FEDERAL PUBLIC DEFENDER
Western District of Washington

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October 11, 2011

Honorable F. James Sensenbrenner
Chair
Subcommittee on Crime, Terrorism and
Homeland Security
House Judiciary Committee
Washington, D.C. 20515

Honorable Robert C. (Bobby) Scott
Ranking Member
Subcommittee on Crime, Terrorism and
Homeland Security
House Judiciary Committee
Washington, D.C. 20515

Re: Hearing on: "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker"

Dear Chairman Sensenbrenner and Representative Scott:

I write on behalf of Federal Public and Community Defenders to comment on the status of federal sentencing today. We support the current constitutional and evolving advisory guideline system, and we oppose the Sentencing Commission's recent proposal to enact presumptive guidelines and proposals by others to enact mandatory guidelines. We appreciate the invitation to comment.

We were stunned by the particulars of the Commission's recommendation for legislative change and its portrayal of the current system. Because no specific language has been provided, the observations below are preliminary. But even without the benefit of specific language, it is clear that the proposal is unconstitutional and not supported by adequate or accurate justification.

It seems that the Commission's proposal (and the proposal for mandatory guidelines) is being championed via a charge that is simply not accurate: that is, racial bias affects sentencing decisions by federal judges under the advisory guideline system. This is a serious charge and rests on a study that the Commission previously acknowledged omits many relevant factors that judges legally and legitimately consider at sentencing, and warned that these omissions make its results unreliable. But the Commission fails to disclose that important warning in its testimony and misleadingly implies that its study includes all relevant factors. Moreover, the Commission's study was the object of recent criticism by a team of researchers that conducted a similar study but reached different conclusions, including the fact that disparity in sentence lengths based on race and ethnicity has not increased under the advisory sentencing system.

Refutation of the premise for the Commission's proposal is not surprising. The idea that federal judges discriminate against racial minorities defies common sense. Prior to enactment of the Sentencing Reform Act (SRA), when judges had unfettered discretion, average sentence length for Black, White and Hispanic offenders was exactly the same and, according to a

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comprehensive review sponsored by the Department of Justice's Bureau of Justice Statistics, sentences were not based on invidious factors. Today, when judicial discretion is intricately guided by advisory guidelines and a statutory framework intended to create reasonable consistency, and when society as a whole is far less biased, it would seem implausible that federal judges are discriminating against people of color in their sentencing decisions. We do know racial disparity poisons the federal system. But the causes are primarily found in mandatory minimum laws, the guidelines themselves, and decisions related to the enforcement and prosecution of mandatory minimum laws, not in discretionary decisions by federal judges. All of this is discussed in detail below.

The Commission also contends that there is growing disparity among districts. In support, it provides a bare listing of rates of non-government sponsored below-range sentences. Whether unwarranted differences exist or are growing are complex questions upon which the Commission sheds no light. The Commission fails to warn, as it has in the past, that *unwarranted* disparity cannot be inferred from a simple listing of rates. Research performed by others shows that variation in sentence length among districts has actually decreased after *Booker*, a more relevant measure than rates. The inadequacy of the Commission's presentation on differences among districts is also discussed below.

We also focus on the advances in federal sentencing law post-*Booker*. Progress, while slow, has been significant. Indeed, the advisory guidelines played an essential role in reducing the pernicious racial effects of the crack cocaine laws. Policy disagreement by district court judges with the guidelines that expand on and enforce those laws was ratified by the United States Supreme Court and helped inspire recent reforms in Congress. Ironically, the initiative and example of the courageous district court judges who provoked that reform would be discouraged by the Commission's proposals. Now is not the time to halt the evolution of the advisory guidelines system.

Seven years after *Booker*, our federal sentencing system is closer to Congress's original intent in the Sentencing Reform Act than the mandatory system it replaced or than any system designed to exclude judges could be. The Commission has begun to respond to the judicial feedback that was previously missing by revising, with congressional approval, guidelines that were not developed based on empirical data or national experience. As it does so, judges have begun to sentence within the guideline range more often – as the Supreme Court predicted. This cooperative dialogue between judges and the Commission is what Congress intended when it enacted the SRA. And the Commission has made progress in explaining the bases for recent amendments to the guidelines, something it largely failed to do before *Booker*.

These developments, which advance the purposes of punishment, resulted simply from giving judges a meaningful role in sentencing. At the same time, there is no evidence that judges have been unduly lenient. Higher rates of below-range sentences flow from the fact that the guidelines consist almost entirely of every imaginable aggravating factor, and a near absence of mitigating factors. Because of *Booker* and its progeny, judges can now vary downward from the guidelines when a defendant's background and life history support mitigated punishment. Even with a somewhat higher rate of below-range sentences, average sentence length is the same or higher today than before *Booker* in all types of cases except crack (due to reduced guideline

ranges) and illegal reentry (due to a large increase in the prosecution of cases with low guideline ranges).

But even though post-*Booker* change has been measured, it has been important. Recent decisions by the Supreme Court emphatically endorse the authority of a sentencing judge to account for the history and characteristics of the defendant in shaping an appropriate punishment. Constraining that discretion will make worse the greatest problem facing our criminal justice system, the unsustainable size and cost of our prison population. We join the Commission in encouraging your support in reducing that population. Meanwhile, the following points (and those in the Addendum) demonstrate that the justifications for legislative change proffered by the Commission and others are unsound, and why the vast majority of federal judges, prosecutors, and defense lawyers support the current advisory system.[1]

I. The Use of Prison Sentences Continues to Increase; Sentence Lengths Remain High; Rates of Below-Range Sentences Have Begun to Drop as the Commission Reduces Unnecessary Severity.

The use of imprisonment continues to grow even after *Booker*. As the Commission's testimony shows, the average extent of reduction for nearly every offense is *less* than it was before *Booker*, and in some cases far less.[2] Average sentence length has stayed the same or increased for all categories of offenses except crack, due to reduced guideline ranges, and illegal reentry, due to a large increase in the prosecution of cases with low guideline ranges. At the same time, in 2011, the rate of below-range sentences has begun to drop, concurrent with reduction of the crack guidelines.

Type of sentence. The guidelines' recommendation of prison in most cases continues to determine the type of sentence imposed, as the Commission has previously reported,[3] and as shown in Figure 1.

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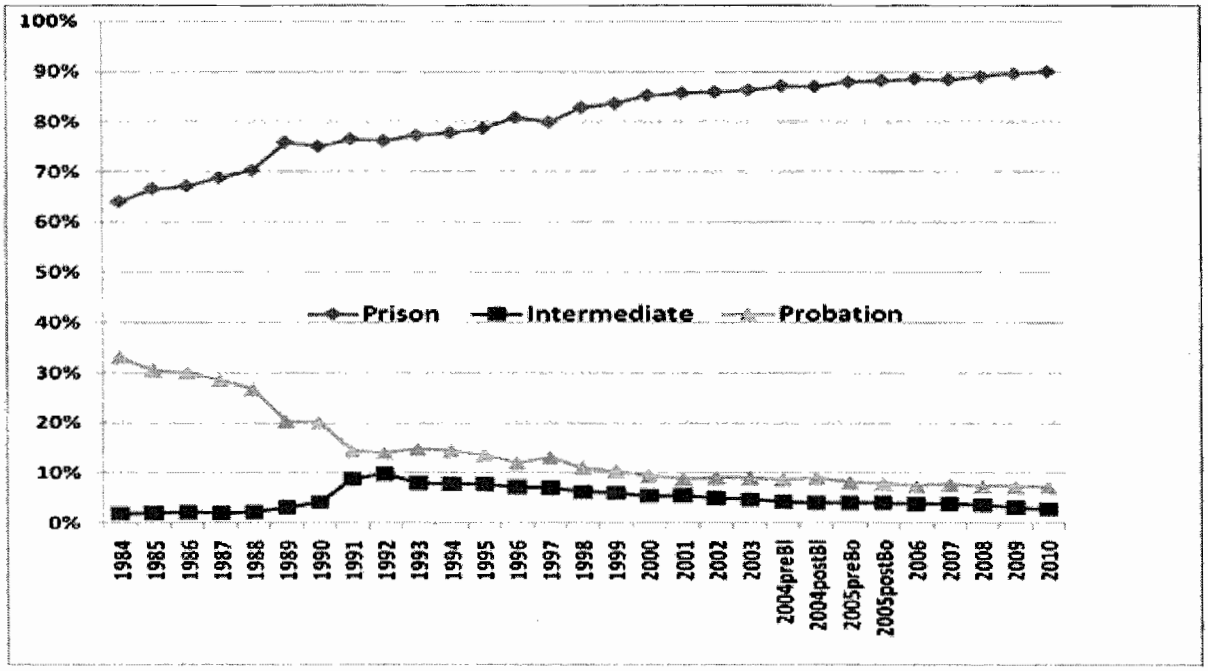
[1] *See* Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010); USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19.

[2] Commission Testimony at 26, 28, 31, 33, 36, 38, 41, 43, 45, 48, 50, 53.

[3] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 12 (2009).

Figure 1
PERCENTAGE OF DEFENDANTS RECEIVING STRAIGHT PRISON, INTERMEDIATE SANCTIONS,[4] STRAIGHT PROBATION
All Felonies 1984 - 2010 4th Quarter



Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; USSC, *Sourcebook of Federal Sentencing Statistics*, tbl.12 (1991-2009); USSC, *Preliminary Quarterly Data Report, Fourth Quarter FY 2010*, tbl.18.

Sentence length and extent of reduction. Average sentence length was roughly 46 months before *Booker*, and is 43.3 months as of the third quarter of 2011.[5] The small decrease is almost solely attributable to reduced guideline ranges in crack cases (a fact the Commission inexplicably omits), and a substantial increase in prosecutions of immigration cases under 8 U.S.C. § 1326(a) (with a statutory maximum of two years and a low guideline range).[6] Average sentence length for all other offenses has increased slightly or stayed the same, except that it has substantially increased in fraud cases, [7] and child pornography cases.[8]

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[4] Intermediate sanctions are prison/community split sentences, and probation with confinement.

[5] USSC, 2001-2007 Sourcebook of Federal Sentencing Statistics, tbl. 13; USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl. 19, figs. C-I.

[6] *Id.*, fig. G, I.

[7] *Id.*, fig. D.

[8] *Id.*, tbl. 19; USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl. 13.

The extent of decrease when judges depart or vary from the guideline range has not increased since *Booker*. The median decrease was 12 months before *Booker*, has been 13 months since *Booker*,[9] and the median percent decrease is less than before *Booker*.[10]

Rate of below-range sentences. The rate of non-government sponsored below-range sentences has dropped to 16.9% in the third quarter of 2011, a significant decrease from 18.7% in the fourth quarter of 2010.[11] This drop during the first three quarters of 2011 (Oct. 1, 2010-June 30, 2011) corresponds with the reduction in the crack guidelines on November 1, 2010 as directed by the Fair Sentencing Act of 2010. This rate is only 4.2 percentage points lower than a year after *Booker*, when many courts were continuing to treat the guidelines as mandatory.[12] This is a measure of the success of the advisory guidelines system; when unsound guidelines are amended to better reflect the statutory purposes and factors, judges follow them more frequently. (*See* Addendum, Part IV)

The rate at which judges vary from the guideline range has been remarkably low. The guidelines are constructed almost solely of aggravating factors and have been repeatedly increased since the guidelines' inception. The guidelines contain almost no mitigating factors. For example, although state of mind is an essential component of the seriousness of the offense, the guidelines do not distinguish among offenders based on more and less culpable states of mind. They require enormous increases based on quantities of drugs possessed by others that were "reasonably foreseeable" to the defendant. They require an increase based on a gun that "was possessed" by others. The guidelines also omit, prohibit, and discourage consideration of many factors that bear directly on the likelihood of recidivism, thus recommending punishment that is excessive to protect the public. Contrary to the Commission's account, the guidelines fail to take into account a host of relevant factors, and for that reason and others, often fail to achieve the statutory purposes of sentencing. (*See* Addendum, Parts II & III)

Presentation of incorrect data. In March 2003, a Department of Justice official appeared before this Subcommittee and complained that judicial departures had increased as a result of the Supreme Court's 1996 decision in *Koon v. United States*, 518 U.S. 81 (1996).[13] Within a month,

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[9] *See* USSC, 2003-2004 Sourcebook of Federal Sentencing Statistics, tbl. 31A; USSC, 2005-2010 Sourcebook of Federal Sentencing Statistics, tbls. 31A-31D; USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbls. 10-13; Testimony of James E. Felman on Behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the House of Representatives, Appendix (Oct. 12, 2011).

[10] *See* USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 31A (40%); 2004 Sourcebook of Federal Sentencing Statistics, tbl. 31A (35.1% pre-*Blakely*, 37.5% post-*Blakely*); USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbls. 10, 12 (over 90% of downward departures and variances are 34.8% or less below the range).

[11] USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl.4.

[12] *Id.* (12.7% first quarter 2006).

[13] Statement of Associate Deputy Attorney General Daniel P. Collins before the Subcomm. on Crime, Terrorism, and Homeland Security of the of the H. Comm. on the Judiciary (Mar. 11, 2003), in 15 Fed. Sent'g Rep. 331, 331 (2003).

Representative Feeney introduced an amendment to the PROTECT Act based on that same representation.[14] On April 30, 2003, a revision of the Feeney Amendment was passed into law, restricting judicial departures but creating a new "fast track" departure for the government.

Later, it came to light that the Department's claims that judicial departures had increased after *Koon* were erroneous. From the early 1990s until 2003, the Commission reported a large and growing number of government-sponsored departures as if they were initiated by judges. What appeared in the Commission's public data as an increase in judicial departures was actually an increase in government-sponsored departures, primarily on the border in immigration and drug cases. The Commission knew the true source of the increase in below-range sentences,[15] but did not correct the way in which it publicly reported the departure rates until after the PROTECT Act was passed.

In October 2003, after the PROTECT was passed, the Commission reported that, excluding southwest border districts, "the national rate of increase in the departure rate is substantially the same during the pre-*Koon* and post-*Koon* eras, and actually declines during the most recent year for which such data is available."[16] The General Accounting Office,[17] and academic researchers,[18] also found that much of the data relied upon by supporters of the PROTECT Act was inaccurate and that the increase in sentences below the guideline range attributed to judges was in fact the product of prosecutorial practices.

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[14] 149 Cong. Rec. H2423 (daily ed. Mar. 27, 2003); 149 Cong. Rec. H3061-01 (daily ed. Apr. 10, 2003).

[15] *See* Statement of John R. Steer, Vice-Chair, U.S. Sent'g. Comm'n, before the Subcomm. on Criminal Justice Oversight, U.S. Senate Judiciary Committee, at 6, 8-9, 10 &Exh. 14 (Oct. 13, 2000) (the "overall biggest set of influences [on departure rates] has been an array of prosecutorial charging and plea bargaining initiatives," the "greatest changes" in the departure rate "since 1992 have occurred in immigration and drug trafficking offenses," "typically initiated by the several U.S. Attorneys," "the two largest categories of reasons" for all downward departures were "agreements to deportation involving unlawful aliens (including various 'Fast Track' plea arrangements)," which had grown from .2% to approximately 20% from 1994 to 1999, "and plea agreements generally," which comprised about 20% from 1992 to 1999).

[16] USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 55 (2003). Until 2003, the Commission had included all government-sponsored departures other than substantial assistance departures in the "other downward departure" rate. After the PROTECT Act was passed, the Commission reported that at least 40% of these "other downward departures" were sought by the government. *Id.* at 54-56, 60.

[17] GAO, *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal years 1999-2001* (2003) (citing problems with Commission data collection and coding procedures).

[18] Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. Empirical Legal Stud. 1 (2005); Mark T. Bailey, *Feeney's Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 Iowa L. Rev. 269 (2004).

In the aftermath of the PROTECT Act, the Judicial Conference and the Commission changed the manner in which sentences are reported to, and categorized, by the Commission, although the potential for misunderstanding remains.[19] Given this history, one would expect the Commission to be especially careful to prevent partisan misuse of its data or the drawing of false inferences from inaccurate, incomplete, or highly aggregated data.

Yet, in its testimony before this Subcommittee, the Commission relies in part on the same kind of data that led to the enactment of the PROTECT Act and fails to adequately explain problems with the data in both the pre- and post-PROTECT Act periods. The graph in the Commission's Appendix C and the rates of below-range sentences shown for immigration and other offenses over time (at pp. 26, 28, 38) make it appear as if the rate of non-government sponsored departures increased after the decision in *Koon*, when they did not, and were far higher in immigration and marijuana cases after *Koon* than they actually were. The Commission's characterization of *Koon* as having actually increased judicial discretion and the rate of judicial departures[20] is wrong. *Koon* incorporated the Commission's restrictive departure standard into the appellate standard of review,[21] and therefore did not increase judicial discretion or the rate of judicial departures, as the Commission itself reported in October 2003. It is unclear what conclusions are meant to be drawn from the Commission's data and description of the post-*Koon* period, but they appear to invite the same misunderstandings that led to previous legislation restricting judicial discretion.

II. The Commission Offers No Meaningful Analysis of Differences Among Districts, Much Less Evidence of Growing or Unwarranted Differences.

The first ground for the Commission's proposed overhaul is what it calls "growing disparities among circuits and districts."[22] Whether differences are growing or unwarranted, what kinds of differences there are, and what causes them, are complex questions upon which the Commission sheds no light. There are a host of local conditions and interactions among judges and prosecutors that legitimately cause differences among districts, as the Commission has been repeatedly advised,[23] and has previously acknowledged.

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[19] Paul J. Hofer, *How Well Do USSC Sentencing Data Help Us Understand Post-Booker Sentencing?* 22 Fed. Sent'g Rep. 89 (2010).

[20] Commission Testimony at 4-5.

[21] *See Koon*, 518 U.S. at 92-95; Kate Stith, *The Hegemony of the Sentencing Commission*, 9 Fed. Sent'g Rep. 14 (1996); Paul Hofer *et al.*, *Departure Rates and Reasons After Koon v. U.S.*, 9 Fed. Sent'g Rep. 284 (1997).

[22] Commission Testimony at 1.

[23] *See, e.g.*, Statement of the Honorable Robert L. Hinkle Before the U.S. Sent'g Comm'n (Feb. 11, 2009); Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, Hearing before the U.S. Sent'g. Comm'n, at 7-11 (July 9, 2009); Tr. of Public Hearing before the U.S. Sent'g Comm'n, Chicago, Ill., at 99-100 (Sept. 9-10, 2009) (remarks of the Hon. Karen K. Caldwell, Eastern District of Kentucky); Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 6-9 (Oct. 21, 2009); Twentieth Annual National Seminar on the Federal Sentencing Guidelines,

The only information the Commission provides is: (1) the low and high rate by district of only non-government sponsored below range sentences for certain offenses, and (2) and a list by district of only non-government sponsored below range sentences for all offenses. The Commission omits any information about whether variations in sentence length among districts have grown. The Commission omits any discussion of government-sponsored rates of below range sentences by district, although this has a very substantial bearing on non-government sponsored rates.[24]

The Commission warned not long ago that "[a]nalyzing sources of . . . regional disparity is complicated because the potential sources are so many, varied, and interacting,"[25] and that "[i]nferring unwarranted disparity from uncontrolled comparisons of average sentences or rates of departure may be erroneous."[26] "The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity cannot be resolved through simple examination of reported rates. . . . When assessing the role of departures in creating unwarranted sentencing disparity . . . caution is advisable and caveats are unavoidable."[27]

A. <u>There is Less Variation Among Districts in Sentence Length Than When the Guidelines Were Mandatory.</u>

Focusing only on rates, the Commission provides no information about whether differences in *sentence length* have grown among districts, a measure that would seem to be much more important in assessing whether inter-district disparity has grown. Other researchers,

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Orlando, Florida (May 4-6, 2011) (remarks of the Hon. John Gleeson, Eastern District of New York); Letter to the Hon. Patti B. Saris from Thomas W. Hillier, II, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012, at 59, 65-68 (Sept. 7, 2011).

[24] *See* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 656 n.66 (2008) ("These differences matter, not just to the residents of our nation's communities, but to the jurors, lawyers, and judges in them. They are acted upon in numerous ways, including in plea bargaining decisions, to produce results that prosecutors and judges believe are just. To be sure, those results are not uniform. Some drug couriers get a four-level downward role adjustment based on the happenstance of being arrested in New York rather than in Miami, just as some illegal immigrants get a three-level fast-track adjustment based on the happenstance of being arrested in Arizona rather than in Utah.").

[25] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 93 (2004) ("Sentencing can be influenced by differences among the districts and circuits in their sentencing case law and 'personas.' These, in turn, are influenced by the political climates of different regions of the country. A great deal of research has established the importance of the local norms of different district courts---what some researchers have called court communities. The norms of different courts are also influenced by practical constraints, such as court workload and the availability of different types of sentencing options.").

[26] *Id.* at 100.

[27] *Id.* at 111.

using the Commission's datasets, have performed this analysis. They found that the "sentence length variance" among districts was 6.6% before the PROTECT Act, 5.8% after the PROTECT Act, 5.2% after *Booker*, and 6.3% after *Gall*.[28] Thus, there is now *less variation in sentence length* than before the PROTECT Act when the guidelines were mandatory.

B. The Commission's Rates Tell Us Nothing Meaningful.

Then Judge (and former U.S. Attorney) Alito said in 1992 that the Commission's "[c]omparisons of the departure rates of different circuits and districts seem to me . . . unsound."[29] He gave several examples of different mixes of types of cases and different magnitudes of cases, set forth in the footnote, and concluded that "no meaningful" or "reliable" comparisons among districts can be made by looking at the Commission's statistics.[30]

The same is true of the Commission's presentation today. The Commission's presentation makes it appear that there are wide differences, with no effort to illuminate the reasons for the differences.[31] Prosecutorial decisions are the primary driver of differences among districts. Yet, there is no analysis of the kinds of cases prosecutors bring, or any discussion of government-sponsored departures and variances. Nor does the Commission

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[28] Jeffery T. Ulmer, Michael T. Light, & John Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, Justice Quarterly (forthcoming 2011) ["Penn State Study – Interdistrict Disparity"], at 18 http://www.tandfonline.com/doi/abs/10.1080/07418825.2011.553726.

[29] Samuel A. Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 Fed. Sent'g Rep. 166 (1992).

[30] "For example, the types of cases prosecuted in federal court in a particular district may be heavily influenced by cases that state and local authorities are able and willing to prosecute. The types of cases prosecuted in a federal district may also be affected by . . . investigative resources . . ., the number of federal prosecutors, and the number of judges and the competing pressures on the district court docket. Finally, each United States Attorney exercises a degree of discretion in setting priorities that are responsive to the district's perceived needs. . . . To take one example, cases involving immigration offenses or simple drug possession, which have very low departure rates, make up 35% of the cases in the Southern District of California but only 6% of the cases in the Southern District of Florida and 3% of the cases in the Eastern District of New York. Consequently, no reliable inter-district comparisons can be made without controlling for differences in the mix of offenses prosecuted. There are other important differences in the mix of cases prosecuted-such as the magnitude of cases falling within a particular offense category-and these differences may also affect departure rates. In two large offense categories, drug and fraud cases, there are very substantial differences in the magnitude of cases prosecuted in the more populous, urbanized districts as opposed to the less populous, more rural districts. If departure rates within an offense category vary based on the magnitude of the case . . . , then meaningful inter-district comparisons cannot be made without controlling for inter-district differences in the magnitude of cases within particular offense categories. . . . The point is that we just can't tell from the Commission's statistics, and we will not be able to tell until a much more sophisticated analysis of each district's cases is performed." *Id.*

[31] Commission Testimony at 26, 28, 31, 33, 36, 38, 41, 43, 46, 48, 50, 53.

disclose that the difference between the highest and lowest government-sponsored rates by district is 12.4 percentage points higher than the difference between the highest and lowest non-government sponsored rates by district.[32]

The Commission provides no explanation at all of why, as it says, the non-government sponsored below range rate in illegal entry cases was a high of 66.7 percent in one district and a low of 1.1 percent in another, or even which districts those were.[33] The lowest rate is likely either New Mexico, which has a 3.5% non-government sponsored rate for all immigration cases (not just illegal entry cases), or Arizona, which has a 4.2% non-government sponsored rate for all immigration cases.[34] These rates are low for good reason. In Arizona, which has a "fast track" program, the government-sponsored rate is 64.7%.[35] In New Mexico, which also has a "fast track" program, the government sponsored rate is 29%,[36] and many defendants who do not receive "fast track" departures are prosecuted under 8 U.S.C. § 1326(a) and receive time served.[37] Thus, in most cases in Arizona and New Mexico, there is no need or even opportunity for judges to depart or vary because the government's actions produce low sentences.

The highest rate the Commission reports for illegal entry cases (66.7%) is most likely for the Southern District of New York, which has a 63.9% non-government sponsored rate for all immigration cases, but only a 2.5% government sponsored rate.[38] The Southern District of New York, unlike Arizona and New Mexico, has no "fast track" program and no § 1326(a) cases. According to the Commission, the presence of fast track programs in some districts and not others creates geographical disparity.[39] Judges in the Southern District of New York (and

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[32] In 2010, prosecutors sought downward departures and variances in 60.4% of cases in the Southern District of California and in 3.7% of cases in the District of South Dakota, a difference of 56.7 percentage points. Judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 4.7% of cases in the Middle District of Georgia, a difference of 44.3 percentage points. *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 26.

[33] Commission Testimony at 26.

[34] We cannot be certain which districts the Commission has found to have the highest and lowest rates for illegal entry cases alone because the Commission publishes rates by district for all immigration cases together, rather than reporting illegal entry separately.

[35] USSC, 2010 Statistical Information Packet, Arizona, tbl. 10.

[36] USSC, 2010 Statistical Information Packet, New Mexico, tbl. 10.

[37] The information regarding the high number of § 1326(a) cases comes from the Defender in the District of New Mexico.

[38] USSC, 2010 Statistical Information Packet, Arizona, New Mexico, Southern District of New York, tbl. 10.

[39] USSC, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003) (criticizing fast-track programs for creating a "type of geographical disparity").

elsewhere) vary to alleviate that disparity.[40] The average *sentence length* for immigration cases is highest in the Southern District of New York at 23.5 months, while in Arizona it is 20 months, and in New Mexico is 6 months.[41]

As one example of a similar dynamic in the drug trafficking area, in the Eastern District of Kentucky, only 6% of drug offenders receive a non-government sponsored below range sentence, but 63.2% of drug offenders receive a government-sponsored departure for cooperation, and average sentence length is 70 months.[42] In the Southern District of West Virginia, only 10.7% of drug offenders receive a government sponsored departure for cooperation, but 35.1% receive a non-government sponsored below range sentence, and average sentence length is 75 months.[43]

Mr. Miner decried the different rates of non-government sponsored departures and variances in 2010 in the Northern (17.2%) and Southern (49%) Districts of New York, but average sentence length was 44.4 months in the Northern District of New York, 54.1 months in the Southern District of New York, and 51.1 months nationally.[44]

The ranking of districts in the Commission's Appendix tells us nothing. For example, the non-government sponsored rate of below guideline sentences in the Western District of Texas was only 11.1% in 2010, well below average. This bare statistic fails to reveal that a large portion of the caseload consists of immigration cases prosecuted under 8 U.S.C. § 1326(a) (with a statutory maximum of 2 years), and marijuana cases prosecuted under 21 U.S.C. § 841(b)(1)(D) (with a statutory maximum of 5 years).[45] Immigration cases are 60% of the caseload and the median sentence is 8 months.[46] Marijuana cases comprise 63.7% of all drug

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[40] According to a former federal prosecutor, "what we've done is to set penalties at unsupportably high levels and then use those high penalties as the starting point for a program of huge sentencing discounts." Frank O. Bowman, III, *Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System*, Written Statement Prepared for Hearing Before the U.S. Sent'g. Comm'n, at 1 (Sept. 23, 2003). "[W]hat makes fast track possible and makes it run is the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis." Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent'g Comm'n, at 27 (May 27, 2009).

[41] USSC, 2010 Statistical Information Packet, Arizona, New Mexico, Southern District of New York, tbl. 7.

[42] USSC, 2010 Statistical Information Packet, Eastern District of Kentucky, tbls. 7, 10.

[43] USSC, 2010 Statistical Information Packet, Southern District of West Virginia, tbls. 7, 10.

[44] USSC, 2010 Statistical Information Packet, Northern District of New York, Southern District of New York, tbl. 7.

[45] The information regarding the high number of § 1326(a) and marijuana cases comes from the Defender in the Western District of Texas.

[46] USSC, 2010 Sourcebook of Federal Sentencing Statistics, Appendix B (Western District of Texas).

cases compared to 26.3% nationally. The guideline range in these marijuana cases is 18-24 months (or less) with reductions for acceptance of responsibility and safety valve, and 12-18 months (or less) with minor role. Unlike many other districts, there is no need for below-range sentences in many cases in the Western District of Texas.[47] Many defendants serve most of their sentences before they are even sentenced.

For a number of reasons for different rates in the District of Massachusetts and the Middle District of Georgia, and other information on this issue, *see* Addendum, Part I.

C. The SRA Recognized That There *Should* Be Local Differences.

The SRA did not require nationwide uniformity, instead recognizing that regional differences are relevant in three different ways—"the community view of the gravity of the offense," "the public concern generated by the offense," and "the current incidence of the offense in the community."[48] The guidelines do not to take account of local conditions, but judges and prosecutors take account of such differences and always have.

That is presumably why the Attorney General has adopted a policy of "district-wide consistency," in accordance with "district-specific policies, priorities, and practices," and "the needs of the communities we serve."[49] In considering the need for just punishment, one question is, "What penalty is needed to restore the offender to moral standing within the community?"[50] As the Second Circuit found in upholding an upward variance in a firearms case in the Southern District of New York, the "community view of the gravity of the offense" and the "public concern generated by the offense" are relevant to the seriousness of the offense.[51] A failure to take into account local conditions and norms would create unwarranted uniformity.[52]

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[47] *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, Appendix B (Western District of Texas: 24.6% drug cases, 50.6 months mean, 33 months median; Southern District of New York: 36% drug cases. 65.7 months mean, 57 months median; Delaware: 27% drug cases, 82.4 months mean, 78 months median; Rhode Island: 53% drug cases, 72.5 months mean, 60 months median).

[48] *See* 28 U.S.C. § 994(c)(4), (5), (7).

[49] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

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

[51] *See United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).

[52] *See* Vincent L. Broderick, *Local Factors In Sentencing*, 5 Fed. Sent'g Rep. 314, 314 (1993) ("Local variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government."); Michael O'Hear, *Federalism and Drug Control*, 57 Vand. L. Rev. 783, 821-22 (2004) (discussing the distortion of drug policy by federalization and justified regional differences).

III. The Commission Gives an Incomplete and Misleading Account of Demographic Differences in Sentencing.

Accusing federal judges of racial bias is a serious charge. We are therefore disappointed to see the Commission overstate its results and fail to caution that its conclusions are insufficiently reliable to be the basis for any policy changes. The Commission's regression analysis omits many relevant factors that would explain the racial differences it reports, omits other relevant information, and fails to acknowledge that the Commission's results have been contradicted by prominent researchers using a different statistical model. This other research finds that racial and ethnic disparity has not increased under the advisory guidelines.

1. The failure to account for all relevant factors that legitimately affect sentencing decisions makes the Commission's conclusions unreliable. The Commission does not collect, and its analysis does not include, many relevant factors that legitimately and legally affect judges' sentencing decisions, and that would likely change the result if they were included.[53] In addition, the Commission's "refined model" omits many highly relevant factors, such as criminal history points, that are known to correlate with both race and sentence lengths, thus overstating the magnitude of the race effects reported.[54]

Rather than caution the Subcommittee that its study omits many relevant factors, the Commission strongly implies the opposite, stating that "this tool . . . accounts, or controls, for the effect of each factor in the analysis. Each factor is separately assessed and the extent to which each factor influences the outcome is measured."[55]

In its March 2010 report on demographic differences, the Commission devoted two full sections to explaining that reliable conclusions could not be drawn from its analysis because relevant factors are missing from its datasets. In a section entitled "Cautions When Reviewing the Results of This Report," it stated:

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[53] Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 107, 115 (1998).

[54] In its March 2010 report, the Commission stated these factors were omitted because their inclusion "somewhat artificially overstated" the impact of the presumptive sentence and "understated" the impact of other independent variables. The Commission claimed that the remaining independent variables are "independent of and not correlated with one another." USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the* Booker Report's *Multivariate Regression Analysis* at 19-20 (2010) [USSC, *2010 Demographic Differences Report*]. No inter-correlation matrix was included in the report, however, and it is implausible that race and gender are not correlated with other independent variables, such as offense type. The effect of the omission of these legally relevant factors is to ignore the fact that judges legitimately weigh some legally relevant factors differently than the guidelines rules. Conversely and ironically, by *not* restricting the presumptive sentence, *id.*at 20 n. 69, the "refined model" assumes that judges weigh the guideline recommendation itself somewhat differently than the law indicates. These differences in model specification are contestable; different researchers believe different choices are appropriate. The Commission's choices resulted in race effects larger than would otherwise be the case.

[55] Commission Testimony at 53-54.

[O]ne or more *key factors* which could affect the analysis may have been *omitted* from the methodologies used because a particular factor is unknown or was erroneously excluded from the analysis, or *because data concerning such a factor is unavailable in the Commission's datasets. Examples* of factors for which no data is readily available in the Commission's datasets *include a measure of the violence in an offender's criminal past, information about crimes not reflected in an offender's criminal history score as calculated under the sentencing guidelines, and information about an offender's employment record.* For these reasons, *the results presented in this report should be interpreted with caution.*

Although the Commission's analysis demonstrates that some differences in the sentences imposed on certain groups of offenders are associated with specific demographic characteristics, it is also *important to note that these differences may be attributable to one (or more) of a number of factors that, while correlated with the demographic characteristics of offenders, are not caused by them.* For example, *judges make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot be measured.* Some of these factors could be correlated with one or more of the demographic characteristics of offenders but not be influenced by any consideration of those characteristics.[56]

In another section entitled "Limitations of Regression Analysis," the Commission stated:

As is apparent, the *usefulness* of regression analysis is *entirely dependent on the data being used.* Therefore, one *important concern* when using regression analysis is an *awareness of what data might be missing* from the analysis. The *omission of one or more important variables usually causes the value of the variables that are included in the model to be overstated.*

For example, a judge sentencing two offenders convicted of similar crimes with the same criminal history score under the federal sentencing guidelines *might impose a longer sentence on the offender with a more violent criminal past than on the offender with a less violent, or non-violent, criminal history.* Similarly, a judge sentencing two offenders convicted of similar crimes might be influenced by the *presence of violence in one case that was not present in the other case and was not reflected in the final offense level* for those cases as determined under the sentencing guidelines. Additionally, judges might be influenced by *crimes not reflected in the criminal history score or by an offender's contacts with the criminal justice system that do not result in a conviction.* Further, an offender's *employment record may have some influence on the sentence imposed.* Data on these factors are not available in the Commission's datasets.[57]

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[56]USSC, *2010 Demographic Differences Report* at 4.

[57]*Id.* at 9.

The Commission explained that, while the datasets it used did not include information on whether offenders had violent criminal history events, it had determined through a random sample from a different dataset that 43.7 percent of black offenders, 24.4 percent of white offenders, 18.9 percent of Hispanic offenders, and 23 percent of "other" offenders had violent criminal history events.[58] Further, not every incidence of violence is reflected in the guideline offense level, and the criminal history score includes only offenses of which the offender was convicted.[59] Employment is not included in the guidelines at all and therefore was not included in the analysis. The Commission stated: "[O]ne or more unmeasured factors that are not available for inclusion in the analysis . . . potentially *could change the results if they were included*."[60]

Why is this so? When there is a statistical correlation between a missing but relevant factor and a demographic factor, such as race, and judges take the relevant factor into account, the analysis appears to show evidence of demographic effects when judges are in fact taking proper account of relevant factors. When judges are required to take account of relevant factors (such as employment and violence in criminal history), which are not included in the guidelines (and thus not included in the Commission's datasets), the analysis appears to show an increase in demographic effects when judges are in fact taking greater account of relevant factors.

2. The Commission misstates its own findings. The size of effects associated with demographic factors in multiple regression analyses commonly fluctuate for a variety of reasons. The Commission previously noted that race effects have been statistically significant some years but not others, making it implausible that deeply rooted racial bias in judicial decision making accounts for the associations between race and sentence lengths in the years it is found.[61]

Yet in its testimony for this hearing, the Commission states that differences in sentence length between Black and White male offenders "have increased steadily since *Booker*."[62] In fact, its analysis of March 2010 reported larger effects for black males than those found in its latest analysis using the most recent data. Compared to its March 2010 analysis, the effect for black males *decreased* in the post-*Gall* period—from a 23.3 percent difference through September 30, 2009,[63] to a 20 percent difference through September 30, 2010.[64] This information is not mentioned in the Commission's testimony.

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[58]*Id*. at 9 n.37.

[59]*Id*. at 10 nn.38-39.

[60]*Id*. at 9 n.35.

[61]*See* discussion in *Fifteen Year Review*, at 123-27.

[62]Commission Testimony at 54.

[63] USSC, *2010 Demographic Differences Report* at 22.

[64]Commission Testimony at 54.

The Commission also fails to mention that under a different model spanning the entire ten-year period from 1999 through 2009, the greatest difference by far in sentence length between black and white offenders occurred in 1999 when the guidelines were mandatory.[65]

3. The Commission appears to be comparing apples and oranges because different models in different time periods contain different control variables. In March 2010, the Commission adopted a new model with a new beginning date of May 1, 2003, rather than fiscal year 1999. The Commission said that it was important to include detention status in its analysis because similar offenders may receive different sentences as a result of whether they were detained before sentencing or not (*e.g.*, they may receive time served if detained but probation if not), and if detention status was associated with race or gender (*e.g.*, because of offense type or inability to post bail), it would confound the results.[66] The Commission was unable to include sentences imposed from 1999 to 2003 in this new model because it had no data on detention status for the years 1999 to 2003.[67]

The Commission now includes a time period for which it said it has no data on detention status and compares it to periods for which detention status is included. The new time period begins on October 1, 1999 and ends April 2003,[68] but the Commission said it has no data on detention status before 2003. Unless the Commission obtained data on detention status for this new time period in some way that it has not explained, it is comparing apples, with no data on detention status before 2003, to oranges, including detention status after 2003.

4. Prominent experts reached the opposite conclusion. Shortly after release of the Commission's report on demographic differences in March 2010, a team of researchers at Pennsylvania State University, including a former Staff Director at the Commission, released a study, also using the Commission's datasets, but reaching different, and additional, conclusions. They found that:

- Disparity in sentence lengths based on race, ethnicity and gender has *not* increased after *Booker* and *Gall*.[69]

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[65] USSC, *2010 Demographic Differences Report* at 14.

[65] *Id.*

[66] *Id.* at 18.

[67] *Id.* at 2 & n.4.

[68] Commission Testimony at 53 n.164.

[69] Jeffery T. Ulmer, Michael T. Light, & John Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, Justice Quarterly (forthcoming 2011) ["Penn State Study – Interdistrict Disparity"], at 24, http://www.tandfonline.com/doi/abs/10.1080/07418825.2011.553726.

- Black-white differences in sentence length are significantly *smaller* in the post-*Booker* and *Gall* periods compared to the pre-PROTECT Act period (October 2001-April 2003) when the guidelines were mandatory.[70]
- There is less variation among districts in the extent to which race influences sentence length after *Booker* and *Gall* than during the pre-PROTECT Act or PROTECT Act periods.[71]
- Gender differences in sentence length are significantly *less* in the post-*Gall* period than in either the pre-PROTECT Act or PROTECT Act periods.[72]
- The effects of race and gender on sentence length were considerably *less* after *Booker* and *Gall* than in 1994-95.[73]
- There were no statistically significant differences in sentence lengths across time periods for Hispanics or non-citizens.[74]
- There is no evidence that *Booker* has "produced greater disparity in the likelihood of minority offenders to receive non-substantial assistance downward departures."[75]

The Penn State Study concluded: "Put simply, racial and gender sentence length disparities are less today, under advisory Guidelines, than they were when the Guidelines were arguably their most rigid and constraining."[76]

The different conclusions of the Commission and Penn State studies are the result of different methodologies. Researchers can model the sentencing decision as either (1) a single decision (How long to imprison?) or (2) a series of decisions (First, *whether* to imprison, and second, for those offenders for whom imprisonment is necessary, *for how long*?). Different factors affect the two decisions differently. For example, a defendant's current employment may influence a judge to prefer probation, so that the defendant can keep his job and continue to support his dependents.[77] A defendant with violence in his criminal history is more likely to be sentenced to prison than a defendant with no violence in his history.

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[70] *Id.* at 24.

[71] *Id.* at 30.

[72] *Id.* at 24.

[73] Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity In the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y __ (forthcoming November 2011) ["Penn State Study – Alternative Analysis"], at 31-32.

[74] Ulmer *et al.*, Penn State Study – Interdistrict Disparity, *supra* note 69, at 24.

[75] Ulmer *et al.*, Penn State Study – Alternative Analysis, *supra* note 73, at 33.

[76] *Id.* at 32.

[77] *See* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (1996) (finding that "offenders who were viably employed were 21 percent more likely to receive an alternative sentence than unemployed offenders").

These kinds of considerations led the Penn State team to prefer the second approach.[78] The Commission chose the first approach, studying all types of sentences together and treating probationary sentences as zero months of imprisonment. The Penn State researchers found that what appeared to be lengthier prison sentences for black male offenders under the advisory guidelines was, in fact, an increased difference in the portion of black and white male offenders who received probation after *Gall.* Even this difference, however, "did not attain statistical significance" when viewed across time periods in the same model.[79] Moreover, the decision whether to imprison is most sensitive to the very offender characteristics missing from the Commission's data, such as employment and violence in criminal history, which are likely to affect the court's decision whether to sentence the defendant to incarceration.[80]

Variations in methodology and findings in this field of research are longstanding and caution against basing policy decisions on the results of this type of study: "Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution."[81]

The only fair conclusion is that there is no reliable evidence that judges act on racial bias when they exercise greater discretion in sentencing.

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[78] Ulmer *et al.*, Penn State Study – Alternative Analysis, *supra* note 73, at 11-15.

[79] *Id.* at 28.

[80] The two studies also differed in their approach to immigration offenses. The Penn State researchers excluded immigration offenses because the overwhelming majority involve non-citizens, who are often non-White, and because immigration cases are handled differently from other crimes, for example, through the use of deportation as a sentencing option and the government's use of "fast track" programs that are dependent not on the defendant's criminal conduct but the district in which the defendant is prosecuted. Ulmer *et al.*, Penn State Study – Alternative Analysis, *supra* note 73, at 15-16, 29-30, 38. If immigration cases are included, it cannot be fairly concluded that any racial or ethnic disparity found is due to discrimination based on these characteristics rather than the result of differences in how non-citizens and immigration cases are handled. This choice by the Penn State researchers is supported by Commission staff research: "Non-citizens are less likely to receive an alternative than are U.S. citizens, reflecting perhaps the impending deportation of the defendant and the absence of a local residence suitable for home confinement. Higher imprisonment rates for non-citizens and for immigration offenders appeared to account for the higher aggregate imprisonment rates for Hispanic defendants. No differences in the use of alternatives were found between Whites, Blacks, and Hispanic defendants after controlling for all other factors in the model." USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (1996).

[81] Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 106 (1993).

5. Unproven allegations of racial bias by judges divert attention from proven sources of unfairness in sentencing, and ignore the fact that judicial discretion helps to correct these problems.

Allegations of racial bias infecting judicial decisions were made before the sentencing guidelines were adopted, but were later proven unfounded. In a comprehensive review sponsored by the Department of Justice's Bureau of Justice Statistics in 1993, leading sentencing researchers concluded:

> During 1986-1988, before full implementation of the guidelines, white, black and Hispanic offenders received similar sentences, on average, in Federal district courts.[82]

> [The] few studies [that] examined actual Federal sentencing decisions prior to the introduction of the guidelines . . . . showed that sentencing was not greatly dependent on the judge that one drew. Rather, outcomes generally corresponded to differences in cases and offenders' characteristics that were commonly seen as legitimately considered. . . . Differences clearly thought to be unwarranted (*e.g.*, by the offender's race or ethnicity) were found to be uniformly small or statistically insignificant.[83]

Despite the repudiation of the charges, racial bias was and is routinely cited as a core reason that judicial discretion must be constrained. In fact, the guidelines and the mandatory minimums on which many guidelines are based are responsible for significant racial disparity. The 1993 Bureau of Justice Statistics review concluded that "there were substantial aggregate differences in sentences imposed on white, black, and Hispanic offenders . . . sentenced under guidelines from January 20, 1989, to June 30, 1990," and that nearly all of these "can be attributed to [factors] that current law and sentencing guidelines establish as legitimate considerations in sentencing decisions."[84]

After its own comprehensive review in 2004, the Commission concluded that some of these laws and guidelines with a disproportionate impact on racial minorities were not justified by the purposes of sentencing.[85] The Commission concluded that "if unfairness continues in the federal sentencing process, it is more an 'institutionalized unfairness' built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. . . . Today's sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black

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[82] *Id.* at 1.

[83] *Id.* at 25.

[84] *Id.* at 1.

[85] *Fifteen Year Review* at 131-34.

offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[86]

Studies like the Commission's and Penn State's do not measure the effects of the *sentencing rules themselves* on racial unfairness. These studies treat the guidelines, mandatory minimum statutes, and pre-sentencing decisions of law enforcement agents and prosecutors that control the guideline calculation as "legally relevant," fair and appropriate. They do not assess the demonstrated adverse impact of rules that are needlessly harsh and that disproportionately punish minorities, such as the different treatment of powder and crack cocaine (which was lessened by the Fair Sentencing Act of 2010) or the severe treatment of prior drug offenses under the so-called "career offender" guideline, or the impact of unequal law enforcement scrutiny, arrests, and charging and plea bargaining decisions.[87]

Nor do these studies assess how much increased judicial discretion after *Booker* has improved fairness in sentencing by permitting judges to offset the effects of these unfair rules and practices. The fact is, defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules, take greater account of relevant differences among defendants, and correct for unfairness in prosecutorial practices and policies.

Notably, the Penn State Study found that below-guideline sentences sponsored by the government "are a greater site of racial disparity than judge initiated deviations."[88] The Commission, however, even as it seeks to constrain judicial discretion, has not studied whether prosecutors' decisions have a racial effect.

The mandatory guidelines created unwarranted disparity arising from unjust rules and the uneven exercise of prosecutorial discretion. Judges were not permitted to correct these problems. The Commission's proposal to reinstate several features of the mandatory guidelines system, under the guise of correcting demographic disparity, would reinstate this unjust regime.

IV. The Racial Gap Caused By the Guidelines and Mandatory Minimums Should Be the Commission's Greatest Concern.

As shown in Figure 2, the racial gap in sentence length was non-existent before the mandatory guidelines and mandatory minimums went into effect. In 1987, *when judges still had complete discretion to impose sentences for any reason or no reason at all, average time served for Black, White and Hispanic defendants was the same.* By 1989, when the guidelines and mandatory minimums had taken effect,[89] average time served for Black offenders was already

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[86] *Id.* at 135.

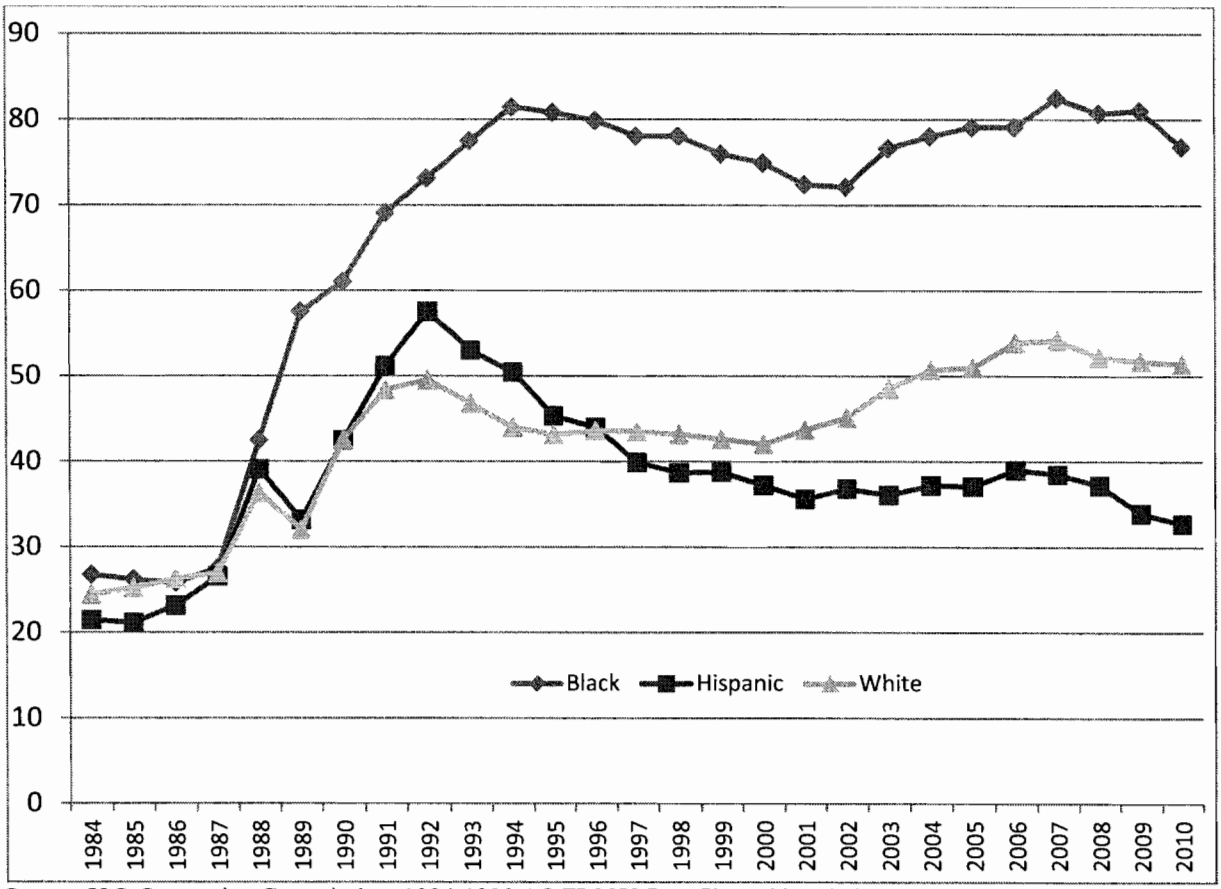
[87] *Id.* at 89-92, 133-35.

[88] Ulmer *et al.*, Penn State Study – Alternative Analysis, *supra* note 73, at 2, 34-35, 39.

[89] The guidelines were upheld on January 18. 1989. *Mistretta v. United States*, 488 U.S. 361 (1989). Mandatory minimums for drug trafficking were applicable to offenses committed after November 1, 1987. *See* Pub. L. No. 99-570, § 1004(b) (Oct. 27, 1986).

more than two years higher than for Whites and Hispanics. Average time served for Hispanics began to drop in 1992 due to the government's use of fast track departures and charge bargains, and has dropped even further in recent years due to a large increase in the prosecution of immigration cases with a low statutory maximum and low guideline range. Sentences for Black offenders, however, continued to soar above the others under the mandatory rules. The gap between time served by Blacks and Whites was greatest in 1994 (at 37.7 months), then began to narrow until 2003, when the PROTECT Act was passed and time served by Black offenders began to grow again. Fortunately, the gap between Blacks and Whites narrowed significantly from 29.3 months in 2009 to 25.4 months in 2010, and will narrow further in 2011 due to the FSA amendments to the guidelines and mandatory minimums.

Figure 2
AVERAGE TIME SERVED BY BLACK, WHITE, AND HISPANIC OFFENDERS
FY1984-2010



Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles; 1991-2010 USSC Monitoring Datafiles. Time served is estimated from the sentence imposed. In the Monitoring Datafile TIMESERV assumes good time credits will be applied. Offenders receiving no term of imprisonment are excluded [SENTIMP=1, 2].

The growth in the racial gap during the mandatory guidelines era was caused by a number of factors, but especially by guidelines and mandatory minimums that greatly increased sentences for crimes most typically committed by African American defendants, even though

these increases did not further any purpose of sentencing. Rules that fail to further the purposes of sentencing are unjust even if they do not have an adverse racial impact, but are especially unjust when they do have an adverse racial impact.

Substantial progress has made in crack sentencing, but problems remain. For example, the Commission has noted that the guidelines' treatment of criminal history, especially minor offenses, may have an adverse impact on minorities without advancing the purposes of sentencing.[90] Guideline ranges increase steeply based on the defendant's criminal history category.[91] African Americans comprise only 20.7% of the defendant population but 32.6% of defendants in the three highest criminal history categories.[92] This does not necessarily mean that African American defendants have committed more crimes when they arrive in federal court. Rather, as the Commission has found, they have a higher risk of arrest and prosecution due to local police and prosecutorial practices in impoverished minority neighborhoods.[93] Research presented to the Commission shows that local arrests and prosecutions for minor offenses (such as driving under the influence, disorderly conduct, and drug possession) have an enormous disparate impact on African Americans.[94] Thus, "while the guidelines say [they are] treating like with like by treating people with the same prior records the same, in fact a black person . . . and a white person with [the same] prior record are not the same, because the patterns of enforcement, the patterns of arrest in their respective communities, on average, are so different."[95]

Another example is the "career offender" guideline, a guideline that originated with a congressional directive but that the Commission made much broader than required.[96] The

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[90] *Fifteen Year Review* at 134.

[91] For example, a defendant with an offense level of 12 has a range of 10-16 months in Criminal History Category I, but a range of 30-37 months in Criminal History Category IV. A defendant with an offense level of 32 has a range of 121-151 months in Criminal History Category I, but a range of 210-262 months in Criminal History Category IV.

[92] USSC 2010 Monitoring Dataset.

[93] *See Fifteen Year Review* at 134 (African-Americans have a higher risk of arrest and therefore more criminal history points than similarly situated white defendants).

[94] Tr. of Hearing Before the U.S. Sent'g Comm'n, New York, NY, at 418-26 (July 9-10, 2009) (testimony of Christopher Stone, Kennedy School of Government, Harvard University).

[95] *Id.* at 424.

[96] Congress directed the Commission in 28 U.S.C. § 994(h), directing the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and: (1) has been convicted of a felony that is (A) a crime of violence, or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, and 46 U.S.C. § 70503; "and (2) has previously been convicted of two or more prior felonies, each of which is" the same type of crime. The career offender guideline, however, includes as qualifying prior convictions state drug offenses (where the statute requires only the enumerated federal offenses) and state misdemeanors if punishable by more than one year (where the statute requires only felonies). *See* USSG §§ 4B1.1, 4B1.2.

Commission found that this guideline recommends punishment that vastly overstates the risk of recidivism, serves no deterrent purpose, and has a racially disparate impact, in just the kinds of cases the Commission chose to include but Congress did not require, *i.e.*, where the defendant qualifies as a "career offender" based on state drug convictions, which are often minor.[97]

In 2004, the Commission found that the use of mandatory minimums varies depending on the decisions of prosecutors and that "charging decisions disproportionately disadvantage minority offenders."[98] For example, Black offenders receive an enhancement under § 924(c) for possession of a firearm *instead of* the less severe two-level increase under the guidelines at a greater rate than White offenders, and this reflects a discretionary choice by prosecutors.[99]

Rather than making unreliable claims that increased judicial discretion has caused increased demographic disparities, the Commission should turn its attention to much more serious problems.

V. Defendants of All Groups Are Treated More Fairly When Judges Can Discount Unjustified Rules and Take Account of Relevant Factors the Guidelines Ignore.

The Commission failed to include mitigating factors in the guidelines, and also placed these relevant factors off limits for departure, without explanation or justification of any kind, and contrary to empirical evidence. The Commission did so despite instructions from Congress to consider including these factors in the guidelines, and to do so intelligently and dispassionately, and to give supporting reasons for its decisions.[100] The Commission did so despite instructions from Congress to maintain sufficient flexibility to permit individualized sentences when warranted by mitigating factors not taken into account in the guidelines.[101] (*See* Addendum, Part III)

Some who would prefer a sentencing system composed of mandatory rules that include no mitigating factors and that have a disproportionate adverse impact on the poor and minorities, imply that judicial consideration of mitigating factors is unfair to minorities. The implication appears to be that minority offenders are uneducated, so consideration of education as a mitigating reflects or is equivalent to racial bias.

This is inaccurate. African American offenders benefit from consideration of offender characteristics at a rate proportionate to or greater than their representation in the offender

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[97] *Fifteen Year Review* at 133-34.

[98] *Id.* at 89-91.

[99] *Id.* at 90.

[100] *See* 28 U.S.C. § 994(d); S. Rep. No. 98-225, at 175 (1983).

[101] 28 U.S.C. § 991(b)(1)(B).

population. For example, while 27.3% of non-immigration offenders in 2010 were African American, 35.7% of offenders who received a below-range sentence for education or vocational skills, and 31.3% of offenders who received a below-range sentence based on the need for education, training or treatment, were African American.[102] The proportional share for African Americans is even greater if immigration offenders are included, because immigration offenders frequently waive their right to present mitigating evidence to the court under "fast track" agreements.[103] Data for a number of below-guideline sentences based on offender characteristics is set forth in the table.

African Americans – FY 2010 – Below-Range Sentences Based on Offender Characteristics	
African American % of non-immigration offenders	**27.3%**
Education, Vocational Skills	35.7%
Need for Training, Skills, Treatment	31.3%
Previous Employment Record	25.7%
Mental & Emotional Conditions	24.4%
Physical Conditions	23.2%
Drug or Alcohol Dependence	26.2%
Family Ties & Responsibilities.	26.3%
Rehabilitation	26.7%
Mule/Role in Offense	24.6%
Childhood Abuse	33.3%
Disadvantaged Upbringing/Lack of Youthful Guidance	33.6%
Criminal History Category Overstates Seriousness or Risk of Recidivism	27.2%

VI. Proposals for Legislative Change Would Cause Upheaval With Nothing to Be Gained.

Making the guidelines more mandatory under the Commission's proposals would not survive constitutional scrutiny and would create unnecessary upheaval in the meantime. Replacing the guidelines with mandatory laws driven by facts alleged in an indictment and proved to a jury or, most often, negotiated in a plea bargain would be very difficult to implement, while inviting greater variation in sentencing and creating massive hidden disparities.

The Commission proposes that Congress enact laws: (1) requiring judges to give the guidelines and policy statements "substantial weight" at sentencing; (2) requiring judges to

[102] USSC, 2010 Monitoring Dataset.

[103] Thus, for example, only 18.6% of *all* offenders in 2010 were African American, but 32.4% of all offenders who received a below-range sentence for education or vocational skills, and 29.5% of all offenders who received a below-range sentence based on the need for education, training or treatment, were African American. USSC, 2010 Monitoring Dataset. "Fast track" deals are used not only in immigration cases, but also in drug trafficking cases in at least four border districts, *i.e.*, Arizona, New Mexico, Southern District of California, and Eastern District of New York.

follow its "three-step" procedure to ensure that the guidelines and the policy statements and commentary restricting consideration of the factors set forth in § 3553(a) are afforded "proper weight," a thinly veiled version of excised § 3553(b)[104]; (3) requiring judges to follow the Commission's incorrect interpretation of § 994(e) and other unspecified directives to the Commission in 28 U.S.C. § 991 et. seq.; (4) requiring appellate courts to apply a presumption of reasonableness to guideline sentences on appeal; (5) requiring appellate courts to require judges to give greater justifications the greater the variance; and (6) requiring appellate courts to apply "heightened review" to "policy disagreements" with the guidelines.[105]

The Commission Chair informed the Subcommittee that the Commission's proposals are taken directly from the Supreme Court's decisions. If that were so, the Commission would not be asking Congress to enact them. Since the Commission does not propose specific language, we will not address its general descriptions in any detail, but have the following observations now.

All of the Commission's proposals rest on the Commission's contention that the guidelines and policy statements "consider" the purposes of sentencing and factors set forth in § 3553(a), and therefore should be given "substantial weight."[106] Contrary to the Commission's assertion, the Supreme Court has rejected this theory and all that flows from it.

This theory appeared in the Commission's testimony before Congress in February 2005 and March 2006,[107] and the Commission quickly "trained" sentencing judges, appellate judges, probation officers and prosecutors to adopt it.[108] Circuit and district court splits soon developed, with some giving the guidelines and policy statements "substantial weight" at sentencing, adopting a conclusive presumption of reasonableness for guideline sentences on appeal, applying a presumption against sentences outside the guideline range at sentencing and on appeal, applying various forms of "heightened review" to non-guideline sentences such as requiring proportional justifications for variances, and deeming disagreements with the Commission's policies to be *per se* unreasonable. These courts "continued to treat the Guidelines as virtually

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[104] The "three-step" procedure the Commission asks Congress to enact is set forth at USSG § 1B1.1. Contrary to the Commission's assertion, the courts of appeals have not agreed with steps (b) and (c) of the Commission's "three-step" as actually written in § 1B1.1. To follow § 1B1.1(b) and (c) would be unlawful.

[105] Commission Testimony at 55-59.

[106] Commission Testimony at 6, 56, 57, 58.

[107] *See* Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005); Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives at (Mar. 16, 2006).

[108] USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*").

mandatory after . . . *Booker*."[109] Other courts declined to accept the premise that the guidelines incorporate the statutory purposes and factors, or the various devices that followed from it, recognizing that to do so would be unconstitutional.

The Supreme Court has resolved these issues against the positions the Commission now advances.[110] While the guideline range is to be treated as the "starting point and the initial benchmark," and is to be given "respectful consideration," the Court has rejected all devices that explicitly or implicitly require or permit the guidelines to be given special "weight" at sentencing or on appeal.[111] The Commission's testimony notwithstanding, "respectful consideration" and "substantial weight" are two very different things; the first is constitutional, the second is not. Further, the Court has repeatedly rejected the Commission's underlying theory that the guidelines incorporate all of the statutory purposes and factors. For one thing, this would mean that the guidelines would be at least as mandatory as they were before *Booker*, and for another, it is not true.[112] The Commission's claim that there is "uncertainty" about the weight to be given the guidelines is without merit.

And none of this is necessary. As the Commission Chair noted, the guidelines exert a strong gravitational pull, in large part because the guidelines are the only factor with a number affixed, and are the starting point and initial benchmark. The guideline range is the starting point whether the court ultimately follows it, varies based on individual circumstances of the offense or characteristics of the defendant, or varies because the guideline range, apart from case-specific facts, fails to achieve § 3553(a)'s objectives.[113]

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[109] *Rita v. United States,* 551 U.S. 338, 366 (2007) (Stevens & Ginsburg, JJ., concurring).

[110] *See United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

[111] *See Rita*, 551 U.S. at 351, 357; *Gall*, 552 U.S. at 47, 49-51, 53-60; *Kimbrough*, 552 U.S. at 90-91, 108; *Nelson*, 129 S. Ct. at 891-92; *Pepper*, 131 S. Ct. at 1241-43, 1246-50. One Justice has argued, to no avail, that the guidelines be given "some significant weight." *Gall*, 552 U.S. at 66-67 (Alito, J., dissenting). Even the appellate presumption of reasonableness that the Court permits, but does not require, is rebuttable, is not binding, does not reflect greater deference to the Commission than to the sentencing judge, has no independent legal effect, and rests solely on the district court's independent judgment that a sentence within the guideline range is appropriate after considering all § 3553(a) purposes and factors. *Rita*, 551 U.S. at 347, 350.

[112] *See Rita*, 551 U.S. 351, 357; *Kimbrough*, 552 U.S. at 96, 101-02, 109-10; *Gall*, 552 U.S. at 46 n.2, 51-60; *Pepper*, 131 S. Ct. at 1242-43, 1247-50.

[113] *See Kimbrough*, 552 U.S. at 109 ("district courts must treat the Guidelines as the 'starting point and the initial benchmark'"); *Gall*, 552 U.S. at 49 (same).

The gravitational pull of the guidelines is seen in the data. The extent of variances below the range is less than it was before *Booker* for most kinds of offenses.[114] The variation in sentence lengths among districts has actually decreased since the guidelines were mandatory.[115] Average sentence length is the same or higher in all types of cases except crack (due to the reduced guideline ranges) and illegal reentry (due to a large increase in the prosecution of cases with low guideline ranges).

We also fail to see how the Commission's proposals would create a "stronger and more effective" guidelines system insofar as it is designed to reduce judicial feedback and discourage courts from considering relevant factors. As the Commission notes: "Each Supreme Court case has required the Commission to increase its efforts to provide meaningful guidance to the courts and the entire criminal justice system, and to ensure that the guidelines continue to reflect the purposes of sentencing."[116] That is the key to stronger and more effective guidelines.

A mandatory guidelines system with jury factfinding would be very difficult to design and implement, as Mr. Miner acknowledges. As Mr. Felman has demonstrated and as Mr. Miner would likely agree, the ranges would have to be wider than variances are today, *i.e.*, 12-13 months, and would thus invite greater variations in sentencing.[117] Perhaps recognizing this flaw, Mr. Miner seems to propose "advisory" guidelines within these broader mandatory ranges with the judge's findings within the "prescribed range" subject to *de novo* review. Advisory guidelines subject to *de novo* review is an oxymoron.

Appellate review would be much less effective than the current reasonableness standard (the effectiveness of which is discussed in the Addendum, Part VI). A jury verdict in favor of the defendant would not be appealable by the government.[118] A jury verdict against the defendant would be reversible only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[119] Most sentences would not be appealable at all because they would be decided conclusively by plea bargains.

Professor Kevin Reitz, Reporter for the American Law Institute's revision of the Model Penal Code and an expert on guidelines systems, observes: "No member of Congress should work to overhaul the post-*Booker* Guidelines on the theory that they herald a return to the bad

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[114] Commission Testimony at 26, 28, 31, 33, 36, 38, 41, 43, 45, 48, 50, 53.

[115] Ulmer *et al.*, Penn State Study – Inter-District Disparity, *supra* note 69, at 18.

[116] Commission Testimony at 61.

[117] The current table has 256 narrow ranges. Mandatory guidelines with jury factfinding would have to have 35-50 much wider ranges.

[118] *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

[119] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

old days of fully discretionary judicial sentencing or on the theory that the new 'advisory' Guidelines are extremely permissive compared with norms in guidelines sentencing systems nationwide. . . . [T]he *Booker*-ized Guidelines . . . remain as restrictive of judicial sentencing discretion as any system in the United States."[120] The Commission's data, as well as more sophisticated research, proves this to be true.

Those concerned with variation in sentences should stick with a system in which there are 256 narrow advisory ranges with gravitational pull, within the statutory framework that Congress designed to create reasonable consistency.[121] This system is constitutional only under the careful limits the Supreme Court has laid down. Pushing those limits is a recipe for disaster.

VII. Conclusion

We hope this information is helpful in addressing the status of post-*Booker* sentencing objectively. We are moving slowly, but in the right direction. Proposals for wholesale change or the more limited suggestions of the Commission will retard progress, further bloat the prison population and do nothing to lessen the racial imbalance in that population.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

TWH/mp

[120] Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155, 171 (2005).

[121] S. Rep. No. 98-225, at 50 (1983).

ADDENDUM
INFORMATION IN RESPONSE TO QUESTIONS AND ISSUES RAISED AT THE HEARING

This addendum provides further information in response to questions and issues raised at the hearing on October 12, 2011.

I. What explains different rates in the District of Massachusetts and the Northern District of Georgia, and in other districts? P. 2.

II. Do the guidelines take into account all relevant sentencing factors? What problems are created by unwarranted uniformity? Why is the rate of below-range sentences higher than the rate of above-range sentences? P. 7.

III. Does the Sentencing Reform Act direct the Commission to ensure that offender characteristics are not considered at sentencing? P. 19.

IV. How does the Commission take account of feedback from sentencing decisions? P. 27.

V. Does the public support the level of punishment recommended by the guidelines? P. 31.

VI. How is the appellate standard of review working? P. 31.

I. Numerous Factors Contribute to Differences Between Massachusetts and the Middle District of Georgia, and to Differences Among Other Districts.

A. Massachusetts versus Middle District of Georgia and other districts

Average sentence length was slightly higher in the District of Massachusetts (69.4 months) than in the Middle District of Georgia (68.8 months), and well above the national average of 51.1 months.[1] Average sentence length was higher in the District of Massachusetts than the national average for each major category of offense.[2]

Rates. The rate of below-guideline sentences in the District of Massachusetts has dropped by seven percentage points, from 35.7% in FY 2010 to 28.7% during the first three quarters of FY 2011; the rate for the Middle District of Georgia has increased from 4.7% in 2010 to 5.7% thus far in 2011.[3]

Some of the reasons for the difference in rates between the District of Massachusetts and the Middle District of Georgia (and other districts) are as follows:

1) Career Offender. The District of Massachusetts has the second highest percentage of total caseload in the nation of defendants categorized as "career offenders."[4] The career offender guideline recommends some of the most severe punishments in the Guidelines Manual. If the instant offense is drug trafficking, as it is for 85% of career offenders in the District of Massachusetts,[5] the guideline range is 210-262 months, 262-327 months, or 360 months to life.[6] A great many of these defendants would not be "career offenders" at all in other districts, and have less serious prior records than "career offenders" in other districts.

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[1] USSC, 2010 Statistical Information Packet, District of Massachusetts, Middle District of Georgia, tbl. 7.

[2] USSC, 2010 Statistical Information Packet, District of Massachusetts, tbl. 7 (drug trafficking – 78.9 months versus 78.4 months nationally; firearms – 98.9 months versus 90.7 months nationally; fraud – 52 months versus 30.5 months nationally; immigration – 22.7 months versus 18.3 months nationally).

[3] USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl.2.

[4] USSC 2010 Monitoring Dataset.

[5] *Id*.

[6] The career offender guideline originated with 28 U.S.C. § 994(h), directing the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and: (1) has been convicted of a felony that is (A) a crime of violence, or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, and 46 U.S.C. § 70503; "and (2) has previously been convicted of two or more prior felonies, each of which is" the same type of crime. The career offender guideline, however, includes as qualifying prior convictions state drug offenses (where the statute requires only the enumerated federal offenses), and state misdemeanors if punishable by more than one year (where the statute requires only "felonies"). *See* USSG §§ 4B1.1, 4B1.2.

This is because, although Congress appears to have intended that the career offender guideline would apply only to offenders with prior convictions that were "felonies" under the law of the convicting jurisdiction,[7] the Commission made the guideline applicable to prior convictions if the offense was punishable by more than one year even if the state classifies the offense as a misdemeanor.[8]

The statutory maximum for many Massachusetts state misdemeanors, including possession with intent to distribute marijuana, resisting arrest, and assault and battery, is two years or two and a half years, whereas most states set the maximum for these offenses at one year. These offenses, with the exception of one less serious form of battery as of 2011,[9] are qualifying prior convictions under the career offender guideline.

Thus, for example, a defendant with two prior convictions (or even diversionary dispositions under state law) for resisting arrest for which he received probation for no more than one year would be a career offender in the District of Massachusetts. Elsewhere, where resisting arrest is punishable by no more than one year, a defendant with the same prior dispositions would not only not be a career offender but would receive no criminal history points and be safety valve eligible.[10] If both defendants were convicted of trafficking in 28 grams of crack, the defendant in the District of Massachusetts would be subject to a guideline range of 210-262 months (or 151-188 months if he pled guilty), while the defendant in the other district would be subject to a guideline range of 51-63 months (or 37-46 months if he pled guilty).

In addition, until 2011, the First Circuit held that juvenile adjudications counted as career offender predicates,[11] though the career offender guideline requires adult convictions.[12]

Finally, the expanded scope of the career offender guideline in Massachusetts is further magnified by the practice of the U.S. Attorney's Office of bringing into federal court crack cases involving small amounts if the career offender guideline applies to the defendant.

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[7] *See* 28 U.S.C. § 994(h)(2) (requiring that the defendant "has previously been convicted of two or more prior *felonies*"). When § 994(h) was enacted in 1984 and today, the term "felony" was and is defined as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. § 802(13), § 951(b).

[8] USSG § 4B1.2, comment. (n.1).

[9] Recently, the First Circuit reversed prior precedent and held that reckless battery is no longer a "violent felony" under 18 U.S.C. § 924(e). *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011). The same analysis applies for purposes of a "crime of violence" under USSG § 4B1.2.

[10] *See* USSG § 4A1.2(c)(1).

[11] *United States v. McGhee*, 651 F.3d 153 (1st Cir. 2011) (reversing prior precedent counting juvenile adjudications).

[12] USSG § 4B1.2, comment. (n.1).

These circumstances make the career offender guideline applicable to a large number of offenders with minor records in the District of Massachusetts, subjecting them to decades-long guideline ranges, while similarly situated offenders in other districts are prosecuted in state court or, if prosecuted in federal court, are not career offenders.

Further, as the Commission itself has found, the severe punishment recommended by the career offender guideline, as applied to those who qualify based on prior drug convictions, vastly overstates the risk of recidivism, serves no deterrent purpose, and has a racially disparate impact.[13]

Judges in the District of Massachusetts varied from the career offender guideline 43.4% of the time in 2010. Given all of the above, this represents a *reduction* in unwarranted disparity.

The Commission could reduce the unwarranted disparity that judges in the District of Massachusetts are correcting by defining "felony" as Congress appears to have intended.

2) Charge bargaining. The variance rate in career offender cases is only 5.3% in the Middle District of Georgia, which makes it an extreme outlier (the mean is 27.7%, the median 25%).[14]

Besides the differences from Massachusetts noted above, prosecutors in the Middle District of Georgia charged a violation of 21 U.S.C. § 843(b) (a "telephone count") as the instant offense in 15.8% of the career offender cases, rather than a drug trafficking violation under 21 U.S.C. § 841. Because the statutory maximum for this offense is at most 8 years, the career offender guideline is at most 51-63 months. If the same person were charged under 21 U.S.C. § 841 (as they would be in Massachusetts), the guideline range would be 210-262 months, 262-327 months, or 360 months to life.

3) Fact bargaining. There is very little fact bargaining in the District of Massachusetts, because prosecutors fear being accused of withholding information from the court. One judge in the district has been vocal about his belief that fact bargaining is illegal and constitutes lying to the court. *See United States v. Green*, 346 F. Supp.2d 259 (D. Mass. 2004); *United States v. Yeje-Cabrera*, 430 F.3d 1, 21-30 (1st Cir. 2005). While the First Circuit has approved fact bargaining, *id*., practice in the district is very much influenced by the judge's position.

4) Crack. In 2010, crack cases comprised 16.1% of all cases in the District of Massachusetts, and 12.1% of the cases in the Middle District of Georgia; the national average was 5.6%.[15]

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[13] USSC, *Fifteen Year Review* at 133-34.

[14] USSC 2010 Monitoring Dataset.

[15] USSC, 2010 Statistical Information Packet, District of Massachusetts, Middle District of Georgia, fig. A.

The overall rate of below-guideline sentences in the District of Massachusetts dropped by seven percentage points, from 35.7% in FY 2010 to 28.7% during the first three quarters of FY 2011, while the overall rate for the Middle District of Georgia increased from 4.7% in 2010 to 5.7% thus far in 2011.[16] Data regarding the kinds of cases in which the variance rate dropped in Massachusetts in 2011 is not yet available, but most likely, judges in the District of Massachusetts were frequently varying from the crack guideline before the amendments directed by the Fair Sentencing Act effective the first quarter of FY 2011, and are now following the guideline, while judges in the Middle District of Georgia followed the crack guideline before and after the FSA amendments.

5) Driving offenses. The Middle District of Georgia has an unusually large number and percentage of "miscellaneous offenses," comprising 31% of its caseload, compared to 3.1% nationally, and 1.8% in the District of Massachusetts.[17] The vast majority of "miscellaneous" offenses in the Middle District of Georgia are traffic offenses on a nearby military base. Most are sentenced within the guideline range, which is so low that over 90% were sentenced to probation and the average sentence for those sentenced to prison was 6.9 months.[18] The District of Massachusetts may get one traffic offense a year.

B. Eastern District of Virginia

Mr. Otis testified that he was proud that in his district, the Eastern District of Virginia, the rate of within guideline sentences is almost 74%. This is not correct and is another example of how the Commission's bare statistics lead to misunderstanding.

The Eastern District of Virginia leads the nation in departures based on cooperation *after* sentencing under Fed. R. Crim. P. 35—with 370 such sentences in 2010.[19] In every other district, all or the vast majority of departures for cooperation are sought and granted at sentencing, not after.[20] This means that other districts' within guideline rates account for cooperation departures, while the Eastern District of Virginia's does not. While the Commission reports a within guideline rate of 73.7% for the Eastern District of Virginia in 2010,[21] the rate

[16] USSC, Preliminary Quarterly Data Report, Third Quarter FY 2011, tbl. 2.

[17] USSC, Statistical Information Packet, Fiscal Year 2010, Middle District of Georgia, District of Massachusetts, tbl. 1.

[18] *Id*., tbls. 5, 7.

[19] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 62 (370 Rule 35 reductions in the Eastern District of Virginia).

[20] *Id*.

[21] USSC, 2010 Statistical Information Packet, Eastern District of Virginia, tbl. 10 (1,453 sentences within the range of 1,971 total sentences = 73.7%).

was actually 62% when the government's Rule 35 departures are included.[22] Comparing the Eastern District of Virginia to other districts without its high number of Rule 35 departures is comparing apples to oranges.

Further, of all sentences outside the guideline range in the Eastern District of Virginia in 2010, 60% were directly sought by the government, while 40% were granted without a government motion.[23] Mr. Otis contends that the rules must always be followed, apparently only by judges. Mr. Otis supports a mandatory system in which each sentence would be determined by the prosecutor's charge and plea bargaining leverage. In that event, there would be massive hidden disparity subject to no review.

C. Other examples of prosecutors' different approaches leading to different rates among districts

The U.S. Attorney for the Northern District of Illinois testified that in his district, drug defendants without an extensive criminal history not eligible for safety valve relief or a substantial assistance motion are permitted to plead to a less serious offense to avoid an overly harsh mandatory minimum sentence.[24] In this district, telephone counts under 21 U.S.C. § 843(b) are charged at nearly nine times the national average.[25] But the rate of government-sponsored below-range sentences in drug trafficking cases is 27.1%, less than the national average of 34.5%.[26]

In the adjoining Iowa districts, prosecutors bring charges carrying the highest mandatory minimum possible, and in the Northern District of Iowa even bring charges in order to prevent the safety valve from applying.[27] But the rate of government-sponsored below-range sentences in these two districts, at 40.8% and 45.7%, is much higher than the national average of 34.5%.[28]

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[22] Adding the 370 Rule 35 reductions brings the total number of cases to 2,341. The total number of cases within the guideline range remains at 1,453. Dividing 1,453 by 2,341 = 62%.

[23] Of 888 sentences above or below the guideline range (370 under Rule 35 and 518 others), the government sought 527 of them. Dividing 527 by 888 = 60%.

[24] Tr. of Public Hearing before the U.S. Sent'g Comm'n, Chicago, Ill., at 249-50 (Sept. 9-10, 2009) (remarks of Patrick J. Fitzgerald, U.S. Att'y, N.D. Ill.).

[25] Telephone counts comprise 0.6% of the national caseload, but 5.2% of the caseload in the Northern District of Illinois. USSC, Statistical Information Packet, Fiscal Year 2010, Northern District of Illinois, tbl.1.

[26] *Id*., tbl. 10.

[27] Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 6-9 (Oct. 21, 2009).

[28] USSC, Statistical Information Packet, Fiscal Year 2010, Northern and Southern Districts of Iowa, tbl.10.

In the Northern District of Illinois, the non-government sponsored rate in drug trafficking cases is greater than average, while in the Iowa districts it is less.[29] It would seem that the transparency of judicial decision-making is preferable to the exercise of prosecutorial discretion, behind closed doors and not subject to review.

Conclusion

Based on the above and the information in Part II of our main letter, it should be clear that prosecutorial practices and policies play a substantial role in creating local differences. The guidelines themselves can also cause local differences, as the career offender guideline does in the District of Massachusetts. The question of whether local differences are warranted or unwarranted is exceedingly complex and cannot be answered by listing rates of below guideline sentence imposed without a government motion by district.

II. The Guidelines Do Not Take Account of Many Relevant Factors that Bear Directly on the Purposes of Sentencing, Creating Unwarranted Uniformity and Unnecessary Cost, as Shown by Empirical Evidence.

Representatives Scott and Deutch asked questions regarding whether the guidelines account for differences in culpability, whether the guidelines take account of all relevant factors, and what problems treating unlike offenders alike causes. Representative Gowdy expressed concern that rates of below-guideline sentences are higher than above-guideline rates (1.7% above, 27.7% government-sponsored below, 16.9% non-government-sponsored below[30]).

A. The guidelines are constructed almost solely aggravating factors, and omit, discourage, and prohibit relevant mitigating factors.

The Commission states that "the guidelines take into consideration all of the sentencing factors set forth in 18 U.S.C. § 3553(a),"[31] but this is not accurate.

Section 3553(a) requires that the sentencing court "shall impose a sentence that is sufficient, but not greater than necessary, to comply with" the purposes of sentencing, and in determining the particular sentence, "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" to (A) reflect the seriousness of the offense, promote respect for law, and provide just punishment; (B) afford adequate deterrence; (C) protect the public from further crimes of the defendant; (D) provide the defendant with needed educational or vocational training, medical care, or other treatment "in the most effective manner," (3) the "kinds of sentences available" by statute, (4) the kind and range of sentence established by the guidelines for the "category of

[29] USSC, Statistical Information Packet, Fiscal Year 2010, Northern District of Illinois, Northern and Southern Districts of Iowa, tbl. 10.

[30] USSC, Preliminary Quarterly Data Report, Third Quarter (2011), tbl. 4.

[31] Commission Testimony at 6; *see also id*. at 55-58.

offense" and the "category of defendant," (5) any "pertinent" policy statement, (6) the need to avoid "unwarranted disparities," and (7) the need to provide restitution to any victims.

The guidelines do not incorporate these principles, purposes, and factors in important ways and for a variety of reasons. For one thing, the Commission is not required to recommend sentences that are "sufficient, but not greater than necessary, to comply with" the purposes of sentencing in each case. For another, the original Commission constructed the guidelines in an imbalanced way, and this has left an indelible imprint on the guidelines. While Congress directed the Commission to construct the guidelines of both mitigating and aggravating characteristics of the defendant and circumstances of the offense,[32] the Commission constructed the guidelines almost solely of aggravating factors, as even a cursory review of the Guidelines Manual reveals.[33] The aggravating factors are based primarily on quantifiable "harms," largely neglect *mens rea*, and some specifically make *mens rea* irrelevant.[34]

Among the aggravating factors is the "relevant conduct" rule, requiring punishment for uncharged, dismissed and acquitted offenses of the defendant and others in jointly undertaken activity at the same rate as convicted offenses,[35] a rule invented by the first Commission that is contrary to the SRA's most basic directives,[36] that no other sentencing commission in the nation has adopted,[37] and that comes as a shock to ordinary citizens and most lawyers.[38]

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[32] 28 U.S.C. § 994(c), (d).

[33] *See* USSG, Chapters, Two, Three, Four.

[34] *See, e.g.*, USSG § 2B1.1, comment. (n.3(A)(v)(III)) ("actual loss" in computer fraud cases includes certain "pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable"); §2K2.1(b)(4) & comment. (n.8(B)) (enhancement "applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an obliterated serial number"); § 2D1.1(b)(1) & comment. (n.3) (enhancement if a firearm "was possessed" applies "unless it is clearly improbable that the weapon was connected with the offense"); *United States v. Napier*, slip op., 2011 WL 1682906 (6th Cir. May 5, 2011) (affirming 2-level increase under § 2D1.1(b)(1) when government conceded there was no evidence the defendant ever possessed a firearm himself or knew that his co-conspirator father had firearms because it was "reasonably foreseeable" that his father would possess firearms); *United States v. Pham*, 463 F.3d 1239, 1246 (11th Cir. 2006) (upholding 2-level increase under § 2D1.1(b)(1) where no evidence defendant possessed a firearm or knew that co-conspirators possessed any firearms, and where firearm was not found at location where charged conduct occurred, because it was reasonably foreseeable that a firearm would be possessed by a co-conspirator "in light of the vastness of the conspiracy and the large amount of drugs and money being exchanged in this case").

[35] USSG § 1B1.3.

[36] The Commission was instructed to avoid unwarranted disparities among defendants "who have been *found guilty* of similar criminal conduct," 28 U.S.C. § 991(b)(1)(B), and to take into account "the circumstances under which *the offense* was committed," and the "nature and degree of the harm caused by *the offense*." 28 U.S.C. § 994(c)(2), (3).

[37] *See* Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 1995 WL 843512 *3 (1995).

Against the guidelines' many aggravating factors, the original Commission included two generally applicable mitigating factors with relatively little weight in the guidelines. These were mitigating role in the offense (only if there was more than one participant in the offense and other conditions were met),[39] and acceptance of responsibility (primarily by pleading guilty),[40] each of which is small in extent and dwarfed by the impact of aggravating factors like drug quantity, loss, and relevant conduct. In addition, the original firearms guideline provided for a decrease if the defendant obtained or possessed a firearm solely for sport or recreation.[41] A handful of mitigating offense circumstances for drug and immigration offenses were added later.[42]

At the same time, the Commission not only omitted from the guidelines all of the mitigating offender characteristics that Congress directed the Commission to consider for inclusion in the guidelines,[43] but used policy statements to prohibit and discourage those and many other factors as grounds for downward departure.[44] (The history of the Commission's treatment of mitigating offender characteristics is discussed further in Part III.)

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[38] *See* David N. Yellen, *Is "Relevant Conduct" Relevant? Reconsidering the Guidelines' Approach to Real Offense Sentencing*, 44 St. Louis L.J. 409, 409-10 (2000) ("Lay people and lawyers who do not practice in the area continue to be amazed when they find out just the rough contours of how relevant conduct works. . . . These rules shock many people."); Jim McElhatton, A $600 drug deal, 40 years in prison, Washington Times, June 29, 2008 (described by one attorney as "a sentencing scheme straight from the mind of Lewis Carroll"); Letter from Juror # 6 in *United States v. Ball*, No. 05-cr-100 (D.D.C.) ("It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that the defendants are being sentenced not on the charges for which they have been found guilty but in the charges for which the [prosecutor's] office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case."), *quoted in United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring).

[39] USSG § 3B1.2.

[40] USSG § 3E1.1.

[41] USSG § 2K2.1(b)(2) (1987). This mitigating factor still exists, though in more limited form and is rarely applied, applying in only 0.8% of sentences imposed under the guideline in 2010. USSC, *Use of Guidelines and Specific Offense Characteristics* 45 (2010)

[42] *See* USSG §§ 2D1.1(b)(11) (2-level decrease if defendant meets safety valve criteria), 2D1.11(a) (if defendant convicted of trafficking in listed chemical, decrease by 2, 3 or 4 levels if receives mitigating role adjustment), 2L1.1(b)(1) (3-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[43] 28 U.S.C. § 994(d).

[44] *See* USSG, Chapter 5, Parts H and K.

Further, though one of the primary goals of the SRA was to reduce reliance on imprisonment and to make alternatives to prison more available,[45] the guidelines recommend prison in nearly every case, and judges continue to follow this recommendation, as shown in Figure 1 in our main letter. The original Commission disregarded congressional directives to ensure that the guidelines reflect the "generally appropriateness" of a non-prison sentence 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,"[46] and to promulgate a guideline for the "determination *whether* to impose a sentence of probation . . . *or* a term of imprisonment."[47] Instead, probation and intermediate sanctions were virtually eliminated. Today, 43.9% of defendants are in the lowest criminal history category, and at least 75% were convicted of non-violent offenses.[48] Yet, 87.4% receive straight prison, while only 7.3% receive probation, 2.5% receive a prison/community split, and 2.8% receive probation and confinement.[49]

The guidelines were amended over the years 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."[50] At the same time, the Commission stamped out most grounds for downward departure.

B. The guidelines do not make relevant distinctions based on culpability, or the need to deter, incapacitate or rehabilitate.

It would not be possible to make all relevant distinctions in generally applicable rules, which is why, as Congress recognized, there was a need for departures.[51] The Commission omitted many relevant circumstances from the guidelines, prohibited and discouraged departures on many individual grounds, and created a departure standard more restrictive than that set forth in the statute. The statute permitted departure based on a factor not "adequately taken into account" in the guideline range,[52] but the Commission prohibited departure in the absence of a factor that was "atypical" compared to other cases sentenced under guidelines that excluded

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[45] S. Rep. No. 98-225, at 39, 50, 59 (1983).

[46] 28 U.S.C. § 994(j).

[47] 28 U.S.C. § 994(a)(1)(A).

[48] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls. 3, 21.

[49] *Id*., tbl. 12.

[50] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

[51] 28 U.S.C. § 991(b)(1)(B); S. Rep. No. 98-225, at 150.

[52] 18 U.S.C. § 3553(b).

many typical but highly relevant mitigating factors.[53] When the rules do not include relevant factors and also prevent departures based on relevant factors, the result is injustice and unnecessarily long prison terms, as shown by a few examples from the mandatory guideline era:

- The unjustified disparity caused by the powder/crack quantity ratio was not a permissible ground for departure because that circumstance was "typical" of all crack cocaine cases under the guidelines and thus did not distinguish the case from the "heartland."[54]

- A departure was impermissible for a young man who pled guilty to being a felon in possession for his brief possession of an unloaded handgun lawfully owned by his father solely to temporarily pawn it in order to pay child support because, although these relatively innocent circumstances were not taken into account in the guideline range, the defendant was motivated by financial difficulties, a factor the Commission prohibited as a ground for departure.[55]

- There was "nothing about" an eighteen-year-old girl's age "that removes her situation from the heartland of cases involving comparable drug crimes," since drug importers often use "young, naive men and women without extensive criminal experience."[56]

- Departure was impermissible because lack of knowledge of the amount or type of contraband was not "unusual" in cases involving drug couriers, even though the court believed the guideline range driven by drug type and quantity was "too harsh," especially when the defendant was a first offender from a "depressed area" with a continuous work history and a wife and two children with whom he lived and whom he supported, also impermissible reasons for departure.[57]

- A case was not "extraordinary" and so a departure was impermissible for a young woman with no prior arrests and a consistent work history ("it does not appear to be exceptional for someone her age"), who during a deep depression and after a chance meeting with a man on the street who was able to quickly exploit her, agreed to be a drug courier in order to repay overdue student loans so she could complete college, though she quickly turned herself in, had "accomplished much in her life" before and after her arrest, and a non-prison sentence would have permitted her to continue her successful rehabilitation.[58]

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[53] USSG § 5K2.0, comment. (backg'd.) (1994).

[54] *See In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996); *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004).

[55] *United States v. Bristow*, 110 F.3d 754, 755, 757-58 (11th Cir. 1997).

[56] *United States v. Rodriguez*, 107 Fed. App'x 295, 298 (3d Cir. 2004).

[57] *United States v. Dias-Ramos*, 384 F.3d 1240, 1241-42 (10th Cir. 2004).

[58] *United States v. Dickerson*, 381 F.3d 251 (3d Cir. 2004).

- A departure was impermissible for a young single mother convicted of distributing two grams of cocaine because, although she was attempting to remain employed and to be a good mother, and though separating her from her children would have a "devastating effect" on her children, "[a] sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children," and "in many cases the other parent may be unable or unwilling to care for the children, and the children will have to live with relatives, friends, or even in foster homes."[59]

Under § 3553(a) and the Supreme Court's decisions, the question is not whether a factor is "atypical" as compared to other cases sentenced under guidelines that do not take account of the factor, but whether the circumstances are relevant to need for the sentence imposed to achieve just punishment, to provide adequate deterrence, to protect the public, and to provide rehabilitation in the most effective manner. This standard permits judges to impose sentences that fit the offense and the offender to best achieve the purposes of sentencing. For example:

- It was highly relevant to the need for deterrence, incapacitation and rehabilitation (though prohibited by the guidelines) that Jason Pepper had been an unemployed drug addict estranged from his family at the time he sold methamphetamine, but then completed a residential drug treatment program, attended college and achieved high grades, was a top employee at his job and slated for promotion, had re-established a relationship with his father, had gotten married and was supporting his wife's young daughter.[60] After a complicated procedural history including a trip to the Supreme Court, the judge finally sentenced Mr. Pepper to time served of 37 months, a reduction from 65 months. The government said that it saw no merit to sending him back to prison after the progress he had made, nor did the judge or the probation officer.

- It was highly significant to the need for deterrence and incapacitation (though deemed "not ordinarily relevant" by the guidelines) that Brian Gall, before he was under any investigation, withdrew from a drug conspiracy and abstained from drugs, completed college, was steadily employed, and ran a business in which he employed others.[61] The Court upheld the sentence of probation with conditions imposed by the judge, a variance from the guideline range of 33 months.

There are many lesser known examples in which judges have imposed reduced sentences based on individualized circumstances that are not recognized by, or omitted from, or prohibited or discouraged by the guidelines, to better achieve the purposes of sentencing. For example:

- In *United States v. Briggs*, the court appropriately considered that the defendant was convicted of a "reverse sting operation" in which government agents fabricated a non-

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[59] *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990).

[60] 131 S. Ct. at 1242-43.

[61] 552 U.S. at 53-59.

existent drug "stash house" with large, but non-existent, drug quantities so that the recommended guideline range of 235-293 months for conspiracy to rob the house was driven exclusively by the fabricated drug quantity. The court of appeals recognized that such reverse sting operations "may risk overstating a defendant's culpability," and by varying downward from a range of 235-293 months to a 132 months (still 12 months higher than the applicable 10-year mandatory minimum), "the district court's sentence took such concerns into account."[62]

- In *United States v. Handy*, the court considered that the 2-level enhancement in the firearms guideline applies whenever it is found that the firearm was stolen, regardless whether the defendant knew or had reason to know that it was stolen, a provision contrary to the historical treatment of *mens rea* and a directly related statute,[63] varying downward from a range of 46-57 months to impose a sentence of 30 months' imprisonment because Handy, a young man "raised in a poverty-stricken environment," found the gun on the street, had no idea it was stolen, had not had it for long, was hoping to sell it, and there was no evidence he intended to use it. The court found that a sentence of 30 months in prison would serve the purpose of specific deterrence and incapacitation, but that Handy's need for educational and vocational training in the most effective manner would be best provided outside prison because "[k]eeping him in prison would result in further hardening of him as a criminal and increase his danger to the community upon release." Instead, "[c]lose supervision by this court's probation services with re-incarceration if necessary provides adequate protection to the public."[64]

- In *United States v. Shull*, the judge varied downward from a range of 78-97 months to 60 months' imprisonment, taking into account that Shull, "another drug user without an education or a job who started selling drugs," completed a drug education program, obtained his GED, completed courses and obtained certifications in refrigeration, electrical, EPA and OSHA safety standards, and was currently enrolled in college taking business classes.[65]

- In *United States v. McMannus*, the judge varied downward from a range of 57-71 months to 24 months' imprisonment, appropriately considering that while on pretrial release, McMannus put himself through community college, was employed and highly commended by his employer, and was a model citizen in his community.[66]

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[62] *United States v. Briggs*, 397 Fed. App'x 329, 333 (9th Cir. 2010).

[63] *United States v. Handy*, 570 F. Supp. 2d 437 (E.D.N.Y. 2008).

[64] *United States v. Handy*, 2008 WL 3049899 (E.D.N.Y. Aug. 4, 2008).

[65] *United States v. Shull*, __ F. Supp. 2d __, 2011 WL 2559426 at *13 (S.D. Ohio June 29, 2011).

[66] *United States v. McMannus*, 262 Fed. App'x 732 (8th Cir. 2008).

- In *United States v. Hernandez*, the judge sentenced Hernandez to 405 months' imprisonment, but should have considered that Hernandez was once a young drug addict who had had a difficult childhood, but that during his twenty years of imprisonment since he was first sentenced, had succeeded at numerous vocational and educational efforts, including earning an associate degree with honors and a diploma for financial planning, had tutored other inmates, and received positive performance reports for work in a variety of prison jobs.[67] Considering these factors on remand, the judge resentenced Hernandez to 384 months' imprisonment.[68]

- In *United States v. Munoz-Nava*, the judge varied downward from a range of 46-57 months to one year and a day in prison, appropriately considering that Munoz-Nava had a long and consistent work history, and was the primary caretaker and sole support of his eight-year old son, as well as the sole support of his ailing, elderly parents, and that his brief stint smuggling drugs in the soles of his boots was "highly out of character," and he was "committed to supporting his family by returning to his pattern of working hard at a legitimate job."[69]

- In *United States v. Davis*, the court varied downward from a range of 18-24 months' imprisonment to time served, 200 hours of community service, and three years' supervised release, appropriately considering that further imprisonment would be "disastrous" to his six young children and wife of fifteen years, who had together "worked night and day" to provide for their family and move them out of a homeless shelter, and who, though unemployed after suffering an injury that required surgery and regular physical therapy, still did what he could to supplement the family's public assistance funds while devoting himself to the health and education of his children and working toward a college degree in radiology when he made the "foolish mistake" of selling a gun due to financial hardship.[70]

- In *United States v. Lupoe*, the court appropriately considered the much lower guideline range that would have been recommended had the government charged Lupoe with a drug offense rather than a gun offense, where the very same facts resulted in a higher guideline range for the gun offense, finding that the higher range was "excessive" in relation to the actual seriousness of the offense.[71] The court varied downward to 18 months' imprisonment, which was still higher than the range recommended by the drug guideline.

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[67] *United States v. Hernandez*, 604 F.3d 48, 53-54 (2d Cir. 2010).

[68] *United States v. Hernandez*, No. 89-cr-229 (E.D.N.Y. Sept. 16, 2010).

[69] *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008).

[70] *United States v. Davis*, slip. op., 2008 WL 2329290 (S.D.N.Y. June 6, 2008).

[71] *United States v. Lupoe*, 2011 WL 5024008 (6th Cir. Oct. 20, 2011).

These defendants and others like them represent all races and socioeconomic backgrounds. They were all punished, but less than they would have been under the guidelines. Mr. Otis appears to recognize the need to distinguish among defendants based on culpability and dangerousness, at least for some people.[72] Fortunately, judges are neutral and able to take into account individualized circumstances in all kinds of cases and for all kinds of people.

C. Empirical research demonstrates that consideration of the factors the guidelines exclude and disfavor protects the public and saves resources.

The Bureau of Prisons is 35% overcapacity, resulting in extreme overcrowding, unsafe conditions, and reduced capacity to provide treatment and training shown to reduce recidivism,[73] at a cost to the taxpayers of well over $6 billion a year.[74] Some credit high incarceration rates for the drop in the crime rate, but "[m]ost scientific evidence suggests that there is little if any relationship between fluctuations in crime rates and incarceration rates."[75] The former Director of the Bureau of Prisons testified earlier this year that 52% of federal inmates are serving "extremely long" sentences for drug related offenses.[76] It is clear that many of these defendants do not need to be sentenced to such long terms of imprisonment in order to protect the public.

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[72] William Otis, *Justice in the Libby Case Lies in a Third Option*, Wash. Post, June 7, 2007 (arguing that Scooter Libby's 30-month prison sentence was "excessive" for a first offender who did not act out of greed or personal malice, had contributed to his community, and was not a danger to the public).

[73] Tr. of Public Hearing Before the U.S. Sent'g Comm'n at 10, 15-16, 49-50, 52 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons).

[74] The annual cost of imprisonment per inmate in 2010 was $28,284.16. *See* U.S. Courts, News, *Newly Available: Costs of Incarceration and Supervision in 2010*, http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx. As of October 20, 2011, the prison population was 217,908. *See* Federal Bureau of Prisons, Weekly Population Report, http://www.bop.gov/locations/weekly_report.jsp.

[75] The JFA Institute, *Unlocking America: Why and How to Reduce America's Prison Population* 8 (2007), available at http://www.countthecosts.org/sites/default/files/Unlocking-America.pdf. This report, authored by eight criminologists from major public universities, surveyed the studies on the impact of incarceration on crime rates, concluded that "the bulk of the evidence" suggests that the effect of imprisonment on crime rates, if any, is "small," and "diminishes as prison populations expand," and that "[t]he overwhelming and undisputed negative side effects of incarceration far outweigh its potential, unproven benefits." *Id*. at 9. One researcher who argues that "the crime rate today would be 25% higher were it not for the large increases in imprisonment from 1970 to 1990" based his analysis on national trends and "does not explain why some states and counties that lowered their incarceration rates experienced the same crime reductions as states that increased incarceration." *Id*. Professor Franklin Zimring, a leading scholar on criminal justice issues, will soon publish research suggesting that the major factor underlying reductions in crime rates is better policing, not mass incarceration. Ted Gest, *Cops and Crime*, The Crime Report (Aug. 2, 2011), http://www.thecrimereport.org/archive/2011-08-cops-and-crime.

[76] Tr. of Public Hearing Before the U.S. Sent'g Comm'n at 9-10, 55 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons).

For example, in 2010, over half of all drug offenders were in the lowest criminal history category (with 0 or 1 point), 83.6% had no weapon involvement, 94% played a mitigating or no aggravating role, and 94.5% accepted responsibility.[77] Nearly 75% were racial minorities.[78]

A wealth of research, including the Commission's own research, demonstrates that the mitigating factors the Commission disapproves are highly relevant to the purposes of sentencing. When judges take these factors into account, prison resources and taxpayer dollars are used more efficiently and effectively.

Recidivism declines markedly with age.[79] The young are less culpable than the average offender,[80] and reform in a short period of time.[81] The Commission's own research and substantial other research demonstrates that employment, education, abstinence from alcohol and drugs, and family ties and responsibilities all predict reduced recidivism.[82] Conversely, the Commission's research and other research shows that unnecessarily lengthy imprisonment increases the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.[83] A significant Bureau of Prisons study found that "[s]table employment or student

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[77] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls. 37, 39, 40, 41.

[78] *Id*., tbl. 34.

[79] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12 & Ex. 9. (2004).

[80] *See, e.g.*, Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* 8 (2005), www.ncjrs.gov/pdffiles1/ojjdp /212757.pdf; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

[81] *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993).

[82] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 5-6, 54 (1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990)); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006); Shirley R. Klein *et al., Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

status . . . prior to confinement is strongly related to a lower likelihood of recidivating."[84] Offenders who found employment after their release recidivated at about half the rate of those who did not.[85]

"The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."[86] The Bureau of Prisons study found that the recidivism rate among offenders who live with a spouse after release is less than half that of those who have other living arrangements.[87] The Commission has acknowledged that "the better family ties are maintained[,] the lower the recidivism rate," and that "children left without parents burden society," but that "creative alternatives to imprisonment for first-time, non-violent offenders with parental responsibilities are not generally available under the guidelines."[88] In light of social science research, one appellate judge

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[83] *See* Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589, 591-93 (2007) ("imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (finding 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," and "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."); Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism."); USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (2009) ("alternatives to incarceration can provide a substitute for costly incarceration," and "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."); Laura Baber, *Results-based Framework for Post-conviction Supervision Recidivism Analysis*, Fed. Probation, Volume 74, Number 3 (2010) (study of 150,000 federal offenders showed 85% of people on probation and 77% of people on supervised release after a prison term remained arrest-free within the first three years of their term), http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2010-12/index.html; Alfred Blumstein & Kiminori Nakamura, Nat'l Inst. of Justice, *'Redemption' in an Era of Widespread Criminal Background Checks*, NIJ Journal, Issue No. 263, June 2009, at 10, 12-14 (risk of re-arrest for 18-20 year old offenders convicted of street crime in state court is the same as that of the general population after four to seven years of remaining arrest-free), http://www.ncjrs.gov/pdffiles1/nij/226870.pdf.

[84] Harer, *Recidivism*, *supra* note 82, at 54.

[85] *Id.* at 4-5.

[86] Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

[87] *See* Harer, *Recidivism*, *supra* note 82, at 5-6.

wondered, "What principle of equity, uniformity, or just deserts blocks any consideration of society's interests in avoiding the risk of producing a next generation of unloved, unnourished, sociopathic criminals?"[89]

For many offenders, drug treatment, mental health treatment, and educational and vocational training are more effective in reducing recidivism than lengthy incarceration.[90] According to the National Institute on Drug Abuse, "Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual's relationships with his or her family, and may improve prospects for employment."[91] Rehabilitation after arrest or after a previous sentencing is highly relevant to the purposes of sentencing,[92] and the Commission's policy statement prohibiting the latter (but not the former) "rests on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[93]

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[88] Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 Fed. Sent'g Rep. 148 (1995).

[89] Patricia M. Wald, *"What About the Kids?": Parenting Issues in Sentencing*, 10 Fed. Sent'g Rep. 34 (1997).

[90] *See, e.g.*, Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007); Susan L. Ettner *et al., Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006); Doug McVay *et al.*, Justice Policy Institute, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004); Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 9, Ex. 4 (2006) (comprehensive review of programs with demonstrated effect on reducing recidivism, including prison- and community-based educational programs), www.wsipp.wa.gov/rptfiles/06-10-1201.pdf, *updated* by Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* 190-91, tbl.1 (2009), www.wsipp.wa.gov/rptfiles/09-00-1201.pdf; U.S. Sent'g Comm'n, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.); *see also id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.).

[91] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007).

[92] *See Gall v. United States*, 552 U.S. 38, 59 (2007); *Pepper v. United States*, 131 S. Ct. 1229, 1242-43 (2011).

[93] *Pepper*, 131 S. Ct. at 1247.

III. Congress Should Reject the Commission's Request to Amend the Sentencing Reform Act to Reflect the Commission's View, Inconsistent with the Act, that Courts Should Be Prohibited and Discouraged from Considering Mitigating Offender Characteristics.

The Commission Chair testified that Congress directed the Commission "not to incorporate certain offender characteristics into the guidelines," and that such factors "shouldn't generally be considered" at sentencing. In fact, Congress directed the Commission to consider including mitigating offender characteristics, as well as mitigating offense circumstances, in the guidelines, and also to maintain sufficient flexibility for individualized sentencing based on any mitigating factors not included in the guidelines. At the same time, Congress directed courts to consider the history and characteristics of the defendant, and provided that no limitation was to be placed on such information. Since its inception, the Commission has failed to comply with these directives to the Commission and thwarted these directives to the courts.

The Commission's written and oral testimony is vague as to what it now seeks.[94] It asks Congress to rewrite the statutes it enacted in 1984 to either: (1) generally discourage judges from considering mitigating factors in sentencing outside the guidelines, or (2) permit the Commission to allow departures based on mitigating factors. The first would undo what Congress has already directed the Commission to do and validate the Commission's failure to do so, and also undo what the statutes direct the courts to do. The second is unnecessary because nothing in the SRA directs the Commission to prevent departures based on mitigating factors, and the Commission is free to abandon its policy statements that prevent and discourage departures.

A. What the statutes say.

Congress directed the Commission to establish "categories of offenses" and "categories of offenders . . . for use in the guidelines and policy statements governing . . . the nature, extent, place of service, or other incidents of an appropriate sentence."[95] In establishing categories of offenses, the Commission was directed by 28 U.S.C. § 994(c) to consider the relevance, among other things, of "the circumstances under which the offense was committed which *mitigate* or aggravate the seriousness of the offense."[96]

In establishing categories of offenders, the Commission was directed by 28 U.S.C. § 994(d) to consider the relevance of eleven offender characteristics, "among others": (1) age, (2) education, (3) vocational skills, (4) mental and emotional conditions, (5) physical condition, including drug dependence, (6) employment record, (7) family ties and responsibilities, (8) community ties, (9) role in the offense, (10) criminal history, and (11) degree of dependence on

[94] Commission Testimony at 57.

[95] 28 U.S.C. § 994(c) and (d).

[96] 28 U.S.C. § 994(c)(2).

criminal activity for a livelihood. The purpose of § 994(d) was to ensure that warranted differences among offenders were reflected in the guidelines.[97]

Congress considered all eleven offender characteristics to be relevant to all aspects of the sentencing decision, with one narrow exception. Congress directed the Commission in 28 U.S.C. § 994(e) to "assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering" five of those factors: "the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." The Senate Report stated: "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."[98]

Section 994(e) was one of three provisions of the SRA reflecting Congress's judgment that prison was not an effective means of rehabilitation and that the disadvantaged should not be warehoused in prison on the theory that prison might be rehabilitative.[99] The Supreme Court recently stated in interpreting the other two provisions: "Section 994(k) bars the Commission from recommending a 'term of imprisonment'—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant's rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range."[100]

Thus, the Commission was not to recommend imprisonment over probation or a longer prison term based on the defendant's lack of education, vocational skills, employment, or stabilizing ties. And rather than counseling that these factors not be considered at sentencing, Congress said that "each of these factors may play other roles in the sentencing decision."[101] For example, "they may, in an appropriate case, call for the use of a term of probation instead of imprisonment."[102] The Senate Report gave several specific examples suggesting how the

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[97] "The key word in discussing unwarranted disparities is 'unwarranted.' . . . The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact, if any, would be warranted by differences among defendants with respect to those factors." S. Rep. No. 98-225, at 161 (1983) (citing 28 U.S.C. § 994(d)).

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

[99] *See* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."); 18 U.S.C. § 3582(a) ("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."); S. Rep. No. 98-225, at 31, 38, 40, 67 n.262, 76-77, 95, 119, 171 & n.531 (1983).

[100] *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011).

[101] S. Rep. No. 98-225, at 174 (1983).

[102] *Id.* at 174-75.

Commission might include these and other characteristics in the guidelines to mitigate sentences.[103]

Congress "encourage[d] the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise."[104]

Therefore, far from "direct[ing] the Commission not to incorporate certain offender characteristics into the guidelines," as the Chair testified, Congress in fact directed the Commission to consider and include any and all factors it found relevant to the sentencing decision when it formulated the guidelines.

Congress also recognized that it was not possible to write all relevant factors into general rules. It therefore directed the Commission to "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors *not* taken into account" in the guidelines.[105] The Senate Report stated:

> [E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors – the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.[106]

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[103] *See id.* at 172-73 ("need for an educational program might call for a sentence to probation" with a program to provide for rehabilitative needs if imprisonment was not necessary for some other purpose of sentencing); *id.* at 173 (same regarding vocational skills); *id.* (same regarding employment); *id.* at 171 n. 531 ("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"); *id.* at 173 n.532 ("a defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release"); *id.* at 174 (family ties and responsibilities may indicate, for example, that the defendant "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*. at 173 (mental or emotional conditions might "call[] for probation with a condition of psychiatric treatment, rather than imprisonment"); *id*. ("drug dependence" 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").

[104] *Id*. at 175.

[105] 28 U.S.C. § 991(b)(1)(B) (emphasis added).

[106] S. Rep. No. 98-225, at 150 (1983).

Congress directed judges to depart when they found an aggravating or mitigating factor not "adequately taken into account" in the guidelines, *see* 18 U.S.C. § 3553(b), a determination that would be informed by the purposes and factors set forth in 18 U.S.C. § 3553(a).[107] Referring specifically to § 3553(a)(1), which requires judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," the Senate Report stated: "All of these considerations and others the judge believed to be appropriate would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline."[108]

Thus, contrary to the Chair's testimony that individual offender characteristics "shouldn't generally be considered" at sentencing, Congress clearly directed the courts to consider a wide range of factors, including "the history and characteristics of the defendant," and further directed: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[109]

Thus, even when the guidelines were to be mandatory, Congress did "not intend that the guidelines be imposed in a mechanistic fashion."[110] To the contrary, it believed "that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."[111] The purpose of the guidelines was "not to eliminate the thoughtful imposition of individualized sentences," but would "enhance the individualization of sentences."[112] Judges would "impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender."[113]

B. What the Commission did.

Other than role in the offense and the aggravating factor of criminal history, the

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[107] "The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which guidelines and policy statements apply. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance." *Id*. at 52.

[108] *Id*. at 75.

[109] 18 U.S.C. § 3661.

[110] S. Rep. No. 98-225, at 52 (1983).

[111] *Id*.

[112] *Id*. at 52-53.

[113] *Id*. at 53.

Commission excluded all of the factors listed in § 994(d) from the guideline rules, and went further, deeming most of them (*i.e.*, age, education, vocational skills, mental and emotional condition, physical condition, employment record, family ties and responsibilities, and community ties) to be "not ordinarily relevant" in departing from the guidelines,[114] and drug and alcohol dependence or abuse to be "not relevant" in departing from the guidelines.[115] Personal financial difficulties and economic pressure on a trade or business were prohibited.[116] Over the ensuing years, the Commission added numerous further restrictions on downward departures, not because Congress told it to, but to prevent courts' attempts to depart from guidelines that did not adequately consider, among other things, individual offender characteristics.[117]

None of the policy statements forbidding or discouraging departures was ever accompanied by any "analysis" or "supporting reasons."[118] Then-Commissioner Breyer unofficially explained that the Commission had omitted from the guidelines most of the factors "which Congress

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[114] USSG §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition, drug dependence), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), p.s. (1987); *see also* USSG ch. 5, pt. H, intro. comment.

[115] USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987).

[116] USSG § 5K2.13, p.s. (Nov. 1, 1987).

[117] For example, when a court of appeals upheld a departure based on the defendant's "diminutive size and immature appearance," after he had been sexually victimized and placed in solitary confinement for his protection, *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), the Commission immediately issued an amended policy statement asserting that physical "appearance, including physique," is not ordinarily relevant in deciding whether to depart. USSG § 5H1.4 p.s.; USSG App. C, amend. 386 (Nov. 1, 1991). Similarly, in response to a court of appeals' holding that a disadvantaged childhood could justify downward departure, the Commission issued a policy statement asserting that a defendant's "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are "not relevant" grounds for departure. USSG § 5H1.12 p.s.; USSG App. C, amend. 466 (Nov. 1, 1992). Military, civic, charitable and public service, employment-related contributions, and prior good works were all likewise deemed not ordinarily relevant, USSG § 5H1.11, p.s.; USSG App. C, amend. 386 (Nov. 1. 1991), "in response to court decisions." USSC, *Simplification Draft Paper, Departures and Offender Characteristics*, Part II(B)(3). The Commission also prohibited departure based on post-sentencing rehabilitation "even if exceptional." USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000).

[118] S. Rep. No. 98-225, at 175 (1983). *See, e.g.*, USSG App. C, amend. 386 (Nov. 1, 1991) (amending § 5H1.4 to provide that physical "appearance, including physique" is not "ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," stating as the reason that it "sets forth the Commission's position that physical appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range"); USSG App. C, amend. 466 (Nov. 1, 1992) (adding § 5H1.12 to provide that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted," stating as the reason that "[t]his amendment provides that the factors specified are not appropriate grounds for departure"); USSG App. C, amend. 651 (Oct. 27, 2003) (amending § 5H1.4 to provide that addiction to gambling is not a reason for a downward departure in any case, stating as the reason that "addiction to gambling is never a relevant ground for departure").

suggested that the Commission should, but was not required to, consider" as one of several "'trade-offs' among Commissioners with different viewpoints."[119] Much later, Justice Breyer said that the decision to omit mitigating offender characteristics was "intended to be provisional and [] subject to revision in light of Guideline implementation experience."[120] That revision did not materialize; instead, further restrictions were added.

The original Commission did not attempt to justify the policy statements deeming education, vocational skills, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" with reference to § 994(e). Later, the Commission went so far as to amend its commentary to "clarify" that the policy statements were "required" by § 994(e).[121] Despite the Commission's contention that it was required by § 994(e) to prevent departures based on the five factors listed there, its disfavored list of grounds for departure included not only those five factors, but all of the other mitigating factors listed in § 994(d) (except role), and others added over the years. The Commission's many restrictions on departure cannot be explained by a fair reading of the Sentencing Reform Act. The only "tension" has been created by the Commission itself.

C. The Commission's 2010 amendments.

Before *Booker*, district court and appellate judges reported that restrictions on mitigating offender characteristics were a primary failing of the guidelines.[122] After *Booker*, countless witnesses advised the Commission at its regional hearings in 2009 and 2010 that mitigating offender characteristics are relevant to the purposes of sentencing.[123] Large majorities of judges

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[119] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988).

[120] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999).

[121] USSG ch. 5, pt. H, intro. comment. (Nov. 1, 1990); USSG, App. C, amend. 357 (Nov. 1, 1990) ("clarify[ing] the relationship of 28 U.S.C. § 994(e) to certain of the policy statements" and describing the directive as "requir[ing]" the Commission to assure that the guidelines and policy statements reflected the "general inappropriateness" of considering these characteristics "in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment"). *Compare* 28 U.S.C. § 994(e) (Commission "shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering" the five factors).

[122] USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary (2003) ("Both district and circuit court judges were most likely to indicate" that "fewer" of the guidelines "maintain[ed] sufficient flexibility to permit individualized sentences," or "provid[ed] defendants with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner where rehabilitation is appropriate.").

[123] *See, e.g.*, Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 281-82, 301-02 (Oct. 20, 2009) (remarks of Hon. Joan Ericksen); *id*. at 289-90, 295-96 (remarks of Hon. Robert Pratt); *id.* at 91-92 (remarks of Hon. Thomas Marten); *id.* at 107-08 (remarks of Kevin Lowry, Chief U.S. Probation Officer); *id.* at 318-20 (remarks of Raymond Moore); Statement of Alan Dubois and Nicole Kaplan,

informed the Commission in a 2010 survey that the mitigating factors its policy statements deem never or "not ordinarily relevant" are in fact "ordinarily relevant,"[124] and that its policy statements are inadequate, too restrictive, and inconsistent with § 3553(a).[125]

In 2010, the Commission amended some of its policy statements to say that age, mental and emotional conditions, physical condition, and military service, rather than "not ordinarily relevant," now "may be relevant," but only if "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." The Commission also amended certain provisions so that drug or alcohol dependence or abuse, rather than "not relevant," is now "ordinarily not" relevant, and invited a small downward departure for a very narrow class of defendants to receive drug treatment.[126] The change was based on "public comment, testimony, and research suggest[ing] that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public."[127] Congress suggested twenty-six years ago that the Commission "recommend that [a drug-dependent] 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."[128] (Mr. Otis's description of this amendment is overwrought and uninformed.)

Hearing Before the U.S. Sent'g Comm'n, at 44-45, 47-50 (Feb. 10, 2009); Tr. of Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 53-54 (Feb. 10, 2009) (remarks of Thomas Bishop, Chief U.S. Probation Officer); Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent'g Comm'n, at 35-37 (May 27, 2009); Tr. of Hearing Before the U.S. Sent'g Comm'n, Stanford, Calif., at 284-86, 357-59 (May 27-28, 2009) (remarks of Thomas W. Hillier II); *id*. at 360-62 (remarks of Davina Chen); *id.* at 168 (remarks of Chris Hansen, Chief U.S. Probation Officer); Tr. of Hearing Before the U.S. Sent'g Comm'n, New York, N.Y., at 331 (July 10, 2009) (remarks of Hon. Donetta W. Ambrose); Statement of Michael Nachmanoff Before the U.S. Sent'g Comm'n, New York, N.Y., at 22-25 (July 9, 2009); Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 104-05 (Sept. 9, 2009) (remarks of Hon. Philip Simon); Statement of Carol Brook Before the U.S. Sent'g Comm'n, at 26-33 (Sept. 10, 2009); Statement of Julia O'Connell Before the U.S. Sent'g Comm'n, Austin, Tex., at 4-10 (Nov. 19, 2009); Statement of Heather Williams Before the U.S. Sent'g Comm'n, Phoenix, Ariz., at 35, 39-40 (Jan. 21, 2010).

[124] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13 (education (48%), vocational skills (41%), employment record (65%), family ties and responsibilities (62%), community ties (49%), employment-related contributions (47%), post-sentencing rehabilitative efforts (57%), post-offense rehabilitative efforts (70%), lack of guidance as a youth (49%), disadvantaged upbringing (50%)).

[125] *Id*., tbl. 14.

[126] USSG § 5H1.4, p.s.; USSG § 5C1.1, comment. (n.6).

[127] *See* USSG § 5C1.1, comment. (n.6); USSG App. C, amend. 738 (Nov. 1, 2010) (Reason for Amendment).

[128] *See* S. Rep. No. 98-225, at 173 (1983).

The net result of these small changes is unclear, since the Commission also amended the introductory commentary to generally disapprove of all offender characteristics, stating that their "most appropriate use" is not for imposing a sentence outside the guideline range but for sentencing within the guideline range,[129] even though the guidelines do not include these factors and a wealth of empirical research shows them to be highly relevant.

The policy statements continue to deem the § 994(e) factors (and others) to be "not ordinarily relevant to the determination of whether a sentence should be outside the guideline range," except perhaps in "exceptional cases."[130] The Commission need not appeal to Congress, because it is free to discard this "heartland" standard and amend the policy statements regarding the § 994(e) factors to comport with the statutes and Supreme Court law.[131]

D. The Commission's present request.

The Commission writes that "28 U.S.C. § 994(e) directs the Commission to 'assure' that the guidelines reflect the 'general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant' *in determining the length of imprisonment*."[132] But the italicized language does not appear in the statute. The statute directs the Commission to "assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." "[D]etermining the particular sentence to be imposed" is what the court does. *See* 18 U.S.C. § 3553(a). "[R]ecommending a term of imprisonment or its length" is what the Commission does, and it may not recommend a prison term or a lengthier prison term based on the factors listed in § 994(e). *See* 28 U.S.C. § 994(e); S. Rep. No. 98-225, at 175 (1983). The Commission's contention that Congress required it to prevent courts from considering these factors in departing downward *from* the guidelines' recommendation of a term of imprisonment is wrong.

We are also concerned about the inaccuracy in the characterization of the data the Commission submits in support of this request. It states that courts consider "those very factors [listed in § 994(e)] under § 3553(a) and often arrive at sentences below the guidelines range as a result of such consideration in almost 14 percent of all . . . cases," and "[d]epartures are followed in only about 3.4 percent of these cases because courts prefer to vary when they consider offender characteristics like family history, for example."[133]

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[129] USSG ch. 5, pt. H, intro. comment.

[130] *Id*.

[131] *See* 28 U.S.C. § 994(e); 29 U.S.C. § 994(k); 18 U.S.C. § 3553(a); 18 U.S.C. § 3582(a); *Pepper v. United States*, 131 S. Ct. 1229, 1242-43 (2011); *Gall v. United States*, 552 U.S. 38, 53-60 (2007); *Tapia*, 131 S. Ct. at 2390.

[132] Commission Testimony at 57.

[133] *Id*.

The Commission cites nothing in support of these numbers, but investigation reveals that it is referring to its data showing that judges imposed below-guideline sentences in 13.8% of cases thus far in 2011 that were not categorized as being based in whole or in part on a "departure," while 3.4% were categorized as being based in whole or in part on a "departure."[134] To say that all of the former ("almost 14 percent") were based on the factors listed in § 994(e) is entirely incorrect. Factors listed in § 994(e) comprised less than 6% of all reasons given for below-range sentences not called "departures."[135] That is to say, judges relied in whole or in part on a reason listed in § 994(e) in less than 1% of all below-range sentences not called "departures."

The Commission either made an error, or it seeks to give the impression that judges cite the § 994(e) offender characteristics far more often than they do, or it is suggesting that Congress directed it in § 994(e) to discourage downward departures for *any* reason, a position even broader than its previous (and also incorrect) position that Congress directed it in § 994(e) to discourage downward departures based on the factors listed therein.

IV. Since *Booker*, the Commission Has Relied on Judicial Feedback to Improve the Guidelines in Important Ways, as Congress Intended.

Representative Deutch asked how the Commission takes into account feedback from judges. Representative Adams was concerned at the description of judicial feedback regarding the child pornography guideline as "sentiment."

A. Feedback from real cases leads to gradual change informed by experience, research, and cooperation among all branches.

Judge Saris answered Mr. Deutch's question with an example of variances in straw purchaser cases where a girlfriend buys a gun for her boyfriend. There are other important examples.

The most important and well-known example is the reduction of the crack guidelines, where the Judiciary, Congress, the Department of Justice, and the Commission came together to achieve greater justice and greater consistency. After *Booker* was decided on January 12, 2005, judges began to impose reduced sentences to correct the unfairness reported by the Commission since 1995. Some courts of appeals held that this was impermissible, creating a circuit split, and the Supreme Court granted certiorari. On January 22, 2007, two of the original sponsors of the SRA, Senators Kennedy and Hatch, along with Senator Feinstein, filed an *amicus* brief in the Supreme Court, arguing that judges should be permitted to disagree with unsound policies

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[134] USSC, Preliminary Quarterly Data Report, Third Quarter, tbl. 1 (2011).

[135] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 25B. Of the 40,076 reasons reported to the Commission, just 2,397 were reasons listed in § 994(e), *i.e.*, family ties and responsibilities, employment record, educational and vocational skills, community ties.

reflected in the guidelines, such as the crack/powder disparity.[136] The Commission took the next step.[137] On May 21, 2007, it voted to reduce the crack guidelines by 2 levels, and urged Congress to take further action as this was not a complete solution to an urgent and compelling problem.[138] The Supreme Court then held in a series of cases that, in order to avoid a constitutional violation, courts must be permitted to vary from guideline ranges based on the principles of sentencing and not only facts, and may disagree with unsound guidelines, and in particular the crack guideline.[139] The rate at which judges sentenced outside the guideline range in crack cases gradually increased.[140] In 2009, the President and the Attorney General announced support for a change in law that would eliminate the crack/powder disparity.[141] On Aug. 3, 2010, Congress enacted the Fair Sentencing Act of 2010, reducing the mandatory minimums for crack and directing the Commission to reduce the guidelines. The amendment took effect November 1, 2010, and the overall below-range rate (not limited to crack cases) dropped concurrently, from 18.7% during the quarter ending September 30, 2010, to 16.9% during the quarter ending June 30, 2011.

The Commission has also made a small but important change to the criminal history rules in response to reasons for below-range sentences and empirical research regarding recidivism.[142] As another example, in response to appellate caselaw finding that a 16-level enhancement based

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[136] Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007. The *Claiborne* case was later replaced by *Kimbrough* when Mario Claiborne died.

[137] USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, Chapter 6 (May 2007) (discussing pre-*Booker* law under which all attempts to "depart" based on the crack disparity were rebuffed, the circuit split after *Booker* on whether courts could disagree with the crack guidelines, the pending *Claiborne* case, and the arguments made by the Senators).

[138] 72 Fed. Reg. 28558, 28573 (May 21, 2007).

[139] *See Cunningham v. California*, 549 U.S. 270 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

[140] *See* Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 5 Fed. Sent'g Rep. 326, 331 (in FY 2009, among crack defendants without trumping mandatory minimums, 57.9% were sentenced below the guideline range); Commission Testimony at 35 (stating that judges sentenced below the crack guideline in only 21.2% of all cases from FY 2008 through FY 2010).

[141] Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice, Before the United States Senate Committee on the Judiciary, Subcommittee on Crime and Drugs (Apr. 29, 2009), http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf; Attorney General Eric Holder, Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium, *Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act*, Washington, D.C. (June 24, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html.

[142] USSG App. C, amend. 742 (Nov. 1, 2010) (Reason for Amendment).

on a 30-year-old conviction created unwarranted uniformity, the Commission sent an amendment to Congress proposing to reduce by 4 levels the 16- and 12-level increases in illegal re-entry cases based on a prior conviction when the conviction is too old to count under the criminal history rules.[143] This change will ameliorate an extreme increase the Commission initially adopted with no research, supporting data, or explanation.[144]

Finally, the Commission is conducting a review of the guideline for possession of child pornography, prompted by a high rate of variances and numerous written opinions by judges and courts of appeals explaining flaws in that guideline, which the Commission will report to Congress.[145] Representative Adams expressed concern at the hearing that Judge Saris stated in a recent interview that a "recent [survey] of federal district judges found that seventy percent felt that penalties for receipt and possession of child pornography were too high—a sentiment likely responsible for a more than forty percent variance rate." This is not mere sentiment, however. As explained in scores of written opinions by district judges and courts of appeals, there are real problems with the severity of this guideline as applied to offenders who possess this material but do not produce it and have never touched a child. The guideline recommends punishment near or exceeding the statutory maximum in the ordinary case, not the aggravated case, and can exceed the punishment for actually engaging in sex with a child. Prosecutors, too, seek below-range sentences in these cases at an unusually high rate, and the Department of Justice has asked the Commission to review the guideline.

B. This is what Congress intended.

Congress directed the Commission in the SRA to measure whether the guidelines were effective in meeting the purposes of sentencing,[146] and to ensure that the guidelines reflected advancement in knowledge of human behavior.[147] The Commission was to "review and revise" the guidelines "in consideration of data and comments coming to its attention," and after consultation with the frontline participants in the criminal justice system.[148] Congress expected that data and reasons from departures would alert the Commission to problems with the

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[143] 76 Fed. Reg. 24960, 24969 (May 3, 2011).

[144] "The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion." Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent'g Rep. 275 (1996); *see* U.S. Sent'g Comm'n, Minutes of Meeting (Apr. 2, 1991).

[145] USSC, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent'g Comm'n, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010).

[146] 28 U.S.C. § 991(b)(2).

[147] 28 U.S.C. § 991(b)(1)(C).

[148] 28 U.S.C. § 994(o).

guidelines in operation.[149] District courts would state their reasons,[150] appellate courts would uphold "reasonable" departures,[151] and the Commission would collect and study the resulting data and reasons, their relationship to the factors set forth in § 3553(a), and their effectiveness in meeting the purposes of sentencing.[152] The Commission would revise the guidelines based on what it learned.[153]

The Supreme Court's decisions have revived this important mechanism.[154] As the Commission "perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission's recommendations."[155]

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[149] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) ("[T]he system is 'evolutionary' – the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."); Edward M. Kennedy, Sentencing Reform—An Evolutionary Process, 3 Fed. Sent'g Rep. 271 (1991) ("[T]he structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues," departures "will lead to a common law of sentencing," and "the guideline system [will] be evolutionary in nature."); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.) ("[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.").

[150] 18 U.S.C. § 3553(c).

[151] 18 U.S.C. § 3742(e) (1990).

[152] 28 U.S.C. § 995(a)(13)-(16).

[153] *See* S. Rep. No. 98-225, at 80 (1983) ("The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements."); *id*. at 151 ("Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines," which "will assist the Sentencing Commission in refining the sentencing guidelines."); *id*. at 182 ("research and data collection . . . functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.").

[154] *See Booker*, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); *Rita*, 551 U.S. at 358 (The courts' "reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors . . . should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.").

[155] *Id*. at 382-83 (Scalia, J., concurring in part and concurring in the judgment).

V. Available Evidence Shows That the Public Does Not Support the Punishment Levels Recommended by the Guidelines.

There was a suggestion at the hearing that the public supports the punishment recommended by the guidelines. Available evidence indicates that this is not so.

Federal judges in the Midwest polled jurors in twenty-two criminal cases after they had issued a verdict of guilt. The cases involved common federal crimes, including drug trafficking, firearms and child pornography offenses. The jurors represented a fair cross section of the community in Ohio, Iowa and Illinois. After the verdict, the jurors were given a questionnaire with a listing of the defendant's past convictions, and were asked one question: "State what you believe an appropriate sentence is, in months." The median sentence jurors would have imposed was just one-third the sentence required by the bottom of the applicable sentencing range. Of 261 jurors, 229 (88%) recommended a sentence below the low end of the guideline range, and 200 (77%) recommended a sentence below that actually imposed by the judge.[156]

In *United States v. Angelos*, Judge Paul Cassell was required by mandatory firearm sentence enhancements to impose a sentence of 55 years on a marijuana dealer with no previous convictions, a job, and a family. Jurors were asked what they would recommend as a sentence, and the mean juror recommendation was 18 years.[157] In a case before Judge Jack Weinstein, where the five-year mandatory minimum for receipt of child pornography applied, most of the jurors believed that this particular defendant should receive treatment and not be imprisoned at all, and three jurors would have acquitted had they known of the five-year mandatory minimum.[158]

VI. The Current Standard of Review Is the Same Standard Congress Enacted in the SRA But More "Robust" Than That Standard, and the Evidence Shows That No Change is Justified.

The Commission's summary description of the state of appellate review is that the Supreme Court "has taken some of the 'teeth' from appellate review of federal sentencing decisions."[159] That was the point. Appellate review before *Booker* was designed to substitute the judgment of the Commission and the courts of appeals for that of the district court judge. That is "no longer

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[156] *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 174-76, 185-88 (2010).

[157] *United States v. Angelos*, 345 F. Supp. 2d 1227, 1242 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006)

[158] *United States v. Polizzi*, 549 F. Supp. 2d 308, 339-41 (E.D.N.Y. 2008), *rev'd*, 564 F.3d 142 (2d Cir. 2009).

[159] Commission Testimony at 12.

an open choice."[160] Rather than "invalidat[e] the entire Act, including its appellate provisions," the Court adopted the reasonableness standard of review.[161]

Even if the Commission's proposals were constitutional, and they are not, the Commission provides an inaccurate and incomplete account of how the appellate review standard evolved and how it is actually working. This section demonstrates that:

- The current "reasonableness" standard of review originated in the Sentencing Reform Act itself, and is more "robust" than that standard. The "reasonableness" standard enacted by Congress in 1984 was replaced by the courts, and then by Congress itself in 2003, with a standard that required courts of appeals to enforce the guidelines and to substitute their own judgments for that of the district court judge. Those standards are unconstitutional.

- Contrary to the Commission's suggestion that the government can't win under the current standard of review, the data show that the government (1) asks for or agrees with the vast majority of sentences imposed, including at least half of below-range sentences sought by defendants, (2) appeals as many sentences as it did before *Booker*, and (3) has a high success rate on appeal.

- Data of actual appellate decisions show that the courts of appeals have all the tools they need to reverse sentences as procedurally or substantively unreasonable. Further, when sentences are reversed for inadequate explanation, district courts impose a different sentence more than half the time.

- Examples of decisions given by Mr. Miner, in which sentences were reversed as too low, demonstrate that no statutory change is warranted.

- Appellate judges recognize that a standard designed to more strictly enforce the guidelines would be unconstitutional and is not warranted.

- The Commission's account of Supreme Court and appellate decisions regarding "policy disagreements" is not accurate and therefore not helpful.

A. The current standard of review originated in the SRA, is more "robust" than that standard, gives proper deference to the sentencing judge, and is thus constitutional.

The Commission asks Congress to enact a more "robust" standard of review. At the hearing, the Commission Chair suggested that this is needed to bring the sentencing system closer to what Congress envisioned in the SRA. However, a brief history of the current standard

[160] *Booker*, 543 U.S. at 263.

[161] *Id*.

of review demonstrates that the current standard is the same standard Congress enacted in the SRA, but more "robust," while remaining constitutional.

Standard of Review 1984-2003. When Congress enacted the SRA, it intended that appellate review would "preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."[162] Thus, from 1984 to 2003, courts of appeals were directed by statute to determine whether a sentence outside the guideline range "is unreasonable, having regard for the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)]," and "the reasons . . . stated by the district court pursuant to the provisions of section 3553(c)."[163] For a sentence within the guideline range, the court of appeals was to determine only whether it "was imposed as a result of an incorrect application of the sentencing guidelines."[164] The court of appeals was to "give due regard to the opportunity of the district court to judge the credibility of the witnesses," "accept the findings of fact of the district court unless they are clearly erroneous," and "give due deference to the district court's application of the guidelines to the facts."[165]

For the first few years, courts of appeals applied the reasonableness standard with deference to the sentencing judge's determination under § 3553(b) that a ground for departure was not adequately taken into consideration, in kind or degree, in the guidelines, having regard for the factors set forth in § 3553(a) and the reasons stated by the judge. However, in 1992, the Supreme Court held in *Williams v. United States* (over vigorous dissent) that a departure prohibited by the Commission's policy statements was reversible as "an incorrect application of the sentencing guidelines," and that a court of appeals may not uphold such a departure on the basis that it was reasonable.[166] And in 1996, in *Koon v. United States*, the Court adopted, as the sole framework for review of departures, the Commission's policy statements and commentary setting forth its "heartland" departure standard and restricting departures on various grounds.[167] While the Court said that departures were subject to "abuse-of-discretion" review, the district courts' discretion was strictly limited by the Commission's policy statements and commentary,[168] and the courts of appeals reviewed district courts' interpretation of those provisions *de novo*.[169] *Koon* made no mention of the statutory unreasonableness standard.

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[162] S. Rep. No. 98-225 at 150 (1983) (emphasis supplied).

[163] *See* 18 U.S.C. § 3742(e)(3) (2002); 18 U.S.C. § 3742(d)(3) (1984); Pub. L. No. 98-473, § 213(a) (Oct. 12, 1984).

[164] *See* 18 U.S.C. § 3742(e)(2) (2002); 18 U.S.C. § 3742(d)(2) (1984); Pub. L. No. 98-473, § 213(a) (Oct. 12, 1984).

[165] *Ibid*.

[166] *Williams v. United* States, 503 U.S. 193, 200-01 & n.2, 202 (1992).

[167] *Koon v. United States*, 518 U.S. 81, 92-95 (1996).

[168] If a factor was forbidden by the Commission, the court "cannot use it." If a factor was "encouraged," the court could depart but only "if the applicable Guideline does not already take it into account,"

While *Williams* and *Koon* thus encouraged courts of appeals to reverse departures unless clearly permitted by the Commission, regardless of whether the departure was reasonable with regard to § 3553(a), both decisions did make clear that courts of appeals were not to substitute their own judgments for those of sentencing courts as to factual determinations and the limited discretionary judgments left open by the Commission.[170]

Standard of Review 2003-2005. In 2003, Congress, in the mistaken belief that there had been an increase in departures because of *Koon*,[171] enacted a new standard of review for departures. It retained vestiges of the SRA's unreasonableness standard, requiring courts of appeals to determine whether the basis for departure "advance[s] the objectives set forth in § 3553(a)(2)," and whether the sentence "departs to an unreasonable degree" with regard to the factors set forth § 3553(a). But, like *Williams* and *Koon*, the new standard gave the Commission's departure provisions overriding effect by requiring courts of appeals to set aside the sentence if the basis for departure "is not authorized by § 3553(b)." In addition, the courts of appeals were directed to substitute their own judgments for those of sentencing courts, setting aside the sentence if the departure "is not justified by the facts of the case," and applying *de novo* review to the district court's application of the guidelines to the facts with respect to all determinations except whether a departure was unreasonable in degree.[172]

Standard of Review After *Booker*. The Court in *Booker* held that the availability of departures "does not avoid the constitutional issue" because departures were not permitted in every case, were unavailable in most cases, and were limited to specified circumstances.[173] The Court excised § 3553(b) and § 3742(e) in their entirety, and re-instated the reasonableness standard for sentences outside the guideline range as originally enacted in the Sentencing Reform Act of 1984, and made it applicable to all sentences, inside and outside the guideline range.[174]

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explicitly or implicitly. As to "discouraged" factors or "encouraged" factors already taken into account explicitly or implicitly, the court could depart if the factor was "present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." Departure based on an "unmentioned" factor was permissible only if, after considering the "structure and theory of both the relevant individual guidelines and the Guidelines taken as a whole" -- which were unstated by the Commission -- the factor is "sufficient to take the case out of the Guideline's heartland." *Koon*, 518 U.S. at 95-96.

[169] *See, e.g., United States v. Roberts*, 313 F.3d 1050, 1053 (8th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002)' *United States v. Harris*, 293 F.3d 863, 871 (5th Cir. 2002).

[170] *Koon*, 518 U.S. at 97; *Williams*, 503 U.S. at 205.

[171] USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-60 (2003).

[172] Pub. L. No. 108-21, § 401(d) (Apr. 30, 2003) (amending 18 U.S.C. § 3742(e)).

[173] *Booker*, 543 U.S. at 234-35.

[174] *See Booker*, 543 U.S. at 259 (excising § 3553(b) and § 3742(e)); *id*. at 261-62 (adopting the "pre-2003 text" telling courts of appeals "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)," and applying it to all sentences "across the board.").

Courts of appeals must review "all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."[175]

There are two components of reasonableness review, procedural and substantive. The court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guideline range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain--including an explanation for any deviation from the Guidelines range."[176]

If the sentence "is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[177] Under that standard, the court of appeals reviews the fact-dependent legal determination of the district court,[178] based on its consideration of the factors set forth at § 3553(a) and in light of the evidence and arguments presented, that the sentence imposed is "sufficient but not greater than necessary" to serve the statutory purposes of sentencing.[179] If the sentence is within the guideline range, the court of appeals "may, but is not required to, apply a presumption of reasonableness."[180] This rebuttable presumption is "not binding," does not reflect greater deference to the Commission than to a district judge, and has no "independent legal effect."[181] "[I]f the sentence is outside the Guidelines range, the court of appeals may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[182] The court of appeals may not substitute its own judgment for that of the

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[175] *Gall*, 552 U.S. at 41; *see also id*. at 46, 49, 51 ("appellate review of sentencing decisions is limited to determining whether they are 'reasonable'" under "a deferential abuse-of-discretion standard," "whether inside or outside the Guidelines range."); *Rita*, 552 U.S. at 351 ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

[176] *Gall*, 552 U.S. at 51.

[177] *Id*.

[178] *Booker*, 543 U.S. at 260 (citing *Pierce v. Underwood*, 487 U.S. 552, 558-62 (1988) (applying abuse-of-discretion standard when district court resolves "fact-dependent legal" questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401, 403 (1990) (applying abuse-of-discretion standard when district court applies a "fact-dependent legal standard" regarding issues "rooted in factual determinations.")); *see also Koon v United States*, 518 U.S. 81, 99 (1996) (citing *Pierce* and *Cooter & Gell* with approval).

[179] 18 U.S.C. § 3553(a)(2).

[180] *Id.*

[181] *Rita*, 551 U.S. at 347, 350.

[182] *Gall*, 552 U.S. at 51.

district court.[183] The court of appeals may not apply "heightened review" to sentences outside the guideline range, such as requiring "'proportional' justifications" the greater the variance, or requiring that a circumstance be "extraordinary," "exceptional," or "unique."[184] Nor may a court of appeals apply "closer review" to a district court's determination that a guideline that was not developed based on empirical data and national experience yields a sentence greater or less than necessary to achieve § 3553(a)'s objectives.[185]

Thus, contrary to the Commission's suggestion that the courts of appeals' power has somehow been reduced or is less robust than what Congress envisioned in 1984, it has been expanded as compared to the standard Congress originally enacted. It now includes determining the procedural and substantive unreasonableness of sentences within the guideline range. While the Commission claims that it seeks more "robust" review, what it seeks is greater deference to the guidelines.[186] The Commission's proposals are not only contrary to Supreme Court law, but as set forth below, are unnecessary and counterproductive.

B. The government asks for or agrees with the vast majority of sentences imposed including at least half of below-range sentences sought by the defendant, appeals as many sentences as it did before *Booker,* and has a high success rate on appeal.

The Commission gives the impression that the government can't win on appeal, complaining that "the Government initiates only a small portion of" appeals,[187] and that "some prosecutors" say this is because "there is little meaningful appellate review of sentences."[188]

The evidence is otherwise. In fiscal year 2010, the government raised 156 issues on appeal; thirty of those issues involved § 3553(a), and the government won 60% of the time.[189] When the guidelines were mandatory in 1998, the government raised 122 issues on appeal; 41 of those issues related to departures, and it won 61% of the time. In 1999, the government raised 54 issues on appeal; 25 were related to departures, and it won 33% of the time. In 2003, under

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[183] *Id.*

[184] *Gall*, 552 U.S. at 45-46, 47, 49, 52.

[185] *Kimbrough*, 552 U.S. 109-10; *Spears*, 129 S. Ct. at 843.

[186] The Commission asks Congress to order courts of appeals to presume all guideline sentences to be reasonable, to require proportional justifications for variances from the guidelines, and to apply "heightened review" to a sentencing court's determination that a guideline fails to achieve § 3553(a)'s objectives.

[187] Commission Testimony at 12.

[188] *Id*. at 14.

[189] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls.56A, 58.

the PROTECT Act standard, the government raised 173 issues on appeal; 63 related to departures, and it won 73% of the time.[190]

Since *Gall* was decided, the government has won reversal of sentences as "too low" at a far greater rate than defendants have won reversal of a sentence as "too high." While, as the Commission says, "thousands [of sentences] are appealed [by defendants] as being too high,"[191] only 11 have been reversed as unreasonably high since *Gall* was decided. In contrast, "only a small percentage of sentences are challenged [by the government] as being too low,"[192] but 18 of those sentences have been reversed as unreasonably low. *See* Appendix (Appellate Decisions After *Gall*).

The government does not initiate more appeals because it asks for or agrees with the vast majority of sentences imposed. In fiscal year 2010, 56.8% of sentences fell within or above the guideline range, and the government sought and received below-guideline sentences in another 25.4% of cases.[193] The government agreed to or did not oppose more than half of the sentences classified by the Commission as "non-government sponsored below range."[194]

In sum, the government does not appeal more often because it agrees with the vast majority of sentences imposed, and when it appeals, it usually wins.

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[190] *See* USSC, 1998 Sourcebook of Federal Sentencing Statistics, tbl. 56 (5K2.0, 5H1.6, 5H1.4 and 5K2.13 are departure issues); USSC, 1999 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, and 5H1.12 are departure issues); USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 58 (5K2.0, 4A1.3, 5H1.6, 5K2.13, 5H1.4, 5H1.10, and 5H1.11 are departure issues).

[191] Commission Testimony at 13.

[192] *Id.*

[193] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.N.

[194] First, the government did not object to 46% (3,332 of 7,266) defense motions for a below range sentence classified as "non-government sponsored" in 2010. USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.28A. Second, because the statement of reasons form does not provide a checkbox for the court to indicate the government's position regarding reasons not addressed in a plea agreement or motion by a party, there is no information on the government's position in 4,773 such instances, all of which are classified as "non-government sponsored." *Id*. Since defense attorneys generally raise all non-frivolous grounds for below range sentences and judges do not raise meritless grounds *sua sponte*, it is likely that the government did not object to a significant portion of these sentences. Third, in 3,246 cases classified as "non-government sponsored" below range, the Commission did not receive sufficient information to determine the government's position or whether the source was a plea agreement, a motion by a party, or something else. *Id*. Since a large majority of cases for which information was available were government sponsored, it is reasonable to assume that the government sponsored or acquiesced in a large portion of cases where information was not available.

C. The data show that courts of appeals have all the tools they need to reverse sentences as procedurally or substantively unreasonable, and that courts impose a different sentence on remand over half the time when reversed for procedural unreasonableness.

The operation of the current standard further demonstrates it enables the courts of appeals to engage in meaningful review. The Appendix lists the appellate decisions after *Gall* that we have been able to identify in which sentences have been reversed for procedural error based on inadequate explanation or failure to address a party's nonfrivolous arguments for a different sentence, or for substantive unreasonableness as too high or too low. We use *Gall* as the starting date because that decision clarified that the courts of appeals may not enforce the guidelines by applying heightened standards of review to non-guideline sentences, and described procedural and substantive review in detail.

Procedural Unreasonableness. Nearly fifty sentences outside the guideline range (above or below) and over sixty sentences within the guideline range have been reversed as procedurally unreasonable where the judge failed to adequately explain the sentence in light of the purposes and factors set forth in § 3553(a) and/or the evidence and arguments presented by the parties. The Commission states that two appellate judges thought that reversal based on procedural error is a "waste of time" because the district court would impose the same sentence on remand.[195] This perception is not accurate. Reversal for failure to adequately explain the sentence, to address a party's nonfrivolous argument for a different sentence, or explain why that argument was rejected leads to a different sentence on remand more than half the time.[196]

Substantive Unreasonableness. Courts of appeals have reversed eighteen sentences as unreasonably low, and eleven sentences as unreasonably high. Only four sentences within the guideline range have been reversed as unreasonably high, one from a circuit that has adopted a rebuttable presumption of reasonableness, and three from circuits that have not. Two of those decisions, *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), and *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), have contributed information to the Commission regarding problematic guidelines, and the Commission specifically relied on *Amezcua-Vasquez* in amending § 2L1.2. Congress expected that the "case law that is developed from . . . appeals" would be "used" by the Commission "to further refine the guidelines."[197] Echoing Congress, the Supreme Court encouraged the Commission to "modify its Guidelines in light of what it learns" from "appellate court decision-making."[198] The Commission's criticism of these decisions is puzzling.[199]

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[195] Commission Testimony at 16.

[196] *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (Oct. 2011), http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

[197] S. Rep. No. 98-225, at 52 (1983).

[198] *Booker*, 543 U.S. at 263.

[199] Commission Testimony at 13, 15-16.

D. Examples given in support of the claim that change is needed support the opposite conclusion.

Mr. Miner has cited two decisions, both of which were reversed as too low, as examples of a need for change in the appellate standard. But those decisions demonstrate that appeals courts have all the tools they need to reverse sentences as too low or too high.

In *United States v. Christman*, the defendant was first sentenced to a 57-month guideline sentence. That sentence was reversed because the judge properly informed the parties, after sentencing and while the appeal was pending, that she had imposed a higher sentence than she otherwise would have because she improperly considered a probation officer's "feelings" about Mr. Christman, feelings that were unsubstantiated by evidence, relayed to her off the record, and contrary to all evidence in the record.[200] In vacating the sentence, the court of appeals invited the judge to reconsider Mr. Christman's arguments for a lower sentence.[201] By the time Mr. Christman was re-sentenced, he had been on supervised release and electronic monitoring for over four years without incident. He was also the sole caretaker for his very ill, elderly mother.[202] The judge imposed a prison sentence of five days. The court of appeals then reversed the five-day sentence as unreasonably low.[203] Mr. Christman now awaits re-sentencing by a different judge.

In the case involving the sentence of Jose Padilla, the guideline range was 360 months to life. The judge imposed a sentence of 208 months, based on the conditions of his pre-trial confinement (uncontested evidence he was held for four years in isolation and subjected to cruel and inhumane treatment), his low risk of recidivism due to his age upon release (mid-fifties when the risk of recidivism is low), and comparable sentences imposed in other terrorist cases (imposing a harsher sentence than less serious terrorism offenders had received but a less severe sentence than more serious terrorist offenders had received). The court of appeals reversed, concluding that the judge had attached too little weight to Padilla's criminal history, gave no weight to his future dangerousness due to his al-Qaeda training, compared him to others who were not similarly situated, and gave too much weight to the conditions of his pre-trial confinement.[204]

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[200] *United States v. Christman*, 509 F.3d 299, 311 (6th Cir. 2007).

[201] *Id.*

[202] *United States v. Christman*, No. 1:04-cr-00127 (S.D. Ohio). Documents and transcripts available on PACER.

[203] *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010).

[204] *United States v. Jayyousi [Padilla]*, __ F.3d __, 2011 WL 4346322, *28-30 (11th Cir. Sept. 19, 2011); *id*. at **41-46 (Barkett, J., dissenting in part).

Mr. Miner's complaint appears to be that one judge on the panel dissented, suggesting a need for a more "well-defined standard of appellate review."[205] Three-judge panels resolve close cases like this one, and a 2-1 decision resolves them no less than a 3-0 decision. Appellate decisions are not always unanimous, and many appellate decisions, regarding both guideline interpretations and departures, were not unanimous when the guidelines were mandatory. This hardly supports a change in the standard of review.

E. Contrary to the Commission's suggestion, appellate judges do not support a standard of review to more strictly enforce the guidelines.

The Commission says that some appellate judges who testified at its regional hearings expressed concern about a lack of clarity regarding the standard for reviewing a sentence for substantive unreasonableness, and that two appellate judges expressed concern about deference to district courts.[206] But the appellate judges did not describe a problem they were unable to correct, recognized that the current standard is necessary if the guidelines are to remain constitutional, did not support statutory change when pressed, recognized that sentencing judges most often get it right, and urged the Commission to better explain and justify its guidelines.

The appellate judges recognized that if the guidelines are advisory—as the Supreme Court has said they must be—appellate review must be truly deferential.[207] Several expressed

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[205] Testimony of Matthew S. Miner, Esq., U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker, at 9 (Oct. 12, 2011).

[206] Commission Testimony at 15.

[207] Tr. of Hearing Before the U.S. Sent'g Comm'n, New York, N.Y., at 65 (July 9, 2009) (Judge Fisher) ("[W]here a district court adheres to the correct processes for imposing a sentence and fully explains its reasoning, it is unlikely that the resulting sentences will be found substantively unreasonable."); *id.* at 35-36 (Judge Kavanaugh) ("[T[he guidelines are advisory, and therefore the appellate role with respect to substantive review is going to be very, very limited.); *id.* at 50-53 (Judge Howard) (explaining that even when he disagreed with a below-guideline sentence after *Booker*, where the district court provided an explanation for the sentence, "it was very hard for us to say that a reasonable person could not accept that explanation"); Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 27 (Oct. 20, 2009) (Judge Hartz) ("[N]ow that appellate courts review the length of the sentences only for substantive reasonableness, appellate review will rarely result in setting aside the sentence below."); *id.* 40 (Judge Tacha) ("[N]ow on appellate review, what we're really looking at is did the district judge look at the 3553(a) factors. . . . [I]t pretty much boils down to did they look at 3553(a) and do it right."); Tr. of Hearing Before the U.S. Sent'g Comm'n, Stanford, Calif., at 54-55 (May 27, 2009) (Judge Tallman) ("I think it's very difficult for the court of appeals to declare it substantively unreasonable."); Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 211 (Sept. 9, 2009) (Judge Sutton) ("We're essentially engaged in abuse-of-discretion review. We can't treat it as a math problem, *Gall* reminds us."); *id.* at 213 (Judge Boggs) ("We're starting over again with something of a mandate for leniency, . . . [and] judges are trying to conscientiously apply this reasonableness standard that the Supreme Court has given us."); Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 227 (Nov. 20, 2009) (Judge Benavides) ("[T]here's got to be room for discretion.").

great respect for district judges, recognizing that they *should* have the discretion now afforded them because they take their sentencing responsibility very seriously and most often get it right.[208] Judge Jones, cited by the Commission as one expressing concern about lack of clarity,[209] stated that "the basic responsibility in sentencing is with the district judge" and emphasized that it is the district judge who "sees the defendant, . . . see[s] the family, . . . [the] body language, all sorts of background events about the defendant that people on an appellate court simply can't. So there's no question in my mind that the sentencing judge is the ultimate repository of power here."[210]

Appellate judges who were asked if there was a need for statutory reform said that there was no such need,[211] even when pressed to agree that a stricter standard is needed because district courts may now disagree with the guidelines.[212] Others, rather than agreeing that a stricter standard should be imposed, urged the Commission to provide justifications for its guidelines, both to assist district judges in determining whether or not to follow them and to assist the courts of appeals in reviewing sentences.[213] Others urged the Commission to provide

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[208] Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 211, 237 (Sept. 9, 2009) (Judge Sutton) (emphasizing that "it's very difficult to draw distinctions between and among defendants, particularly when we're not the ones who eye-balled the defendant. We're not the ones who were at the hearing. We're not the ones who heard the allocution. We're not the ones that heard any other evidence" and "most judges in our circuit [are] paying a lot of attention to the guideline recommendations and when they're not following them, they're thinking pretty hard about it"); Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 226, 240 (Nov. 20, 2009) (Judge Benavides) ("I think it's a healthy thing to give discretion to the district courts because they are judges . . . . [Y]ou've got the best of both worlds."); Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 55 (Oct. 20, 2009) (Judge Tacha) (expressing confidence that judges conscientiously exercise their discretion); Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 230 (Nov. 20, 2009) (Judge Jones) ("[T]he basic responsibility in sentencing is with the district judge."); Tr. of Hearing Before the U.S. Sent'g Comm'n, New York, N.Y., at 53 (July 9, 2009) (Judge Howard) ("I have had a chance to review a lot of sentences, even since *Gall*, and we can understand what the district court is thinking.").

[209] Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 249 (Nov. 20, 2009) (Judge Jones) ("[I]t is very difficult to find a principle[d] basis, after *Gall* and *Kimbrough*, for saying that a sentence is unreasonable.").

[210] Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 230 (Nov. 20, 2009) (Judge Jones).

[211] Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 214 (Sept. 9, 2009) (Judge Boggs); Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 54, 55 (Oct. 20, 2009) (Judge Tacha).

[212] Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 55 (Oct. 20, 2009) (Judge Tacha).

[213] Tr. of Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 24-25 (Feb. 10, 2009) (Judge Tjoflat) ("[T]he Commission ought to tell judges, out to tell the world when they set the norm, here is why we are setting the norm and tie the setting to one of the sentencing factors in 3553(a)."); Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 27 (Oct. 20, 2009) (Judge Hartz) ("What I would recommend for consideration is an expansion of the guidelines manual to include additional commentary providing the rationale for various provisions. . . . [N]ow that the guidelines are only advisory, they must not only be understandable, but also persuasive.").

better data regarding the rates of, and reasons for, variances in certain cases.[214] Judge Sutton emphasized that, while it would be helpful to have more detailed statistics from the Commission, the current system "as a matter of policy seems to be a positive one in many respects," particularly its recognition of "individualized sentencing."[215] Others supported the most deferential review possible and recommended against detailed appellate involvement.[216] Judge Loken made several recommendations to *reduce* the appellate courts' involvement in sentencing appeals, not to provide stricter review authority.[217]

A number of appellate judges, now two years ago, may still have been unsure how to apply substantive reasonableness review.[218] It should not be surprising that it would take some time to adjust to the reasonableness standard, after enforcing the guidelines for many years and substituting their own judgment for at least two years. Those standards were deemed unconstitutional in *Booker*.[219] As such, even the lone appellate judge who clearly wished for greater power to reverse sentences acknowledged that his wish was unconstitutional.[220]

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[214] Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 210, 233-34 (Sept. 9, 2009) (Judge Sutton) (suggesting that the Commission might provide statistics showing that there are a large number of significant downward variances for certain offenses, which "would give appellate judges more comfort in continuing to affirm them or primarily affirming them," and suggesting that appellate judges could use that information to "justify significant variances"); Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 220 (Nov. 20, 2009) (Judge Jones) (suggesting that the Commission could go "into deeper analysis when variances occur" or categorize and explain the "underlying factors that cause an enhancement or a downward departure or variance").

[215] Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 235 (Sept. 9, 2009) (Judge Sutton).

[216] Tr. of Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 19-20 (Feb. 10, 2009) (Judge Shedd) (stating that he would prefer "the *most deferential* standard of review" possible, even no review at all). Judge Loken said that the mandatory guidelines had resulted in a "great deal of appellate work for a very modest benefit," had hoped that this would end with advisory guidelines, and was sorry that it hadn't. Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 34 (Oct. 20, 2009).

[217] *Id.* at 37-38, 47.

[218] Tr. of Hearing Before the U.S. Sent'g Comm'n, Stanford, Calif., at 46 (May 27, 2009) (Judge Kozinski); Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 208-210 (Sept. 9, 2009) (Judge Sutton); *id.* at 214 (Judge Boggs); *id.* at 237 (Judge Easterbrook); Tr. of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 53 (Oct. 20, 2009) (Judge Tacha); Tr. of Hearing Before the U.S. Sent'g Comm'n, Austin, Tex., at 219 (Nov. 20, 2009) (Judge Jones).

[219] *United States v. Booker*, 543 U.S. 220, 234-35, 245, 259 (2005) (excising § 3553(b) and § 3742(e)).

[220] Tr. of Hearing Before the U.S. Sent'g Comm'n , Stanford, Calif., at 46 (May 27, 2009) (Judge Kozinski) ("Any sort of attempt to try to deduct a good formula, that's exactly the sort of thing we're not supposed to do on the book, and just provide some hard constraints, because at that point those things become mandatory and they become [un]constitutional."); *id.* at 78 ("If the Sentencing Commission can't solve the problem, Congress can't solve the problem either because the problem then winds up being

In any event, the courts of appeals have now found their bearings. For example, Judge Tjoflat wondered at the regional hearing "how [] you cabin the district court,"[221] but the Eleventh Circuit has now vacated thirteen sentences as substantively or procedurally unreasonable, including the sentence of Jose Padilla.[222] Similarly, Judges Sutton and Boggs expressed some "concern" that the reasonableness standard does not provide enough guidance,[223] but the Sixth Circuit has now vacated thirty-one sentences as substantively or procedurally unreasonable, including the sentence of Richard Christman.[224]

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unconstitutional."); *see also* Tr. of Hearing Before the U.S. Sent'g Comm'n , Chicago, Ill., at 237 (Sept. 9, 2009) (Judge Easterbrook) ("I wonder whether after *Booker* it's feasible.").

[221] Tr. of Hearing Before the Sent'g Comm'n, Atlanta, Ga., at 31 (Feb. 10, 2009).

[222] *United States v. Jayyousi [Padilla]*, __ F.3d ___, 2011 WL 4346322 (11th Cir. Sept. 19, 2011); *United States v. Luster*, 388 Fed. App'x 936 (11th Cir. 2010); *United States v. Kirschner*, 397 Fed. App'x 514 (11th Cir. 2010); *United States v. Mattox*, 402 Fed. App'x 507 (11th Cir. 2010); *United States v. Lopez*, 343 Fed. App'x 484 (11th Cir. 2009); *United States v. Irey*, 612 F3d 1160 (11th Cir. 2010); *United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009); *United States v. McVay*, 294 Fed. App'x 488 (11th Cir. 2008); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008); *United States v. Narvaez*, 285 Fed. App'x 720 (11th Cir. 2008); *United States v. [Julio] Magana*, 279 Fed. App'x 756 (11th Cir. 2008); *United States v. Livesay*¸ 525 F.3d 1081 (11th Cir. 2008); *United States v. Prather*, 279 Fed. App'x 761 (11th Cir. 2008).

[223] Tr. of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 205-11, 214 (Sept. 9, 2009).

[224] *United States v. Wright*, 426 Fed. App'x 412 (6th Cir. 2011); *United States v. Davy*, 2011 WL 2711045 (6th Cir. July 12, 2011); *United States v. Taylor*, 648 F.3d 417 (6th Cir. 2011); *United States v. Pizzino*, 419 Fed. App'x 579 (6th Cir. 2011); *United States v. Goff*, 400 Fed App'x 1 (6th Cir. 2010); *United States v. Wallace*, 597 F.3d 794 (6th Cir. 2010); *United States v. Rhodes*, 410 Fed. App'x 856 (6th Cir. 2010); *United States v. Temple*, 404 Fed. App'x 15 (6th Cir. 2010); *United States v. Pritchard*, 392 Fed. App'x 433 (6th Cir. 2010); *United States v. Ross*, 375 Fed. App'x 502 (6th Cir. 2010); *United States v. Worex*, 420 Fed. App'x 546 (6th Cir. 2011); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010); *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010); *United States v. Fenderson*, 354 Fed. App'x 236 (6th Cir. 2009); *United States v. Howell*, 352 Fed. App'x 55 (6th Cir. 2009); *United States v. Delgadillo*, 318 Fed. App'x 380 (6th Cir. 2009); *United States v. Robertson*, 309 Fed. App'x 918 (6th Cir. 2009); *United States v. Recla*, 560 F.3d 539 (6th Cir. 2009); *United States v. Penson*, 526 F.3d 331 (6th Cir. 2008); *United States v. Stephens*, 549 F.3d 459 (6th Cir. 2008); *United States v. Peters*, 512 F.3d 787 (6th Cir. 2008); *United States v. Ortega-Rogel*, 281 Fed. App'x 471 (6th Cir. 2008); *United States v. Harris*, 339 Fed. App'x 533 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008); *United States v. Hughes*, 283 Fed. App'x 345 (6th Cir. 2008); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009); *United States v. Grams*, 566 F.3d 683 (6th Cir. 2009); *United States v. Gapinksi*, 561 F.3d 467 (6th Cir. 2009); *United States v. Blackie*, 548 F.3d 395 (6th Cir. 2008); *United States v. Harris*, 339 Fed. App'x 533 (6th Cir. 2009); *United States v. Henry*, 545 F.3d 367 (6th Cir. 2008).

F. The Commission's account of Supreme Court and appellate decisions regarding "policy disagreements" is not accurate.

The Commission has accurately described the Supreme Court's decisions regarding "policy disagreements" elsewhere,[225] but paints a misleading picture of those decisions here. Without citing any decision, because there is none, the Commission states that "the Court has increasingly encouraged the lower courts to examine federal sentencing guidelines developed as a result of 'congressional directives,'" and that the "Court suggests this 'policy disagreement' analysis is appropriate because guidelines that result from congressional directive, particularly specific directives, 'do not exemplify the Commission's exercise of its characteristic institutional role.'"[226]

The Court has said no such thing. The point of these decisions is that a sentencing judge may vary from a guideline because the guideline itself, apart from case specific facts, fails to satisfy § 3553(a)'s objectives. *See Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *see also Rita v. United States*, 551 U.S. 338, 351, 357 (2007). The Court read the plain language of the statutes Congress enacted and concluded that Congress did not require the courts, or the Commission, to comply with the 100:1 powder to crack ratio except at the mandatory minimum penalty levels.[227] The Court also recognized that the Commission's "characteristic institutional role" was to "base its determinations on empirical data and national experience,"[228] just as the SRA says. The Court relied heavily on the Commission's own reports to conclude that the Commission had not acted in that role when it incorporated the 100:1 ratio into the guidelines. The Court held that when a sentencing court concludes that a guideline itself fails to achieve § 3553(a)'s purposes, that decision is subject to abuse-of-discretion review, and that the court's conclusion that the crack guideline failed to achieve those purposes was not an abuse of discretion.[229]

Senators Kennedy, Hatch and Feinstein specifically encouraged the Court to adopt this type of variance in an *amicus* brief they filed in *United States v. Claiborne*, a case later replaced by *Kimbrough*.[230] They said that the crack-powder disparity is "completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing."[231] They urged reversal of the variance in Claiborne's

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[225] *See* U.S. Sentencing Commission, Selected Supreme Court Cases on Sentencing Issues, at 10-11, 20-21 (July 2011), http://www.ussc.gov/Legal/Court_Decisions/Supreme_Court_Cases.pdf.

[226] Commission Testimony at 17.

[227] *Kimbrough*, 552 U.S. at 102-05.

[228] *Id*.

[229] *Id*. at 109-10; *see also Spears*, 129 S. Ct. at 843 (such a variance "is not suspect").

[230] *Claiborne* was dismissed as moot when Mario Claiborne died, and was replaced with *Kimbrough*.

[231] Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance at 30, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007.

case in part because the judge did *not* cite the crack-powder disparity, though defense counsel raised it.[232] They emphasized that "Congress intended the Commission to establish sentencing policies based on objective data and sound public policy, not prejudice or politics, and courts should respect that institutional role,"[233] but they recognized that "the guidelines do not always reflect objective data or good policy," as the Commission's own findings regarding the crack guidelines demonstrated.[234] The Senators urged the Court to require district courts to "articulate reasons for a sentence that not only are applicable to the particular facts before them, but that also cite or establish principles of general applicability."[235] Articulation of broader principles "promotes transparency," "facilitates the work of the Commission [in] refin[ing] the guidelines," and provides principles "that can be followed or distinguished by other district courts in other cases."[236]

The Commission also inaccurately describes the appellate case law. It states, for example, that the argument has been made "that a guideline is not an appropriate benchmark or starting point if the guideline is based on a congressional directive rather than on the Commission's review of empirical data or national experience," citing *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009), and that the Fifth Circuit held "that any lack of empirical basis underlying the illegal reentry guideline renders the sentence substantively unreasonable."[237] The guideline involved in that case was the illegal re-entry guideline, a guideline that is not based on a congressional directive. The defendant did not argue that the guideline should not be the starting point and initial benchmark, which would be contrary to clear Supreme Court law,[238] but that the circuit's presumption of reasonableness should not apply because the Commission added a 16-level enhancement to this guideline without any study or empirical basis.[239] In response, the Fifth Circuit said that "district courts certainly may disagree

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[232] *Id*. at 27-28.

[233] *Id*. at 4.

[234] *Id*. at 21.

[235] *Id*. at 23 & n.5 (disagreeing with *United States v. Pho,* 433 F.3d 53 (1st Cir. 2006)).

[236] *Id*. at 23.

[237] Commission Testimony at 17 & n.115.

[238] *See Kimbrough*, 552 U.S. at 109 ("district courts must treat the Guidelines as the 'starting point and the initial benchmark'"); *Gall*, 552 U.S. at 49 (same).

[239] *See* Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent'g Rep. 275 (1996) ("The Commission did no study to determine if such sentences were necessary--or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion."); U.S. Sent'g Comm'n, Minutes of Meeting (Apr. 2, 1991).

with the Guidelines for policy reasons and may adjust a sentence accordingly," but that it would "not second-guess" the district court's decision not to do so.[240]

The Commission further asserts that the courts of appeals "are divided on the question whether guidelines promulgated in response to a congressional directive are entitled to less deference than guidelines promulgated pursuant to the Commission's 'characteristic institutional role.'"[241] This is not correct. Every guideline, whether based on a congressional directive or not, must be calculated correctly and treated as the starting point and the initial benchmark. There is no circuit split over whether any guideline is due less "deference" if it is based on a congressional directive. There is one (and only one) circuit split, and it concerns whether judges may vary from the illegal re-entry guideline to correct the disparity created by the existence of fast-track programs in some jurisdictions, but not others,[242] a disparity identified by the Commission itself.[243] Like any other circuit split, this one will likely be resolved by the Supreme Court in due course.

[240] 564 F.3d at 367.

[241] Commission Testimony at 18.

[242] Six circuits permit such a variance. *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *see also United States v. Hernandez-Lopez*, 2009 WL 921121, *5 (10th Cir. Apr. 7, 2009) (noting without discussion district court's statement that it had previously granted variances based on the disparity between sentences in fast track and other districts). Three do not. *See United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008). Eleventh Circuit Judge Carnes concurred separately in the denial of rehearing in *Vega-Castillo* to say that the issue is "potentially meritorious," and that he may vote for reconsideration in a case "where there is no apparent reason why the defendant would not have been offered the benefits of an early disposition program if he had been in a district with that kind of program."

[243] USSC, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003).

APPENDIX: APPELLATE DECISIONS AFTER *GALL*

Sentences within the guideline range reversed as substantively unreasonable

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010)
United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009)
United States v. Paul, 561 F.3d 970 (9th Cir. 2009)
United States v. Wright, 426 Fed. App'x 412 (6th Cir. 2011)

Sentences within the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument

United States v. Tutty, 612 F.3d 128 (2d Cir. 2010)
United States v. Hernandez, 604 F.3d 48 (2d Cir. 2010)
United States v. Johnson, 273 Fed. App'x 95 (2d Cir. 2008)
United States v. Friedman, __ F.3d __, 2011 WL 4470674 (3d Cir. Sept. 28, 2011)
United States v. Byrd, 415 Fed. App'x 437 (3d Cir. 2011)
United States v. Carver, 347 Fed. App'x 830 (3d Cir. 2009)
United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008)
United States v. Medel-Moran, 422 Fed. App'x 262 (4th Cir. 2011)
United States v. Gonzalez-Villatoro, 417 Fed. App'x 297 (4th Cir. 2011)
United States v. Leech, 409 Fed. App'x 633 (4th Cir. 2011)
United States v. Taylor, 371 Fed. App'x 375 (4th Cir. 2010)
United States v. Walker, 403 Fed. App'x 803 (4th Cir. 2010)
United States v. Martinez-Martinez, 378 Fed. App'x 302 (4th Cir. 2010)
United States v. Jackson, 397 Fed. App'x 924 (4th Cir. 2010)
United States v. Hardee, 396 Fed. App'x 17 (4th Cir. 2010)
United States v. Ricketts, 395 Fed. App'x 69 (4th Cir. 2010)
United States v. Cornette, 396 Fed. App'x 8 (4th Cir. 2010)
United States v. Black, 389 Fed. App'x 256 (4th Cir. 2010)
United States v. Lynn, 592 F.3d 572, 581 (4th Cir. 2010)
United States v. Pacheco Mayen, 383 Fed. App'x 352 (4th Cir. 2010)
United States v. Clark, 383 Fed. App'x 310 (4th Cir. 2010)
United States v. Olislager, 383 Fed. App'x 314 (4th Cir. 2010)
United States v. Murphy, 380 Fed. App'x 344 (4th Cir. 2010)
United States v. Dury, 336 Fed. App'x 371 (4th Cir. 2009)
United States v. Shambry, 343 Fed. App'x 941 (4th Cir. 2009)
United States v. Harris, 337 Fed. App'x 371 (4th Cir. 2009)
United States v. Sanders, 340 Fed. App'x 162 (4th Cir. 2009)
United States v. Tisdale, 264 Fed. App'x 403 (5th Cir. 2008)
United States v. Davy, 2011 WL 2711045 (6th Cir. July 12, 2011)
United States v. Taylor, 648 F.3d 417 (6th Cir. 2011)
United States v. Pizzino, 419 Fed. App'x 579 (6th Cir. 2011)
United States v. Goff, 400 Fed App'x 1 (6th Cir. 2010)
United States v. Wallace, 597 F.3d 794 (6th Cir. 2010)

United States v. Rhodes, 410 Fed. App'x 856 (6th Cir. 2010)
United States v. Temple, 404 Fed. App'x 15 (6th Cir. 2010)
United States v. Pritchard, 392 Fed. App'x 433 (6th Cir. 2010)
United States v. Ross, 375 Fed. App'x 502 (6th Cir. 2010)
United States v. Fenderson, 354 Fed. App'x 236 (6th Cir. 2009)
United States v. Howell, 352 Fed. App'x 55 (6th Cir. 2009)
United States v. Delgadillo, 318 Fed. App'x 380 (6th Cir. 2009)
United States v. Robertson, 309 Fed. App'x 918 (6th Cir. 2009)
United States v. Recla, 560 F.3d 539 (6th Cir. 2009)
United States v. Penson, 526 F.3d 331 (6th Cir. 2008)
United States v. Stephens, 549 F.3d 459 (6th Cir. 2008)
United States v. Peters, 512 F.3d 787 (6th Cir. 2008)
United States v. Garcia-Oliveros, 639 F.3d 380 (7th Cir. 2011)
United States v. Johnson, 635 F.3d 983 (7th Cir. 2011)
United States v. Figueroa, 622 F.3d 739 (7th Cir. 2010)
United States v. Panice, 598 F.3d 426 (7th Cir. 2010)
United States v. Harris, 567 F.3d 846 (7th Cir. 2009)
United States v. Steward, 339 Fed. App'x 650 (7th Cir. 2009)
United States v. [Clinton] Williams, 553 F.3d 1073 (7th Cir. 2009)
United States v. Villegas-Miranda, 579 F.3d 798 (7th Cir. 2009)
United States v. Jackson, 546 F.3d 465 (7th Cir. 2008)
United States v. Skinner, 303 Fed. App'x 369 (7th Cir. 2008)
United States v. Mota, 2011 WL 2003433 (9th Cir. May 24, 2011)
Untied States v. Ferguson, 412 Fed. App'x 974 (9th Cir. 2011)
United States v. Waknine, 543 F.3d 546 (9th Cir. 2008)
United States v. Santillanes, 274 Fed. App'x 718 (10th Cir. 2008)
United States v. Cerno, 529 F.3d 926 (10th Cir. 2008)
United States v. Luster, 388 Fed. App'x 936 (11th Cir. 2010)
United States v. Narvaez, 285 Fed. App'x 720 (11th Cir. 2008)
United States v. Hall, 610 F.3d 727 (D.C. Cir. 2010)

Sentences outside the guideline range reversed as substantively unreasonable – Defendant's appeal

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008) (above)
United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009) (below)
United States v. Calderon-Minchola, 351 Fed. App'x 610 (3d Cir. 2009) (below)
United States v. Worex, 420 Fed. App'x 546 (6th Cir. 2011) (above)
United States v. Ortega-Rogel, 281 Fed. App'x 471 (6th Cir. 2008) (above)
United States v. Miller, 601 F.3d 734 (7th Cir. 2010) (above)
United States v. Lopez, 343 Fed. App'x 484 (11th Cir. 2009) (above)

Sentences outside the guideline range reversed as substantively unreasonable – Government's appeal (all below)

United States v. Cutler, 520 F.3d 136 (2d Cir. 2008)

United States v. Hayes, 383 Fed. App'x 204 (3d Cir. 2010)
United States v. Lychock, 578 F.3d 214 (3d Cir. 2009)
United States v. Engle, 592 F.3d 495 (4th Cir. 2010)
United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008)
United States v. Camiscione, 591 F.3d 823 (6th Cir. 2010)
United States v. Christman, 607 F.3d 1110 (6th Cir. 2010)
United States v. Harris, 339 Fed. App'x 533 (6th Cir. 2009)
United States v. Hunt, 521 F.3d 636, 650 (6th Cir. 2008)
United States v. Hughes, 283 Fed. App'x 345 (6th Cir. 2008)
United States v. [Davis] Omole, 523 F.3d 691 (7th Cir. 2008)
United States v. Kane, 639 F.3d 1121 (8th Cir. 2011)
United States v. Friedman, 554 F.3d 1301 (10th Cir. 2009)
United States v. Jayyousi [Padilla], __ F.3d ___, 2011 WL 4346322 (11th Cir. Sept. 19, 2011)
United States v. Irey, 612 F3d 1160 (11th Cir. 2010)
United States v. Livesay, 587 F.3d 1274 (11th Cir. 2009)
United States v. McVay, 294 Fed. App'x 488 (11th Cir. 2008)
United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008)

Sentences outside the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument –
Defendant's appeal

United States v. Persico, 293 Fed. App'x 24 (2d Cir. 2008) (above)
United States v. Brown, 2011 WL 2036345 (May 25, 2011) (below)
United States v. Brown, 595 F.3d 498 (3rd Cir. 2010) (below)
United States v. Brown, 578 F.3d 221 (3rd Cir. 2009) (above)
United States v. Grant, 323 Fed. App'x 189 (3d Cir. 2009) (above)
United States v. Swift, 357 Fed. App'x 489 (3d Cir. 2009) (below)
United States v. Strickland, 2010 WL 235080 (4th Cir. Jan. 21, 2010) (above)
United States v. Monroe, 396 Fed. App'x 33 (4th Cir. 2010) (above)
United States v. Cameron, 340 Fed. App'x 872 (4th Cir. 2009) (above)
United States v. Maynor, 310 Fed. App'x 595 (4th Cir. 2009) (above)
United States v. Dillon, 355 Fed. App'x 732 (4th Cir. 2009) (above)
United States v. Phillips, 415 Fed. App'x 557 (5th Cir. 2011) (above)
United States v. Aguilar-Rodriguez, 288 Fed. App'x 918 (5th Cir. 2008) (above)
United States v. Barahona-Montenegro, 565 F.3d 980 (6th Cir. 2009) (above)
United States v. Grams, 566 F.3d 683 (6th Cir. 2009) (above)
United States v. Gapinksi, 561 F.3d 467 (6th Cir. 2009) (below)
United States v. Blackie, 548 F.3d 395 (6th Cir. 2008) (above)
United States v. Hann, 407 Fed. App'x 953 (7th Cir. 2011) (above)
United States v. Kirkpatrick, 589 F.3d 414 (7th Cir. 2009) (above)
United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009) (above)
United States v. Azure, 536 F.3d 922, 932 (8th Cir. 2008) (above)
United States v. Oba, 317 Fed. App'x 698 (9th Cir. 2009) (above)
United States v. Medawar, 270 Fed. App'x 488 (9th Cir. 2008) (below)

United States v. Lente, 647 F.3d 1021 (10th Cir. 2011) (above)
United States v. Kirschner, 397 Fed. App'x 514 (11th Cir. 2010) (above)
United States v. Mattox, 402 Fed. App'x 507 (11th Cir. 2010) (above)
United States v. [Julio] Magana, 279 Fed. App'x 756 (11th Cir. 2008) (above)
United States v. Akhigbe, 642 F.3d 1078 (D.C. Cir. 2011) (above)
In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008) (above)

Sentences outside the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument –
Government's appeal (all below)

United States v. DeSilva, 613 F.3d 352 (2d Cir. 2010)
United States v. Negroni, 638 F.3d 434 (3d Cir. 2011)
United States v. Merced, 603 F.3d 203 (3d Cir. 2010)
United States v. Levinson, 543 F.3d 190 (3d Cir. 2008)
United States v. Moolenaar, 259 Fed. App'x 433 (3d Cir. 2007)
United States v. Morace, 594 F.3d 340 (4th Cir. 2010)
United States v. Gaskill, 318 Fed. App'x 251 (4th Cir. 2009)
United States v. Carter, 564 F.3d 325 (4th Cir. 2009)
United States v. Harris, 339 Fed. App'x 533 (6th Cir. 2009)
United States v. Henry, 545 F.3d 367 (6th Cir. 2008)
United States v. Brown, 610 F.3d 395 (7th Cir. 2010)
United States v. Kane, 552 F.3d 748 (8th Cir. 2009)
United States v. Shy, 538 F.3d 933 (8th Cir. 2008)
United States v. Bragg, 582 F.3d 965 (9th Cir. 2009)
United States v. Pena-Hermosillo, 522 F.3d 1108 (10th Cir. 2008)
United States v. Livesay¸ 525 F.3d 1081 (11th Cir. 2008)
United States v. Prather, 279 Fed. App'x 761 (11th Cir. 2008)