imposed, the length of the term." S. Rep. No. 98-225 at 116 (1983) (emphasis supplied). "The phrase 'to the extent that they are applicable' acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives." *Id*. at 119 n.415.

---

[49] USSC, *Alternatives to Incarceration in the Federal Criminal Justice System*, at 12 (Jan. 2009).

[50] Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 Northwestern L. R. 1247, 1250 (Summer 1997) (describing pre-guideline sentencing practice, where "the probation officer's major threshold recommendation, in many cases, dealt with the issue of whether the defendant should receive a prison sentence or probation").

[51] U.S. Sentencing Commission, 2007 Sourcebook of Federal Sentencing Statistics, Fig. D, available at http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm.

[52] Fifteen Year Review at 43.

Consistent with this directive to judges, Congress also directed the Commission to promulgate guidelines for both the "in/out" question, and the "if prison, how long" question:

> The Commission . . . shall promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence . . . including -- (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment [and] (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment.

28 U.S.C. § 994(a)(1)(A) & (B).

Congress intended that probation would be used with at least the same frequency as before the guidelines. It directed the Commission to "ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society" while permitting "*increased* use of restitution, community service, and other alternative sentences" in all other cases. *See* Pub. L. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (emphasis added).

Congress identified when probation should be the presumptive sentence, when some term of imprisonment should be imposed, and encouraged the use of non-prison alternatives in between. Probation would be generally appropriate in "cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Some term of imprisonment would be generally appropriate for "a person convicted of a crime of violence that results in serious bodily injury." *Id*.

For defendants between these poles, Congress encouraged the use of non-prison sentences in a variety of ways. First, "in light of current knowledge that imprisonment is not an appropriate means of promoting correction and rehabilitation," S. Rep. No. 98-225 at 76 (1983), it directed the Commission and the courts to use prison only if it served some purpose of sentencing other than rehabilitation, and to use probation in all other circumstances. *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225 at 119, 176 (1983). Congress specifically noted that "if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation." *Id*. at 171 n. 531. *See also id*. at 92 (Committee "expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions").

Second, Congress recognized that probation would often satisfy the other purposes of sentencing: "It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose. This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service." *Id*. Congress recently restored payment of fine, restitution and community service as the three options for a mandatory condition of probation after the AEDPA of 1996 had

mistakenly made restitution, notice to victims, and residence restrictions the three choices.[53] *See* Pub. L. No. 110-406, Sec. 14(a) (Oct. 13, 2008), amending 18 U.S.C. § 3563(a)(2). The Supreme Court in *Gall* recognized the substantial restriction of liberty involved in even standard conditions of probation, *Gall*, 128 S. Ct. at 595-96 & n.4, and that in some cases, "'a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.'" *Id.* at 599 (quoting district court opinion).

Third, Congress provided numerous examples of when probation *should* be used, based on the very same factors that the policy statements in the Guidelines Manual prohibit or discourage from consideration. Through the directives in 28 U.S.C. § 994(d) and (e), Congress sought to guard against the use of incarceration to warehouse defendants who lacked the advantages of education, employment, and stabilizing ties, and specifically encouraged such factors as a reason for probation.[54] Regarding the directive to the Commission to assure that the guidelines and policy statements were "entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders," 28 U.S.C. § 994(d), the Senate Report explained:

> The Committee added [this] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training. Indeed, *in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training*. This qualifying language in subsection (d), *when read with the provisions in proposed Section 3582(c) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that "might be good for him."*

S. Rep. No. 98-225 at 171 & n.531 (1983) (emphasis supplied). In other words, the Commission was to provide for probation to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing.

Emphasizing the same point in explaining the directive to the Commission to "assure that the guidelines, *in recommending a term of imprisonment or length of a term of imprisonment*,

---

[53] The new law also restores community confinement as a discretionary condition of supervised release and maintains intermittent confinement "only for a violation of supervised release in accordance with section 3583(e)(2) and only when facilities are available." *See* Pub. L. No. 110-406, Sec. 14(b) (Oct. 13, 2008), amending 18 U.S.C. § 3583(d).

[54] S. Rep. No. 98-225 at 175, 172-73 (1983).

reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties," 28 U.S.C. § 994(e) (emphasis supplied), the Senate Report said:

> As discussed in connection with subsection (d), each of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community. The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

S. Rep. No. 98-225 at 174-75.

In specifically discussing the factors listed in subsections (d) and (e), Congress identified a number of ways in which they would call for a sentence of probation, intermittent confinement, or community service:

- "[S]ubsection (e) specifies that education should be an inappropriate consideration in determining the appropriate length" of a prison term [meaning that lack of education should not be used to determine the length of a prison term], but "the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment." *Id*. at 172-73.

- Similar considerations apply to vocational skills and employment record. *Id*. A "defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release." *Id*. at 173 n.532.

- "The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment." *Id*. at 173.

- "Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. However, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for 'drying out,' as a condition of probation." *Id*.

- "Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. . . . Of course, the physical condition of the defendant would play an important role in the determination of conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs." *Id.*

- "As stated in subsection (e), the Committee believes that [family ties and responsibilities] is generally inappropriate in determining *to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment*." *Id*. at 174 (emphasis supplied). The Commission could conclude "that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family." *Id*.

Data just published by the Commission shows that over 92% of federal defendants are sentenced to prison (85.3% to straight prison).[55] These defendants are overwhelmingly people of color (70%), poor (87% get no fine imposed), and relatively undereducated (only 6% graduated from college, and half did not graduate from high school); and their crimes are typically victimless (drugs and immigration account for 6 out of 10 convictions). Further, contrary to the perception that guns go with drugs, 83% of federal drug offenses do not involve a firearm. With the exception of crack offenders, drug offenders are usually first offenders. Two-thirds of marijuana defendants are in criminal history category I, as are 60% of heroin and cocaine defendants, and half of methamphetamine defendants. Crack offenders, 82% of whom are African American, are more likely to have criminal history points[56] because they have a higher risk of arrest and prosecution than similarly situated Whites.[57]

This data is totally inconsistent with Congress's intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders. It is also inconsistent with current research. In 1996, Commission staff authored a paper entitled *Sentencing Options under the Guidelines,* [58] which acknowledged that non-prison sentences are associated with less recidivism than prison sentences,[59] that "[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,"[60] and that "alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties."[61]

---

[55] *See* USSC, Overview of Federal Criminal Cases Fiscal Year 2007 (Dec. 2008), http://www.ussc.gov/general/20081222_Data_Overview.pdf; Changing Face of Federal Criminal Sentencing (Dec. 2008), http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf.

[56] *Id.*

[57] *See* Michael Tonry, Malign Neglect – Race, Crime, and Punishment in America. New York: Oxford University Press (1995).

[58] U.S. Sentencing Commission, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), available at http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf.

[59] *Id.* at 18.

[60] *Id*.

Other research likewise has shown that prison can be counterproductive. For example, Bureau of Prisons research in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who were then in Criminal History Category I, guideline sentences were costly to taxpayers, had little if any incapacitation or deterrent value, and were likely to negatively impact recidivism.[62] *See e.g.*, Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994). "The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality." Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005).[63]

The Sentencing Commission held a Symposium in July 2008, entitled "Alternatives to Incarceration."[64] The recurring theme, illustrated largely by research and implementation of alternatives in the states, was that lengthy incarceration leads to increased recidivism and is not the most cost effective means of protecting public safety.

V. Objective, Well-Reasoned Support for Non-Guideline Sentences

The Supreme Court made clear in *Spears* that a judge's ability to reject the 100:1 powder to crack ratio "necessarily implies adoption of some other ratio to govern the mine-run case. . . . Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio." 129 S. Ct. at 843. Likewise, the judge's ability to disagree with other guidelines as a matter of policy necessarily permits adoption of an alternative basis for the sentence that does not suffer from the same policy problems.

This part offers suggestions for objective, well-reasoned bases that can be used, alone or in combination, to support a non-guideline sentence of probation or a shorter prison term. These suggestions are intended to complement an individualized analysis of the circumstances of the offense and characteristics of the defendant in light of the purposes of sentencing, deconstruction of the applicable guideline, and other empirically-based arguments for a sentence that best reflects the statutory purposes.

A. Sever and/or Reweigh the Flawed Guideline Provision

---

[61] *Id*. at 19.

[62] *See also* Steve Sady & Lynn Deffebach, *The Need for Full Implementation of Ameliorative Statutes* (June 2008) (demonstrating that BOP has failed to implement existing statutory provisions for treatment and reduced sentences, thus failing to prepare prisoners for re-entry and creating over-incarceration), http://www.rashkind.com/alternatives/dir_04/Sady_Over-Incarceration.pdf.

[63] Available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

[64] The transcript, papers, power points, charts and graphs are available at http://www.rashkind.com/alternatives/toc.htm, and http://www.ussc.gov/SYMPO2008/NSATI_0.htm.

The Commission has a duty to review and revise the guidelines in response to judicial decisions, sentencing data, empirical research, and comment from the criminal justice community. *See Rita*, 128 S. Ct. at 2464-65; 28 U.S.C. § 994(o), § 991(b)(1)(C) & (2). When a guideline is not based on this "empirical data and national experience," it "does not exemplify the Commission's exercise of its characteristic institutional role," and it is not an abuse of discretion to categorically reject it even in a "mine-run case." *Kimbrough*, 128 S. Ct. at 575; *Spears*, 129 S. Ct. at 843-44. Thus, one way to "calculate" a non-guideline sentence is simply not to apply the flawed component of the guideline calculation, or to assign a different weight to a guideline enhancement that is excessive. Here are a few examples, but there are as many possibilities as there are flawed guidelines.

Child Pornography. In *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009), the judge, like many other judges, concluded that USSG § 2G2.2 "does not reflect empirical analysis, but congressional mandates that interfere with and undermine the work of the Sentencing Commission," and that "the guideline impermissibly and illogically skews sentences for even 'average' defendants to the upper end of the statutory range, regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability . . . largely because the level enhancements, some quite extreme, are based on circumstances that appear in nearly every child pornography case." *Id*. at 1104-05. The judge then found that "a reasoned alternative to the flawed guideline is for the sentencing judge to begin with the base offense level, which reflects the mandatory minimum statutory sentence, U.S.S.G. § 2G2.2(a), and then to consider appropriately identified factors, such as those in § 2G2.2(b)(1), (3), (4), and (5), but to give those factors more appropriate weight in the determination of a particular defendant's sentence. Such 'cherry picking' and reweighing of factors from the guideline is appropriate—indeed, totally consistent with the exercise of my discretion to apply the 18 U.S.C. § 3553(a) factors—because it reflects the extent of my categorical and policy disagreement with the guideline." *Id*. at 1107.

Career Offender. The judge may conclude that the career offender guideline is unsound for any number of reasons. It provides for much harsher sentences than under past practice, s*ee* Supplementary Report at 44, and is contrary to empirical evidence and national experience, as shown by the Commission's own research, the sentencing data, and judicial decisions. *See* Amy Baron-Evans & Jennifer Niles Coffin, *Deconstructing the Career Offender Guideline* at 32-39 (Aug. 29, 2008) (hereinafter "Deconstructing the Career Offender Guideline").[65] The guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies and promotes racial disparity. *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (2004) (hereinafter "Fifteen Year Review").[66] The public disagrees with the harshness of three strikes laws like the career offender guideline. *See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary

[65] Available at http://www.fd.org/pdf_lib/Deconstructing%20the%20Career%20Offender%20Guideline%208.29.08..pdf.

[66] Available at http://www.ussc.gov/15_year/15year.htm.

(1997).[67] Exacerbating these problems, the Commission's definitions of predicate offenses are broader than 28 U.S.C. § 994(h) requires. *See* Deconstructing the Career Offender Guideline at 10-31.

If the judge concludes that the career offender guideline is unsound, one option is to impose a sentence within the guideline range that would have applied absent the career offender provision. *See, e.g., United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008) (district court had discretion to impose the guideline sentence absent the career offender provision); *United States v. Martin*, 520 F.3d 87 (1st Cir. 2008) (upholding sentence within the guideline range absent the career offender provision). Judges did this frequently even when the guidelines were mandatory. *See* Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996).

Firearms. The judge may determine that certain aspects of the firearms guideline, USSG § 2K2.1, are unsound, and therefore apply the guideline without those provisions.[68] Take, for example, a case in which the defendant is convicted under 18 U.S.C. § 922(g)(1) of unlawful possession of a firearm as a convicted felon, the defendant has two previous convictions for a "crime of violence" or "controlled substance offense," and the serial number is obliterated though the defendant was not aware of that. Under the guideline as written, the total offense level would be 28, and, if the defendant was in Criminal History Category III, the range would be 97-121 months. Based on the following, the range should be 15-21 months, calculated with a base offense level of 14. *See* USSG § 2K2.1(a)(6)(A) (defendant was a prohibited person).

First, the base offense level is unsound. In 1991, the base offense level was increased from 12 to 20 if the defendant had one prior conviction for a "crime of violence" or "controlled substance offense" (as defined in the career offender guideline) and from 12 to 24 if the defendant had two or more such prior convictions.[69] These base offense levels were and are contrary to the empirical data. According to a 1990 Commission Working Group Report, guideline ranges in effect at the time were "generally insufficient" because the upward departure rate was 8.4% and 25% of cases were sentenced at the upper end of the range.[70] However, the working group found that these more severe sentences were *not* imposed disproportionately on defendants with prior convictions for drug-related offenses and crimes of violence; nonetheless, it proposed doubling the base offense level based on the existence of these very types of prior

[67] Available at http://www.ussc.gov/nss/jp_exsum.htm.

[68] The arguments in this section and other arguments deconstructing the firearms guideline are set forth in more detail in Louise Arkel's 2K2.1 Sentencing Memo, http://www.fd.org/pdf_lib/2K2.1%20Sentmemo.pdf, and Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker at 42-47 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

[69] USSG, App. C, Amend. 374 (1991).

[70] *See* USSC, *Firearms and Explosive Materials Working Group Report* at 8 & 10 (Dec. 11, 1990).

convictions.[71] The rationale was to achieve consistency with the Armed Career Criminal Act, 18 U.S.C. § 924(e), an entirely different statute which requires a fifteen-year mandatory minimum penalty for defendants with three previous convictions for a "violent felony" or a "serious drug offense."[72] USSG § 2K2.1 was amended accordingly, and therefore suffers from the same vice the Supreme Court identified in the drug guidelines.[73] The average sentence length then increased from approximately 28 months in fiscal year 1989 to approximately 82 months in fiscal year 1995.[74] Since then, the rate of below-guideline sentences has increased from 10% in 1997 to 16.7% in 2008,[75] and average sentence length has decreased.[76] For the past ten years (excluding 2003-2005 due to the PROTECT Act), the rate of below-guideline sentences has well exceeded the 8.4% upward departure rate that led the Commission to conclude that guideline ranges in effect before the 1991 amendment were "generally insufficient." Yet the Commission has taken no action to reduce sentences under this guideline.

Second, the obliterated serial number enhancement is unsound because the Commission has never explained how it advances the purposes of sentencing and much evidence shows that it does not. The original guideline provided for a one-level enhancement if the firearm had an obliterated serial number. *See* USSG § 2K2.1(b)(1) (1988). This was doubled to two levels by an amendment effective November 1, 1989. The sole explanation was that it would "better reflect the seriousness of the offense," *see* USSG, App. C, Amend. 189, yet the enhancement applies regardless of whether the defendant knew the serial number was obliterated, even though *mens rea* is an essential component of culpability. In 2006, it was doubled again, to four levels. *See* USSG, App. C, Amend. 691. When published for comment, the reason was "the difficulty in tracing firearms with altered or obliterated serial numbers."[77] The final amendment was published with an additional reason, "the increased market for these types of weapons,"[78] which seems to imply an erroneous theory that increasing the punishment would increase deterrence, though this is unclear because this reason was never published for comment or raised by any

---

[71] *Id*. Tab D at 10.

[72] *Id*. at 19-20.

[73] *See Gall*, 128 S. Ct. at 594 n.2 ("the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences."); *Kimbrough*, 128 S. Ct. at 567 (Commission "did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

[74] Fifteen Year Review at 67, Fig. 2.16.

[75] USSC, 1997 Sourcebook of Federal Sentencing Statistics, Table 28, http://www.ussc.gov/annrpt/1997/sbtoc97.htm; USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, Table 5, http://www.ussc.gov/sc_cases/USSC_2008_Quarter_Report_4th.pdf.

[76] Fifteen Year Review at 67, Fig. 2.16 (65 months by 2002); USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, Fig. E (55 months by end of 4th quarter 2008).

[77] Federal Register Notice at 41 (Jan. 27, 2006), http://www.ussc.gov/FEDREG/Fedreg0106.pdf.

[78] Federal Register Notice at 47 (May 18, 2006), http://www.ussc.gov/FEDREG/2006finalnot.pdf.

witness in a public document or hearing. Responding to the reason published, the Defenders provided information from a law enforcement website explaining that the serial number is able to be restored by a simple laboratory procedure in most cases and anecdotal information that the number is recovered more often than not.[79] The Defenders and the Practitioners Advisory Group also urged the Commission to add a *mens rea* requirement based on § 3553(a)(2)(A) (the need to achieve "just punishment" in light of the "seriousness of the offense") and § 3553(a)(6) (the need to "avoid unwarranted disparities" created by treating dissimilar defendants the same).[80] DOJ expressed no direct opinion on a *mens rea* requirement but perhaps unwittingly supported such a requirement by arguing that the 4-level enhancement would "better reflect the culpability of this conduct" because the "intentional obliteration of a serial number can be intended only to make it more difficult" to trace the firearm.[81] The Commission adopted the 4-level increase, and declined to add a *mens rea* requirement without explanation. The same 4-level enhancement applies whether the defendant was convicted under § 922(g) and had no knowledge that the serial number was obliterated, or was convicted under § 922(k) based on proof beyond a reasonable doubt that he knew the serial number was obliterated.

Relevant Conduct. Under certain portions of the "relevant conduct" guideline and its commentary, judges are required to calculate the guideline range based not only on the crime of conviction, but on separate crimes, comprised of their own elements, of which the defendant was acquitted, with which the defendant was never charged, or which were dismissed. Moreover, the recommended guideline sentence is precisely the same under these relevant conduct provisions as it would be if the defendant had been convicted of the additional offenses. These provisions were a radical departure from past practice in the federal courts and national experience in the states, were not authorized by Congress, were adopted without empirical support, have been a policy failure in practice, and have been subject to enduring criticism and calls for reform, all to no avail. *See* Baron-Evans & Coffin, *Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing* (August 11, 2008) (hereinafter "Deconstructing the Relevant Conduct Guideline"), http://www.fd.org/pdf_lib/relevant%20conduct3.pdf.

The judge can and should decline to apply those portions of the relevant conduct guideline that add months and years for uncharged, dismissed or acquitted crimes. It is not *only* judges, lawyers and academics who have urged the Commission to junk the relevant conduct guideline. John Steer, a veteran of the Commission since its inception as General Counsel and then Vice Chair, co-authored a 1990 article declaring relevant conduct to be the "cornerstone" of the guidelines and attempting to justify it. *See* Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990). Recently, Mr.

[79] Defenders' Written Testimony at 16 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf, citing Division of Criminal Investigation, Iowa Department of Public Safety, *Restoration of Obliterated Serial Numbers*, http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm.

[80] *Id*. at 17; PAG Written Testimony at 9-10 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

[81] DOJ Written Testimony at 10 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

Steer said that acquitted conduct should be removed from the guideline calculation, and that the use of "unconvicted counts" in the same course of conduct or common scheme under § 1B1.3 (a)(2) and (3) "is the aspect of the guideline that I find most difficult to defend." *See An Interview with John Steer, Former Vice Chair of the U.S. Sentencing Commission*, The Champion at 42, September 2008. While Mr. Steer suggested cutting the quantity involved in such counts in half, *id*., there does not appear to be any more of a policy basis for that solution than for counting the entire quantity. Given the complete policy failure of this form of "relevant conduct," *see* Deconstructing the Relevant Conduct Guideline, *supra*, at 19-27; Fifteen Year Review at 50, 86, 92, it should not be applied at all.

B. Use Empirical Data of Past Practice

Again, the Commission's past practice study is contained in U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987) (hereinafter "Supplementary Report"), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf. In addition to Table 2, cited in Part IV regarding non-prison sentences, the study contains other useful data that can be used to support a non-guideline sentence.

Caution: In using the past practice study, be sure to carefully work the numbers out to determine if the past practice average is in fact lower than the current guideline range. And, if it is lower, does it coincide with the sentence you are seeking for this client? The past practice study is based on average time served in the pre-guidelines era. It does not mean that this average is now, or would have been then, the sentence that is sufficient but not greater than necessary to satisfy the relevant purposes of sentencing in this particular case.

Tables 1(a) and 1(b). Table 1(a), entitled "Estimated Time Served for Baseline Offenses," at pp. 27-34, shows "sentence levels" which are estimates of average time served translated into guideline offense levels (adjusted for good time of 15%[82]), for first-time offenders (no prior convictions) convicted at trial of various "baseline offenses" who were "sentenced to a term of imprisonment." *Id*. at 23-24. In other words, the "sentence level" upon which the guidelines allegedly were based does not account for cases in which a prison term was not imposed, which was quite a few cases. The percentage sentenced to prison for each baseline offense is shown in the last column of Table 1(a). *See also* Table 2 at p. 68 (showing percent sentenced to probation, probation with confinement, and split sentences). The Commission acknowledged that if those sentenced to probation (0 months imprisonment) were included in the estimates, "the average time served by all first-time" offenders convicted at trial of one of the baseline offenses "is actually" less than that corresponding to the "sentence level" shown in Table 1(a), *i.e.*, it is the fraction of 100 sentenced to prison times the "average time served" corresponding to the "sentence level" shown in Table 1(a). *Id*. at 24 (illustrating the math).

[82] Note that BOP does not actually give 15% good time credit (54 days), but only 12.8% good time credit (47 days). Thus, the guideline sentence should be reduced by 7 days per year. *See* Sady & Deffebach, *supra* note 62, at 3-9.

Table 1(b), entitled "Estimated Level Adjustments," at pp. 35-39, shows adjustments, in guideline offense levels, for certain aggravating and mitigating circumstances identified by the Commission, which are not reflected in the "sentence levels" in Table 1(a). *See* Supplementary Report at 23-24. Note that many mitigating factors that judges routinely took into account before the guidelines and that they must take into account now under § 3553(a)(1) are not included in Table 1(b), though it does include a few mitigating factors that the guidelines prohibit, *e.g.*, "single event" in a drug case and being a "drug user" in a drug case.[83]

As an example of how to use Tables 1(a) and (b) (based on other examples in the Supplementary Report), take a first time offender who pled guilty to extortion, the offense involved $20,000 or less, and the defendant played a lesser role in the offense. The sentence level in Table 1(a) for embezzlement of $20,000 or less is 17, *id*. at 33, which means the average time served for first offenders sentenced to prison for that baseline offense was 27 months (the number of months halfway between 24 and 30 months for a level 17). *Id*. at 23. According to Table 1(b), however, defendants convicted of extortion who played a lesser role got the equivalent of 6 levels off, *id*. at 35, and the equivalent of 3 levels off for pleading guilty. *Id.* at 38. Accordingly, the adjusted sentence level would be 8 (17-6-3), or 0-6 months, and this defendant should be one of the 73% of such defendants sentenced to probation. *Id*. at 33. Alternatively, because only 37% of offenders convicted of extortion of $20,000 or less were sentenced to prison, *id*., the sentence based on the average time served for all such offenders would be 10 months (.37 times 27). *Id*. at 24.

Below is a chart showing other examples as compared to the 2008 guidelines. You can use the average in column 2 plus or minus aggravating or mitigating factors from column 4, or you can use the average from column 3. Do not subtract for mitigating factors from the average

[83] The mitigating factors shown in Table 1(b) are lesser role in the offense, cooperation, not using a weapon in a homicide, drug use in heroin or cocaine sales cases, non-federal facility in robbery cases, single event in heroin sales cases, "Convict for blackmail" in extortion/blackmail cases, guilty plea. *See* Supplementary Report, Table 1(b). The Commission, in explaining the initial set of guidelines, said that it did not incorporate many relevant sentencing factors into the guideline rules because (1) of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision" and (2) "its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates," which it said contained "impressionistic accounts." It said that if "the guidelines do not specify an augmentation or diminution," this was "because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense." *See* 52 FR 18046, 18050 (May 13, 1987). The initial set of guidelines did not specify *any* diminution for any mitigating factor, even those that were not too "impressionistic" to be identified and included in Table 1(b), other than role in the offense. Moreover, at the outset, and increasingly over time, the Commission placed mitigating factors off limits even as grounds for departure. This, in turn, resulted in a lack of data showing that any mitigating factor was "empirically important" enough for inclusion in the guideline rules, because the Commission collects data on reasons for departure only when departure is granted. *See* Fifteen Year Review at 119. In other words, the Commission prohibited and discouraged departures, so courts did not grant them, so the Commission did not collect the information, which justified it in not incorporating mitigating factors into the guideline rules.

for all offenders shown in column 3, as many probation sentences were likely due in part to mitigating factors.

1. Base Offense	2. Past Practice for those sentenced to prison + applicable addition or subtraction	3. Past Practice for all, whether sentenced to prison or probation	4. Potential addition or subtraction of levels under Past Practice (if not included in column 2)	5. 2008 Guideline Range, CHC I
1st degree murder	136 months (level 32)	136 months (100% prison)	Leader +4 Unusually Cruel +1 Vulnerable Victim +2 No weapon -3 or 4	Life
Assault with serious injury, no weapon	27 months (level 17)	20 months (75% prison/25% probation)	Unusually Cruel +2 Vulnerable Victim +2 Injury planned + 3 Injury to l. enf. + 0 or 1 Guilty plea -2 or 3	30-71 months
Robbery, single event, $3000 + weapon present, no injury	51 months (level 20 +3 for weapon)	43 months (85% prison/15% probation)	Additional planning +1 Lesser role -4 Hostages taken +5 Not fed facility -5 Injury +6 Income primarily from crime +2 Guilty plea -3 or 4	57-108 months (not including 924(c))
Sophisticated Fraud – more than $1 million	21 months (level 15)	17 months (82% prison/18% probation)	Vulnerable victim+4 or 5 Additional planning +1 Lesser role -1or 2 Cooperation -1 or 2 Govt victim -1 Income primarily from crime +2 Guilty plea -3 or 4	46 months - Life
Smuggling Illegal Aliens	3 months (level 7)	1.5 months (50% prison/50% probation)	Lesser role -2 Income primarily from crime +3	4 months - Life

Source: Supplementary Report at 23-29; 2008 USSC Guidelines Manual

Drug Offenses. The guidelines for drug offenses deviated from past practice in two ways. They (1) were not based on pure weight as under past practice, but on the weight of a "mixture or substance containing a detectable amount" of the drug, and (2) were calibrated across 17 levels (covering 32 offense levels) to the quantities at the two statutory mandatory minimum levels.[84] As a result, "sentences for drug offenses . . . are much higher than [past] practice." *See* Supplementary Report at 18. Indeed, the average sentence served for drug offenses has nearly quadrupled since before the guidelines.[85] And while the Commission projected that the drug guidelines would add only 9/10 of a month to the average sentence, *see* Supplementary Report at 69-70, as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties.[86] This is because the Commission's original projection attributed the entire 17-level drug quantity table to the "Drug Law," when in fact that law established only two quantity thresholds for five and ten-year mandatory minimums. Further, by elevating the impact of quantity to the exclusion of factors more pertinent to personal culpability, the guidelines overstate the seriousness of the offense even from a pure "just deserts" perspective.[87] Thirty-one percent of judges surveyed in 2002 listed drug sentencing as "the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing," with "73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses."[88]

---

[84] *See Gall*, 128 S. Ct. at 594 n.2 ("the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences."); *Kimbrough*, 128 S. Ct. at 567 (Commission "did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

[85] The average sentence served in drug cases was 23 months. *See* Supplementary Report, Table 3 at 69. In fiscal year 2007, the average sentence imposed was 83.2 months. *See* U.S. Sentencing Commission, 2007 Sourcebook, Table 13.

[86] Fifteen Year Review at 54.

[87] *See* Fifteen Year Report at 50 (quantity a "particularly poor proxy for the culpability of low-level offenders . . . who do not share in the profits or decision-making"); Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991) (guidelines disregard factors that are important from a just deserts perspective in favor of "harm" only because it is easier, on the surface, to quantify); Hofer & Lawrence, *An Empirical Study of the Application of the Relevant Conduct Guidelines § 1B1.3*, 4 Fed. Sent. Rep. 330, 1992 WL 195017 (May/June 1992) (sentences imposed are "vastly disproportionate to the defendant's culpability" when based on amounts involved in a conspiracy in which the defendant played a minor part); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-57 (1992) ("Drug quantity, which should count as one among many sentencing factors, and not the most important one at that, becomes the only sentencing factor."); Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission* 2 (1995) ("[T]he Judicial Conference ... encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved").

[88] Fifteen Year Review at 52, citing U.S. Sentencing Commission, *Survey of Article III Judges on the*

Below is a chart showing average time served sentences in drug cases under past practice, potential additions and subtractions for aggravating and mitigating factors (note how much more of a reduction was given for a guilty plea and how much less for cooperation when judges and not the government were in charge), and, in the last column, the current guideline range. Current guideline sentences may appear to be lower than average past practice at very low weights, but past practice sentences were based on pure weight while the guideline sentence is based on the weight of the "entire mixture or substance," and purity is likely to be lowest in cases involving small amounts. *See* Supplementary Report, Appendix B, Notes on § 2D1.1 (under parole guidelines, "if 10 grams of 10% pure heroin was seized, it would be treated as 1 gram of heroin").

Drug/Pure Weight	**Past Practice for those sentenced to prison**	**Past Practice for all, whether sentenced to prison or probation**	**Potential addition or subtraction of levels under Past Practice**	**2008 Guidelines – based on weight of mixture or substance, assuming no enhancements**	
Heroin					
1 g. or less	24 months	8.4 months	Leader +3 Lesser Role -3 Weapon +3 Cooperation -3 Drug User -1 Importation +3 Single Event -1 Guilty Plea -5 Income primarily from crime +3	10-16 months	
1 g.	27 months	20 months		10-16 months	
2-5 g.	30 months	24 months		10-16 months	
6-20 g.	33.5 months	28.5 months		15-27 months	
21-50 g.	37 months	33 months		27-41 months	
51-200 g.	41.5 months	38 months		33-78 months	
201-700 g.	46 months	44 months		63-97 months	
701-1000 g.	51.5 months	49 months		97-121 months	
1001-10,000 g.	57 months	55 months		121-188 months	
10,001-50,000 g.	64 months	63 months		188-293 months	
50,001 g. or more	70.5 months	70 months		235-293 months	
Cocaine				**Powder**	**Crack**
1 g. or less	21 months	7 months	Leader +2 Lesser Role -2 Weapon +3 Cooperation -2 Drug User -2 Importation +1 Guilty Plea -7 Income primarily from	10-16	10-16
1 g.	24 months	16 months		10-16	15-27
2-5 g.	27 months	20 months		10-16	27-51
6-20 g.	30 months	25 months		10-16	51-63
21-50 g.	33.5 months	29 months		10-21	63-97
51-150 g.	37 months	33 months		21-33	97-121
151-500 g.	41.5 months	39 months		27-63	121-151

Federal Sentencing Guidelines (Feb. 2003), available at http://www.ussc.gov/judsurv/judsurv.htm.

501-1500 g.	46 months	44 months	crime +2	63-97	151-188
1501-6000 g.	51.5 months	50 months		78-151	188-293
6001-25,000 g.	57 months	56 months		121-188	235-293
25,000 g. or more	64 months	63 months		151-293	235-293
Marijuana					
1 lb. or less	7 months	1 month	Leader +4 Cooperation -3 Guilty Plea -2 Income primarily from crime +2	0-6 months	
1 lb.	9 months	2 months		0-6 months	
2-10 lbs.	11 months	6 months		6-16 months	
10-35 lbs.	13 months	8 months		10-27 months	
35-200 lbs.	15 months	10.5 months		21-63 months	
201-1000 lbs.	18 months	14 months		51-97 months	
1001-3000 lbs.	21 months	18 months		78-151 months	
3001-10,000 lbs.	24 months	22 months		121-188 months	
10,001-40,000 lbs.	27 months	25 months		151-235 months	
40,001 lbs. or more	30 months	29 months		188-293 months	

Source: Supplementary Report at 32, 35-39; 2008 USSC Guidelines Manual.

To illustrate, take a defendant who pleads guilty to drug trafficking for her role as a courier in delivering 2 kilograms of powder cocaine of 75% purity. She has no prior record, had no involvement in procuring the drugs or in negotiating the transaction, was to be paid $250, and has a drug habit. The "sentence level" under past practice (for 1.5 kg. pure weight) was 46 months, equivalent to a guideline level of 22. Under past practice, she would have received the equivalent of 2 levels off for her lesser role, 2 levels off for being a drug user, and 7 levels off for pleading guilty, resulting in the equivalent of a guideline level 11, or 8-14 months. With safety valve and a variance, perhaps based on the need for drug treatment and some vocational skills, this defendant may receive a sentence of probation.

Using the past practice study in drug cases seems particularly appropriate because the drug guidelines are not based on any empirical evidence, as the Court recognized in both *Gall* and *Kimbrough*. Though the Commission did not explain its rationale for extrapolating the drug guidelines across 17 quantity levels from the two mandatory minimum levels at the time it did so in 1987, *see* Fifteen Year Review at 48-49, one Commissioner explained at the recent hearing that the Commission did so based on a "proportionality principle" found in 28 U.S.C. § 991(b)(1)(B) and § 994(a). Section 991(b)(1)(B) directs the Commission to:

> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or

> aggravating factors not taken into account in the establishment of general sentencing practices.

From this, the Commission decided that it should design the guidelines to avoid "cliffs" between quantities at the mandatory minimum levels and those slightly below them. However unattractive "cliffs" may be, the Commission's decision was not based on empirical evidence, ignored sentencing purposes and fairness, and created unwarranted disparities and unwarranted uniformity. Further, while § 994(a) requires the guidelines to be "consistent with all pertinent provisions of any Federal statute," the guidelines need not be keyed to mandatory minimums to be "consistent with" them, since USSG § 5G1.1(b) provides that a mandatory minimum trumps a lower guideline range. Moreover, this language was not added until the PROTECT Act in 2003. In 1987, when the Commission chose to extrapolate the drug guidelines from the mandatory minimums, rather than to use empirical evidence of past practice, the SRA required consistency with "all pertinent provisions of title 18," *not* Title 21. *See* 28 U.S.C. § 994(b)(1). In sum, the "proportionality principle," which is not explicit in any provision of the SRA, has been used to create guidelines that ignore statutory directives that are crystal clear, such as that the guidelines must meet the purposes of sentencing set forth in § 3553(a)(2), reflect advancement in knowledge of human behavior, and minimize prison overcrowding. *See* 28 U.S.C. § 991(b)(1)(A), § 991(b)(1)(C), § 994(g).

Role in the Offense. If the judge is not persuaded to attenuate the impact of drug quantity to reflect past practice, another approach is to increase the impact of role in the offense. A frequent complaint, particularly in drug cases, is that the mitigating role adjustment is dwarfed by the impact of quantity on the guideline range.[89] The Commission apparently limited the adjustment to a maximum of four levels because if the reduction were greater, guideline sentences would conflict with mandatory minimum sentences in a large number of cases.[90] Since then, Justice Breyer has argued that the scope of the role adjustment should be broadened.[91] According to the past practice study, a lesser role in the offense reduced the sentence served in drug cases on average by the equivalent of two offense levels in cocaine offenses and three levels in heroin offenses.[92] However, this was based on a table with 11 quantity levels. *See* Supplementary Report at 32. The Guidelines' drug quantity table covers 32 levels, three times as many. Thus, to remain proportionate and balance the increased weight given to drug quantity under the statute-linked guidelines, the number of levels for mitigating role should be tripled, from two to six or three to nine levels.

---

[89] See, e.g., *United States v. Cabrera*, 567 F.Supp.2d 271, 272-273 (D. Mass. 2008); U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group* 51 (Nov. 10, 1992) (discussing need for "a greater reduction for mitigating role").

[90] Fifteen Year Review at 49.

[91] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *11 (Jan./Feb. 1999).

[92] Supplementary Report, Table 1(b) at 35.

Pure Drug Weight. If the judge declines to use average time served corresponding to the drug quantity shown in Table 1(a), the judge may at least be willing to apply the offense level in § 2D1.1's drug quantity table to the pure weight of the drug. For most drugs, the guidelines are based on "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." *See* USSG § 2D1.1, Drug Quantity Table, Note (A). Under past practice, the Parole Commission set release dates based on the weight of the pure drug.[93] The Commission's past practice study also used pure drug weight. But Congress used the weight of a mixture or substance containing a detectable amount of the drug in the Anti-Drug Abuse Act of 1986, and the Commission followed suit in the guidelines for most drug types.[94] Thus, as the Commission has acknowledged, the guidelines incorporate "arbitrary variations due to the weight of inactive ingredients."[95] A sentence based on the pure weight of the drug can make a difference, depending on the purity. For example, the following table adjusts the guideline ranges for various quantities of powder cocaine of 70% purity:

Powder Cocaine of 70% purity	**Guideline range based on pure weight**	**Guideline range based on entire weight of mixture or substance**
25 g.	10-16 months	15-21 months
100 g.	21-27 months	27-33 months
500 g.	41-51 months	63-78 months
2,000 g.	63-78 months	78-97 months
50,000 g.	151-188 months	188-235 months

Defendants with criminal history. As noted above, Table 1(a) shows average time served for first offenders. How to account for criminal history? One option is to use the Criminal History Category produced by the current criminal history rules along with the offense level produced by using Tables 1(a) and (b). A second option is to use Table 3 of the Supplementary Report, the first column of which shows average time served (counting probation as zero months) for all offenders at all criminal history levels convicted of nine crimes, as shown in the chart below. A third option would be to decrease the sentence by showing that your client has a lower risk of recidivism than a typical offender because he has one or more characteristics that the Commission's research has shown are associated with lower recidivism rates. *See* Part V.C.3.

Estimated Time Served, Including Probationary Sentences and All Criminal History Levels	
Robbery	44.8 months
Person	37.7 months
Drugs	23.1 months
Firearms	14.1 months

[93] Supplementary Report, Appendix B, Notes to § 2D1.1.

[94] Fifteen Year Review at 48.

[95] *Id*. at 50.

Burglary	7.7 months
Fraud	7.0 months
Property	6.8 months
Immigration	5.7 months
Income Tax	5.5 months

Source: Supplementary Report, Table 3, at p. 69

Appendix C. Another possibly useful table, provided by the Parole Commission, shows the average time that offenders sentenced to a term of imprisonment were expected to serve based on release dates set at their initial parole hearing.[96] This table, however, includes only those eligible for parole. To be eligible, one had to receive a sentence in excess of 12 months, which was only 30% of all offenders convicted of "serious crimes." *See* Supplementary Report at 25 & n.66. This means that the table reflects higher average sentences than the average for all defendants convicted of a particular offense. *Id*. at 26. Still, it contains data that could be helpful. For example, the mean expected time served sentence was 25.3 months for involuntary manslaughter; 11.5 to 18.7 months (depending on risk factor) for being an illegal alien; and 13.8 to 26.4 months (depending on risk factor) for being a felon in possession of a firearm.

Note that for firearms offenses, you will have to use either Appendix C or the first column of Table 3 (at. p. 69) because firearms offenses are not included in Table 1(a).

C. Use Current Data

1. Average Sentences

One way to identify an appropriate sentence and confirm that the sentence avoids unwarranted disparities is to consult average sentences for the offense of conviction in the nation, circuit or district. For example, in *United States v. Cole*, slip op., 2008 WL 5204441 (N. D. Ohio Dec. 11, 2008), the judge found that the majority of defendants convicted of fraud in the nation and in the Sixth Circuit received non-prison sentences, and that the median sentence for fraud defendants sentenced to prison was 16 months. On this basis, the judge concluded that a sentence of a year and a day, with an above-guideline fine, avoided unwarranted disparities.

Or, the judge can compare the case at hand to similar and dissimilar cases. In a different *United States v. Cole*, 256 Fed. Appx. 510 (3d Cir. Nov. 29, 2007), the Third Circuit rejected the defendant's argument that the district court erred by failing to consider average sentences for bribery in the nation or in the district because he did not explain how his case compared to that of the average bribery defendant in either jurisdiction. This can be difficult to do because the Sentencing Commission does not report average sentence lengths for varying offense circumstances or offender characteristics. It reports the frequency with which certain components of a guideline sentence (base offense level, specific offense characteristics, adjustments) are used, but does not report average sentences associated with any combination of components. *See* USSC, *Guideline Application Frequencies for Fiscal Year 2007*.[97] It publishes

[96] Note that the Supplementary Report at p. 25 describes this as Appendix B but it is actually Appendix C.

[97] Available at http://www.ussc.gov/gl_freq/glfreq2007.HTM.

the median sentence by type of offense when a departure or variance was given, but does not give the reasons associated with those median sentences. USSC, 2008 *Preliminary Quarterly Data Report, 4th Quarter Release*.[98]

Nonetheless, sufficient information can be obtained from reported cases, the local Probation Office, or cases provided by the parties. For example, in *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), the judge recognized that the guideline range of 360 months to life, the result of guideline increases stemming from highly publicized major frauds such as Enron, defied common sense in the comparatively run of the mill securities fraud case before him. The judge sentenced the defendants to 60 months, based primarily on similarities and differences between the case before him and other securities fraud cases compiled by the parties. In both *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008), and *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009), the courts compared the cases before them to similar and dissimilar cases, and independently considering the § 3553(a) purposes and factors to determine how closely to follow analogous cases.

As noted in the Third Circuit's *Cole* decision, using averages for broad offense types fails to take into account aggravating and mitigating factors particular to the cases being sentenced. Such broad averages are not proposed here as the "correct" sentences, only as an objective starting point for judges to take into account when fashioning an individualized sentence, or as a check at the end as in the district court *Cole* decision. The recommended guideline sentence often fails to take account of relevant mitigating factors, overstates and duplicates aggravating circumstances, and lacks any basis in empirical data. If so, as in *Parris*, *Stern*, and *Beiermann*, the judge can compare the case at hand to cases of the same general type with similar and dissimilar aggravating and mitigating factors.

2. Median Reductions from the Guideline Minimum

Tables 7 through 13 of the Commission's FY 2008 Fourth Quarter Preliminary Quarterly Data Report show the median sentence imposed, the median decrease from the guideline minimum in months, and the median percent decrease from the guideline minimum, by offense type for each kind of an array of below-guideline sentences, including both government-sponsored and non-government-sponsored. USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*.[99] For example, the median decrease from the minimum guideline sentence for "downward departures with Booker/18 U.S.C. § 3553" in drug trafficking cases was 23 months in 2008. *Id*.,Table 11. The same kind of data appears in Tables 5 through 11A of the Preliminary Post-Kimbrough/Gall Data Report,[100] though some of the figures differ.

3. Risk of Recidivism

---

[98] Available at http://www.ussc.gov/sc_cases/USSC_2008_Quarter_Report_4th.pdf.

[99] Available at http://www.ussc.gov/sc_cases/USSC_2008_Quarter_Report_4th.pdf.

[100] Available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_December_08_Final.pdf.

The Sentencing Commission has released three studies on recidivism: *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "Measuring Recidivism"),[101] *Recidivism and the First Offender* (May 2004) (hereinafter "First Offender"),[102] and *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) (hereinafter "Salient Factor Score").[103] It also discusses the risk of recidivism for certain career offenders in its Fifteen Year Review.

These studies demonstrate that certain aspects of the guidelines overstate the risk of recidivism. For example, convictions counted in U.S.S.G. § 4A1.1(f) do not predict any increased recidivism.[104] Thus, § 4A1.1(f) should not be applied.

Inclusion of non-moving traffic violations in the criminal history score may adversely affect minorities "without clearly advancing a purpose of sentencing" (regardless of the defendant's race) and "there are many other" such possibilities.[105] Thus, at least some minor offenses should not be counted in the criminal history score.

The overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[106] *See* Fifteen Year Review at 134 (emphasis in original). This "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id*. (emphasis in original).

The recidivism rate of those whose career offender status was based on one or more prior "crimes of violence" was about 52%. *Id*. However, this does not mean that the recidivating events were violent. Only 12.5% of the recidivating events for Category VI offenders overall were a "serious violent offense," defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses. *See* Measuring Recidivism at 32,

---

[101] Available at http://www.ussc.gov/publicat/Recidivism_General.pdf.

[102] Available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

[103] Available at http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

[104] *Salient Factor Score* at 7, 11, 15.

[105] Fifteen Year Report at 134.

[106] In the year following *Booker*, the instant offense of 71.8% of defendants sentenced under the career offender guideline was drug trafficking. *See* USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 138 (March 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf. What kinds of priors they had is, unhelpfully, not reported.

Exh. 13. Only 4.1% were drug trafficking. *Id.* The largest proportion of recidivating events were probation or supervised release revocations, at 38.3%, which can be anything from failing to file a monthly report to failing to report a change of address. *Id*.

Offenders are most likely to recidivate when their sentence is straight prison than when the sentence is probation or a split sentence,[107] and drug treatment programs and educational opportunities are likely to have a high cost-benefit value.[108] This data weighs against a prison sentence.

The studies show that the following factors – which the guidelines prohibit or discourage -- correlate with reduced recidivism:

- Age: Age is a powerful component of recidivism prediction, which the Guidelines do not take into account.[109] "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.[110]
- Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism (19.6%) than for those who are unemployed (32.4%).[111]
- Education: Recidivism rates decrease with increasing educational level (no high school (31.4%), high school (19.3%), some college (18%), college degree (8.8%).[112]
- Family: Recidivism rates are lower for defendants who are married (13.8%) or were married but are divorced (19.5%) than if never married (32.3%).[113]
- Gender: Women recidivate at a lower rate (13.7%) than men (24.3%).[114]
- Abstinence from drug use: Recidivism rates are lower for those without illicit drug use in the year prior to the offense (17.4%) than those who used illicit drugs in the year prior to the offense (31%).[115]
- Non-Violent Offenders: Offenders sentenced under the fraud (16.9%), larceny (19.1%) and drug guidelines (21.2%) are the least likely to recidivate.[116]

---

[107] *Measuring Recidivism* at 13 & Exhibit 12.

[108] *Id*. at 15-16.

[109] *Salient Factor Score* at 8, 13-15.

[110] *Measuring Recidivism* at 12 & Exhibit 9.

[111] *Id*. at 12 & Exhibit 10.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 11 & Exhibit 9.

[115] *Id*. at 13 & Exhibit 10.

[116] *Measuring Recidivism* at 13 & Exhibit 11.

- First Offenders: In 2004, the Commission reported that over 49% of federal offenders in 1992 had zero criminal history points; in 2001, that percentage was over 40%.[117] First offenders are more likely to be involved in less dangerous offenses and their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role or acceptance of responsibility.[118] They are also more likely than offenders with criminal histories to have a high school education, to be employed, and to have dependents.[119] Further supporting alternatives to prison for this group is that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.[120] However "first offender" status is defined, the rate of recidivism (including reconviction, rearrest or revocation) for first offenders is 11.7%, which is significantly lower than the rate of 22.6% for offenders with one criminal history point, or that of 36.5% for offenders with two or more criminal history points.[121] The rate of reconviction alone is similarly much lower: offenders with zero criminal history points have a reconviction rate of 3.5%, those with one point have a reconviction rate of 5.5%, those with two or more points have a reconviction rate of 10.3%.

You can use percentages associated with characteristics of your client to argue that a sentence of probation or a short prison term satisfies the need to protect the public, § 3553(a)(2)(C), because your client is less likely to recidivate than average. Here is an example from a sentencing memo written by Peter Goldberger:

> For all male offenders in CHC I, the recidivism rate is 15.2%. For those over age 50 at the time of sentencing, however, the rate in CHC I is only 6.2%. For those who are college graduates, the rate in CHC I is just 7.1%, and for those who are married, the rate is 9.8%. For those with no history of illicit drug use, the recidivism rate is half that of those who do have a drug history. Undoubtedly, for those like Mr. Doe who are educated and married and drug free and over 50 the combined rate is even lower. [citing U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (Res. Ser., rel. 1, May 2004), Exh. 9, at 28; Exh. 10, at 29]. Finally, for all Category I defendants convicted of fraud, the recidivism rate is just 9.3%, the lowest of any offense category, and 39% below average for the category as a whole. [citing U.S. Sent. Comm'n, Measuring Recidivism, supra, Exh. 11, at 30]. For these reasons, to assist the Court in finding the least sentence sufficient to account for the need to protect the public from further crimes of the defendant, the PSI should be amended to include information about Mr. Doe's lesser statistical risk of recidivism. *See United States v. Eberhard*, 2005 WL 1384038

[117] *First Offender* at 4.

[118] *Id.* at 9-10.

[119] *Id*. at 6-11.

[120] *Measuring Recidivism* at 13 & Exhibit 12.

[121] *First Offender* at 13-14.

(S.D.N.Y., June 9, 2005); *Simon v. United States*, 361 F.Supp.2d 35, 40 (S.D.N.Y. 2005); *United States v. Nellum*, 2005 WL 300073, *3 (N.D.Ind. Feb. 3, 2005) (all utilizing similar statistics to justify lower sentences).

VI. Examples

Example 1: Low-Level Crack Dealer: The defendant is a 40-year-old low-level crack dealer who sold small amounts to support her habit. She ended up selling 50 grams of crack over time to an informant. She has no criminal history. She did not graduate from high school. She worked steadily in unskilled jobs until she became addicted to crack. She is in a drug treatment program now and is working. She has two young children, and the father is not around and does not support them.

Step 1: Calculate the guideline range.

- 50 grams = level 30 = 97-121 months

Step 2: Look at sentencing purposes.

- Retribution?
  - Seriousness -- No violence, no weapons, no injury, little profit, motivated by drug habit
  - Respect for Law – Crack/powder disparity creates disrespect for law.
- General Deterrence?
  - "Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else." *See* Fifteen Year Review at 134.
- Protect Public from Further Crimes?
  - Several factors indicate a lower than average risk of recidivism: She is a first offender, female, 40 years old, has abstained from drugs for 6 months, and has been working for 6 months and has a steady work history. *See* Measuring Recidivism.
  - Drug treatment is more effective than prison. *See* Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002). Drug treatment in the community is more effective than drug treatment in prison. *See Washington State Institute for Public Policy, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exh. 4 at p. 9 (October 2006), available at http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf. She is successfully completing a drug treatment program now.
- Rehabilitation?
  - Drug treatment, job training needed
  - Motivated by the need to care for and raise her children

Step 3: What would a purpose-driven sentence be?

- Probation with job training, drug treatment
  - But can't have probation because it's a Class A felony. *See* 3559(a), 3561(a).

- Prison with RDAP is not optimal because she should not be separated from her children, and a prison sentence long enough to get into RDAP (24 months) does not appear to be "necessary" to satisfy any purpose of sentencing other than rehabilitation.

- Home detention, community confinement, or one day or weekends in jail ("intermittent confinement") with treatment, job training makes more sense.

- Safety valve to avoid the mandatory minimum

Step 4: Why the drug guideline should not apply: Deconstruct the Drug Guideline.

- See *Kimbrough*, *Spears*: The crack guideline was not based on national data or empirical research, it creates racial disparity, and the court may categorically disagree.
- Can replace with own ratio, see *Spears*
  - 1:1 = level 16, CHC I = 21-27 months
- But even the powder range is not based on empirical evidence.
  - *See Kimbrough* at 567; *Gall* at 594 n.2.
  - See *US v. Thomas*, __F. Supp. 2d __, 2009 WL 188037 (E.D. Wis. Jan. 24, 2009)

Step 5: Look to past practice for empirical evidence.
- First offender:
  - Level 19 – 2 for role – 2 for being a drug user – 7 for pleading guilty = level 8 = 0-6 months. *See* Supplementary Report at 32, 35, 36, 38.

Conclusion: Sentencing purposes, deconstruction, past practice all point to the same conclusion. Because she cannot be sentenced to straight probation, she should receive minimal prison time, *e.g.*, one day, and supervision with conditions of drug treatment and job training.

Example 2: Career Offender: The defendant is a small-time heroin dealer who was picked up with 50 grams of heroin. He was raised by a drug-addicted mother, was on the streets at the age of 10, was an addict himself by the age of 13, and was living in his car at the time of his arrest. He has two prior minor state drug convictions, for both of which he received 60 days time served.

Step 1: Calculate the guideline range.
- 50 grams = level 20
- Regular range in CHC III = 41-51 months

- Career offender range = level 32, CHC VI = 210-262 months

Step 2: Look at sentencing purposes.
- Retribution?
  - Seriousness -- No violence, no weapons, no injury, little profit, instant and prior offenses the result of disadvantaged upbringing, lack of education, addiction, has not made a "career" out of crime.

  - Respect for Law – The public disagrees with harsh three-strikes punishments like the career offender guideline. *See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary (1997), http://www.ussc.gov/nss/jp_exsum.htm.
- General Deterrence?
  - "Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else." *See* Fifteen Year Review at 134.
- Protect Public from Further Crimes?
  - Risk of recidivism is closer to those in the criminal history category in which he would be absent the career offender guideline. *See* Fifteen Year Review at 134.
  - Drug treatment, education, vocational training would prevent further crime.
- Rehabilitation?
  - Drug treatment, education, job training needed

Step 3: What would a purpose-driven sentence be?

- Probation is possible because the stat max is less than 25 years. *See* 3559(a), 3561(a).
- Or, some prison time may be warranted because of his record, but the main goal should be rehabilitation, which would protect the public from further crimes of the defendant.

Step 4: Why the career offender guideline should not apply: Deconstruct the Career Offender Guideline.

- Not Based on Past Practice – Deconstructing the Career Offender Guideline at 8, http://www.fd.org/pdf_lib/Deconstructing%20the%20Career%20Offender%20Guideline%208.29.08..pdf.
  - "much larger increases" than under pre-guidelines practice. USSC Supplementary Report at 44
- Just like drug guidelines not based on past practice but keyed to statutory minimums, *Kimbrough* at 567; *Gall* at 594 n.2, the career offender guideline is not based on past practice but keyed to statutory maximums.

- Sentencing Commission's Own Findings, Fifteen Year Review at 133-34, described in Deconstructing the Career Offender Guideline at 32-33
  - Recidivism risk = same as defendants in non-career offender criminal history category
  - Deterrence is not served because retail dealers are easily replaced
  - Career offender guideline creates racial disparity because drug crimes are more easily detected on the streets in poor neighborhoods.

- His priors are state drug offenses; the guideline includes state drug offenses but § 994(h) does not. The Commission gave no reason for including state offenses.

- Support with caselaw in similar cases. *See* Deconstructing the Career Offender Guideline at 36-38.

- Support with data: In the year after *Booker* (unfortunately, the Commission has not provided more recent data on the career offender guideline):

- Below-guideline rate more than doubled to 21.5% in the year after *Booker*
- Median percent decrease rose from 28.2% post-PROTECT Act, to 33.4% for downward departures and 30.5% for variances.
- 75% of the below-guideline sentences were in drug trafficking cases, and only 40.5% of sentences in drug trafficking cases were within the guideline range
- Most common reason: predicates too minor or remote, sentence greater than necessary

See Final Report on the Impact of United States v. Booker on Federal Sentencing at 137-140 (March 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

Step 5: Why the regular drug guideline should not apply: Deconstruct the Drug Guideline.

- The drug guidelines are not based on empirical evidence.
  - *See Kimbrough* at 567; *Gall* at 594 n.2.
  - See *US v. Thomas*, __F. Supp. 2d __, 2009 WL 188037 (E.D. Wis. Jan. 24, 2009)
- By 2002, the guidelines alone (independent of mandatory minimum laws) accounted for 25% of the more than doubling of drug trafficking sentences. *See* USSC, *Fifteen Year Review* at 47.
- Quantity is a "poor proxy" for offense seriousness. *See* Fifteen Year Review at 50; *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008).
- For non-violent drug offenders with little criminal history, a short prison sentence will deter as well as a long one. *See* U.S. Dept. of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories*, Executive Summary (Feb. 4, 1994), available at http://www.fd.org/odstb_BookerMain.htm.
- Severe guideline sentences can increase recidivism. *See* Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994).

Step 6: Look to past practice for empirical evidence.

- If first offender:
  - Level 20 – 2 for role – 2 for being a drug user – 7 for pleading guilty = level 9 = 4-10 months. *See* Supplementary Report at 32, 35, 36, 38.
- He's in criminal history category III, so, using the Sentencing Table in the Guideline Manual, his equivalent past practice sentence would be:
  - 8-14 months

Conclusion: The judge could sentence this defendant to probation with drug treatment if there is a good program in the area. Or, the shortest term possible to be eligible for RDAP, which is 24 months, which would result in up to a year off, probably less because of the waiting list. If he receives a prison sentence, he would be a good candidate for re-entry court or drug court while on supervised release (if available in the district), to help him find work and stay clean.

Example 3: Felon-in-Possession: The defendant is convicted under § 922(g) for being a felon in possession of a firearm. The firearm has an obliterated serial number, of which he was unaware. He is 55 years old, completed college, is married, is employed, and has no substance abuse problems. His criminal history consists of one state conviction for his involvement in a small marijuana deal eight years earlier, for which he received no jail time.

Step 1: Calculate the guideline range.

- 20 + 4 for obliterated serial number
- In CHC I, the guideline range is 51-63 months

Step 2: Look at purposes.

- Retribution?
  - Seriousness -- No violence, no victims, rural area where everybody has a gun, did not know serial number obliterated
  - Congress intended that judges could decrease penalties based on community norms. *See* 28 USC 994(c)(4), (5); S. Rep. No. 98-225 at 170.
- General Deterrence?
  - Empirical research shows no relationship between sentence length and deterrence. See Part I.C.2, *supra*.
- Protect Public from Further Crimes?
  - Several factors indicate a lower than average risk of recidivism: He is in Criminal History Category I, is 55 years old, has a college education, is married, is employed, and has no substance abuse problems. *See* Measuring Recidivism.
  - Possession of a firearm is not a crime of violence, he did not use it in a violent way, he is not a threat to public safety.
  - His prior conviction is remote and relatively minor.
- Rehabilitation?
  - Doesn't need any.

Step 3: What would a purpose-driven sentence be?

- What purpose would be served by prison?
- Probation seems to be the appropriate sentence.

Step 4: Why the guideline sentence should not apply: Deconstruct § 2K2.1.

- In 1987, the offense level was 9
- In 1988, it was raised to 12
- In 1991, it was raised to 20 for defendants with one prior controlled substance offense or crime of violence, as defined in the career offender guideline
- Why was it raised from 12 to 20? As explained above in Part V.A, the 8.4% rate of upward departures led the Commission to believe that the guideline range was "unacceptably low." It found that these upward departures, however, did not correlate with prior controlled substance offenses or crimes of violence. Nonetheless, it raised the guideline range in order to make § 2K2.1 sentences "proportionate" with ACCA's 15-year mandatory minimum for 3 or more prior violent felonies or serious drug offenses. As with the drug guidelines, the Commission sought to mirror a mandatory minimum statute, contrary to the data. *See* USSC, *Firearms and Explosive Materials Working Group Report* (Dec. 11, 1990).
- As a result, average sentence length increased from 28 months in 1989 to 82 months in 1995. Then sentence length decreased as downward departures and variances increased from 10% in 1997 to 16.7% in 2008, rates that are much

higher than the 8.4% upward departure rate that led the Commission to believe the guideline range was "unacceptably low."

- As also explained in Part V.A, the 4-level enhancement for an obliterated serial number was not based on any empirical data, was adopted in the face of evidence that obliterated serial numbers are easily recovered, and no *mens rea* requirement was added even though all of the public comment supported such a requirement.

Step 5: Look for alternative numbers.

- The offense level under the current guidelines without the controlled substance offense increase or the obliterated serial number increase is 14, which would be 15-21 months in CHC I.
- Or, you could look at the "mean" sentence under past practice for parole eligible defendants, which was 13.8-26.4 months, but this is skewed high because it includes only parole eligible defendants.

Step 6: If these numbers do not seem satisfactory in light of the characteristics of this defendant and the purposes of sentencing, return to the "in/out" question, as stated in the Guidelines Manual:

> "The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." USSG, Chapter 5, Part B - Probation, Introductory Commentary.

Conclusion: The judge could sentence this defendant to probation, with the obvious condition that he not possess a firearm.

Example 4: Illegal Re-Entry: This is not an example, but some ideas. The average past practice sentence for immigration offenders with any kind of criminal history was 5.7 months. *See* Supplementary Report, Table 3, at p. 69. In circuits such as the First and Second, where variances based on fast track disparity are allowed, you can raise that issue and deconstruct the illegal re-entry guideline. If you are in a circuit that prohibits variances based on fast track disparity, you can still deconstruct the illegal re-entry guideline, *see United States v. Gomez-Herrera*, 523 F.3d 554, 557 n.1 & 563 (5th Cir. 2008) (noting that court may disagree with the guideline), and should ask in the alternative for a variance based on fast track disparity and file a cert petition in case the Supreme Court reverses these decisions.

A paper on deconstructing the illegal re-entry guideline is being prepared. In the meantime, *see The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker at 34-37, http://www.fd.org/pdf_lib/EvansStruggle.pdf.

In addition, Jennifer Coffin has written the following excellent argument:

The Commission has long recognized that "departures serve as an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines." USSC, *Report to Congress: Downward Departures From the Federal Sentencing Guidelines*, at 5 (Oct. 2003) ("Downward Departures"), http://www.ussc.gov/departrpt03/departrpt03.pdf; see USSG ch. 1, intro, pt. 4(b); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section."). As envisioned by the original Commission, "such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform act to periodically review and revise the guidelines." *Downward Departures*, at 5. Congress, too, expected that comments and data coming to the Commission's attention would be instrumental in the overall improvement of the guidelines:

> In a very substantial way, this subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

S. Rep. No. 98-225, at 178 (1983).

The Commission has explained that, in practice, "a high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly." *Downward Departures* at 5. In 2004, prompted in part by "public comment that the guideline penalties for all homicides, other than first degree murder, were inadequate and in need of review," the Commission looked at the data for second degree murder and "found that in 2002, courts departed upward from the guideline range in 34.3% of the cases." *See* USSG, App. C, Amend. 663 (Nov. 1, 2004) (Reason for Amendment). "Data also showed a high level of upward departure sentences for some other homicide offenses, such as voluntary manslaughter, which had a 28.6% upward departure rate in 2002." *Id*. "Based upon such indications that the sentences may be inadequate for these offenses, the Commission increased the base offense levels of many of the homicide guidelines to punish them more appropriately and with an eye toward restoring the proportionality found in the original guidelines." *Id*.

In fiscal year 2001, the rate of downward departure in immigration offenses was 35.6% and accounted for one-third of all downward departures. *Downward Departures*, at 38, 41-42. This prompted the Commission to amend § 2L1.2 to provide graduated enhancements based on the prior conviction in an effort to reduce the rate of downward departures. *Id*. at 16-17. At the time, the Commission explained that the amendment "responds to concerns raised by a number of judges, probation officers, and defense attorneys . . . that § 2L1.2 sometimes results in disproportionate penalties because of the 16-level enhancement" and that the "criminal justice system has been addressing this inequity on an ad

hoc basis in such cases by increased use of departures." *See* USSG, App. C, Amend. 632 (Nov. 1, 2001).

However, the Commission's action in 2001 has not operated to reduce the rate of downward departure for illegal reentry, which remain as high as ever. In 2006, based on motions by the government and determinations by the courts, 36.5% of sentences imposed for illegal reentry were lower than the advisory guideline range, not including sentences reduced for substantial assistance under § 5K1.1. *See* USSC, 2006 Sourcebook of Federal Sentencing Statistics, tbl. 28 (2006); *see also* USSC, 2007 Sourcebook of Federal Sentencing Statistics, tbl. 28 (2007) (showing below-guidelines sentences in 40% of illegal reentry cases). The trend continues in the wake of *Gall* and *Kimbrough*. *See* USSC, Preliminary Post-Kimbrough/Gall Data Report, tbl. 4 (Dec. 2008) (showing below-guideline sentences in 38.2% of illegal reentry cases), http://www.ussc.gov/USSC_Kimbrough_Gall_Report_December_08_Final.pdf.

In addition, the Commission receives consistent public comment expressing concerns that the guideline penalties for illegal reentry are too high. *See, e.g.*, Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Comments on Proposed Amendments, at 2-3 (Mar. 6, 2008); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration at 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn before the U.S. Sentencing Commission Re: Proposed Immigration Amendments, San Diego, California (Mar. 6, 2006), all available at http://www.fd.org/pub_SentenceLetters.htm.

By the Commission's own analysis and practice, the high rate of downward departure under § 2L1.2 indicates that the guideline does not adequately reflect the considerations before the courts in illegal reentry cases and should be amended to allow the courts to impose lower sentences that are within the guidelines, which would have the desired effect of reducing the rate of downward departure. Until then, the actual sentences imposed for illegal reentry offenses, including the widespread use of government-sponsored downward departures, demonstrate that the current guideline is greater than necessary to achieve the goals of sentencing under § 3553(a)(2).

APPENDIX
Publication 107 at II-70-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005

Sentencing Recommendation and Justification

The sentencing recommendation and justification are critical components of the presentence report. The process of making a recommendation begins with a careful assessment of all of the facts pertaining to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, as to what the officer believes to be an appropriate sentence. The justification is the officer's explanation of the facts and laws that shaped the recommendation.

When recommending a sentence, the officer should keep inmind the factors identified in 18 U.S.C. § 3553 that are considered by the court when imposing a sentence:

> (a) Factors to be considered in imposing a sentence. -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed --
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further criminal conduct;
> (D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the U.S. Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1) and that are in effect on the date the defendant is sentenced;
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

The presentence report is constructed so that PartA (The Offense), Part B (The Defendant's Criminal History), and Part C (Offender Characteristics) will meet the requirements of 18 U.S.C. § 3553(a)(1). Part D Sentencing Options will provide the information required by 18 U.S.C. §§ 3553(a)(3), (4), and (5), and in doing so, fulfill the requirements of 18 U.S.C. § 3553(a)(6).

Any sentence recommended must be "sufficient, but not greater than necessary, to comply with" the statutory sentencing purposes. It is important, therefore, for the officer to assess the information contained in the presentence report in this light. Officers may wish to consider the following questions during the assessment. The questions are not exhaustive, but are designed to stimulate and inform the process:

In assessing the seriousness of the offense:

• What was the duration and extent of the offense? Was it an isolated incident or of fairly short time frame or did the offense occur over a long period of time: months or years?

• What was the level of sophistication or complexity of the offense, planning or concealment? Was the offense relatively simple or easily discoverable?

• Was it a violent crime? Was there a weapon and how was it used? What type of weapon(s)?

• How many victims were affected by the offense? To what degree or extent (monetary, psychologically, physically; temporary, permanent)? Were any victims particularly vulnerable? What is the likelihood of restoring the victim through restitution?

In assessing respect for the law:

• Does the defendant have a history of aggressive or non-compliant behavior, particularly with law enforcement or authorities (e.g., resisting arrest, assaulting police, failure to appear or escape, etc.)?

• Has the defendant been cooperative?

• Have there been successful or unsuccessful prior periods of supervision?

• Has the defendant demonstrated by words and actions acceptance of responsibility for his/her offense?

• What is the defendant's attitude toward the system (e.g., arresting agents, probation/pretrial, prosecuting attorney, court, etc.)?

• Has there been any attempt to obstruct justice?

• Has the defendant had few or many encounters with the criminal justice system?

• Does the defendant have gang affiliations or other long-term criminal associations?

• Does the defendant have any pending criminal matters, including outstanding warrants, revocations, additional offenses?

In assessing just punishment:
• Does the defendant have a past pattern for similar conduct?

• What was the defendant's role in the offense in comparison to co-conspirators or other participants?

• What were the motivations of the defendant for committing the offense?

• What sentences were imposed on like-situated co-conspirators?

• Has the defendant cooperated with law enforcement and to what degree?

• Does the defendant have insight into his/her criminal conduct? Is the defendant genuinely motivated to change?

In assessing adequate deterrence:

• Have there been prior incarcerations and for what duration?

• Were there prior periods of supervision and if so were they successful or unsuccessful?

• What does this defendant need to keep from re-offending? What is the best place for the defendant to receive that assistance: prison or the community?

• Does the defendant have any untreated addictions or other serious impediments?

• What kind of support network does the defendant have from family, friends or the community? Are those positive or negative influences?

• Is the defendant currently in treatment? Has the defendant had past successes or failures with treatment?

In assessing protection of the community:

• Does this defendant pose a physical danger to the community at large, to certain types of individuals (e.g., children, the elderly, minorities, etc.) or to specific individuals?

• Does this defendant pose any other danger or risk to the community, to certain types of individuals or to specific individuals? For example did the offense involve child pornography, cyber crimes, identity thefts, investment scams, etc.?

In assessing the needs of the defendant:

• Educational level: Does the defendant have any language barriers? Does the defendant have any learning disabilities? Does the defendant have at least a high school diploma or GED? Has the defendant expressed an interest in acquiring core education?

• Vocational training: Does the defendant have any verifiable special skills or training that he or she can rely on to obtain future employment? Does the defendant have a stable, legitimate work history? Does the defendant have a history of underemployment? In what area has the defendant expressed an interest?

• Physical Health: Does the defendant have serious physical problems? Does the defendant require medication or treatment? Does the defendant have any physical challenges that require special accommodations?

• Mental Health: Does the defendant have a history of psychiatric or psychological problems? Does the defendant require medication? Does the defendant have a history of suicide attempts or ideations? Does the defendant have a history of aggression toward others?

• Other Correctional Treatment: Does the defendant have a documented history of alcohol and/or drug abuse? Is the defendant amenable to treatment? Is the defendant eligible for the Residential Drug Abuse Treatment Program? Is there a financial obligation the defendant will need to pay? Is the defendant eligible for the Intensive Confinement Center (boot camp)? Would the defendant benefit from a life skills or parenting course?