“View from the Defense Bar” Panel

Written Statement of

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Before the

United States Sentencing Commission

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APPENDICES

Chairman, the Honorable Judge Sessions, and Distinguished Commission Members:

INTRODUCTION

The man sits at counsel table. His hands are sweaty and his stomach turns somersaults. He doesn't know if the judge will give him the most time, or the least. He hopes his lawyer can explain "Why:" what brought him here and how it's not all that he is. He wonders if he will miss his daughter's next birthday or the next 5 birthdays as she becomes a young woman. He worries he will never see his elderly father alive again. And while it was hard enough getting work before, will anyone ever hire him now that he is a "felon?"

His lawyer told him the judge will start thinking about his sentence at the Guideline Range. A chart full of numbers representing him and his crime.

> But how individual is [a sentencing] if a 258 box grid seals your fate before you ever step foot in front of a judge . . .?[1]

She said it was just a starting place. So, let's start.

ALTERNATIVES TO INCARCERATION

Re-Entry Courts

President Obama has promoted drug and re-entry courts as a means of ultimately combating our nation's drug problems.[2]

About two years ago, a Committee - made up of representatives from the District of Arizona's Probation, U.S. Attorney and Federal Public Defender Offices - met to discuss the possible implementation of a post-sentence court to supervise drug abusers. The plans were initially stymied because only magistrate judges expressed an interest in the program. This caused a problem because one of the proven benefits of the federal Problem Solving Courts existing in the Districts of Oregon and Massachusetts is the ability to impose a penalty for a violation of supervision. Magistrates have no jurisdiction to impose punishment in felonies.

While alternatives were being explored, a few district judges became interested and the

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[1] President Josiah "Jed" Bartlett, *The West Wing: The Benign Prerogative*, Episode 99 (Season 5, Episode 11, 2004).

[2] CNN News, *White House Tries to Combat Drug Demand with Rehab* (4/18/09). http://www.cnn.com/2009/POLITICS/04/18/obama.drug.war/index.html

decision was made to expand the post-conviction court to be a "re-entry [into the community] court": to encompass drug and alcohol problems, mental illness, and other hurdles convicted persons might face. At the same time, Probation implemented a study to decide whether it should practice differing degrees of defendant supervision based upon conviction type - and individual history and needs of the defendant - rather than the intense, "one size fits all" supervision traditionally practiced.[3]

Consistent with the other federal problem solving courts, Arizona's re-entry court would be voluntary, provide immediate sanctions for misbehavior (from writing a report or attending sentencing hearings to community service hours or weekends in prison), and give time reductions in supervised release or probation supervision.

We hope talks about this sentencing alternative will renew soon. A defendant's willingness to participate in this supervision alternative is a factor we hope sentencing judges will consider.

Pretrial Problem Solving Court

While waiting for Probation to begin its "re-entry court," local Magistrate Charles M. Pyle started a pretrial problem solving court in January 2008.[4] Inspired by a talk about addiction at a magistrate conference, he felt the court might do more to assist released defendants with an unstable lifestyle. Whenever Magistrate Pyle handled an Initial Appearance or Detention hearing where release was ordered and the defendant had a reported history of substance abuse, he ordered monthly Status Conferences to monitor the defendant's progress while on release.

The Status Conferences run as follows:

- The defendant, his/her lawyer, his/her Pretrial Officer, and a Duty Assistant U.S. Attorney meet with a magistrate (magistrates rotate on a yearly basis). Occasionally the defendant's substance abuse counselor participates.

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[3] *See generally* Christopher T. Lowenkamp, Jennifer Pealer, Paula Smith, Edward J. Latessa, "Adhering to the Risk and Need Principles: Does It Matter for Supervision-Based Programs?," 70 Federal Probation (Dec. 2006), available at http://www.uscourts.gov/fedprob/December_2006/adhering.html. This follows along the same path as the differing levels of sex offender risks warranting differing levels of law enforcement notice and monitoring.

[4] This summary comes from my January 2010 interview with Magistrate Charles R. Pyle in his chambers. His Memorandum regarding the program is attached as Appendix 1.

- Meetings are the third Tuesday each month at 3:00 p.m to interfere as little as possible with employment.
- All defendants are present for all conferences.
- Meetings are more conversational than formal and ask for updates on the defendant's treatment, work, family, etc.
- A pretrial violation is dealt with, when possible, by adding electronic monitoring. Arrests on revocation are made away from the Courthouse and Status Conference.
- Upon completing 6 months, participants are given a Certificate of Completion by the District Court.
- Pretrial provides a summary of the defendant's participation if and when the defendant is sentenced.

The meetings serve the same purpose as other Problem Solving Courts:
- Abstention from drug and alcohol use through active substance abuse treatment and, if needed, mental health treatment.
- Understanding of addiction and recognition of patterns leading to relapse.
- Gaining life skills for independent living, education and employment.

Status Conferences are not adversarial, and instead have a therapeutic emphasis with an agreement that what would normally constitute a violation (with exceptions) will be handled informally. And the team approach - with a judge, a lawyer and a pretrial officer taking the time on a regular basis to see how a defendant is doing - gives important inspiration to people who may not have had positive reinforcement for a long while, if ever.

Despite its potential benefits, in 2009, of the 10 total referrals, only one came from Pretrial with the others made by 2 of our 7 magistrates. The U.S. Attorney has offered a sentencing benefit for successfully completing the Pretrial Problem Solving Court twice during the duration of the program. In those plea agreements, the defendant was promised additional level reductions at sentencing for successful graduation from the program.

As to Tucson's Pretrial Problem Solving Court, Magistrate Pyle reports that, during his run managing the Court:

- The highest number of participants he had at any time was 12 and 19 overall for the year he managed the Pretrial Drug Court.
- Of those 19, over half successfully finished the program.

Tucson's Pretrial program could benefit from greater U.S. Attorney participation and from consistent incentives for successful defendant participation. The Federal Defender community has recommended increased U.S. Attorney participation to Attorney

General Holder's representatives by a Memorandum dated August 19, 2009.

This Pretrial program might also benefit from:

- implementing graduated punishments *á la* the post-sentencing drug court model
  1. return to court and observe proceedings (especially sentencings or revocation admission) for half or full day ("sit sanction");
  2. provide explanation, orally or in writing, for noncompliant behavior (state failed condition, explain why it happened, suggest how to avoid in future);
  3. community service at site decided by Court after discussion with participant;
  4. curfew; and
  5. home confinement;
- increasing Status Conferences to twice monthly for the first few months, then taper off as a reward for successful participation; and
- having defendants sign a contract going beyond release conditions which conveys the more therapeutic aspects of Pretrial Problem Solving Court.

The Commission can also assist this effort by amending the guidelines to recommend downward departures and/or non-prison sentences for defendants who have participated in post-offense rehabilitation efforts. This would encourage more defendants to participate earlier in rehabilitation efforts, thereby reducing the likelihood of future crime whether or not they are lucky enough to have access to a pretrial court like Tucson's.

Post-Offense Rehabilitation

Post-offense rehabilitation was previously regarded as a factor taken into consideration within the acceptance of responsibility guideline, U.S.S.G. § 3E1.1. Pre-*Gall*, several circuits recognized extraordinary post-offense rehabilitation as a downward departure ground under U.S.S.G. § 5K2.0.[5]

After *Gall*, the court need no longer find the defendant's efforts be "out of the heartland" or extraordinary a difficult standard to meet under departure caselaw. to vary from the

[5] United States v. Bradstreet, 207 F.3d 76 (1st Cir.2000); United State v. Barton, 76 F.3d 499, 503 (2d Cir.1996); United States v. Sally, 116 F.3d 76, 80 (3rd Cir.1997) and United States v. Yeamen, 248 F.3d 223, 228 (3d Cir.2001); United States v. Brock, 108 F.3d 31, 34 (4th Cir.1997); United States v. Rudolph, 190 F.3d 720 (6th Cir.1999), *citing* Rhodes supra; United States v. Chapman, 356 F.3d 843, 849 (8th Cir.2004); United States v. Tzoc-Sierra, 387 F.3d 978, 981 (9th Cir.2004); United States v. Whitaker, 152 F.3d 1238, 1240 (10th Cir.1998); United States v. Stuart, 384 F.3d 1243, 1248 (11th Cir.2004); United States v. Rhodes, 145 F.3d 1375 (D.C.Cir.1998).

Guidelines.

> [A] Court of Appeals may not require sentences that deviate substantially from the Guidelines range to be justified by extraordinary circumstances.[6]

Post-offense rehabilitation has been recognized by courts to take the form of:

- a defendant admitting his wrongdoing to his family and friends,[7]
- therapy with an aunt and at a church,[8]
- treatment for addictions, mental illness therapy and medication, full-time employment and working overtime, paying child support and arrearage, and family contact,[9]
- post-conviction and while in custody earning a GED and an additional nine college credits,[10]
- defendant had, at his own request, entered a treatment program for his drug and alcohol addictions,[11] and
- defendant entered sex offender and chemical dependency treatment programs "voluntarily and before he was aware that federal charges would be filed against him."[12]

The Commission should recommend downward departure for post-offense rehabilitation.

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[6] Gall v. United States, 552 U.S. 38, 47 (2007), cited by Kimbrough v. United States, 552 U.S. 85, 115 (2007).

[7] Chapman, 356 F.3d at 846, citing United States v. DeShon, 183 F.3d 888, 889 (8th Cir.1999).

[8] United States v. Reilly, 178 F.3d 1288 (Table) (4th Cir.2004).

[9] United States v. McBroom, 991 F.Supp. 445, 450 (D.N.J. 1998).

[10] Sally, 116 F.3d at 77.

[11] United States v. Newton, 212 F.3d 423, 424 (8th Cir. 2000).

[12] United States v. Kapitzke, 130 F.3d 820, 823 (8th Cir.1997).

DEPARTURES, VARIANCES AND MITIGATION FACTORS

Defendants with Immigration Detainers

Undocumented immigrant defendants and foreign-born defendants who may have legal status in the United States but on whom Immigration and Customs Enforcement (ICE) has placed a detainer do time differently than other defendants.

1. Bureau of Prisons (BOP) Treats Inmates with ICE Detainers Differently

These are the many ways that prison time for an inmate with an ICE detainer differs from other inmates' sentences:

- Aliens with immigration detainers are not eligible for community confinement or halfway house placement before the end of their BOP sentences.[13] As a result, immigration offenders do not benefit from the early release provisions that apply to other inmates who participate in the Residential Drug Abuse Treatment Program (RDAP).[14]
- Such inmates are not required to attend and are low priority in enrolling in literacy and occupational education programs[15] or English as a Second Language programs.[16] Because of their inability to participate in these programs, they may

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[13] 28 C.F.R. § 550.55(b); BOP Program Statements 5331.02 *Early Release Procedures under 18 U.S.C. § 3621(e)*, p.3, §5(1) (3/19/2009) and 7310.04, *Community Corrections Center(CCC) Utilization and Transfer Procedures*, p.11, §(10)(b) (12/16/1998). http://www.bop.gov/policy/progstat/5331_002.pdf and http://www.bop.gov/policy/progstat/7310_004.pdf

[14] 28 C.F.R. § 550.55(b); BOP Program Statements 5331.02 *Early Release Procedures under 18 U.S.C. § 3621(e)*, p.3, §5(1) (3/19/2009) and 7310.04, *Community Corrections Center(CCC) Utilization and Transfer Procedures*, p.11, §(10)(b) (12/16/1998). http://www.bop.gov/policy/progstat/5331_002.pdf and http://www.bop.gov/policy/progstat/7310_004.pdf

[15] 28 C.F.R. §§ 544.51(b) and 544.71(a)(3); BOP Program Statement 5353.01, *Occupational Education Programs*, p.3, §7(b) (12/17/2003). http://www.bop.gov/policy/progstat/5353_001.pdf

[16] 28 C.F.R. §§ 523.20(d) and 544.41(a)(3); BOP Program Statement 5350.24, *English-as-a-Second Language Program (ESL)*, p.3, §5(a)(3) (7/24/1997). http://www.bop.gov/policy/progstat/5350_024.pdf This, however, will not affect the alien's ability to earn good time credits. 28 C.F.R. § 523.20(d).

not meet the literacy prerequisites for work in UNICOR above the most minimal grade.[17]

- The lower pay of alien inmates affects their ability to purchase from prison commissaries basic amenities not provided by the institution, including personal care items, shoes, and food items. It also lessens their opportunity to maintain telephone contact with family members because inmates must pay for phone calls through a phone credit account.[18]
- The alien inmates also do not get the $10 release gratuity.[19]

The disparate treatment given by the Bureau of Prisons to these sentenced aliens is not likely to provide them with the skills needed to improve their situations when they return to their native lands; it mostly just warehouses them. As this warehousing does not further 18 U.S.C. § 3553(a)(2)(D)'s goal of imposing a "sentence [which] must provide defendant with training," a departure or variance based on this fact is appropriate.[20]

2. Defendants with Immigration Detainers Serve Additional Prison Time upon BOP Release

Once their BOP sentence is complete, defendants with immigration detainers wait 2 to 5 days for ICE to pick them up and take them to an immigration prison.

> *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays

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[17] 28 C.F.R. § 544.74(a) and 345.35(a) precluding inmates with deportation, exclusion or removal orders from working except in the lower paying non-federal prison industry jobs.

[18] BOP Program Statement 5264.07, Telephone Regulations for Inmates (1/31/2002).

[19] BOP Program Statement 5873.06, *Release Gratuities, Transportation and Clothing*, p.5, §7(e) (8/6/2003). http://www.bop.gov/policy/progstat/5873_006.pdf

[20] *C.f.* United States v. Martinez-Ramos, 184 F.3d 1055, 1058-1059 (9th Cir.1999), though the court, looking at a perceived Guidelines mandate, never cited nor made reference to any legislative history, publication, transcript of hearing, or other proceeding demonstrating whether the Sentencing Commission considered the disparate treatment received by these defendants once imprisoned; United States v. Cubillos, 91 F.3d 1342, 1343 (9th Cir.1996).

in order to permit assumption of custody by the Department.[21]

These prisons are no different from any BOP or contract facility and are, in some ways, worse. How long defendants stay in these facilities awaiting their removal proceedings and ultimate removal from the United States depends upon:

- where the facility is and how far it is from the Border,
- how many immigrants it holds at any particular time,
- the proximity to the nearest Immigration Court, and
- whether the defendant is fighting removal.

Our clients report that they spend anywhere from a week to a month awaiting removal to their countries of origin. The time is longer if there are many immigrants whose removal hearings need to be scheduled at the nearest Immigration court. And when an immigrant fights removal - frequently *pro se* from a prison far from the family who can provide the information to show prejudice in removal and without representation[22] - the stay can be months or years.[23]

The immigrant's actual removal should occur within 90 days from when the removal order is "administratively final."[24] The time is longer the further from the Border the facility is, when scheduling actual departures is less frequent, and/or when the immigrant is an "inadmissible or criminal alien."[25]

In recent years, concerns have arisen over the lack of medical treatment for immigrants in ICE custody.[26] ICE itself identified 104 ICE custody immigrant deaths from October

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[21] 8 C.F.R. § 287.7(d).

[22] Sandra Hernandez, *Detained Immigrants Area Scattered* (Daily Journal Newswire Articles, 12/9/09), citing the Syracuse University-based Transactional Records Access Clearinghouse (TRAC) report *Huge Increase in Transfers of ICE Detainees*. http://trac.syr.edu/immigration/reports/220/

[23] 8 U.S.C. § 1229A and 1231(a)

[24] 8 U.S.C. § 1231(a).

[25] 8 U.S.C. § 1231(a)(1)(C)and (6).

[26] House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Hearing on Detention and Removal: Immigration Detainee Medical Care (10/04/2007); DHS Press Release, *Secretary Napolitano and Ice Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives*,

2003 to August 2009.[27] In a December 2009 Department of Homeland Security (DHS) - Office of the Inspector General report, a ten point Recommendation list was made to improve medical care for immigrants in ICE custody.[28]

3. Immigrant Juveniles Are Subject to Greater Delays Returning Home

In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[29] At Section 235, amending 8 U.S.C. § 1232, the Act implemented "SPECIAL RULES FOR CHILDREN FROM CONTIGUOUS COUNTRIES" to combat child trafficking at our Borders and Ports of Entry.[30] It requires Homeland Security to take custody of any "unaccompanied alien child" who is a citizen of either Canada or México to be sure the child:

(i) has not been a victim of a severe form of trafficking in persons,
(ii) is not at risk for being trafficked if returned home, and
(iii) does not fear being returned home.[31]

Most of our immigrant juvenile defendants are charged with drug importation or possession with intent to distribute from a port of entry or near the border arrest. A district court judge will impose a sentence which should be "time served" or a brief amount of time more, believing and intending the juvenile will spend but a brief time with Immigration before being returned home to México. Instead, ICE takes custody of the immigrant juvenile and moves him or her across and around the country to make a *Wilberforce Act* determination. Those juveniles we know of have spent up to 6 weeks in

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(10/7/09). http://judiciary.house.gov/hearings/hear_100407_2.html and http://www.ice.gov/pi/nr/0910/091006washington.htm.

[27] DHS Press Release, *ICE Identification of Previously Un-tracked Detainee Deaths Highlights Importance of Detention Reform* (8/17/09). http://www.ice.gov/pi/nr/0908/090817washington.htm *See also* Tom Barry, *A Death in Texas - Profits, poverty and immigration converge*, BOSTON REVIEW, p.7-15 (Nov/Dec 2009).

[28] *The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees*, OIG-10-23 (12/2009).

[29] Pub.Law 110-457, 122 Stat. 5075 (12/23/08).

[30] 8 U.S.C. § 1232(a)(2).

[31] 8 U.S.C. § 1232(a)(2)(A)(i) and (ii).

this ICE merry-go-round, *in communicado*, with parents who make panicked calls to our lawyers.

Because BOP consistently refuses to credit time spent in ICE custody, the Commission should encourage judges to take into account time spent in ICE detention before and after sentencing, and to take into account that non-citizens serve harder time in federal prison.[32]

VICTIMS

In the District of Arizona, victims' statutory rights are honored. Every Presentence Report (PSR) contains victim impact information (when applicable). Victims or their representatives are given the opportunity to allocute. Prosecutors and their Victim-Witness personnel are conscientious in representing the desires of victims who are not present or who prefer to not speak. Judges in Arizona have never failed to engage victims or their representatives and make special effort to explain the reason for imposing the sentence in light of either what they said, what was included in the PSR or what the Assistant U.S. Attorney represented on their behalf.

Professor Paul G. Cassell has urged this Commission to adopt several policy statements he claims are required to implement the Crime Victims Rights Act (CVRA):[33]

- Require/advise probation officers to seek out victims.
- Require/advise prosecutors to provide victims all portions of the PSR that are "relevant" to the defendant's sentence upon request.
- Allow victims to object to the PSR.
- Allow victims to present information regarding facts in dispute.
- Allow victims to argue guideline calculations and departures.

Yet none of these proposals are based on any language in the CVRA, and none are necessary to achieve the legitimate goals of our adversarial criminal justice system.

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[32] U.S.S.G. § 1B1.12.

[33] *See* Statement of Paul G. Cassell Before the U.S. Sentencing Commission at 8-20 (Denver, Oct. 20, 2009) (hereinafter "Cassell Statement"); USSC, Public Hearing, Transcript at 217-22, 235-39, 244-46, 252-53 (Denver, Oct. 20, 2009) (hereinafter "Denver Transcript").

The Role of Victims at Sentencing Has Been Carefully Defined By Congress, the Rules Committee, and the Courts.

Congress, the Rules Committee of the Judicial Conference and the courts have already rejected Professor Cassell's proposals. In fact, most of the proposals conflict with existing rules, statutes, constitutional provisions, and/or decisional law.

Under the CVRA, victims have the right to allocute at the sentencing hearing regarding the personal impact of the crime and to confer with the case's prosecutor without impairing prosecutorial discretion.

Under other rules and laws, the PSR must include information regarding victim impact and restitution. Victims can be called upon to provide information or testimony as percipient fact witnesses. Information provided by victims may be challenged the same as information from any other source. In this way, victims receive specific, limited statutory rights, defendants' paramount constitutional rights are protected, and the sentencing judge receives all the information needed to impose sentence.

> EXAMPLE: The *Brock* case.
> The judge decided the degree of the victim's injury based on the victim's trial testimony, photographs of the injuries, the medical records, written submissions from the victim and his lawyer, and the positions of the probation officer and the parties. The victim conferred with the prosecutor throughout the case, allocuted at sentencing, and possessed all sentencing memoranda.[34]

This is inadequate only if one rejects the adversary criminal justice system that the Framers created and that Congress preserved by enacting the CVRA rather than a victim rights constitutional amendment.[35] In Professor Cassell's view, victims should act

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[34] In re Brock, 262 Fed. Appx. 510, 512-13 (4th Cir. Jan. 31, 2008)

[35] The "CVRA strikes a different balance [than the failed constitutional amendment], and it is fair to assume that it does so to accommodate the concerns of those legislators [who opposed the amendment]." *See* United States v. Turner, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005). The fundamental objection to a Victim Rights Constitutional Amendment was it would replace the Framers-created two-party adversary system with a three-party system. In the proposed three-party system criminal defendants would face both a public prosecutor **and** a victim acting as private prosecutor with rights equal to or greater than the accused's.

Legislators opposing the constitutional amendment pointed out that the "colonies shifted to a system of public prosecutions because they viewed the system of private

as private prosecutors with rights to litigate the defendant's sentence and to obtain all information in the presentence report - the guideline calculations, offense conduct, and personal information of the defendant -"connected to sentencing issues."[36] In his view, because the Commission's current policy statement advises judges to follow the law, it is "inadequate."[37]

But, as this Commission knows, its role is not to say what the law means or to change its meaning.[38] The Commission's policy statements must comply with the Constitution and existing federal statutes.[39]

The Commission should not assert "jurisdiction" over these matters and decide them differently than the Rules Committee has done.[40] Congress delegated to the Supreme Court, acting on recommendations from the Judicial Conference, "the power to

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prosecutions as 'inefficient, elitist, and sometimes vindictive.'" *See* S. Rep. No. 108-191 at 68-69 (2003) (minority views).

> The Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice . . .. [W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy . . .. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority, . . . (or) to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.

Id. at 56, 69, and 70.

[36] *See* Denver Transcript at 241-246; Cassell Statement at 15, 2-18.

[37] Denver Transcript at 218; Cassell Statement at 7.

[38] "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). The Commission is "not a court and does not exercise judicial power." Mistretta v. United States, 488 U.S. 361, 384-85 (1989).

[39] *See, e.g.*, Stinson v. United States, 508 U.S. 36, 45 (1993).

[40] *See* Cassell Statement at 14.

prescribe general rules of practice and procedure."[41] "Such rules shall not abridge, enlarge or modify any substantive right."[42] Accordingly, the Rules Committee has rejected Professor Cassell's theory that "the general right to fairness [should be used] as a springboard for a variety of victim rights not otherwise provided for in the CVRA,"[43] and each of the proposals he now asks the Commission to adopt. The Committee

> concluded that the rules should incorporate, not go beyond, the specific statutory provisions. The CVRA reflects a careful Congressional balance between the rights of defendants, the discretion afforded to prosecution, and the new rights afforded to victims. In light of this careful statutory balance . . . it would not be appropriate to create new victim rights not based upon the statute. Rather, [the Committee] sought to incorporate the rights Congress did afford into the rules.[44]

The Supreme Court approved the amended rules; Congress enacted them. "All laws in conflict with such rules shall be of no further force or effect."[45]

Proposal Regarding Presentence Report Preparation.

The Commission should not adopt a policy statement requiring probation officers to determine whether any victim wishes to provide information. The Rules Committee rejected this proposal: there is no need for mandatory language telling probation officers they must gather information.[46] The PSR already must include "information that assesses any financial, social, psychological, and medical impact on any victim," as well as "information sufficient for a restitution order . . . when the law provides for

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[41] 28 U.S.C. §§ 331 and 2072(a).

[42] 28 U.S.C. § 2072(a) and (b).

[43] *See* Memorandum to Criminal Rules Advisory Committee from Professor Sara Sun Beale at 1 (Sept. 19, 2005) (hereinafter "Beale Memo"), included in http://www.uscourts.gov/rules/Agenda%20Books/Criminal/CR2005-10.pdf.

[44] Id. at 1-2. *See also Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure* at 4 (May 19, 2007) (revised July 2007) (same), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

[45] 18 U.S.C. § 2072(b).

[46] Beale Memo at 18.

restitution."[47] Prosecutors and probation officers are also statutorily required to gather victim information regarding restitution.[48] The Cassell proposal intends to go further, requiring "the probation officer to affirmatively seek out the victim."[49] As probation officers have testified, such a requirement (or, more accurately, such advice, if followed) would intrude on victims who wish to have no involvement, and would create undue burden and expense.[50]

Proposals to Give Victims the Right to Litigate the Sentence and to Obtain All Information in the PSR Relevant to the Sentence.

Professor Cassell urges the Commission to issue policy statements to give victims:

(1) the right to obtain from the prosecutor upon demand the "relevant contents" of the presentence report, which includes the guideline calculation, the offense conduct, and any personal information about the defendant that is "connected to sentencing issues;"[51]
(2) the right to object to the presentence report;[52]
(3) the right to present information regarding any fact in dispute;[53] and
(4) the right to file prehearing submissions, including arguments for departure.[54]

These proposals are all premised on the incorrect notion that the CVRA has made victims "the functional equivalent of parties," with rights to be "heard on disputed

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[47] Fed.R.Crim.P. 32(d)(2)(B), (D). This rule was recently amended, responding to Professor Cassell's requests, to (1) remove the requirement that information regarding victims be "verified" and stated "in a nonargumentative style," and (2) require a report with restitution information whenever restitution is "permitted," rather than only when "required."

[48] *See* 18 U.S.C. § 3664(a), (d)(1), (d)(2).

[49] Cassell Statement at 9.

[50] Denver Transcript at 132-137.

[51] *See* Cassell Statement at 9, 13, 15; Denver Transcript at 241-44.

[52] *See* Cassell Statement at 9-10.

[53] *Id*. at 17-18.

[54] *Id*. at 18.

guideline issues," to "make sentence recommendations," and to "due process" of law.[55] None of this is in the CVRA's language. The statute's language, enacted by a congressional majority, controls[56] and cannot be amended by floor statements of individual legislators.[57]

1. The right to be "reasonably heard" at a public sentencing hearing is a right of allocution.

The CVRA provides a right "to be reasonably heard at any public proceeding in the district court involving . . . sentencing."[58] This is not a right to discovery nor to present evidence or legal arguments, but a "right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed," *i.e.*, to "speak" in "open

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[55] *See* Cassell Statement at 4, 5, 6, 15.

[56] *See* Crandon v. United States, 494 U.S. 152, 160 (1997); Whitfield v. United States, 543 U.S. 209, 215 (2005); Department of Housing and Urban Development v. Rucker, 535 U.S. 125, 130-36 (2002); United States v. Gonzales, 520 U.S. 1, 6 (1997); Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

[57] "Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute." *See* Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 457 (2002). Such statements may "open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." Regan v. Wald, 468 U.S. 222, 237 (1984).

> [T]he statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The **only** reliable indication of **that** intent-the only thing we know for sure can be attributed to **all** of them-is the words of the bill that they voted to make law.

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) (emphasis in original). *See also* Appendix 2: Barack Obama, *The Audacity of Hope*, Chap.1 (Random House 2006), concerning the phenomenon of congressional members ordinarily addressing a virtually empty floor. Interpreting the CVRA based on one Senator's floor statements bypasses the constitutional requirements for enactment, bicameralism and presentment. U.S. CONST. art. I, § *7*; INS v. Chadha, 462 U.S. 919, 945 (1983).

[58] 18 U.S.C. § 3771(a)(4).

court" about the "effects of a crime," "victims' feelings," "broken families and lost jobs," and "to look this defendant in the eye and let him know the suffering his misconduct has caused."[59]

The Rules Committee recently amended Rule 32(i)(4)(B) to provide a right of allocution:

> Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

The rule was "amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right 'to be reasonably heard' in judicial proceedings regarding sentencing."[60] The amended rule directs the sentencing judge to permit any victim present in the courtroom at sentencing a chance to speak. "Absent unusual circumstances, any victim present should be allowed a reasonable opportunity to speak directly to the judge."[61]

2. The right to be "reasonably heard" at a public sentencing hearing is not a right to obtain the presentence report, to object to the presentence report, to introduce evidence on objections to presentence reports, to litigate guideline issues, or to make sentencing recommendations.

The Rules Committee rejected Professor Cassell's proposal to amend Rule 32 to permit victims to raise objections to the presentence report because it "goes beyond the statutory right . . . to be 'reasonably heard."[62] For the same reason, it rejected his proposal to amend Rule 32:

- to provide notice of a departure ground identified by the victim,[63] and
- to allow victims to "comment on the probation officer's determinations, and to

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[59] Kenna v. United States District Court, 435 F.3d 1011, 1014 n.2, 1015-17 (9th Cir.2006).

[60] Fed.R.Crim.P. 32, 2008 Advisory Committee Note. *See also* 18 U.S.C. § 3771(a)(4).

[61] Fed.R.Crim.P. 32, 2008 Advisory Committee Note.

[62] Beale Memo at 18.

[63] Id. at 18-19.

introduce evidence on objections to the presentence report."[64]

The Committee felt that it was best left to the courts to determine "when the right to be heard would include the right to introduce evidence," and found it "was by no means clear that the CVRA contemplates that victims will be entitled to access all of the particulars of the presentence report and be entitled to litigate issues concerning the application of various guidelines, etc."[65]

The courts, who decide what the law means, have determined that victims are **not** parties, do **not** have a right to due process of law, and do **not** have rights to litigate defendants' sentences or to obtain presentence reports. Victims may provide factual information as provided by existing rules, not as a right under the CVRA.[66]

a. Victims are not parties.

Victims "are not accorded formal party status, nor are they even accorded intervenor status as in a civil action."[67] "[T]he government and defendant [are] the only true parties."[68]

b. Victims do not have the right to litigate a defendant's sentence.

The courts have rejected a victim's claimed right to litigate guidelines as basis for disclosure of PSR,[69] or to appeal a defendant's sentence.[70] Further, the CVRA provides

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[64] Id.

[65] Id. at 19.

[66] *See* Part C, *infra*.

[67] United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008).

[68] Id. at 428. *See also* United States v. Wright, 603 F.Supp.2d 506, 509 (E.D.N.Y. 2009) ("the victim of a crime is not a 'party' in the criminal prosecution").

[69] *See* In re Kenna, 453 F.3d 1136 (9th Cir.2006) (*Kenna II*) (affirming district court's rejection of victim's claimed right to litigate guidelines as basis for disclosure of PSR); Kenna v. United States District Court, 435 F.3d 1011, 1014 & n.2 (9th Cir.2006) (*Kenna I*) (distinguishing allocution from presentation of facts and argument).

[70] United States v. Hunter, 548 F.3d 1308, 1311-12 (10th Cir.2008).

victims no right to present argument regarding, or to appeal, guideline calculations.[71]

c. Victims do not have a right to make a sentencing recommendation.

Counsel for the victim in *Kenna II* made the same argument Professor Cassell makes here – that the victim had a right to the PSR so he could exercise his right to make a "sentencing recommendation."[72] The Ninth Circuit found no support for this claim "in either the language of the statute or the legislative history."[73]

d. Victims do not have a right to due process of law.

Professor Cassell contends that the statutory right "to be treated with fairness . . . gives victims a free-standing right to due process," making them full-fledged litigants of the defendant's sentence.[74] This theory flies in the face of the fact that Congress enacted a statute, **not** a victim rights constitutional amendment. In April 2004, Senator Jon Kyl argued for a crime victims' constitutional amendment because, he said, crime victims "have **no** constitutional rights in the criminal justice process."[75] The CVRA was enacted in October 2004 after such a constitutional amendment failed. A right to due process is not found in the CVRA, and cannot be added by a floor statement.[76]

Only defendants have a right to due process at sentencing. The Due Process Clause provides that no person may be deprived through official action of life, liberty or property without due process of law. The defendant, of course, has a right to due process of law in his own sentencing because his life, liberty **and** property are at stake. Victims possess no constitutionally-protected interest in decisions regarding a defendant's

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[71] In re Brock, 262 Fed. Appx. 510, 512-13 (4th Cir. Jan. 31, 2008).

[72] Like Professor Cassell, they relied on a floor statement by Senator Jon Kyl.

[73] Kenna, 453 F.3d at 1136. *See also* United States v. Hughes, slip op., 2008 WL 2604249 at *7 n.7 (6th Cir.2008) (questioning "why the particular desires of this victim should affect the legal analysis necessary for sentencing" in light of the absence of any such right in 18 U.S.C. § 3771).

[74] Cassell Statement at 6.

[75] *See* Crime Victims' Rights Amendment: The Need for Constitutional Protection at 2, April 7, 2004 (emphasis in original), available at http://rpc.senate.gov/_files/Apr0704VictimsSD.pdf.

[76] *See* footnote 57 and 58, *supra*.

sentence.

This argument was made and rejected in *Kenna II*, and was also rejected by the Rules Committee:

> The committee carefully reviewed proposals that would have amended a large number of individual rules to provide rights not expressly stated in the Act, based on the crime victims' general right to be treated with fairness and with respect. The advisory committee concluded that such proposals would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act.[77]

e. Victims do not have a right to obtain the presentence report or any information in it.

This Commission should reject Professor Cassell's proposal for a policy statement asserting that "[t]he attorney for the government shall, if any victim requests, communicate the relevant contents of the pre-sentence report to the victim."[78]

As Professor Cassell explained, "relevant contents" would include the guideline calculation as a "starting point," the offense conduct unless "somebody make[s] a motion if there's a problem,"[79] and all "personal information about the defendant [that is] directly connected to sentencing issues."[80]

This proposal envisions a private prosecution model in which victims have rights to "argue sentencing issues," to make "sentencing recommendations," and to "due process" of law.[81] As shown above, these are not found in the CVRA and the Rules Committee and all courts to address the issue have rejected them. The proposal also fails to appreciate that a PSR is kept confidential to protect the defendant's privacy interests, the confidentiality of all other sources of information (including the victim's)

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[77] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

[78] Denver Transcript at 243-44.

[79] Id.

[80] Cassell Statement at 15.

[81] Cassell Statement at 6, 11-12, 15.

and the court's ability to obtain the information necessary for sentencing.

By statute and rule, the PSR is disclosed **only** to the parties.[82] In addition, many districts and circuits have local rules requiring the PSR to be sealed and prohibiting disclosure to third parties. The restitution amount for a particular victim is disclosed only to that victim.[83] Otherwise, "the privacy of any records filed, or testimony heard, pursuant to this [restitution] section," including the defendant's financial information and information submitted by other victims, "shall be maintained to the greatest extent possible."[84]

The Rules Committee rejected Professor Cassell's proposal to amend Rule 32 "to require the prosecutor to disclose all relevant portions of the presentence report to any victim who wishes to receive this information," both because the CVRA does not provide such a right and because

> presentence reports are typically treated as confidential, because they include a great deal of personal information about the defendant (and may include other confidential information about third parties).[85]

According to Professor Cassell, the Rules Committee's concern about disclosing a defendant's personal information is of no moment because the defendant has supposedly "forfeited" his privacy by committing a crime.[86] However, the Supreme Court and the courts of appeals have established a strong presumption of confidentiality in the PSR with respect to third parties, including victims and other defendants. The presumption is based on:

1. the need to protect the privacy and confidentiality of **the defendant**, the subject of the report,
2. the need to protect the confidentiality of all other information sources in the report, including the defendant's family members, treatment providers, witnesses, and other victims, and
3. the need to ensure the court's continued ability to obtain all necessary

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[82] *See* 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b); Fed.R.Crim.P. 32(e)(2).

[83] 18 U.S.C. § 3664(d)(2)(A)(ii).

[84] 18 U.S.C. § 3664(d)(4).

[85] Beale Memo at 18, 19.

[86] *See* Cassell Statement at 15-16.

information.[87]

The information in the PSR comes from:

- the defendant,
- the defendant's family, employers and friends,
- medical, psychiatric and social services providers (subject to HIPPA and other confidentiality laws);
- cooperating witnesses and other witnesses,
- grand jury minutes,
- law enforcement agencies, and
- other victims of the offense.

If the report were disclosed to victims, important information would not be provided by these individuals and entities.

To overcome the presumption of confidentiality, a third party must establish a compelling need for particular information in the report such that disclosure is necessary to meet the ends of justice. Before the CVRA, a solid wall of authority held that no third party had met that test.[88] The defendant's right of access to the PSR, which is based on

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[87] *See, e.g.,* United States Dept. of Justice v. Julian, 486 U.S. 1, 12-13 (1988) (rule prohibiting disclosure except to defendant, prosecutor and court is to protect the defendant and others from harm and prevent chilling effect); United States v. Trevino, 89 F.3d 187, 191 (4th Cir.1996) ("disclosure of confidential PSR information may compromise the defendant's privacy interest in that material"); United States v. Huckaby, 43 F.3d 135, 136 (5th Cir.1995) (report is "kept confidential to protect the sentencing process, the defendant's privacy interest, and those people who have cooperated with criminal investigations"); United States v. Corbitt, 879 F.2d 224, 229-30 (7th Cir.1989) ("The criminal defendant has a strong interest in maintaining the confidentiality of his or her presentence report. Sentencing proceedings, and particularly the presentence investigation, often involve a broad-ranging inquiry into a defendant's private life, not limited by traditional rules of evidence. . . . [P]ublication of the contents of a presentence report would tend to discourage full disclosure to the sentencing judge."); United States v. Ingrassia, 2005 WL 2875220 *17 (E.D.N.Y. Sept. 7, 2005) (declining to disclose report in light of "privacy interests of defendants and possibly victims as well").

[88] *See* United States v. Trevino, 89 F.3d 187, 192 (4th Cir.1996); United States v. Huckaby, 43 F.3d 135 (5th Cir.1995); United States v. Anzalone, 886 F.2d 229 (9th Cir. 1989); United States v. Corbitt, 879 F.2d 224, 229-30 (7th Cir.1989); United States v. McKnight, 771 F.2d 388 (8th Cir.1985); United States v. Anderson, 724 F.2d 596 (7th Cir.1984); United States v. Charmer Industries, Inc., 711 F.2d 1164 (2d Cir.1983);

the defendant's right to due process of law, provides no basis for disclosing it to anyone else.[89] After the CVRA, the courts have uniformly held that the CVRA gives victims no right to the PSR and that victims have failed to meet the compelling need test.[90]

The CVRA does provide victims a "reasonable right to confer with" the prosecutor.[91]

United States v. Martinello, 556 F.2d 1215 (5th Cir.1977); United States v. Cyphers, 553 F.2d 1064 (7th Cir.1977); United States v. Dingle, 546 F.2d 1378 (10th Cir.1976); United States v. Figurski, 545 F.2d 389 (4th Cir.1976); United States v. Walker, 491 F.2d 236 (9th Cir.1974); United States v. Greathouse, 484 F.2d 805 (7th Cir.1973); United States v. Evans, 454 F.2d 813 (8th Cir.1972); United States v. Boesky, 674 F.Supp. 1128 (S.D.N.Y. 1987); United States v. Krause, 78 F.R.D. 203 (E.D. Wis. 1978); Hancock Bros. v. Jones, 293 F. Supp. 1229 (N.D. Cal. 1968).

[89] *See* United States Dept. of Justice v. Julian, 486 U.S. 1, 9-10, 12 (1988); Corbitt, 879 F.2d at 229, 235-36; Charmer Industries, 711 F.2d at 1171-72; Hancock Bros., 293 F. Supp. at 1234.

[90] *See* In re Siler, 571 F.3d 604, 609, 611 (6th Cir. 2009) ("the CVRA does not provide an independent right to obtain PSRs" and district court "did not abuse its discretion in finding that there was not the required 'special need' for the release of these nonpublic documents"); In re Brock, slip op., 2008 WL 268923 (4th Cir. Jan. 31, 2008) (Brock "did not need access to the PSR to describe the crime's impact on him"); In re Kenna, 453 F.3d 1136 (9th Cir. 2006) (finding no "support for Kenna's argument in either the language of the statute or the legislative history," and "Kenna has not demonstrated that his reasons for requesting the PSR outweigh the confidentiality of the report under the traditional 'ends of justice' test."); United States v. Coxton, 598 F. Supp. 2d 737 (W.D.N.C. 2009) ("nothing in the CVRA or its legislative history requires the disclosure of the PSR" and victims do not need the PSR to exercise "their rights to be reasonably heard [or] to full and timely restitution"); United States v. BP Products, 2008 WL 501321 *9 (S.D. Tex. Feb. 21, 2008) ("Courts have not required victim access to PSRs under the CVRA."); United States v. Citgo Petroleum Corp., 2007 WL 2274393 *2 (S.D. Tex. Aug. 8, 2007) ("the Act does not require the disclosure of presentence investigation reports or other documents of a similar nature"); United States v. Sacane, 2007 WL 951666 *1 (D. Conn. Mar. 28, 2007) (the CVRA does not provide victims a right to the defendant's financial information and providing such information would violate 18 U.S.C. § 3664(d)(4)); United States v. Ingrassia, 2005 WL 2875220 *16-17 (E.D.N.Y. 2005) ("The statute no more requires disclosure of the pre-sentence report to meet its remedial goal of giving crime victims a voice in sentencing than it does disclosure of all discovery in a criminal case to promote the goal of giving victims a voice at plea proceedings.").

[91] 18 U.S.C. § 3771(a)(5).

Prosecutors may provide information to victims in their discretion and if permitted by law.[92]

The Rules Committee determined that "the prosecutor should remain the victim's source of information regarding the sentencing process and the contents of the presentence report," and "should have discretion to determine what information from the presentence report should be imparted to the victim," with any disputes to be resolved by the courts.[93] The CVRA does not give victims the right to dictate what information a prosecutor must disclose.[94] The prosecutor must, of course, abide by applicable laws, rules and caselaw limiting disclosure. Victims have access to all information that is in the public record.

Existing Laws and Rules Provide Courts with All the Information Needed for Sentencing, While Protecting Defendants' Constitutional Rights.

Professor Cassell suggests that judges cannot determine the seriousness of the offense or the restitution amount unless PSRs are disclosed to victims and victims are permitted to act as litigants.[95] The court, however, receives all necessary information in the PSR and in the parties' submissions, including information the probation officer and prosecutor obtain from victims.[96] In addition, victims often provide written impact statements and they have a right to allocute at the sentencing hearing.[97] Victims may also be called as witnesses to give factual testimony. This, however, is not the victim's right, but the right of a party to call witnesses and the authority of the court to hear and

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[92] "To the extent victims might wish to *obtain* information on which to base their input [at sentencing], the contemplated mechanism for doing so was conferral with the prosecutor rather than the implicit creation of an affirmative disclosure right." Ingrassia, at *17 n.11 (emphasis in original).

[93] Beale Memo at 18.

[94] "Nothing in [the CVRA] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

[95] Cassell Statement at 14.

[96] *See* Fed.R.Crim.P. 32(c)(1)(B), (d)(2)(B); 18 U.S.C. § 3664(a), (d)(1)-(5), (e).

[97] Fed.R.Crim.P. 32(i)(4)(B).

regulate the presentation of evidence.[98]

When a victim provides information that may affect the sentence, whether through the PSR, a written impact statement, allocution, or testimony, the defendant has a constitutional due process right to notice and an opportunity to challenge the information, including through confrontation and cross-examination.[99] These rights are protected through various provisions of Rule 32 and Rule 26.2.[100] These protections apply to information or testimony provided by victims, just like information or testimony provided by any other witness.[101]

Professor Cassell suggests his proposed policy statements are somehow necessary to

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[98] *See* United States v. Campbell, 309 Fed. Appx. 490 (2d Cir. Feb. 13, 2009) (defendant's wife's testimony regarding supervised release violation was not based on the CVRA but on court's authority to hear relevant evidence at sentencing); Kenna, 435 F.3d at 1014 n.2 (distinguishing victim's "right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed," from a "right to present evidence or testify under oath").

[99] *See* Coy v. Iowa, 487 U.S. 1012 (1988) (confrontation); Crawford v. Washington, 541 U.S. 36 (2004) (cross-examination); Rita v. United States, 127 S. Ct. 2456, 2465 (2007) (adversarial testing); Burns v. United States, 501 U.S. 129, 137-38 (1991) (notice and opportunity to challenge); United States v. Tucker, 404 U.S. 443, 447 (1972) (defendant may not be sentenced based on "materially untrue" assumptions); Townsend v. Burke, 334 U.S. 736, 741 (1948) (defendant has due process right not to be sentenced based upon materially false information).

[100] The rules provide the defendant: (1) notice via the PSR; (2) opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; (3) opportunity to file a sentencing memorandum and argue orally to the court; (4) opportunity for a hearing; (5) the right to obtain witness statements, to have witnesses placed under oath and to question witnesses at any such hearing; and (6) the right to have the court resolve any disputed matter. *See* Rule 32(e)(2), (f), (g), (h), (i); Fed.R.Crim.P. 26.2(a)-(d), (f).

[101] *See* United States v. Rakes, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007) (defendant had a right to receive and comment upon victim's letter); United States v. Endsley, slip op., 2009 WL 385864 *2 & n.1 (D. Kan. Feb. 17, 2009) (defendant had a right to "refute by argument and relevant information any matter offered for the court's consideration," including "victim impact statement" alleging that defendant's conduct had "life-altering implications"). *See also* United States v. Campbell, 309 Fed. Appx. 490 (2d Cir. Feb. 13, 2009) (defendant had a right to notice and opportunity to prepare a response to victim-witness testimony, but he withdrew his objection).

provide fair notice to the defense in light of Irizarry v. United States, 128 S. Ct. 2198 (2008). However, *Irizarry* and other recent Supreme Court decisions require that:

- the parties receive advance notice of all information relevant to sentencing,
- the parties have the opportunity to challenge all such information, and
- continuances be requested and granted if any information comes as a surprise.[102]

***Brock* Confirms that the Proposals Are Unnecessary.**

Professor Cassell contends that "the need for change" reflected in his proposals is demonstrated by a case where an assault victim was not permitted to be heard regarding his injuries. Yet Mr. Brock **was** heard regarding his injuries in every way possible under the law. He was not, however, given the PSR or allowed to make arguments regarding guideline calculations, which, as explained above, the law does not require or allow.

The *Brock* Case:
United States v. Gregory and John Bermudez, No. 06-1035-WMN.

In a workplace dispute at the Postal Service, defendants, John and Gregory Bermudez, assaulted Wayne Brock. Mr. Brock was represented by counsel, Russell P. Butler, Maryland Crime Victims' Resource Center, Inc., since a few weeks after John and Gregory Bermudez were indicted, throughout the filing of extensive pretrial motions, Gregory Bermudez's guilty plea, John Bermudez' trial, and the sentencing of both, all before the same judge. Mr. Brock testified at John's trial, offering his account of the assault and surrounding events, describing his injuries and treatment, and identifying the medical records and photographs of his injuries. (Reporter's Transcript [RT] Trial 8/1/2007, p.55-67 (describing injuries with records and photographs). This transcript of Brock's trial testimony, as well as portions of the sentencing hearing transcript are attached to In re Brock, #08-1086, Docket 11: Petition for Writ of Mandamus, available through PACER at https://ecf.ca4.uscourts.gov/cmecf/servlet/TransportRoom.)

Mr. Brock and his lawyer conferred with prosecutors throughout the cases.

[102] Irizarry, 128 S. Ct. at 2203-04 & n.2. *See also* Rita v. United States, 127 S. Ct. 2456, 2465 (2007) (district court subjects "the defendant's sentence to thorough adversarial testing contemplated by federal sentencing procedure"); Gall v. United States, 128 S. Ct. 586, 597 (2007) (basing sentence on clearly erroneous facts would be "procedural error").

The government provided a description and photographs of Mr. Brock's injuries to Probation. This information was included in the PSR, along with the government's position that the degree of Mr. Brock's injuries was not "serious bodily injury," but between "bodily injury" and "serious bodily injury," and, thus, should result in a 4-level enhancement under § 2A2.2(b)(3)(D). The defendants argued, and Probation agreed, a 3-level enhancement for "bodily injury" under § 2A2.2(b)(3)(A) was appropriate. (RT Sentencing 1/17/2008, p.89. *See also* Dkt 107: Defendant Gregory Bermudez's Sentencing Memo at 21 (1/10/2008) https://ecf.mdd.uscourts.gov/cgi-bin/iquery.pl?caseNumber=1:06-cr-00135-WMN)

At Mr. Brock's request, the two cases, which had been scheduled for separate sentencing hearings, were consolidated for sentencing. Gregory filed his sentencing memorandum one week before sentencing; John submitted a sentencing letter four days before sentencing; copies were provided to the government. The government filed its sentencing memorandum two days before sentencing. Each of these documents contained comprehensive discussion of the guideline calculations as well as the offense facts and described Mr. Brock's injuries and treatment. In addition, John attached the medical records, which had been introduced at trial and previously provided to Probation.

One day before sentencing, Mr. Brock's counsel filed a motion for disclosure to obtain four sections of the PSR: "(1) the background/statement of facts section; (2) the restitution section, including any discussion of his losses and the defendants' ability to pay; (3) the sentencing guidelines calculation section; and (4) the upward departure section." He also filed an "impact statement," and a "restitution affidavit" setting forth a claim for restitution without supporting documentation.

The government provided Mr. Brock and Mr. Butler with its sentencing memorandum when it was filed, but did not immediately provide the defendants' submissions, having mistakenly believed they were under seal when in fact they were in the public record. Mr. Butler was given all the documents at the sentencing hearing. The government indicated the motion for disclosure may therefore be "moot," and Mr. Butler agreed "there may not be a necessity to look at the Presentence Report." Judge William M. Nickerson, the trial and sentencing judge, denied the motion for disclosure based on United States v. Trevino, 89 F.3d 187 (4th Cir.1996), which requires a compelling showing of need before any portion of a PSR may be disclosed. (RT Sentencing 1/17/08, p.2-11.)

The parties assumed the aggravated assault guideline, § 2A2.2, was the applicable guideline. Judge Nickerson found this was incorrect, based on Application Note 1 defining "aggravated assault" as involving a dangerous weapon or intent to commit another felony (neither of which was involved), or "serious bodily injury" as defined in § 1B1.1, comment. n.1. He determined, after considering the medical records, Mr. Brock's trial testimony, photographs of his injuries, and Mr. Brock's written impact and restitution submissions, that Mr. Brock's injuries did not amount to "serious bodily injury." (RT Sentencing 1/17/08, p.75-78, 81-82, 90, 96-99. Mr. Brock's PTSD was not caused by the assault, but was a pre-existing condition. Id. at 84-85.) Judge Nickerson also heard oral presentations from Mr. Brock **and** Mr. Butler regarding the assault and its impact, including Mr. Brock's injuries. (RT Sentencing 1/17/08, p.87, 160-63.) He declined to hear argument from Mr. Butler on the guideline calculation. (RT Sentencing 1/17/08, p.86-88.)

Judge Nickerson applied § 2A2.3, added 2 points for bodily injury and 2 points for obstructive conduct (based on Gregory having filed charges against Brock and John having testified at trial), subtracted 2 points for acceptance for Gregory, and sentenced both defendants within the guideline range: John to 10 months and Gregory to 8 months. Numerous factors in addition to the guideline calculations were at issue in these cases. As the prosecutor noted, the degree of injury was not really the driving factor. The judge stated the guidelines were only one factor in his sentencing decisions and, if the applicable guideline was § 2A2.2, he would have varied and still imposed the same sentences. (RT Sentencing 1/17/08, p.163-173, 178-79.) Judge Nickerson later ordered $8400 in restitution, an amount the defendants disputed.

Mr. Brock then filed a petition for mandamus, claiming he was denied rights under the CVRA (a) to the PSR portions he had requested and (b) to argue guideline calculations. (In re Brock, #08-1086, Docket 11: Petition for Writ of Mandamus)

The Fourth Circuit correctly found that the CVRA provides no such rights, and that to provide them to Mr. Brock would have violated various rules, laws, and decisions. While recognizing the CVRA provides a right to make an impact statement, it specifically held there is no right to argue guideline calculations, and, under a local rule, the PSR is a "confidential internal court document" only to be provided to the defendant, the defendant's counsel and the government's attorney pursuant 18 U.S.C. § 3552(d) and Fed. R. Crim. P. 32(e)(2). *See* In re Brock, 262 Fed. Appx. 510 (4th Cir. Jan. 31, 2008).

> Mr. Brock asked, in the alternative, for the Fourth Circuit to consider his petition as an appeal of the defendants' sentences. (In re Brock, #08-1086, Dkt 25: Petitioner's Reply to Respondent's Opposition to Petition for Mandamus, p.8.) The Fourth Circuit declined, as the CVRA provides victims no right to appeal defendant sentences. (In re Brock, 262 Fed. Appx. at 513.) The government took no position on the petition for mandamus, (In re Brock, #08-1086, Dkt 20: Prosecutor letter to Fourth Circuit, 1/29/08), and did not appeal the sentences.

As can be seen, the Commission does not need to make any changes concerning victims.

OFFENDER CHARACTERISTICS

Defender witnesses at each of this Commission's regional hearings have explained that the restrictive policy statements set forth in Chapter 5's Parts H and K are inconsistent with current law, increasingly irrelevant, and needlessly complicate sentencing.[103] The Commission has now published issues for comment regarding five policy statements set forth in Chapter 5, Part H. The Defender Guidelines Committee will be addressing these issues for comment during the amendment cycle.

The narrow purpose of this portion of my testimony is to clarify the record regarding the Defender position on offender characteristics. That position, in brief, is that:

1. Under the law, judges **must** consider offender characteristics whenever relevant to **any** sentencing purpose.
2. Consistent with congressional intent and the Guideline's structure and content, offender characteristics should ordinarily be considered as reasons to sentence below the guideline range, and should rarely, if ever, be used as reasons to sentence above the guideline range.
3. Under the individualized sentencing required by § 3553(a) and Supreme Court law, whether any such factor occurs more frequently in one demographic group or another is irrelevant to sentencing purposes and, thus, an invalid basis for the Commission to discourage its consideration.

[103] Testimony of Alan DuBois and Nicole Kaplan at 47-52 (Atlanta, 2/10/09); Testimony of Thomas W. Hillier II and Davina Chen at 31-37 (Stanford, 5/27/09); Testimony of Michael Nachmanoff at 22-27 (New York, 7/9/09); Testimony of Carol Brook at 26-35 (Chicago, 9/10/09); Testimony of Raymond Moore at 19-29 (Denver, 10/21/09); Testimony of Julia O'Connell at 2-10 (Austin, 11/9/09).

Current Law and Practice.

First, under the sentencing statute, as modified by United States v. Booker, 543 U.S. 220 (2005), a court must "impose a sentence sufficient, but not greater than necessary" to comply with the sentencing purposes set forth in 18 U.S.C. § 3553(a)(2). In "determining the particular sentence to be imposed," the court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant."[104]

Second, in *Gall*, the Supreme Court noted that § 3553(a)(1) is a "broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant," and emphasized that the sentencing court, which "has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court . . . must make an individualized assessment based on the facts presented."[105]

Finally, 18 U.S.C. § 3661 provides that "[n]o 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."

A sentencing judge must also consider "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines,"[106] and "any pertinent policy statement" issued by the Commission pursuant to § 994(a)(2).[107] The court may impose a sentence different from that recommended by the Guidelines based:

- on an argument for "departure" recognized in the Guidelines Manual, or
- because the Guidelines "do not generally treat certain defendant characteristics in the proper way," or
- because "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations."[108]

In *Gall*, the Court upheld a below guideline sentence based on a number of factors

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[104] 18 U.S.C. § 3553(a)(1).

[105] Gall v. United States, 552 U.S. 38, 50 & n.6, 51-52 (2007).

[106] 18 U.S.C. § 3553(a)(4).

[107] 18 U.S.C. § 3553(a)(5).

[108] Rita v. United States, 551 U.S. 338, 351, 357 (2007).

prohibited or discouraged by the Commission's policy statements.[109]

Subsequent to these decisions, courts frequently rely on offender characteristics as reasons for sentences below the guideline range, sometimes as "departures," but more often under § 3553(a)(1) and (2). They have found offender characteristics relevant in a broader range of circumstances than recognized or allowed by the Commission's policy statements, the case law interpreting those policy statements, and the standard for departure excised by the Supreme Court in *Booker*.

Congressional Intent.

Congress expected that most offender characteristics would be mitigating, not aggravating. It directed the Commission, "in establishing categories of defendants for use in the guidelines and policy statements governing" probation, fines, imprisonment, supervised release, and other sanctions, to "consider whether [eleven specified] matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account" in establishing categories of defendants "only to the extent that they do have relevance."[110] The eleven specified matters were

> (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.[111]

With respect to five of those eleven matters, the Commission was directed to "assure that the Guidelines in recommending a term of imprisonment or length of a term of

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[109] The Court upheld the sentence based on offense circumstances and defendant characteristics which the Guidelines' policy statements prohibit (*i.e.*, voluntary withdrawal from a conspiracy), or deem "not ordinarily relevant" (*i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs). *See* USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5. While voluntary withdrawal from a conspiracy is a factor that may be considered in granting a 2-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited departure ground. *See* USSG § 5K2.0(d)(2).

[110] 28 U.S.C. § 994(d).

[111] Id.

imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[112]

The five factors set forth in § 994(e), or the lack thereof, were not to be used to recommend imprisonment over probation or a longer prison term, but "each of these factors may play other roles in the sentencing decision."[113] "[T]hey may, in an appropriate case, call for the use of a term of probation instead of imprisonment."[114] The purpose of this subsection was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."[115]

As examples of how these factors might be used, the legislative history suggested that:

- the need for education, vocational skills, or employment might call for a sentence of probation with a rehabilitative program if imprisonment was not necessary for some other sentencing purpose;[116]
- a defendant's education or vocation would be highly pertinent to determining the nature of community service to be ordered as a condition of probation or supervised release;[117] and
- family ties and responsibilities may call for intermittent confinement to enable the defendant to work.[118]

None of these examples indicates that any of these factors should be used to aggravate sentences.

Subsection 994(d) includes six offender characteristics in addition to those specified in subsection 994(e). Congress indicated two of these factors -- mental or emotional condition and physical condition including drug dependence – should be mitigating and

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[112] 28 U.S.C. § 994(e).

[113] *See* S. Rep. No. 98-225 at 174 (1983).

[114] Id. at 174-75.

[115] Id. at 175.

[116] Id. at 171 n.531, 172-73.

[117] Id. at 173 n.532.

[118] Id. at 174.

not aggravating. The text recognizes that a mental or emotional condition may mitigate the defendant's culpability. The legislative history states such conditions may call for probation with a condition of psychiatric treatment, or treatment in a prison setting only for a particularly serious type of case when no alternative exists to protect the public except incarceration.[119] Drug dependence is not to be considered in deciding whether to incarcerate a defendant, but "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."[120] "Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation."[121] No examples were given indicating these factors should be aggravating.

When the guidelines and policy statements were binding on the courts, courts and the Commission recognized that factors appropriate in choosing probation over prison were necessarily appropriate also in choosing a lesser prison term than the guidelines recommended.[122]

The legislative history indicated no view as to whether any particular age, if used to establish categories of defendants, should be aggravating or mitigating.[123] The legislative history recognized that role in the offense may be mitigating or aggravating, and that criminal history and degree of dependence upon criminal activity for a livelihood may be aggravating.[124]

The Commission established "categories of defendants" for only three of the offender

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

[120] Id.

[121] Id.

[122] *See* Lussier v. Runyon, 50 F.3d 1103, 1108 (1st Cir.1995); United States v. Love, 19 F.3d 415, 416 (8th Cir.1994); United States v. O'Neil, 11 F.3d 292, 297 (1st Cir. 1993); United States v. Slater, 971 F.2d 626, 635 (7th Cir.1992); United States v. Hilton, 946 F.2d 955, 958 (1st Cir.1991); United States v. Ghannam, 899 F.2d 327, 329 (4th Cir.1990); U.S.S.G. App. C, Amend. 386 (Nov. 1991).

[123] *See* S. Rep. No. 98-225 at 172 (1983).

[124] Id. at 174.

characteristics listed in 28 U.S.C. § 994(d): role in the offense;[125] criminal history;[126] and degree of dependence upon criminal activity for a livelihood.[127] The Commission made misuse of one's special training or education to facilitate criminal activity an express guideline factor.[128] The Commission did not consider any other offender characteristic in "establishing categories of defendants."

Structure and Content of the Guidelines.

The Guidelines are constructed of many aggravating factors, including role in the offense, criminal history, and dependence upon criminal activity for a livelihood. The Guidelines themselves do not include (and the policy statements currently disfavor) many offender characteristics that should mitigate punishment because, for example, they indicate a lower risk of recidivism, reduced culpability, good character, or a need for treatment or training in the most effective manner. Given the overarching directive to judges to impose the sentence "sufficient, but not greater than necessary" to achieve sentencing purposes (a directive to which the Commission is not subject in creating guidelines), the burden of proof rests on those who would argue that the Commission's policy statements should suggest that a lengthier sentence than current guidelines recommend is warranted for offenders with certain characteristics.

We firmly believe that those offender characteristics not incorporated in the guideline rules should ordinarily be considered as reasons to sentence below the guideline range, and should rarely, if ever, be used to sentence above the guideline range. The argument advanced against this asymmetrical approach (which Congress intended) is that, in theory, these offender characteristics can "cut both ways" and, to be "balanced," the Commission should show how they can be either aggravating or mitigating. But this is pure abstraction, not based on evidence concerning how the Guidelines operate in the real world. There is no evidence the Guidelines fail to recommend sufficiently severe sentences because they do not include offender characteristics. There is significant evidence the Guidelines recommend unnecessarily severe sentences because they are comprised almost solely of aggravating factors and do not include offender characteristics.

The Sentencing Reform Act (SRA) and the Supreme Court charge the Commission with revising the Guidelines in light of judicial feedback. The long overdue need for

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[125] *See* U.S.S.G. Chapter 3, Part B.

[126] *See* U.S.S.G. Chapter 4.

[127] *See* U.S.S.G. Chapter 4, Part B.

[128] *See* U.S.S.G. § 3B1.3.

mitigation is reflected in the data.

FY 2009		
Sentences Outside the Guideline Range	33194	100%
Above the Guideline Range	1414	4%
"Non-Government Sponsored" below Range	12262	37%
"Government Sponsored" below Range	19518	59%

To our knowledge, with the minor exception discussed below, judges do not cite Part H factors as bases for sentences above the guideline range, but very frequently cite them as bases for downward departure and other sentences below the guideline range.[129] The SRA charges the Commission to minimize the possibility that the federal prison population will exceed Bureau of Prisons' capacity;[130] the Bureau of Prisons is at least 37% above capacity today. The Commission has not demonstrated that the incarceration levels required by the current guidelines are inadequate to protect the public, or that the benefits of lengthier incarceration for any category of offender would exceed its increased costs.

Judges have long indicated that restrictions on consideration of offender characteristics as mitigating factors is a primary weakness of the Guidelines, and that greater consideration of such factors is warranted to reduce unnecessarily harsh sentences in individual cases, which results in prison overcrowding. All of the judges who addressed this issue in varying contexts at the regional hearings sought information about the purposes and evidentiary bases of *the guideline rules*, noting that the guideline rules are, if anything, too severe, and that they use their discretion after *Booker* to mitigate the harshness of the Guidelines.[131]

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[129] To indicate consideration of offender characteristics, judges can, on the STATEMENT OF REASONS form, check a box corresponding to Part V's "Reason for Departure," or to one of Part VI's general § 3553(a) subsections and can write in an offender characteristic with or without checking a box. If the judge checks a box in Part VI and does not write in the offender characteristic(s) considered, there is no way to know which offender characteristic(s) the judge considered short of reviewing the sentencing transcript and/or other sentencing documents.

[130] 28 U.S.C. § 994(g).

[131] *See* USSC, Public Hearing, Stanford, at 89-90, 133-36, 147-48 (Judge Lasnik); *id*. at 95, 120, 123, 125-26 (Judge Mollway); *id*. at 139 (Judge Breyer); *id*. at 46-47 (Judge Walker); *id*. at 51, 92-93 (Judge Shea); *id*. at 81-83, 85 (Judge Winmill);

RDAP Exception

According to Tables 24-24B of the 2008 Sourcebook, judges cited the need for education, treatment or training as a reason for an above-guideline sentence 130 times (as the sole reason or one of multiple reasons).

We surveyed Defenders to find out what this data might mean. Most offices reported this either never happens or only happens in supervised release revocation cases as an attempt to help defendants by giving them enough time to participate in the BOP's RDAP program.[132] A handful of offices reported that judges sometimes imposed an original sentence above the guideline range (*i.e.*, up to 24 or 30 months) believing this would provide sufficient time to complete RDAP and obtain its sentence reduction. In some districts, judges have done this over a defendant's objection; in others, only with the defendant's agreement. In a number of districts, judges who once did this no longer do because they learned people do not even get into RDAP within 24 months, much less complete the program or get the 12 month reduction.

Title 18 U.S.C. § 3582(a) provides that "imprisonment is not an appropriate means of promoting correction and rehabilitation," and the legislative history makes clear that a person should not be sent to prison or receive a lengthier prison term based solely on rehabilitative needs; some other purpose of sentencing must require prison or a lengthier prison term. Some circuits have held this is an improper basis for choosing a prison sentence or a longer prison sentence, whether within or above the guideline range.[133]

The "Camouflage" Theory.

The Defenders strongly oppose any plan which continues to discourage consideration of offender characteristics based on a theory that such factors are used to "camouflage" (or as a "proxy" for) consideration of race or socioeconomic status. Although no administrative record explains why the § 994(e) factors were deemed never or not

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USSC, Public Hearing, Chicago, at 30-31, 33, 37 (Judge Carr); *id*. at 87, 91 (Judge McCalla); *id*. at 104-105, 113; USSC, Public Hearing, Denver, at 27-28 (Judge Hartz); *id*. at 63-64, 91-92 (Judge Marten); *id*. at 77, 80-81 (Judge Kane); *id*. at 281-83, 300-302 (Judge Ericksen); *id*. at 289-90, 298-300 (Judge Pratt); *id*. at 291-92 (Judge Gaitan); USSC, Public Hearing, Austin (Judges Cauthron, Starrett, Zainey, Holmes).

[132] RDAP takes about 15 months to complete and provides up to one year early release.

[133] *See* In re Sealed Case, 573 F.3d 844 (D.C.2009); United States v. Hoffa, 587 F.3d 610 (3d Cir.2009); United States v. Manzella, 475 F.3d 152, 161 (3d Cir.2007).

ordinarily relevant, a law review article published four years after the Guidelines went into effect asserted that these "prohibitions help to ensure that other considerations, possibly associated with a defendant's race or personal status, are not used to 'camouflage' the improper use of those factors as to which the statute mandates neutrality."[134]

Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[135] Its concern was that the Guidelines not be used to warehouse the disadvantaged in prison, as might have been done before the Guidelines' existence. The Senate Report explained:

> This qualifying language in subsection (d), when read with the provisions in proposed Section 3582(c) [now 3582(a)] of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that 'might be good for him.'[136]

Congress intended that the presence or absence of all of the § 994(d) factors, including those listed in § 994(e), *would* be considered when "relevan[t] to the purposes of sentencing."[137]

The "camouflage" explanation was never particularly convincing. Relevant factors directly benefitting the poor and minorities – disadvantaged upbringing and drug or alcohol dependence or abuse -- were not just discouraged but completely prohibited. Consideration of personal financial difficulties and financial pressures on a trade or business, which would have benefitted defendants at all socioeconomic levels, were prohibited as well. The more convincing explanation, supported by the record, is simply that, during the mandatory Guidelines era, the Commission acted to curtail consideration of mitigating factors.[138]

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[134] William W. Wilkins Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Disparity Problem*, 2 Crim. L.F. 355, 371 (1991).

[135] 28 U.S.C. § 994(d).

[136] S. Rep. No. 98-225 at 171 n.531 (1983).

[137] Id. at 175.

[138] The policy statements deeming not ordinarily relevant (a) physical appearance and physique, (b) military, civic, charitable or public service, (c) employment-related contributions, and (d) a record of prior good works, and those

It has been suggested that the Commission may want to continue disfavoring consideration of certain offender characteristic(s) if, or when, such factors occur more frequently in certain demographic groups than others. If certain offender characteristics are unevenly distributed among demographic groups, this is no different than the many aggravating factors that **must** be used to calculate guideline ranges. The weapon enhancement and the criminal history rules disproportionately impact African Americans, but no one has suggested these rules should be disfavored, presumably because they advance a sentencing goal. Indeed, almost every aggravating factor in the Manual likely occurs more frequently in one demographic or another. As the Commission has found, this is a problem only when the factor does not serve any sentencing purpose, as with the crack and career offender guidelines.[139]

We believe the harsh treatment of (a) low-level, non-violent drug offenders based solely on drug quantity (involving drugs other than crack) and (b) illegal re-entrants based solely on prior record fall into this problematic category as well.

Discouraging consideration of relevant mitigating factors because they are unevenly distributed among demographic groups (if true) would elevate factors such as race and class to legitimate sentencing considerations *per se*, but only with respect to mitigating factors. This would continue to promote an imbalance between aggravating and mitigating factors. It would violate the directive that the guidelines and policy statements be "entirely neutral" as to demographic factors.[140] And it would be contrary to the Commission's previous approach to this issue: the disproportionate impact of a factor (or its absence) on a certain group is a concern only when the impact is adverse and consideration of that factor does not clearly advance a sentencing purpose.[141]

The way to address any disproportionate impact of judicial consideration of offender characteristics is to stop prohibiting consideration of relevant factors likely to directly

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deeming never relevant (1) lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing and (2) post-sentencing rehabilitation were promulgated in direct response to court decisions **approving** consideration of those factors. *See* Simplification Draft Paper, Departures and Offender Characteristics, Part II(B)(2) & (3); App. C, Amend. 602 (Nov. 1, 2000). Prohibitions on considering a gambling addiction or a single aberrant act, even when the defendant is eligible for the safety valve, were added in response to, but not required by, the PROTECT Act.

[139] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 113-14, 134-35 (Nov. 2004) (Fifteen Year Review).

[140] *See* 28 U.S.C. § 994(d).

[141] *See Fifteen Years Review* at 113-14.

benefit members of disadvantaged groups (such as disadvantaged upbringing, addiction, and personal financial difficulties), not to discourage consideration of other relevant factors because they may benefit some other group. In fact, offender characteristics occur in different ways, potentially balancing the benefits among groups. For example, employment points to reduced recidivism; lack of employment may point to reduced culpability and a need for vocational training. In this regard, in FY 2008, judges cited as a reason for giving a below-Guideline sentence previous employment record, education, or vocational skills 660 times, and providing the defendant with needed education or vocational skills/medical care 1294 times.[142]

It is not fair to deny a defendant leniency based on a factor relevant to sentencing purposes because that factor occurs more frequently in the defendant's racial or socioeconomic group. And doing so benefits no one in other groups where the factor occurs less frequently. Indeed, once a policy discouraging consideration of a factor like employment is established because it occurs more frequently among those at higher socioeconomic levels, that policy must also apply to offenders at lower socioeconomic levels who are employed or can benefit from a work program, since the Commission cannot tell judges to consider a factor only for certain demographic groups.[143]

We are also concerned that any such policy would imply that judges who depart or vary based on offender characteristics create unwarranted disparity, or even engage in discrimination, when the data needed to support such a conclusion does not exist. That conclusion would require showing that offenders with the same characteristics are treated differently due to race or socioeconomic status.

We do not believe that conclusion could be reached. The Commission records the presence of most offender characteristics only when they are specifically cited as a reason for departure or variance.[144] This does not come close to capturing the actual occurrence of offender characteristics in the defendant population. A departure or variance is not given in every case where an offender characteristic exists for any number of reasons, including that a mandatory minimum or plea agreement precludes it. And, because the policy statements discourage or prohibit consideration of offender

[142] *See* USSC, 2008 Sourcebook of Federal Sentencing Statistics, Tables 25-25B.

[143] *See* 28 U.S.C. § 994(d).

[144] The Commission's monitoring dataset includes data on educational level and number of dependents, but does not include data on other offender characteristics unless they are cited as reasons for departure or variance. As the Commission has acknowledged, "[d]ata are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do not receive a departure is not routinely collected." *See* Fifteen Year Review at 119.

characteristics, judges are more likely to check one of the general reasons under § 3553(a) in Part VI of the statement of reasons form than to check one of the reasons that specify offender characteristics in Part V of the form.

With the information the Commission has, it might find that white defendants receive departures for employment more frequently than defendants of other races, but that would not establish that offenders of other races with similar employment records do not receive departures at a proportionate rate. Likewise, the Commission might find that minority offenders receive variances for needed vocational training more often than white offenders, but that would not establish that white offenders with similar needs do not receive variances at a proportionate rate.

Indian and Military Cases and Defendants

The following two sections effectively demonstrate that current restrictions in Chapter 5 on factors like disadvantaged upbringing, personal financial difficulties, drug or alcohol dependence or abuse, and military service are not helpful.

The real life, human drama crimes in Title 18 - murder, assault, rape, child abuse and molestation - are generally only brought to federal court if they occur in the "special territorial jurisdiction of the United States."[145] This includes cruise ships, airplanes, space vessels, federal buildings, national forests and parks, and guano islands.[146]

However, most of the charges we see arise on reservations: Indian and Military.[147] We also increasingly see more Native Americans and present and former military in drug and alien smuggling cases. In today's economy and while we still battle an 8-year period of longer and more repetitive duty tours, the problems these populations face merit consideration in mitigation of punishment. These are not the only kinds of defendants who face similar difficulties, and whose history and characteristics deserve consideration, but these are the defendants we see.

[145] 18 U.S.C. §§ 81 (arson), 114 (assault), 661 (theft and embezzlement), 662 (receiving stolen property), 1111-1113 (murder), 1201 (kidnaping), 1363 (malicious mischief), 2111 (burglary and robbery), 2241-2244 (sex abuse and sexual abuse of minors), 2252 (sexual exploitation of minors), 2261-2262 (stalking and domestic violence/violating a protection order),

[146] 18 U.S.C. § 7(1), (2), (4), (5), and (6).

[147] 18 U.S.C. §§ 7(3) and 1153.

1. Native Americans

Arizona has 14 Indian Reservations and 21 recognized Native American tribes. Much of this population lives far from the U.S. District Courts in Phoenix, Tucson, Flagstaff, and Yuma. Tribal members whose felony cases are resolved in Tucson may have to travel 2 to 3 hours one-way to get to court or report to Pretrial Services or Probation. For cases resolved in Phoenix, some Apache tribal members may spend the same time on the road to court, with Navajo, Hopi and Pai tribal members traveling 4 to 6 hours one-way, necessitating an unaffordable overnight stay.

This is the state of our Native American population:

- In 2006, chronic liver disease (likely from alcoholism) is the fifth highest cause of death, accounting for 4.2% of Native American deaths - 4 of every hundred deaths. This did not make the top ten of white population deaths and compares only with the Latino/Hispanic population at sixth place with 2.7% deaths from chronic liver disease.[148]
- In 2006, suicide ranked as the eighth highest cause of death, accounting for 2.8% of Native American deaths - 3 of every hundred deaths. Suicide was the 10th most common cause of death in the white population, with 1.4% of of deaths by suicide.[149]
- In 2004 for people age 12 and older, Native Americans showed the highest illegal drug use, the highest binge alcohol use and the second highest heavy alcohol use.[150]
- In 2008, about 1 in every four Native American families lived below the United States poverty level.[151]

"Already grappling with historically high rates of unemployment, American Indians, on and off reservations, are seeing even higher rates due to the country's two-year long

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[148] Appendix 3: Leading Causes of Death - 2006, Substance Use and Abuse - 2004, and Poverty Levels - 2008 by Race/Ethnicity, citing Center for Disease Control, *Health, United States, 2006*,Table 31, ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/Health_US/hus08tables/Table030.xls

[149] Id.

[150] Appendix 3, citing Center for Disease Control, *Health, United States, 2006*,Table 66.

[151] Appendix 3, citing U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States, 2008,* (9/09), http://www.census.gov/prod/2009pubs/p60-236.pdf

economic downturn, according to a new survey."[152] From the end of 2007 until early 2009, Native American unemployment almost doubled to 13.6%.[153] Almost a third of Native Americans are without health insurance.[154]

Further, the United States Surgeon General reports "the lifetime prevalence of mental disorders (amongst Native Americans) to be 70%."[155] Depression factors into anywhere from 10% to 30% of Native Americans and a homeless person is four time more likely to be Native American than from any other group.[156]

> American Indian adolescents were much more likely to be diagnosed with AD/HD and substance abuse or substance dependence disorders. The rates of conduct disorder and oppositional defiant disorder were also elevated in the American Indian sample.[157]

A review of the supervised revocations in the District of Arizona in FY 2008, using Probation Department records, shows:[158]

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[152] Annette Fuentes, *American Indian Unemployment—from Bad to Worse in Recession*, NEW AMERICA MEDIA (12/19/09), http://www.finalcall.com/artman/publish/printer_6682.shtml

[153] Id., citing Algernon Austin, *American Indians and the Great Recession: Economic Disparities Growing Larger*, Economic Policy Institute Issue Brief #264 (12/7/09), based on Department of Labor records, http://www.epi.org/publications/entry/ib264/

[154] Tom Rogers, *Native American Poverty - A Challenge Too Often Ignored*, Spotlight on Poverty (date unknown), http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=0fe5c04e-fdbf-4718-980c-0373ba823da7

[155] U.S. Department of Health and Human Services, Office of the Surgeon General, SAMHSA *Fact Sheet regarding Native American Indians*, http://mentalhealth.samhsa.gov/cre/fact4.asp

[156] Id.

[157] U.S. Department of Health and Human Services, Office of the Surgeon General, SAMHSA, *Chapter 4: Mental Health Care for American Indians and Alaska Natives*, http://mentalhealth.samhsa.gov/cre/ch4_need_mental_health.asp

[158] Appendix 4: FY 2008 District of Arizona Supervised Release Cases and Revocation by Risk Assessed and Criminal History Category: Total cases and Native American cases.

DEFENDANT CATEGORY	TOTAL SUPERVISED	% NATIVE AMERICANS	TOTAL REVOKED	% NATIVE AMERICANS
RPI 0	63	10%	4	0%
RPI 1	158	8.2%	13	2%
RPI 2	207	15%	28	15%
RPI 3	199	21%	59	29%
RPI 4	216	33%	82	33.8%
RPI 5	152	31%	66	36%
RPI 6	141	31%	77	43%
RPI 7	151	35%	91	46%
RPI 8	144	36%	99	42.4%
RPI 9	109	32%	88	35%
No RPI	154	31.8%	52	40%
CHx I	840	31.5%	250	54%
CHx II	209	28.7%	104	36.5%
CHx III	260	22.6%	133	33%
CHx IV	114	17.5%	54	25.9%
CHx V	63	11.1%	39	17.9%
CHx VI	60	1.6%	38	0%
No CHx	147	19%	41	39%
RPI = Risk Assessment Category; CHx = Criminal History Category				

With the exception of Risk Assessed categories 1 and 2 and Criminal History Category IV, the percent of Native American revocations matched or exceeded the percent of Native Americans being supervised. Neither Probation nor our Office was able to explain this, except perhaps that the distances Native Americans need to travel to report to Probation may be a factor.

The *Tribal Law and Order Act of 2009* promises to place, at least part-time, Probation Officers on reservations to ease defendants' ability to report and satisfy release

conditions.[159] The House bill has been referred to Committee; Senate Committees reported on their bill and it has been placed on the Senate's Legislative Calendar.[160]

2. Military and Military Base Personnel and Residents, Reservists, National Guard and Veterans

> *There's a condition in combat. Most people know about it. It's when a fighting person's nervous system has been stressed to it's absolute peak and maximum. Can't take anymore input. The nervous system has either (click) snapped or is about to snap. In the First World War, that condition was called "shell shock." Simple, honest, direct language. Two syllables - shell shock. Almost sounds like the guns themselves. That was seventy years ago. Then a whole generation went by and the Second World War came along and very same combat condition was called "battle fatigue." Four syllables now. Takes a little longer to say. Doesn't seem to hurt as much. "Fatigue" is a nicer word than "shock." **Shell shock!** Battle fatigue. Then we had the war in Korea, 1950. Madison Avenue was riding high by that time, and the very same combat condition was called "operational exhaustion." Hey, were up to eight syllables now! And the humanity has been squeezed completely out of the phrase. It's totally sterile now. "Operational exhaustion." Sounds like something that might happen to your car. Then of course, came the war in Vietnam, which has only been over for about sixteen or seventeen years, and thanks to the lies and deceits surrounding that war, I guess it's no surprise that the very same condition was called "post-traumatic stress disorder." Still eight syllables, but we've added a hyphen! And the pain is completely buried under jargon. "Post-traumatic stress disorder." I'll bet you if we'd of still been calling it shell shock, some of those Vietnam veterans might have gotten the attention they needed at the time. I'll betcha. I'll betcha.*
>
> ~ George Carlin, *Parental Advisory - Explicit Lyrics* (CD 1990)

For over eight years, our country has been at war in Iraq and Afghanistan. Not only has our active military been there in multiple and lengthy tours, but our Reservists and National Guard have been there in lengthy and multiple tours.

Already, our federal, state and local criminal courts have seen increasing numbers of defendants who have served our country honorably, risking life and limb, as well as former jobs which employers could not keep open, spouses and children who got on without their military family members and hardly recognize who he or she has become. We have seen their increased alcohol and substance abuse and their difficulty in holding down work and maintaining relationships. We see them too emotionally injured to recognize the depth of what has happened to them, too proud to admit a problem or seek help.

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[159] H.R. 1924 and S.797 (111th Cong, 2009-2010).

[160] General Orders Calendar No. 192.

The jobless rate amongst these war veterans was a year ago 27% higher than the general population.[161] According to a Pentagon report in December 2009, about one in four soldiers admitted to abusing prescription drugs, mostly pain relievers, and greater numbers of soldiers acknowledged suicidal ideations, binge drinking and PTSD.[162]

In Arizona, according to Cara Wilson of the Phoenix Veteran's Administration (VA) Health Care System, in discussing the veterans of Operations Enduring Freedom and Iraqi Freedom:

- mental health is the second most treated condition by the VA;
- most are treated for PTSD, followed by Depressive Disorders, Anxiety Disorders, and substance abuse; and
- many veterans suffer from Traumatic Brain Injury (TBI) which manifests like PTSD, but they may not realize they have it and may be improperly diagnosed because 85% are "closed head" injuries caused by blasts or explosions with no visible wounds.[163]

Our Office has seen an increased number of these veterans facing charges of drug or alien smuggling. It is up to us - defense lawyers and prosecutors, judges, Probation and Pretrial - to find a way to help them, to invite them back into society and to welcome them with something more than a Guidelines Manual that denies recognition of their particular history and characteristics.

CHILD PORNOGRAPHY

U.S.S.G. § 2G2.2, the Guideline governing child pornography distribution and possession convictions, has become increasingly harsher in its level computation, many times based upon Congressional mandate. Judges consistently state that sentences for child pornography convictions are too severe and they vary from the Guidelines.[164]

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[161] Gregg Zoroya, *Jobless Rate at 11.2% for Veterans of Iraq, Afghanistan*, USA Today (3/20/09), http://www.usatoday.com/news/nation/2009-03-19-jobless-veterans_N.htm

[162] Gregg Zoroya, *U.S. Troops Admit Abusing Prescription Drugs*, USA Today (12/17/09), http://www.usatoday.com/news/military/2009-12-16-milhealth_N.htm

[163] Cara Wilson, *PowerPoint Presentation: Operation Enduring Freedom, Operation Iraqi Freedom (OEF/OIF): Access to Care,* http://www.azfbh.org/files/Presentation_for_11_10.ppt

[164] *See* USSC, Public Hearing, Atlanta p.69 (Nicole Kaplan), *id.* p.134 (Judge Presnell), *id.* p.142 (Chief Judge William Moore, Jr., S.D. GA); Chicago pp.54-55, 58, 59-60 (Chief Judge Gerald Rosen, E.D. MI), *id.* p.250 (Patrick Fitzgerald, U.S. Attorney,

The Guidelines, however, have failed to keep pace with how technology has changed who is charged and convicted and the pornography involved. Further, there is the concern (generally unwarranted) that a defendant convicted of child pornography is a molester-in-waiting or has already directly victimized a child.

The *Butner* Study and Risk for Hands-On Offenses

In March, 2009, Drs. Michael L. Bourke and Andres E. Hernandez's article *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders* was published in the JOURNAL OF FAMILY VIOLENCE.[165] Prosecutors have been known to quote at sentencings that Report's statement that "[b]y the end of treatment, . . . 131 (of the child pornography offender/)subjects (85%) admitted they had at least one hands-on sexual offense."[166]

However, Dr. Hernandez himself has cautioned against interpreting his Report this way:

> Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel the argument that the majority of CP offenders **are** indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence. The incidence of contact sexual crimes among CP offenders, as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all CP offenders. Notwithstanding, some individuals in law enforcement are tempted to rely on a biased interpretation of our study (i.e., to prove that the majority of CP offenders are child molesters). . . . While I empathize with the emotional issues and moral dilemmas experienced by those who investigate and prosecute CP crimes, I believe we cannot prosecute or incarcerate our way out of this problem.[167]

There are many additional concerns the defense community has about using the *Butner*

N.D. IL), *id.* pp.332-334 (Jacqueline Johnson, 1st Asst. FPD, N.D. OH).

[165] 24 J.Fam.Viol. 183-191 (2009), published on-line 12/08.

[166] Id. at 187. *See e.g.* United States v. Camiscione, --- F.3d ----, 2010 WL 98947 at *4 (6th Cir. 1/13/10).

[167] Andres E. Hernandez, Psy.D. *Position Paper: Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment*, presented at the GLOBAL SYMPOSIUM: EXAMINING THE RELATIONSHIP BETWEEN ONLINE AND OFFLINE OFFENSES AND PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN,(UNC-Chapel Hill 4/5-7/09). http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf

Redux Report in child pornography sentencings.

First, in 2000, Dr. Hernandez gave a Poster Presentation asserting in his "Self-Reported Contact Sexual Crimes of Federal Inmates Convicted of Child Pornography Offenses" that those inmates he treated increased their "admissions" to contact sex crimes during treatment and that child pornography offenders were at risk for contact sexual offenses.[168] The 54 inmates surveyed were Dr. Hernandez' patients at FCI-Butner, participants in that facility's Sex Offender Treatment Program (SOTP). At the Program's start, 24 of the 54 inmates had PSRs reporting a total of 53 contact sex crimes (no specifications on victims' ages). By the end of their SOTP participation, between counseling (individual and group) and polygraph use, 43 had allegedly "admitted" 1424 total contact sex crimes. This Position Paper was not peer reviewed and faced other questions as to its validity.

In 2006, Drs. Bourke and Hernandez attempted to publish their *Butner Redux Report* in the JOURNAL OF FAMILY VIOLENCE, but BOP directed the psychologists to withdraw it.[169]

The article ultimately reported last year differs little from proposed 2006 article; only a few journal citations are changed. *Butner Redux* was a review of 155 Internet sex offenders who completed or left FCI-Butner's SOTP between October 2002 and October 2005. Of the 201 original participants, 46 were excluded for voluntary withdrawal or expulsion from the Program and there was one death.

At the Program's start, 54 of the 155 inmates had PSRs reporting a total of 53 contact sex crimes. By the end of their SOTP, between counseling (individual and group) and polygraph use, 131 had allegedly "admitted" 1777 contact sex crimes, thus giving the 85% result. These "victims" supposedly ranged in age from newborn to adult and included males and females.

Concerns included (1) using data on unadjudicated/unverified sex offenses (2) gained during the patient-therapist relationship. The former concern exists because the scientific community generally does not accept as a valid index of future dangerousness reports of unadjudicated sex crimes solicited during treatment. Post-apprehension recidivism is scientifically gauged by new criminal convictions.

The latter concern exists because of a patient's desire to please the therapist, to give the therapist what the counselor wants to hear. This is because the inmates perceive that their well-being may depend on whether their treatment providers view them in a

[168] 19th Annual Conference Research and Treatment Conference, Association for the Treatment of Sexual Abusers (ATSA) (San Diego, 11/00).

[169] Julian Sher, Benedict Carey, *Debate of Child Pornography's Link to Molesting*, N.Y.Times (7/19/07), http://www.nytimes.com/2007/07/19/us/19sex.html.

positive or negative light. Further, the therapist may have defined "sex crime" in an over-inclusive way. There are concerns about questioning patients in the imprisonment setting as opposed to a setting free from the psycho-social prison dynamics. This is an artifact known as "researcher demand characteristics," also known as the *Hawthorne Effect*.[170]

An additional concern involves peer review. While publication in the JOURNAL OF FAMILY VIOLENCE requires "peer review,"

> [t]his process involves blind review by one of the Regional Editors and at least two other referees.[171]

Authors of submitted article are "encourage[d] . . . to recommend individuals who could be considered as reviewers, providing the editorial office with full names and contact details. Authors are also given the opportunity to request the exclusion of a specific reviewer."[172] We do not know who reviewed *Butner Redux* and whether or not any were "recommended" by Drs. Bourke or Hernandez. We are concerned that this method of "peer review" is biased.

Finally, if Dr. Hernandez' own words from last year are insufficient to place *Butner Redux* in perspective, the studies summarized in Appendix 5 show that child pornography offenders are less likely to recidivate than other offenders in other categories, are not likely to commit nor likely have not committed contact sex crimes, and respond well to supervision.

Computer Use

In the District of Arizona, the majority of child pornography cases involve computers as mere storage of picture or video files. I know of only a few cases which did not involve computer file storage:

- Several video tapes of child pornography were dug up in a rental property backyard by the tenant. The owner had also produced the tapes about 30 years ago in trips to the Asian Pacific Rim where he was a participant with minor

[170] Martin T. Orne, M.D., Ph.D., *On the Social Psychology of the Psychological Experiment: with Particular Reference to Demand Characteristics and Their Implications*, 17 American Psychologist 76-783 (1962).

[171] http://www.springer.com/authors?SGWID=0-111-7-714809-0.

[172] http://www.springer.com/authors?SGWID=0-111-7-713510-0.

girls.[173]

- A Customs Agent had his computer seized and searched pursuant to a warrant concerning drugs. Child pornography videos of him molesting his daughter as well as other child pornography files were found on the computer.[174]
- A few recent cases resulted from a U.S. Postal Inspector sting where the Inspectors, in an undercover capacity, advertised via the Internet, seized DVDs with titles suggesting they contained child pornography. Defendants were arrested when they went to the Post Office to retrieve the DVDs that had been mailed to them.

In the bulk of our child pornography cases, defendants do not use their computers to create their own child pornography involving hands-on touching, nor do they sell via Internet what they have accumulated, nor do they use the computer to try to evade detection through the U.S. Postal Service.

As the Commission knows, "computer use," despite Congressional edict and U.S.S.G. § 2G2.2(b)(6), is the rule rather than the exception and the vast majority of defendants do not use the computer in a way initially contemplated by Congress.

Section 2G2.2 also over-punishes less culpable defendants by failing to distinguish between active and passive possession. In my experience, many defendants convicted of possession of child pornography obtained their files by "trading" via a file-sharing program or website such as an Internet Relay Chat (IRC), KaZaa, and Limewire. Anything from music, videos, photos, documents, etc. can be traded. Trading files through these programs or websites can be active or passive.

1. With active trading, the person logs onto the site and looks specifically in other subscribers' trading file folders to choose and download specific files based only on the file's name or the other subscriber's description of what files are offered, trading one's own files in return.
2. With passive trading, the person sets up his/her trading file folder presumably full of files of the same type the person wishes to receive. The program allows for giving a description of what the person hopes to receive: I want kitten pictures, Shakira's music, guitar tabs, for example. Then the person simply has the program running in the background whenever the computer is turned on. The person has no control over what others trade for his files and frequently may end up with files he/she has no interest in and does not want. It is not unusual for the person's receiving file folder to be filled beyond his/her time to see what it contains.

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[173] United States v. Walter Stevens, USDCt-AZ (Tuc) Case N° CR 07-480-RCC.

[174] United States v. Jay Gillilland, USDCt-AZ (Tuc) Case N° CR-1712-JMR-HCE and CR-1747-JMR-HCE.

The Guidelines should distinguish between "active" and "passive" possession on the computer.

"Active" possession, receipt and/or distribution on the computer occurred in these cases:

- Whenever a person creates child pornography using a digital video recorder or the video function of any digital camera or cell phone, then downloads it to his computer, storing, editing and distributing it from that computer.
- Bernard Ward is an ex-priest and Radio talk show host who used his computer to chat on-line about sex scenarios involving his own children and requested child pornography and sent his own by e-mail.[175]
- Michael Camiscione purchased (via 22 credit card purchases in a 5 month period in 1999) subscriptions to Internet child pornography websites and intentionally downloaded files he selected from the many offered. During the over-3 year period total in which he perused and selected child pornography to download from these, he spent about $30,000, going bankrupt in the process.[176]

"Passive" possession, receipt and/or distribution on the computer happens when the child pornography is on the computer from a file-trading or peer-to-peer network program such as an IRC, KaZaa or LimeWire. The person sets up the file folder from which files can be traded (downloaded) and into which other people's files sent (uploaded) in a preset file size ratio. Even without requesting "child pornography," once the program is set up and left running, others can upload any computer file, whether the person requested that type or not. It can happen while the person is using other programs on his computer and even when he is gone from his house or while he sleeps. He only knows those files are there if and when he reviews what files were uploaded.[177]

Finally, in defending child pornography cases and needing to review the alleged child pornography for trial and/or sentencing, I find the sources of child pornography have changed with the technology. While some certainly is current, some has been digitized from video 30 and 40 years old. By far, the increasingly greater source of child pornography is from the computer webcam, digital cameras and cell phones with cameras and video recorders created by teenaged boys and girls exploring their

[175] United States v. Bernard Ward, USDCt-NDCA Case N° CR 07-602-VRW.

[176] United States v. Camiscione, --- F.3d ----, 2010 WL 98947 at *4 (6th Cir. 1/13/10).

[177] *See e.g.* United States v. William Fuller, USDCt-AZ (Tuc) Case N° CR-06-825-RCC; United States v. Thomas King, USDCt-AZ (Phx) Case N° CR 07-258-PGR; United States v. Jason Wright, USDCt-AZ (Tuc) Case N° CR03-1908-RCC.

sexuality. One of our defendants had his cell phone searched and agents discovered he had saved an image of his 17 year old girlfriend's bare breasts which she had used her own cell phone to take then texted the image to him, also known as Multimedia Messaging Service (MMS).

These technological changes must be considered by the Commission to aid judges in deciding how those convicted of child pornography offenses should be punished and supervised.

GUIDELINES AND CONGRESSIONAL DIRECTIVES

The Commission should identify those Guidelines that are the product of congressional mandate.

For example:

> USSG §2G2.2
> (b) Specific Offense Characteristics
> (3) (Apply the greatest) If the offense involved:
> (B) *Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain,* increase by **5** levels. [*Italicized* portion added by congressional directive: Pub.L. 105-314, Title 5, §506 (10/30/98); 112 Stat. 2974].
> . . .
> (6) *If the offense involved the use of a computer* or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels. [*Italicized* portion added by congressional directive: Pub.L. 104-71, §3 (1996); 109 Stat. 774.]

Clarifying in the Manual which guidelines are not the product of the Commission's "characteristic institutional role" will better enable the courts and all parties to determine whether the guideline yields a sentence greater than necessary to achieve the purposes set forth in § 3553(a)(2).

CONCLUSION

Thank you for giving me this opportunity to talk with you. I hope the information here is helpful to you in fashioning Guidelines which truly allow judges to sentence individually and fairly, with justice for all.

CONSIDERATIONS FOR A PRETRIAL DRUG COURT PROGRAM

CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE
DISTRICT OF ARIZONA

Since the beginning of 2008, I have been working with Pretrial Services to come up with a supervision method that will help us have greater success in keeping defendants with drug addiction problems in compliance with their pretrial release conditions and able to remain on pretrial release. The program primarily involves residential drug treatment, increased pretrial supervision, and increased judicial involvement. We initially called the program "Pretrial Drug Court." This memorandum will review how the program was started and how it is working from a judicial perspective.

THE INSPIRATION FOR THE PROGRAM

Over the years, for me and many of my colleagues, the supervision of defendants who are addicted to methamphetamine became particularly challenging, seemingly hopeless. Additionally, many of the methamphetamine addicts were charged with either mail theft crimes or alien smuggling crimes which seemed likely not to lead to lengthy prison terms. Three things motivated me to work with Pretrial Services on an alternative supervision model.

First, at the Magistrate Judges' Workshop in 2006, there was a breakout session dealing with drug addiction presented by two doctors from the National Institute of Health. Among the many things that I took from that very valuable presentation was the notion that methamphetamine addiction was not hopeless to treat. Rather, it is frequently the lifestyles associated with methamphetamine addiction that hamper the successful response to treatment of the addiction. Secondly, regardless of lifestyle, the rehabilitation frequently needs more than one attempt, or even a successful rehabilitation may have a relapse. Finally, the presentation made clear that judges can have a different impact on an addict and his behavior.

The following summer at the Magistrate Judges' Workshop, there was a presentation on post-conviction drug court. This presentation again showed how a judge can have a special role and valuable influence on the behavior of someone under court supervision. Additionally, it was emphasized how the value of positive feedback was just as important as the negative feedback in leading to positive behavior change. Again, in these post-conviction drug court programs, intensive supervision was a critical aspect of the program.

Finally, my own long-standing concerns about pretrial supervision led me to believe that increased judicial involvement may lead to greater success on pretrial release. I was

particularly concerned about being out of the loop on the employment aspect of the pretrial supervision conditions. I believed that coaxing a defendant into employment was going to increase his ability to succeed on pretrial release. I was also frustrated by the lack of information as to a defendant's successful compliance with conditions. Overall, I agreed with what I heard in the previous two years of workshops, that increased judicial involvement could assist PTS in achieving a positive outcome.

START OF THE PROGRAM

In January 2008, after several consultations with officers from Pretrial Services, their pretrial drug court program started on a rather *ad hoc* basis. Originally, the program was limited to mail fraud cases before me. In my experience, the defendants charged with mail fraud were always methamphetamine addicts and likely to face short sentences. A few months later, we expanded the program to include any defendants referred to residential drug treatment as a condition of pretrial release. Since the inception of the program, all but one of the defendants have been involved in residential drug treatment. Almost all of the defendants have as their primary addiction methamphetamine abuse.

MECHANICS OF THE PROGRAM

For the first few months when it was an *ad hoc* program, status conferences with defendants in the program were set at random. Since April, the Pretrial Drug Court Status Conferences are set for all of the defendants in the program on the third Tuesday of each month at 3:00 p.m. We have found that this works out much better, not only for the predictability of when the defendants can expect they need to appear before the court, but also because of the peer influence of being there with the other defendants in the program. A representative of the Government is present in the form of a duty AUSA. The defendant is obviously required to appear with his attorney. The assigned Pretrial Services officer is also present. Their appearance is an on-the-record court appearance. The defendant and their attorney comes to the podium where the defendant can report on what has occurred in the past month and respond to the Court's questions. The defendant frequently meets with the Pretrial Services officer prior to the hearing and submits a urinalysis sample. The Pretrial Services officer also meets with the Court briefly prior to the hearing to update the Court on the defendant's progress for the last month.

AREAS OF FOCUS

Primarily, the Court reviews with the defendant his behavior and experiences for the previous month. The typical areas reviewed during this colloquy include urinalysis drops, employment, housing, family interaction, upcoming transitions in housing, and the status of the criminal case. I try to make a point of congratulating the defendant concerning the areas in which they are performing well. I will often ask the defendants how they feel about these

areas where they are performing well and how they feel overall on pretrial supervision. Because of the nature of the hearing, there are certain things that I do not inquire into. For instance, I do not ask for an admission that the defendant violated any conditions, since he has not been given any notice of any violation and it is not the purpose of the proceeding. I do not ask the defendant to talk about the facts of the underlying case. And, of course, I do not ask the defendant about any communications he has had with his defense attorney.

If the defendant has had performance problems in the previous month, instead of asking the defendant to admit guilt to those violations, I emphasize discussing the consequences to the defendant of engaging in that type of conduct, whether it be a dirty UA or a missed appointment with a pretrial services officer. In this way, I feel I am not violating the defendant's rights to be noticed concerning any violation that the court is going to act on, but at the same time keeping the reality of the court's alternative, which is to place the defendant in custody pending trial.

ANECDOTAL OBSERVATIONS

POWER OF POSITIVE FEEDBACK - The use of positive feedback during the colloquy is a critical aspect of the drug court exercise. Measuring the impact of positive feedback is virtually impossible. However, this Court has readily observed the changes in posture and demeanor that result immediately from positive feedback. I speculate that many of these defendants receive very little positive feedback in normal circumstances.

POWER OF PEER PRESSURE - I believe that one of the important aspects of drug court is for defendants to see other people in a similar circumstance and to see them succeed. Normally as I am talking to a defendant, particularly about positive things, I can see the other defendants in the program nodding their head as I am talking. A particular example of peer pressure involved a defendant who showed up in a sport coat and tie, much more formal than usual for court here in Tucson. I commented concerning the defendant's attire and how I perceived this as his statement of showing respect for the court. The next month at drug court, three of the defendants were dressed in coat and tie.

POWER OF JUDICIAL INVOLVEMENT - As explained earlier, in both the drug addiction workshop of 2006 and the drug court workshop in 2007, the power of judicial involvement was emphasized by the presenters. There is no question that a judge can have a different impact on defendants than a pretrial services officer can. Because of this, during drug court, I wear my robe and I sit on the bench. In one drug court session for a defendant who had had some minor slip-ups the previous month, I was complimenting the defendant on his improved performance. The defendant quickly responded that I had scared him to death the previous month so he made sure his performance was improved for this month.

POWER OF EXPECTATION - Frequently at the end of my colloquy with the defendant, sort of

summarizing what has gone on the last month, I will build in my expectations for the next month and perhaps set a goal for that month. For instance, I may tell the defendant that if there are no problems in the next month, I will remove electronic monitoring. If we have discussed potential employment situations or a change in counseling, then I will tell the defendant that I will expect to hear about the employment or new counseling when we talk again the next month. Frequently, I am very specific about what I expect them do. In other words, when the defendant leaves, he has a very clear idea of my expectations for the ensuing month.

POWER OF FAMILY - While to date this has not been developed much, several of the defendants in drug court have reinstated relationships with children or parents that have essentially been abandoned for several years. It is not surprising that one of the impacts of drug addiction is damage to or severing of family relationships. In these instances where family relationships have been restored, the impact on the defendant has been quite powerful.

CARROTS AND STICKS

It is clear that in a pretrial drug court context, there is less availability of carrots than in the post-conviction supervision contacts. In some post-conviction drug courts, there is an agreement that the supervision will be significantly shortened upon the successful completion of the drug court program. That is not an option in pretrial drug court. The main carrot that we have is that if you comply with pretrial drug court, you will not have your pretrial release conditions revoked. We do have the ability to add or remove conditions based on the performance of the defendant on pretrial release. As discussed earlier, the use of positive feedback to commend their conduct in compliance with conditions and warnings of the potential for revocation when there is not compliance, is a regular part of the monthly colloquy. Other potential carrots that have been discussed is some sort of certificate of completion of pretrial drug court or the potential of a letter to the sentencing judge for the successful defendant.

We do not have the ability to use short-term jail sentences to get a defendant's attention, such as is used in the Massachusetts post-conviction drug court program. I have observed pretrial services officers use writing assignments with the defendants they are supervising with great effect. However, I do not presently think that is appropriate for the judge to do. These people have not been adjudicated guilty and, therefore, my focus should be upon the defendant's compliance with conditions of release. Similarly, we cannot assign community service as a requirement for pretrial releasees. In my view, it is also important that the judge not become too chummy with the defendants. As I explained earlier, I conduct our court in my judicial robe and sitting on the bench. These are my cases, and there could be a petition to revoke or other judicial action required with this defendant in the future. Additionally, the judicial authority and its potential consequences for the defendant is an important aspect of

encouraging the behavioral compliance we are seeking. Unlike post-conviction drug court, it is difficult to schedule a graduation, because the case is in flux and we do not know when a trial or sentencing will occur, which would arbitrarily end the program. I do think it would be good for us to set up a goal, say six months, after which attendance in drug court would no longer be required. At that last session, we could consider having a brief ceremony, and if we decide to use certificates of completion, then present the certificate.

FUTURE MECHANICAL WORK

As we go along, I am sure there will be changes to how we run the program that will come to mind. In August, we began to implement two changes. First, we had all of the defendants in the program sit in the jury box and after they spoke with the court, they were to go back to their seat in the jury box. In other words, all of the defendants stayed until everyone had spoken with the judge. The defense attorneys were allowed to leave after their clients had spoken with the judge. Again, I think there is a real peer pressure impact to the program and this change facilitated the impact of the peer pressure. There did not seem to be any resistence from the defendants in doing this. Secondly, the impact of family is important. It may be of value to the defendant for him or her to have family members see the defendant in the colloquy with the judge where the judge is praising the defendant for all the progress they have made while on supervision. While there appears to be great value in this, it is very difficult to implement. It would appear to be something that has to be the responsibility of the defendant and the individual choice of the defendant. At the August drug court session, I did, for the first time, suggest to the defendants that if they did want to invite family members, they were welcomed and encouraged to attend. We will keep an eye in the future on whether or not any of the defendants take advantage of that opportunity.

As the program transitions from *ad hoc* to more structured, there are several things we will need to do. We will need to send a letter to the defense attorneys so they will understand the purpose and the operation of the program. Additionally, we will need to send a letter to the AUSA's so that they can understand the purpose of the program and what the expectations are. Those letters should, of course, make clear that any counsel is free to object to defendant's participation in the program or the implementation of any particular condition. An objection would likely require us to go from the informal drug court mode to a more formal procedure related to the conditions.

I think it will be important for Pretrial Services to keep track of the outcomes to see if we can gage the impact of the program. If the program ultimately proves successful, we will have to continue in our efforts to formalize the basic procedures so that the program could be implemented by other judges.

POTENTIAL BENEFITS OF PROGRAM

The purpose of the program, and it's most direct benefit, is to keep more defendants on pretrial release status. That allows the defendants to be defended more effectively and inexpensively. It frees up resources from the Marshal's Service and CCA. It will allow defendants who ultimately are sentenced to serve more of that sentence at a BOP facility, as opposed to CCA, where more programming is available.

Whether a defendant is successful or not in the pretrial drug court program, the experience should improve the likelihood of success in post-conviction supervision. Success in post-conviction supervision in many ways has the most significant impact upon community safety. I have found that defendants are frequently quite surprised and very appreciative that officials in the criminal justice system, particularly the pretrial services officer, the defense attorney and the judge, care about defendant's success on release. Whenever we can, I think it is important to educate and convince these defendants that a law-abiding existence in the community provides a better outcome for them.

POTENTIAL PROBLEMS

There will be many potential problems with the program that we will have to keep a close eye on to avoid. The population that we are dealing with, serious drug addicts, most of whom have a significant criminal history, is a population prone to manipulating those around them. There is certainly the potential for manipulation in this program. You do not have to be overly clever to figure out what things that the judge wants to hear during the colloquy with the defendant. However, because we have so many other controls, such as urine drug testing, counseling, and location monitoring, the capacity for successful manipulation is greatly decreased.

One of the most significant benefits of the program, in my view, is for the successful pretrial release to be a bridge to a successful performance on supervised release. The impact of this bridge becomes less as the sentence in the Bureau of Prisons becomes longer. Once we get to sentences longer than a few years, that impact is probably *de minimus*.

A major potential problem is that the impact on pretrial services resources is significant. Supervision of defendants in pretrial drug court is much more time consuming for the pretrial services officers than for the judge. For the judge, it is only an investment of a few hours a month in the program. To date, the pretrial services officers have been gracious or even excited about making this extra commitment because they see the potential for success. However, if the program was expanded to other judges then, at some point, that increased commitment could have significant impact on resources of pretrial services.

Finally, as alluded to in other sections of this memorandum, it is important for all involved

to remember that we are in a pre-conviction status which frequently is a careful line for us to walk in our roles as pretrial services officers and as judges. In that regard, it is important that we be mindful not to violate any of the defendant's due process rights. It is equally important that we maintain the authority and independence of our role as the judge in the case.

SAMPLE FORMS

Attached to this outline are three forms. The first is a sample completion certificate. We will change the certificate when we come up with a new name for the program. Second, is a hypothetical monthly status report. This is the report I receive before the drug court hearing on the third Thursday. Third, is a one page form, also a hypothetical, that I use as a shorthand to quickly see how the defendant has performed in the essential areas throughout his time in the program. In addition to these three forms, a copy of the Drug Court Guidelines established by Pretrial Services is attached.

CONCLUSION

In the first eight months of this program, by far most of the reaction has been very positive. I believe the Pretrial Services officers who are assigned to the program are very excited about it. What we are trying to accomplish with the program is to successfully encourage a behavior change in a difficult client, which in many ways is the reason they became involved as pretrial services officers. The hearings themselves can be fairly powerful. I have received positive feedback from my courtroom deputy and from Magistrate Judge Jacqueline Marshall, who has both attended one of my drug court sessions and conducted one of them for me. I see a real change in the defendants and I believe the defendants are pleased both with the program and with their performance in the program. At the August session, eight of the ten defendants had performed without any problem for the previous months, and for the two defendants who had problems, they were not problems that would likely lead in the first instance to a petition to revoke.

Concerning the attorney participants, I believe that overall the defense attorneys have been very pleased and are of course very happy to have their clients out of custody, instead of having to travel to Florence to visit them. I worry that the sessions are time-consuming for the defense attorneys, but because they are an important part of the defendants succeeding on pretrial release, I think their presence there is important. I do think that presence can be handled by a coverage attorney since by the design of the program, no formal adverse action is going to be taken against the defendant at the hearing.

The Assistant U.S. Attorneys, I suspect, have been more conflicted about the program. However, to date, I have not obtained much detailed feedback from AUSA's upon this issue, except that the Justice Department does not want anything called "drug court." As a concession to this concern, we intend to rename our program in the near future. I am also

concerned about the time consumed by the AUSA's at the drug court session on the third Tuesday. I think the main role of the prosecutor at the session is to, in essence, be the embodiment of the alternative to be performing well, along with the judge, of course. I do think that role can be filled by a duty AUSA, and that it is not necessary to have the assigned AUSA attend drug court.

Methamphetamine is a very difficult addiction to deal with, particularly given the lifestyles of many of the defendants that we deal with. Fortunately, the resources we have at Pretrial Services for residential drug treatment, electronic and GPS monitoring, and other counseling, have significantly increased during the time that I have been on the court. This assists us greatly in responding to the needs of the defendants.

The reality is that almost all of these defendants will be convicted and sent to prison. Almost all of these defendants will be back in our community soon. Almost all of these defendants will be back upon court supervision soon. We need to start having success with these defendants on release in order to improve the long-term safety of our community.

The fact that most all of these defendants are going to go to prison does not, in my mind, negate the importance of success on pretrial release. I believe there is a different mentality for pretrial release and supervised release. Pretrial release is discretionary. The defendant is wanting the court to do something for them, allow them to remain released, pending the adjudication of the case. They are motivated to perform well for the court. Supervised release is mandatory. The consequences of failing to comply with release terms is the same as for pretrial release, incarceration, but I believe the motivation is different. I suspect that many of the defendants come to supervised release with the attitude that they have done their time, so why are people still bothering them. If we can have success with the defendants when their motivation is more positive, I strongly believe we will have greater success with these defendants on supervised release as we take the all important step of transitioning these defendants back into our communities.

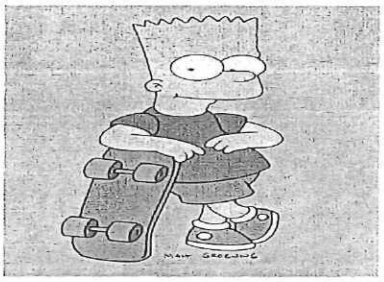
At that workshop in 2006, the breakout session on drug addiction had an overflowing crowd of magistrate judges literally standing outside the doors in the hallway. One judge asked the question that was on all of our minds, "Why don't we have any success with the methamphetamine addicts?" The presenter said there is no reason why you should not be able to have success with the appropriate combination of conditions. I think drug court is one program with the potential for success in dealing with this difficult population. There is no question, that it is important for our court and our community to increase our success in rehabilitating the methamphetamine addict.

U.S. PRETRIAL SERVICES
RELEASE STATUS REPORT FOR DRUG COURT

DATE: May 19, 2008

TO: The Honorable Charles R. Pyle, U.S. Magistrate Judge **PACTS#** 111961

FROM: Elliott V. Ness, U.S. Pretrial Services Officer



DEFENDANT: SIMPSON, Bartholomew Edward

DOCKET NO.: 4:CR-08-0130703-003-TUC-JMR

CHARGED OFFENSE: **8 USC 1324, Alien Smuggling**

RELEASE DATE: 12/06/06 **NEXT COURT DATE:** **06/02/08** **TYPE OF HEARING:** Change of Plea

HALFWAY HOUSE/RESIDENTIAL TREATMENT: ☒ Yes ☐ No

CURRENT LOCATION: Vida Serena - inpatient drug treatment

START DATE: 03/26/08 **END DATE:** 07/01/08

LAST APPEARANCE: 04/15/2008

ALLEGED VIOLATION: The defendant has a history of not reporting as directed, no submitting urine specimens as directed, failure to provide employment verification, and a history of abusing marijuana and methamphetamine. A petition to revoke his conditions of release on January 9, 2008.

RESPONSE TO NONCOMPLIANCE: The defendant was subsequently placed at Vida Serena on March 26, 2008, where he has completed the first phase of his drug treatment and is currently awaiting bed space for the re-entry program where he will be getting ready to return to the community. An Adult Recovery Team (ART) meeting is set for May 23, 2008, at 9:00 a.m. to set a graduation date from inpatient drug treatment, and to formulate a transition plan for the defendant to return to the community.

ADJUSTMENT UNDER SUPERVISION: The defendant has worked hard at becoming clean and sober from drugs. He has 78 days sober and is currently employed at St. Brutus's Hospital in the housekeeping department. The defendant received his first paycheck on May 15, 2008. The undersigned has received very positive feedback from the defendant's treatment counselor indicating the defendant is working hard on his sobriety, and he has taken on a leadership role in group meetings at the facility. The defendant appears to be newly energized in getting sober to the point where he has grieved over how much his drug addiction has taken from him in terms of personal pride, relationships, and his standing in his community. These losses appear to have given the defendant the impetus to steer his life in a sober direction.

A routine records check revealed no new law-enforcement contacts.

The key to the defendant's continued success in his sobriety will be abstinence from drugs and alcohol, formulating a support network in the community, and attending aftercare group sessions. All of these issues will be addressed at the defendant's ART (Adult Recovery Team) meeting on May 31, 2008.

RECOMMENDATION: At this time, Pretrial Services respectfully recommends the defendant remain released on the previously imposed conditions.

_____ **Reviewed By:** _____

Elliott V. Ness
United States Pretrial Services Officer

Certificate of Achievement

awarded to:

(Defendant name)

on this ___ day of _____ _____ ,
for your successful completion of the
U.S. Pretrial Services Drug Court Program.

_____

Date

_____

The Honorable Charles R. Pyle
U.S. Magistrate Judge

Appendix 1-11

United States Pretrial Services
District of Arizona

DRUG COURT GUIDELINES

I. Introduction:

United States Pretrial Services, under the guidance of U.S. Magistrate Judge Charles R. Pyle, created a pilot drug court program in Tucson in August 2007 to provide an alternative in addressing the substance abusing defendant in the federal court system.

The program utilizes traditional drug court practices of intensive supervision, increased judicial involvement, frequent urine testing and enhanced contact with treatment providers.

Target goals for defendants in the drug court program are:

1. Maintain long-term sobriety

2. Remain law-abiding

3. Comply with all court-imposed conditions of release

4. Obtain stable employment

5. Foster healthy relationships

II. Eligibility Criteria:

a. The defendant must have a documented drug or alcohol problem.
b. The defendant's case must be assigned to the Honorable Magistrate Judge Charles R. Pyle.
c. The defendant must currently be in either outpatient or residential substance abuse treatment.
d. Defendant's entrance into drug court will be staffed and agreed upon between Judge Pyle and Pretrial Services.
e. Defendants who reside outside of the metropolitan Tucson area will be considered for drug court on a case by case basis based on the availability of transportation.
f. The maximum number of participants is 10; however, once 10 people are enrolled in drug court, a waiting list will be maintained.

III. Onset of Drug Court Participation:

a. Defendants will start attending drug court hearings as soon as they are identified by Pretrial Services or the Court as drug court cases.
b. Defendants can enter at any point in their case; however, this will be reviewed if the defendant is pending sentencing.

IV. Successful Completion of the Drug Court Program:

a. The defendant can successfully complete the drug court program in six to nine months, subject to approval of the Court. If there is non-compliance the Court may extend the duration of the program as deemed necessary.
b. Defendants that relapse after completion of the drug court program may be re-enrolled in the program upon approval.

V. Drug Court Hearings:

a. Hearings shall be held on the third Tuesday of each month unless otherwise specified.
b. A drug court team member from Pretrial Services will staff each defendant's case with the magistrate judge prior to the hearing.
c. A status report outlining the defendant's adjustment under supervision will be submitted by Pretrial Services at the drug court hearing.
d. The defendant and defense counsel are required to attend and be punctual for all court hearings.
e. The assigned Assistant United States Attorney or a representative is required to attend all court hearings.
f. A drug court team member from Pretrial Services will attend all drug court hearings.
g. At the hearing the defendant may discuss his or her overall performance on supervision.
h. The judge may inquire about the following:

- drug and alcohol test results
- compliance with treatment
- pretrial reporting
- employment status
- family support
- residential status
- mental health issues

VI. Violation Reporting:

a. Violations can be reported to the Court independent of drug court hearings.
b. If a violation cannot be resolved in a drug court hearing, an evidentiary hearing will be set to address the violation.

VII. Sanctions:

Graduated sanctions can be used such as:

1. Increased drug and alcohol testing
2. Curfew
3. Electronic monitoring/home confinement
4. Residential treatment
5. Revocation

VIII. Rewards:

a. Reduction in frequency of drug and alcohol testing
b. Removal of conditions such as:
   - Curfew
   - Home confinement with electronic monitoring
   - Placement in residential treatment

c. Upon the completion of the drug court program, the defendant will be awarded a certificate.

IX. Statistical Analysis:

The need to utilize Probation and Pretrial Services Automated Case Tracking System (PACTS) for statistical support will be important to analyze the effectiveness of drug court in reducing violations.

Drug court cases are currently identified in PACTS by entering "Drug Court" in the Investigation section in PACTS.

attachments: certificate of achievement, pamphlet, status report and violation report

(09/2008)

Defendant: Simpson, Bartholomew Edward
Docket No: 4:CR-08-0130703-003
PACTS No: 111961
Offense Charged: 8 USC 1324, Alien Smugg
Release Date: 12/6/2006
Next Court Date: 06/02/2008 Change of Plea

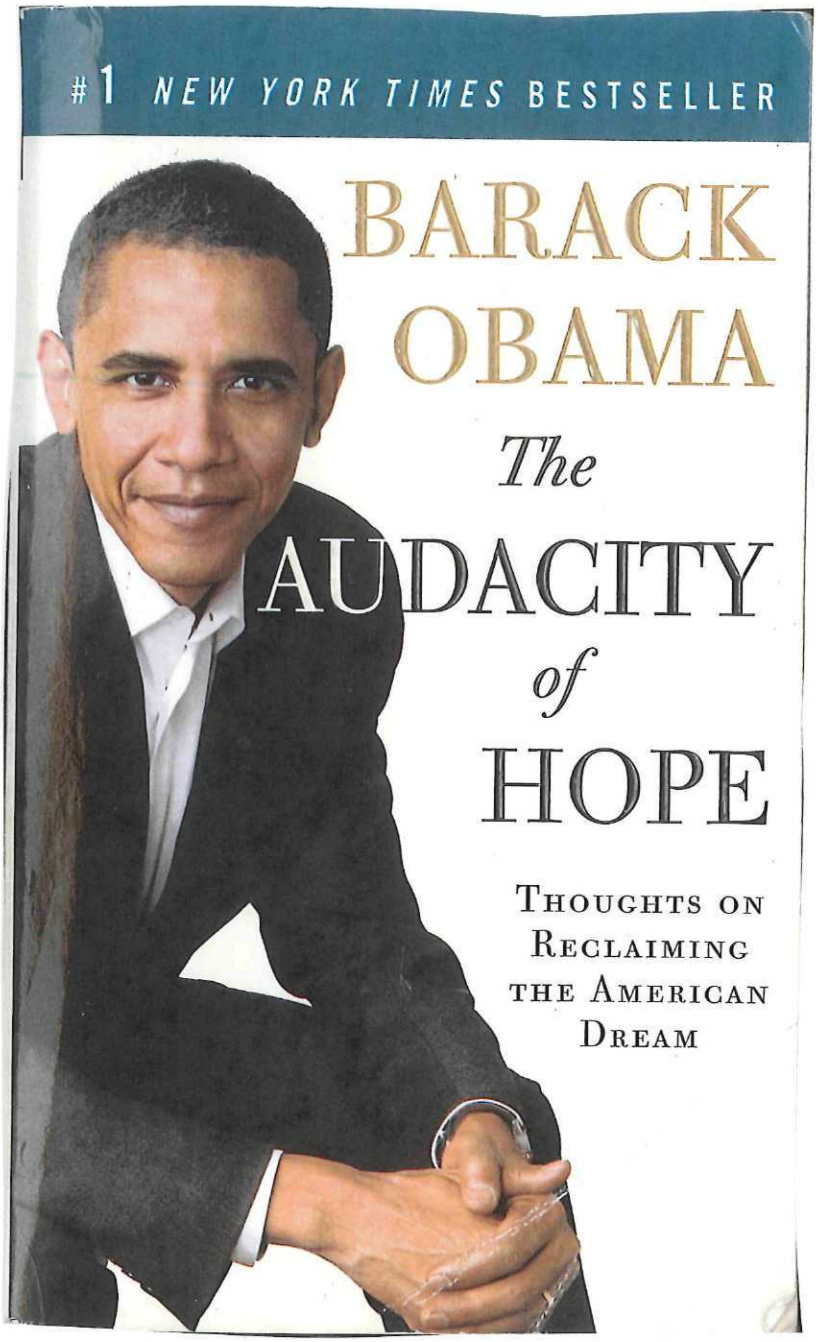
DATE: Monday, May 19, 2008
TO: Honorable Charles R. Pyle, U.S. Magistrate Judge
FROM: Elliott V. Ness, United States Pretrial Services Officer

Drug Court Session	1	2	3	4	5	6
Drug Court Date	9/19/2007	10/19/2007	11/19/2007		1/19/2008	2/19/2008
# Drug Tests	10	12	6	10	10	10
# POSITIVE Drug Tests	1 THC	1 Cocaine	0 None	0	0	0
# MISSED Drug Tests			4 Missed UA's	0	0	0
Police Contact?	None	None	None	N	N	N
Current Employment	Peter Piper Pizza	Peter Piper Pizza	Fired from job	Unemployed	St. Brutus' Hospital	St. Brutus' Hospital
Drug Treatment Status	1	1 Referred to	1	1 1/1/2008	1 1/1/2008	1 1/1/2008
	2	2 CC	2	2 6/6/2008	2 6/6/2008	2 6/6/2008
Sup Grp Attendance				Weekly AA	Weekly AA	Weekly AA
SERIOUS INCIDENT?	No	Yes Associates	No	No	No	No

CC) Cactus Counseling **NB**) New Beginnings **VS**) Vida Serena **BSS**) Behavioral Systems Southwest

Drug Court Session	7	8	9	10	11	12
Drug Court Date	3/19/2008	4/19/2008	5/19/2008			
# Drug Tests	10	10	10			
# POSITIVE Drug Tests	0	0	1 THC, HER			
# MISSED Drug Tests	0	0	0			
Police Contact?	N	N	N			
Current Employment	St. Brutus' Hospital	St. Brutus' Hospital	St. Brutus' Hospital			
Drug Treatment Status	1 1/1/2008	1 1/1/2008	1 1/1/2008			
	2 6/6/2008	2 6/6/2008	2 6/6/2008			
Sup Grp Attendance	Weekly AA	Weekly AA	Weekly AA			
SERIOUS INCIDENT?	No	No	No			

CC) Cactus Counseling **NB**) New Beginnings **VS**) Vida Serena **BSS**) Behavioral Systems Southwest


#1 NEW YORK TIMES BESTSELLER
BARACK OBAMA
The AUDACITY of HOPE
THOUGHTS ON RECLAIMING THE AMERICAN DREAM

FIRST VINTAGE BOOKS EDITION, JULY 2008

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DACITY *of* HOPE

nate in four horseshoe-shaped rows. te back to 1819, and atop each desk or inkwells and quills. Open the id you will find within the names of used it—Taft and Long, Stennis and r penned in the senator's own hand. here in the chamber, I can imagine rt Humphrey at one of these desks, loption of civil rights legislation; or lesks over, thumbing through lists, es; or LBJ prowling the aisles, grabng votes. Sometimes I will wander Daniel Webster once sat and image packed gallery and his colleagues, thunderously defends the Union ession.

ide quickly. Except for the few mine, my colleagues and I don't spend ate floor. Most of the decisions—and when to call them, about how handled and how uncooperative to cooperate—have been worked the majority leader, the relevant eir staffs, and (depending on the nvolved and the magnanimity of g the bill) their Democratic counreach the floor and the clerk starts ne senators will have determined—s or her staff, caucus leader, prest groups, constituent mail, and st how to position himself on the

It makes for an efficient process, which is much appreciated by the members, who are juggling twelve- or thirteen-hour schedules and want to get back to their offices to meet constituents or return phone calls, to a nearby hotel to cultivate donors, or to the television studio for a live interview. If you stick around, though, you may see one lone senator standing at his desk after the others have left, seeking recognition to deliver a statement on the floor. It may be an explanation of a bill he's introducing, or it may be a broader commentary on some unmet national challenge. The speaker's voice may flare with passion; his arguments—about cuts to programs for the poor, or obstructionism on judicial appointments, or the need for energy independence—may be soundly constructed. But the speaker will be addressing a near-empty chamber: just the presiding officer, a few staffers, the Senate reporter, and C-SPAN's unblinking eye. The speaker will finish. A blue-uniformed page will silently gather the statement for the official record. Another senator may enter as the first one departs, and she will stand at her desk, seek recognition, and deliver her statement, repeating the ritual.

In the world's greatest deliberative body, no one is listening.

I REMEMBER January 4, 2005—the day that I and a third of the Senate were sworn in as members of the 109th Congress—as a beautiful blur. The sun was bright, the air unseasonably warm. From Illinois, Hawaii, London, and Kenya, my family and friends crowded into the Senate visitors' gallery to cheer as my new colleagues and I stood beside the marble dais and raised our right hands to take

LEADING CAUSES OF DEATH BY RACE/ETHNICITY - 2006
SUBSTANCE USE AND ABUSE BY RACE/ETHNICITY - 2004
POVERTY LEVELS BY RACE/ETHNICITY - 2008

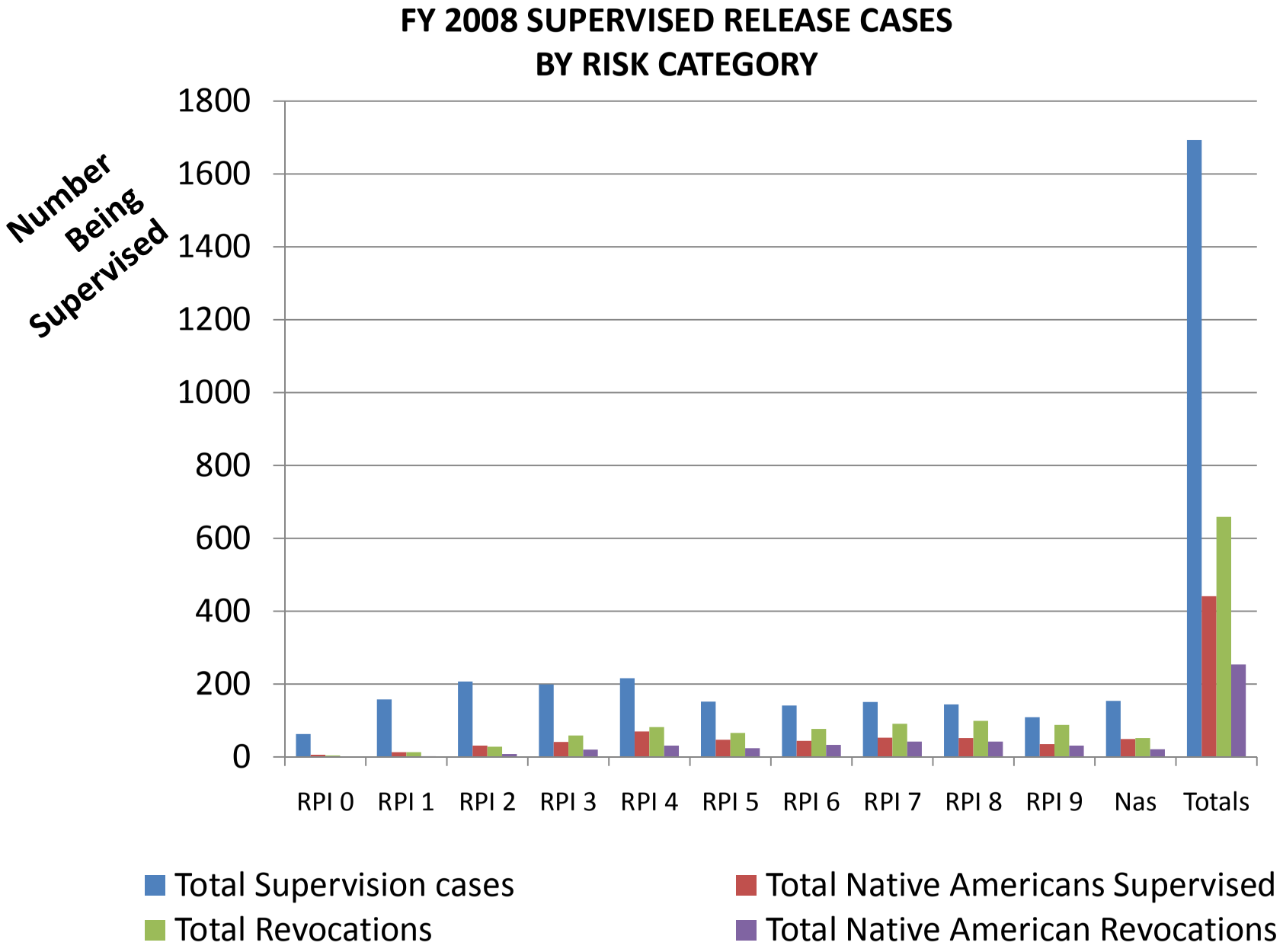
TYPE OF DEATH	WHITE	AFRICAN AMERICAN	NATIVE AMERICAN	ASIAN	HISPANIC LATINO
2006 - Causes of Death (Ranking)[1]					
ALL DEATHS	2077549	289971	14037	44707	133004
SUICIDE	30138 (10th)	--	395 (8th)	813 (9th)	--
HOMICIDE	--	9032 (6th)	--	--	3524 (7th)
HIV	--	6854 (9th)	--	--	--
LIVER DISEASE	--	--	596 (5th)	--	3592 (6th)
2004 - Use of substance age 12 and over (% of population)[2]					
Illegal drugs	2.7%	1.6%	3%	0.9%	2.4%
Alcohol use	55.2%	37.1%	36.2%	37.4%	40,2%
binge alcohol use	23.8%	18.3%	25.8%	12.4%	24%
heavy alcohol use	7.9%	4.4%	7.7%	2.7%	5.3%

ALL PERSONS	WHITE	AFRICAN AMERICAN	NATIVE AMERICAN	ASIAN	HISPANIC LATINO
2008 (Table 4- Families Below Poverty Level)[3]					
13.2%	11.2%	24.7%	24.2%	11.8%	23.2%

[1] Center for Disease Control, *Health, United States, 2006*,Table 31, ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/Health_US/hus08tables/Table030.xls

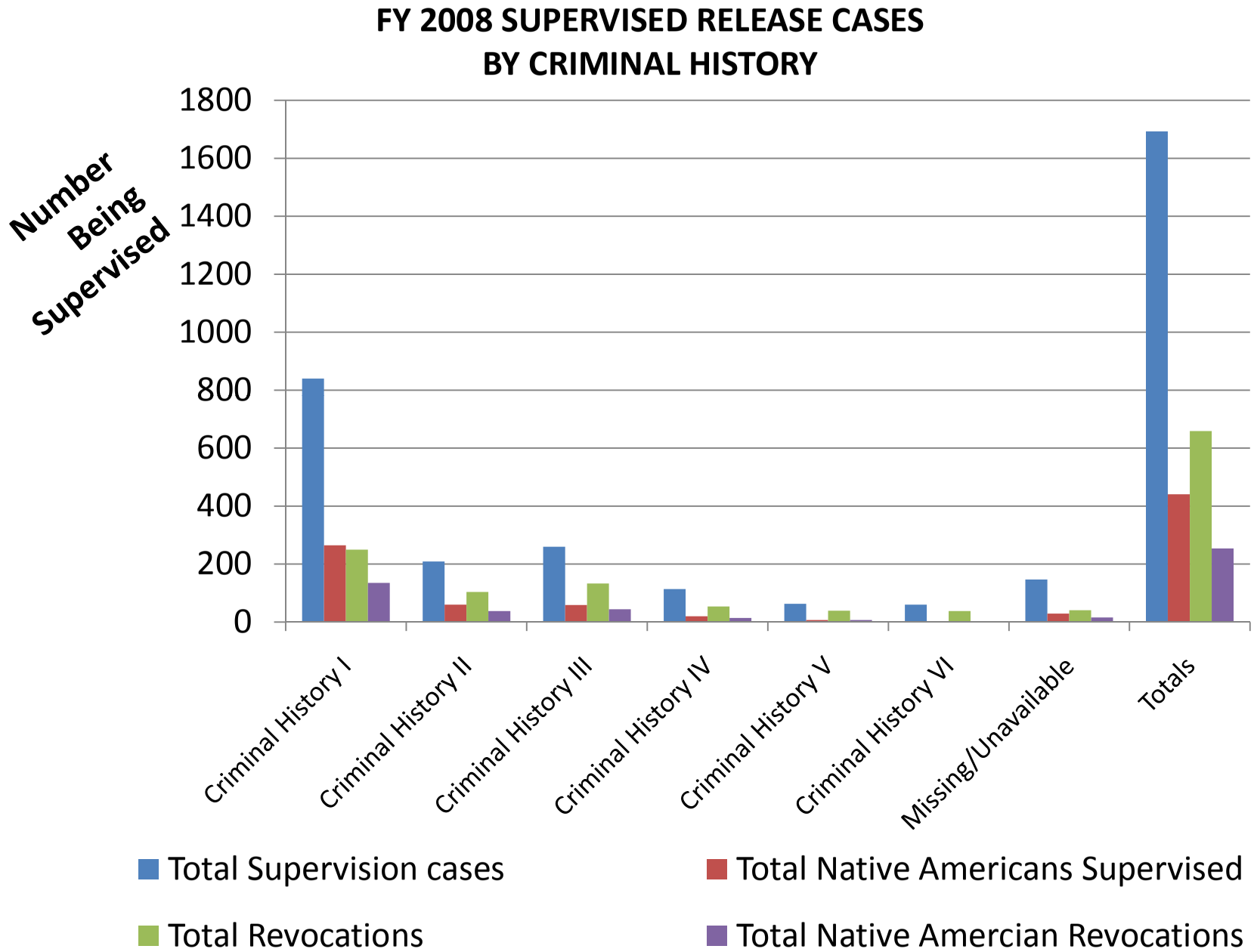
[2] *Id.*, Table 66.

[3] U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States, 2008,* (9/09), http://www.census.gov/prod/2009pubs/p60-236.pdf


FY 2008 SUPERVISED RELEASE CASES
BY RISK CATEGORY
Number Being Supervised
1800
1600
1400
1200
1000
800
600
400
200
0
RPI 0
RPI 1
RPI 2
RPI 3
RPI 4
RPI 5
RPI 6
RPI 7
RPI 8
RPI 9
Nas
Totals
Total Supervision cases
Total Native Americans Supervised
Total Revocations
Total Native American Revocations

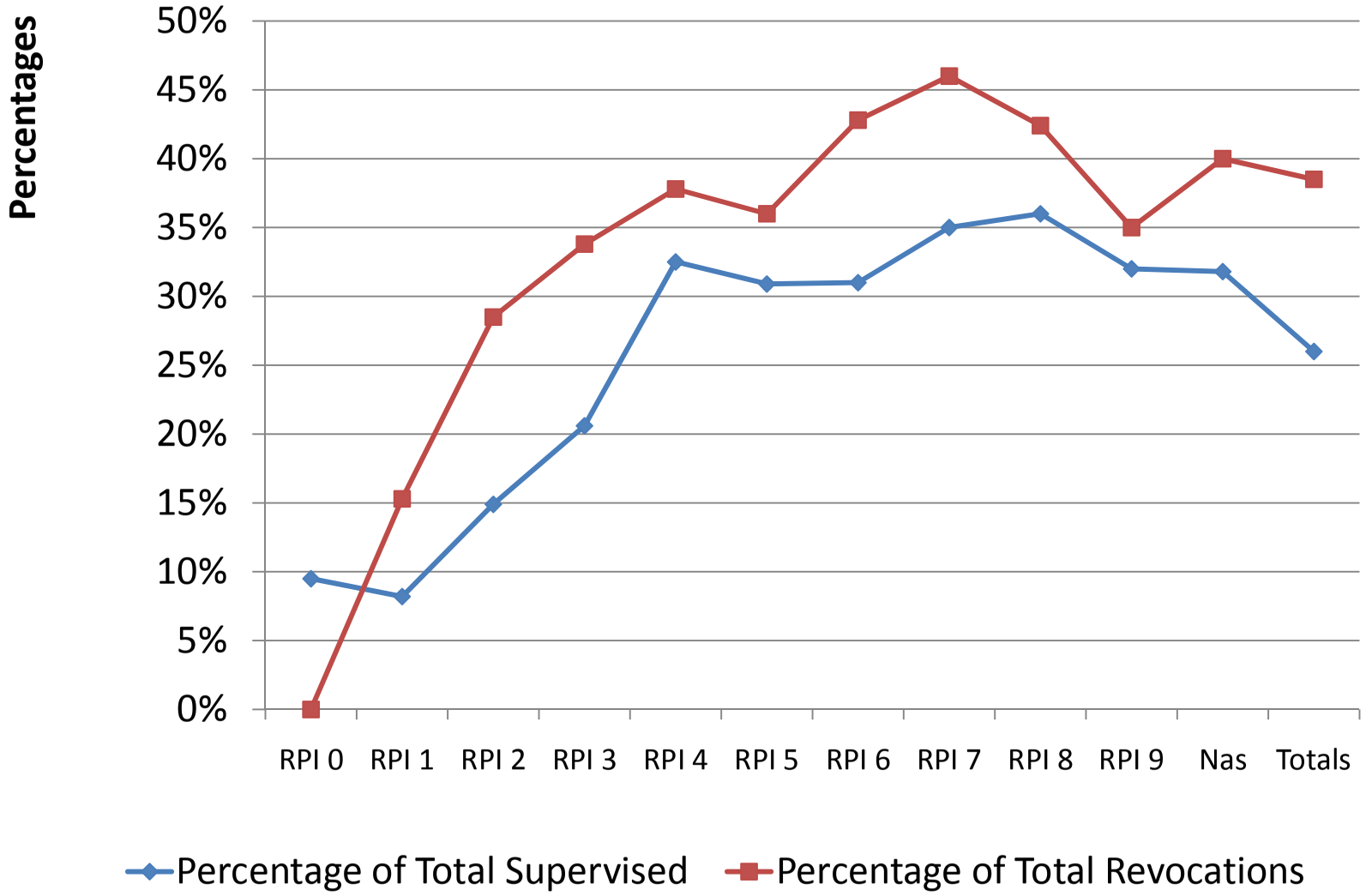
Appendix 4-1

	Total Supervision cases	Total Native Americans Supervised	Total Revocations	Total Native American Revocations
RPI 0	63	6	4	0
RPI 1	158	13	13	2
RPI 2	207	31	28	8
RPI 3	199	41	59	20
RPI 4	216	70	82	31
RPI 5	152	47	66	24
RPI 6	141	44	77	33
RPI 7	151	53	91	42
RPI 8	144	52	99	42
RPI 9	109	35	88	31
Nas	154	49	52	21
Totals	1693	441	659	254

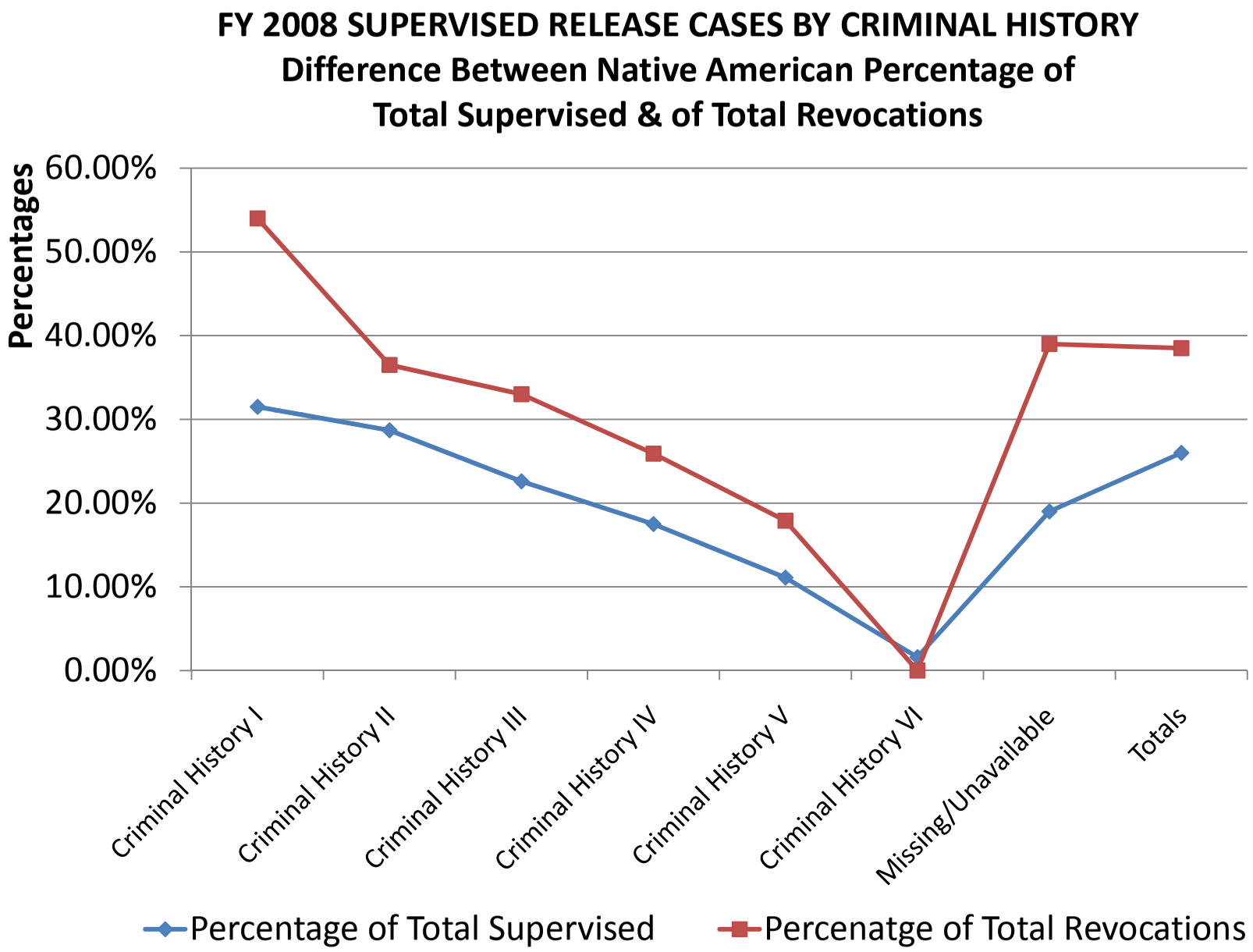

FY 2008 SUPERVISED RELEASE CASES
BY CRIMINAL HISTORY
Number Being Supervised
1800
1600
1400
1200
1000
800
600
400
200
0
Criminal History I
Criminal History II
Criminal History III
Criminal History IV
Criminal History V
Criminal History VI
Missing/Unavailable
Totals
Total Supervision cases
Total Native Americans Supervised
Total Revocations
Total Native Amercian Revocations

	Total Supervision cases	Total Native Americans Supervised	Total Revocations	Total Native Amercian Revocations
Criminal History I	840	265	250	135
Criminal History II	209	60	104	38
Criminal History III	260	59	133	44
Criminal History IV	114	20	54	14
Criminal History V	63	7	39	7
Criminal History VI	60	1	38	0
Missing/Unavailable	147	29	41	16
Totals	1693	441	659	254

FY 2008 SUPERVISED RELEASE CASES BY RISK CATEGORY
Difference Between Native American Percentage of Total Supervised & of Total Revocations



	Percentage 0f Total Supervised	Percentage of Total Revocations
RPI 0	10%	0.00%
RPI 1	8.20%	15%
RPI 2	15%	29%
RPI 3	21%	33.80%
RPI 4	33%	38%
RPI 5	31%	36.00%
RPI 6	31.00%	43%
RPI 7	35.00%	46.00%
RPI 8	36.00%	42.40%
RPI 9	32.00%	35.00%
Nas	31.80%	40.00%
Totals	26.00%	38.50%


FY 2008 SUPERVISED RELEASE CASES BY CRIMINAL HISTORY
Difference Between Native American Percentage of
Total Supervised & of Total Revocations
Percentages
60.00%
50.00%
40.00%
30.00%
20.00%
10.00%
0.00%
Criminal History I
Criminal History II
Criminal History III
Criminal History IV
Criminal History V
Criminal History VI
Missing/Unavailable
Totals
Percentage of Total Supervised
Percenatge of Total Revocations

	Percentage of Total Supervised	Percenatge of Total Revocations
Criminal History I	31.50%	54%
Criminal History II	28.70%	36.50%
Criminal History III	22.60%	33%
Criminal History IV	17.50%	25.90%
Criminal History V	11.10%	17.90%
Criminal History VI	1.60%	0%
Missing/Unavailable	19%	39%
Totals	26%	38.50%

STUDIES OF CHILD PORNOGRAPHY OFFENDERS CONCERNING LIKELIHOOD TO COMMIT CONTACT SEX CRIMES - SUMMARY

Wollert, R. W., Waggoner, J., & Smith, J., *Child Pornography Offenders Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*. Poster session: Association for the Treatment of Sexual Abusers (ATSA) (Dallas 10/09).	
PARTICIPANTS	72; participated in federally-funded treatment programs after being charged with or convicted of possessing, distributing or producing child pornography (pp.4). • 10 of the 72 had prior convictions for a sex offense, 2 had a prior conviction for child pornography, 3 had prior convictions for public indecency and/or peeping, and 6 were convicted of a contact sex offense at the same time as the child pornography conviction. Only 1 used the Internet to attempt to arrange a meeting with a minor female (pp.5). • 72% of all offenders in the study were negative for patterns of sexual conduct problems beyond child pornography (pp.5).
RESULTS	suggests child pornography offenders do not have violent histories and are less likely to recidivate than other types of sex offenders (pp.4). • Over average span of 4 years, only 1 out of the 72 offenders was taken into custody for possessing child pornography. 1 other was apprehended for committing non-contact sex offense. • None of 72 was arrested on child molestation charges, and no one who had successfully completed supervision was charged with another sex offense (both contact and non-contact) (pp.4). Other factors correlated with reduced recidivism risk (pp.6-7): • Age – current average age of those studied was 48. • There were no violent crimes committed at same time as the child pornography offense. • Only 1 violent crime had been committed by a participant prior to committing the child pornography offense. • Only 2 offenders had 4 or more sentencing dates prior to the child pornography conviction. • 25 of offenders convicted of a child pornography offense were never in a long-term committed relationship, NOTE: impact of this factor has yet to be determined (pp.7).

STUDIES OF CHILD PORNOGRAPHY OFFENDERS CONCERNING LIKELIHOOD TO COMMIT CONTACT SEX CRIMES - SUMMARY

Elliott, I.A., Beech, A.R., Madeville-Norden, R, & Hayes, E., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 Sexual Abuse: Journal of Research and Treatment 86 (3/09)	
PARTICIPANTS	Compared psychological test results from 505 adult male Internet sex offenders (including those with convictions for accessing, downloading, trading and/or making indecent images of a child or children younger than 18 years of age only) and 526 adult male contact sex offenders (including those convicted of direct contact sexual victimization of a child younger than 16 years of age, including rape, indecent assault, and gross indecency) (pp.80).
RESULTS	"contact offenders are more likely than Internet offenders to have primary deficits related to the antisocial cognitions pathway, meaning they are more likely to harbor offense-supportive belief systems that justify and maintain their behavior, to have greater difficulty identifying the harmful impact of sexual contact on a child, and to hold maladaptive beliefs relating to the sexual sophistication of children, all of which diminishes their ability to display empathy" (pp.87) (citations omitted).

Webb, L., Craissati, J. & Keen, S., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, published online on behalf of ATSA (11/16/07), https://www.researchgate.net/publication/5839237_Characteristics_of_internet_child_pornography_offenders_a_comparison_with_child_molesters	
PARTICIPANTS	210 adult male subjects; 43% (90) had been convicted of an Internet child pornography offense; 57% (120) had been convicted of a contact sex offense with a child victim. Of the Internet offenders, 51% had been convicted of making child pornography; 36% had been convicted of possessing child pornography. Only 5 offenders had an index offense of both Internet pornography and contact sex offending and were thus excluded from the study due to the small sample size.
RESULTS	Contact offenders had significantly more "formal" failures, meaning reconvictions and supervision violations. Only 1 Internet offender was convicted for a general (e.g., nonsexual/nonviolent) offense and 2 were convicted for further Internet sex offenses. The "breach and recall" (return to custody for violations of release conditions) rate was also significantly higher for contact offenders at 17%, compared to 0 for Internet offenders.

STUDIES OF CHILD PORNOGRAPHY OFFENDERS CONCERNING LIKELIHOOD TO COMMIT CONTACT SEX CRIMES - SUMMARY

Webb, L., Craissati, J. & Keen, S., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, published online on behalf of ATSA (11/16/07), https://www.researchgate.net/publication/5839237_Characteristics_of_internet_child_pornography_offenders_a_comparison_with_child_molesters	
	Internet offenders miss no supervision or treatment sessions while 8% of contact offenders missed supervision sessions and 13% missed treatment sessions. Contact offenders were also significantly more likely to drop out of treatment (18% compared to 4% of Internet offenders); 13% of contact offenders dropped out of treatment for "unacceptable reasons," compared to 0 Internet offenders. Contact offenders were also significantly more likely to engage in sexually risky behaviors, both "general" behaviors such as accessing adult pornography and specific behaviors encompassing a new allegation or charge. 26% of contact offenders engaged in general sexually risky behaviors and 16% engaged in specific risky behaviors, compared to 14% general and 4% specific in the Internet offender group (pp.459-60).

Seto, M.C. & Eke, A.W., *The Criminal Histories and Later Offending of Child Pornography Offenders*, Sexual Abuse: A Journal of Research and Treatment, Vol. 17, No. 2, (April 2005).	
PARTICIPANTS	201 child pornography offenders(pp. 203-04); 56% had a prior criminal charge of any kind – of those: 45% had a prior nonviolent offense, 30% had prior violent offenses, 24% had prior contact sexual offenses, 17% had prior noncontact sexual offenses, and 15% had prior child pornography offenses.
RESULTS	Offenders with prior criminal history were significantly more likely to fail probation or parole, and significantly more likely to reoffend in some way (pp.206). Those who committed other crimes in addition to child pornography offenses to be more likely to fail probation or parole and to offend again (pp.207). Child pornography offenders with one or more prior contact sexual offenses were the most likely to reoffend, both generally and sexually, although the overall rate of sexual reoffending was low (4%), and only one offender committed a new contact sexual offense (pp.207,208). "[O]ur finding does contradict the assumption that all child pornography offenders are at very high risk to commit contact sexual offenses involving children" (pp.208).

STUDIES OF CHILD PORNOGRAPHY OFFENDERS CONCERNING LIKELIHOOD TO COMMIT CONTACT SEX CRIMES - SUMMARY

Malamuth, M. & Huppin, M., *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. Rev. of L. & Soc. Change 773 (2007).	
PARTICIPANTS	• Study of 193 university males: 21% reported some sexual attraction to small children, 9% reported fantasizing about having sex with children, 5% reported masturbatory fantasies involving sex with children, and 7% indicated some likelihood of sex with children if they could be assured they would not be caught or punished (from FN 105). • In another study of undergraduate men, 22 of 100 men reported sexual attraction to a child (as did 3 of 100 undergraduate women surveyed). [from FN 106].
RESULTS	Arousal to child pornography is not confined to a sick few (pp. 792). Demonstrated pedophilic interest does not mean person is a pedophile. Similarly, pedophilia does not automatically mean someone is or is likely to be a contact sex offender. Some pedophiles do not act on their sexual attractions, and some contact sex offenders act opportunistically against children rather than on a distinct attraction to them. (pp.792).

Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., Rossegger, A., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, BMC Psychiatry (July 14, 2009)	
PARTICIPANTS	231 suspected child pornography users in Switzerland and the proportion of those who subsequently reoffended within the next six years with both contact and non-contact sex offenses. The study included new convictions, new charges, and new investigations. 127 of the suspected offenders were actually convicted; due to the strength of the evidence against them, however (all used credit cards to purchase material and 95% of them confessed to having used child pornography), authors assumed all were child pornography users. Average age = 36, range =18-65; 58% single, 33% married, 8% divorced, 1% widowed; 25% had children. 45% = college diploma, 50% = formal vocational training, and 5% = unskilled labor. Roughly one-third worked in a computer science or engineering-related position, another third in the service industry, and 26% held blue collar job. 2 offenders produced child pornography; 19% had more than 5,000 files. 4.8% had a prior conviction for either a

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Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., Rossegger, A., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, BMC Psychiatry (July 14, 2009)	
	violent or a sex offense. 2 people had a prior conviction for a contact sex offense against a child; 8 had a prior child pornography offense, 1 had a prior violent offense.
RESULTS	*Results 1:* During 6-year study period, only 6% were investigated for or charged with a sexual or violent offense – 3.9% of the investigations or charges were for new child pornography offenses, 0.8% were for a contact sex offense involving a child, and 1.3% were for a violent offense (pp. 4 of 7). Of the 0.8% who were charged with or investigated for a contact sex offense (2 people), 1 person had a prior contact sex offense conviction (pp. 4 of 7). *Results 2:* During the six-year study period, only 3% were convicted of a sexual or violent offense. 2.6% of those were convicted of another child pornography offense, and 0.8% (1) was convicted of a violent offense. None of the new convictions were for a contact sex offense (pp. 4 of 7). *Results 3:* The group of subjects that had been acquitted were significantly more likely to be married, did not have various forms of illegal pornography, were less likely to own a collection of material, held less subscriptions to websites selling legal pornography, and were less likely to possess legal pornography (pp. 5 of 7). NOTE, however, the two people with a prior contact sex offense and the one person with a prior violent offense were all in the group that had been acquitted. None of those in the acquitted group was investigated for or charged with another child pornography offense (compared to 7.3% of the convicted group), but 1.9% of the acquitted group (2 people) were investigated for or charged with a contact sex offense (compared to 0% of the convicted group) (pp. 5 of 7).

Seto, M, *Assessing the Risk Caused by Child Pornography Offenders*, prepared for G8 Global Symposium (UNC-Chapel Hill 4/6-7/09).	
PARTICIPANTS	201 adult male child pornography offenders from Ontario Sex Offender Registry; 301 police case files on child pornography.
RESULTS	Relatively few child pornography offenders go on to commit contact sex offense.