

**Statement of Jacqueline A. Johnson  
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**Public Hearing Before the  
United States Sentencing Commission**

**“The Sentencing Reform Act: 25 Years Later”  
Chicago, Illinois  
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I thank the Commission for this opportunity to testify on behalf of the Federal Public and Community Defenders about how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted, and what changes can be made to improve it.<sup>1</sup>

I have been practicing criminal law in federal court for twenty-five years both in private practice and as a member of the Office of the Federal Public Defender in the Northern District of Ohio. I have seen federal sentencing go from one extreme, where judges had complete discretion to impose sentences for any reason and without any guidance, to the opposite extreme, where sentences were mandated by mechanical rules and judges had almost no discretion. Now, twenty-five years after the Sentencing Reform Act, the system has reached a healthy balance. Judges now have the wise guidance of 18 U.S.C. § 3553(a), directing them to consider the advisory guidelines and all of the relevant circumstances of the offense and the offender, and to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing.

The advisory guideline system also promises long term improvement by giving judges a meaningful role in the evolution of the guidelines and enabling the Commission to act in its characteristic institutional role. A judge’s “reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors,” provides “relevant information” to the Commission so that the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw.”<sup>2</sup> The “Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”<sup>3</sup>

We appreciate the work the Commission has already done to improve federal sentencing. Primarily because of the Commission’s work on crack cocaine, the Attorney

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<sup>1</sup> The Defenders are required to “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” 28 U.S.C. § 994(o).

<sup>2</sup> *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007).

<sup>3</sup> *Booker v. United States*, 543 U.S. 220, 264 (2005).

General has announced the Administration's support for a 1:1 ratio, and Congress seems to be on the brink of enacting legislation to accomplish that result. We hope that the Commission will recommend that the statutory change be made retroactive.

The Commission's retroactive two-level reduction in the crack cocaine guidelines has resulted in relief for nearly 300 of our clients in the Northern District of Ohio and thousands more across the country. Many district court judges have acted upon the Commission's research on the sentencing disparity between offenses involving crack and powder cocaine. In July of this year, a judge in the Northern District of Ohio adopted a 1:1 ratio after considering the Commission's reports.<sup>4</sup> Other judges have also adopted a 1:1 ratio.<sup>5</sup> This demonstrates that, when the Commission provides empirical research and data, judges trust the Commission's findings.

In Part I below, I discuss how the Supreme Court's decisions in *Booker* and subsequent cases have improved sentencing in the district court and have resulted in appellate review that is working as it should be. In Part II, I discuss how the Commission can improve the system by revising the guidelines and advising Congress based on feedback from judges and empirical data and research. This part includes a description of an enlightening study conducted by a federal judge in my district indicating that, contrary to what Congress and the Commission may believe, fully informed members of the public believe that the guidelines and mandatory minimums are unjustly harsh. In Part III, I discuss evidence showing that judges are exercising their discretion moderately by any measure, and address certain anecdotes that have been offered to undermine confidence in judges.

**I. The Supreme Court's Decisions in *Booker* and Subsequent Cases Have Improved Sentencing in the District Court and Have Resulted in Appropriate Appellate Review.**

**A. The sentencing process is more transparent and honest, and the sentences imposed are more fair and effective.**

Like most of the judges, probation officers, academics, and community representatives who have testified before you, the Defenders believe that the advisory guideline system is working much better than the mandatory guideline system. Judges must now impose a sentence that is sufficient, but not greater than necessary, to achieve just punishment, respect for law, deterrence, protection of the public, and rehabilitation. In doing so, judges must consider the applicable guideline range, all of the circumstances

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<sup>4</sup> *United States v. Griffin*, No. 1:09CR08 (N.D. Ohio).

<sup>5</sup> See, e.g., *United States v. Russell*, 2009 WL 2485734 (W.D. Pa., Aug 12, 2009); *United States v. Owens*, 2009 WL 2485842 (W.D. Pa. Aug 12, 2009); *United States v. Lewis*, 623 F.Supp.2d 42 (D.D.C. June 9, 2009); *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009).

of the offense, and the history and characteristics of the defendant. Judges can openly disagree with a guideline sentence, even in an ordinary case.<sup>6</sup>

We support this system because sentencing is more honest and sentences are more just. Except when a mandatory minimum statute applies, judges are no longer required to impose sentences that they believe are too severe, and defendants are no longer told that the judge has no choice but to impose an excessive sentence. Defendants respect the system because the judge explains the sentence in terms that make sense. In my district, it was always our practice to present as complete a picture of our clients as we could, but the reality was that judges could rarely take the information we presented into account. Judges now explain the sentence in terms of the defendant's situation and what purpose the sentence is meant to accomplish. This goes a long way to creating respect for law.

At the same time, the sentencing decision still revolves around the guidelines. The sentencing judge must “begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and “to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”<sup>7</sup> A major variance from the guideline range requires a more significant justification than a minor one.<sup>8</sup> The judge “must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.”<sup>9</sup> As a practical matter, the guidelines continue to be the focal point because they are the only § 3553(a) factor with a number affixed.<sup>10</sup>

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<sup>6</sup> See *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

<sup>7</sup> *Gall*, 128 S. Ct. at 596.

<sup>8</sup> *Id.* at 597.

<sup>9</sup> *Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009).

<sup>10</sup> The psychological phenomenon of “anchoring” to a number has often been noted in connection with post-*Booker* sentencing. See Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 127 (2006) (“Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.”), <http://www.thepocketpart.org/2006/07/gertner.html> (quotations omitted); Panel Discussion, *Federal Sentencing Under “Advisory Guidelines”: Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006) (Judge Lynch describing research on “anchoring”: “Whether people like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact. I think it is psychologically inevitable that the Guidelines will have a powerful influence on sentences, even if they are purely advisory.”).

Those who are concerned that the advisory guidelines lack sufficient teeth should note that the federal advisory guidelines have all of the attributes of what is considered a more mandatory system in the states -- requiring judges to calculate the guideline range, requiring reasons for departure, appellate review, and monitoring of compliance rates. Most states that have appellate review provide it to the defendant but not the prosecution. In more voluntary systems, judges are free to depart without giving reasons, there is no appellate review, and compliance is not monitored.<sup>11</sup>

## **B. Appellate review is working appropriately.**

When Congress enacted the SRA, its goals for appellate review were to “preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court,” to correct “clearly unreasonable” sentences, and to “reduce *unwarranted* sentencing disparity.”<sup>12</sup> But courts of appeals enforced the guidelines more rigidly than expected or than the statutes required, even before the PROTECT Act formally enacted *de novo* review.<sup>13</sup> In *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court clarified that the standard of review was abuse of discretion, but the courts of appeals continued to reverse departures at a high rate and to reverse denials of departures at a low rate,<sup>14</sup> and thus *Koon* had no significant impact on departure rates.<sup>15</sup> This overly strict enforcement of the guidelines created unwarranted uniformity, and stifled feedback to the Commission, which had been thought to be essential to the proper functioning of the guideline system.<sup>16</sup> Judges were

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<sup>11</sup> National Center for State Courts, *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States* at 5 (“Assessing Consistency”), <http://www.pewcenteronthestates.org/uploadedFiles/PEWExecutiveSummaryv10.pdf>; National Center for State Courts, *State Sentencing Guidelines, Profiles and Continuum*, <http://www.ncsconline.org/csi/PEW-Profiles-v12-online.pdf>.

<sup>12</sup> S. Rep. No. 98-225 at 150 (1983) (emphasis supplied).

<sup>13</sup> See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83 (2003); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1500 (1997).

<sup>14</sup> See Appendix 1.

<sup>15</sup> See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 49-50 (March 2006); Mark T. Bailey, *Feeney’s Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 Iowa L. Rev. 269, 295-97 (2004).

<sup>16</sup> See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (October 2003) (“departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines,” which “would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines.”); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not*

prohibited from even considering the purposes of sentencing,<sup>17</sup> and were compelled to impose sentences based on unsound and unfair policies, such as the crack guideline.

The Supreme Court has now excised *de novo* review and prohibited “extraordinary circumstances” review because those standards made the guidelines mandatory and therefore unconstitutional.<sup>18</sup> The Court also emphasized, as Congress did in enacting the SRA, that sentencing is properly the function of the district court judge, not the court of appeals, for reasons of institutional competence.<sup>19</sup> The current abuse of discretion standard ensures that the Commission receives necessary feedback from sentencing judges. A judge’s “reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors,” provides “relevant information” to the Commission so that the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw.”<sup>20</sup> At the same time, the courts of appeals play a meaningful role in ensuring that sentences are grounded in § 3553(a) and in regulating district court decisions that fall outside the bounds of

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*Disparity*, 29 Am. Crim. L. Rev. 833, 861-62 (1992) (departures are “essential to the proper functioning of the Guidelines system” and the SRA “makes clear that departures are legitimate sentencing tools and that their availability should remain flexible”).

<sup>17</sup> See, e.g., *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) (“To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines.”); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) (“Disproportionality does not, in itself, provide an appropriate basis for a downward departure.”); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court’s reliance on defendant’s family ties and responsibilities, majority “pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant’s life will be frustrated by this court.”).

<sup>18</sup> *Booker*, 543 U.S. at 259-60 (2005); *Rita*, 127 S. Ct. at 2465-67; *Gall*, 128 S. Ct. at 595-96.

<sup>19</sup> “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, district courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.” *Gall*, 128 S. Ct. at 597-98 (internal punctuation and citations omitted). The sentencing judge is in the best position to “consider what impact, if any, each particular purpose [set forth in § 3553(a)(2)] should have on the sentence in each case.” S. Rep. No. 98-225 at 77 (1983); see also 18 U.S.C. § 3551(a).

<sup>20</sup> *Rita*, 127 S. Ct. at 2469.

reasonableness. They retain a “limited yet important” responsibility “to ensure that a substantively reasonable sentence has been imposed in a procedurally fair way.”<sup>21</sup>

A sentence must first pass muster under a robust set of procedural requirements.<sup>22</sup> Procedural errors that may affect the kind or length of a sentence, like improperly calculating the guidelines, overlooking relevant factors, or clearly erroneous fact-finding, are caught and remedied on remand.<sup>23</sup> Inadequate explanations for the chosen sentence are similarly rejected.<sup>24</sup> By requiring district courts to adequately explain the reasons for the sentence imposed, appellate courts are better able to determine whether a sentence is substantively reasonable.<sup>25</sup> Requiring reasoned explanations also guards against

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<sup>21</sup> *United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008).

<sup>22</sup> *Gall*, 128 S. Ct. at 597 (The court of appeals must “ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.”).

<sup>23</sup> *See, e.g., United States v. Bartlett*, 567 F.3d 901, 910 (7<sup>th</sup> Cir. 2009 (remanding where judge varied upward from a mistaken guideline calculation); *United States v. Egbert*, 562 F.3d 1092, 1104 (10<sup>th</sup> Cir. 2009) (remanding for resentencing where there was no evidence to support the district court’s finding that a defendant exercised control over participants under USSG § 3B1.1(a) and because there was insufficient evidence to support the district court’s finding that a victim suffered “serious bodily injury” as defined in USSG § 1B1.1 cmt. (n.1)); *United States v. Delgado-Martinez*, 564 F.3d 750, 753-54 (5<sup>th</sup> Cir. 2009) (improper calculation of the guideline range was procedural error that may have affected outcome of sentence imposed); *United States v. Calimlim*, 538 F.3d 706, 715-18 (7<sup>th</sup> Cir. 2008) (remanding for resentencing where district court improperly failed to apply enhancements); *United States v. Abdelsalam*, 311 Fed. Appx. 832, 845, 848 (6<sup>th</sup> Cir. 2009) (remanding for resentencing where district court erred in calculating base offense level and its findings of monetary loss were clearly erroneous); *United States v. Goward*, No. 06-2586, 2009 WL 512685 (6<sup>th</sup> Cir. Mar. 2, 2009) (reversing as procedurally unreasonable a below-guideline sentence where district court may have improperly included two prior convictions in the criminal history score).

<sup>24</sup> *See, e.g., United States v. Tisdale*, 264 Fed. Appx. 403 (5<sup>th</sup> Cir. 2008) (reversing within-guideline sentences as procedurally unreasonable because the district court did not give any indication it had considered any of the § 3553(a) factors or articulate sufficient reasons why it was rejecting the defendant’s arguments for a sentence below the guidelines); *United States v. Carter*, 564 F.3d 325, 330 (4<sup>th</sup> Cir. 2009) (reversing a below-guideline sentence “[b]ecause the record here does not demonstrate that the district court conducted such an assessment and so does not reveal why the district court deemed the sentence it imposed appropriate, we cannot hold the sentence procedurally reasonable”); *United States v. Grant*, 323 Fed. Appx. 189, 192 (3d Cir. 2009) (reversing as procedurally unreasonable an above-guideline sentence where district court failed to “explain why the variance is justified in terms of this particular defendant and this particular offense”).

<sup>25</sup> *See, e.g., United States v. Stephens*, 549 F.3d 459, 467 (6<sup>th</sup> Cir. 2008) (explaining that it could not, on the record before it, meaningfully review whether the sentence was substantively reasonable).

arbitrariness and promotes confidence in the justice system because the parties and the public can both understand why the defendant received a particular sentence.<sup>26</sup> Reasoned explanations should also inform the Commission when it considers whether and how to amend particular guidelines, and should help the Commission understand apparent disparities in sentencing between what on their face appear to be similarly situated defendants.

The Sixth Circuit has embraced this robust procedural review for all sentences, whether within or outside the advisory guideline range. It has readily remanded cases involving sentences outside the guideline range when the district court's explanation for the sentence was insufficient or failed to address a defendant's nonfrivolous arguments.<sup>27</sup> It has also readily affirmed sentences outside the guideline range when the district court's explanation for the sentence was sufficient.<sup>28</sup> And it has reversed sentences within the

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<sup>26</sup> See, e.g., *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008) (reversing as procedurally unreasonable a below-guideline sentence because the district court “failed to explain its reasons for [the sentence] in a way that allows for meaningful appellate review and promotes the perception of fair sentencing”).

<sup>27</sup> See, e.g., *United States v. Blackie*, 548 F.3d 395, 401-02 (6th Cir. 2008) (reversing a sentence as procedurally unreasonable where the district court “did not refer to the applicable Guidelines range and failed to provide its specific reasons for an upward departure or variance at the time of sentencing or in the written judgment and commitment order”); *United States v. Garcia*, 312 Fed. Appx. 801, 809 (6th Cir. 2009) (reversing below-guideline sentence upon finding the district court did not provide a “full exposition of the § 3553(a) factors”); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009) (reversing above-guideline sentence where district court failed to adequately address the defendant's arguments or explain its chosen sentence); *United States v. Recia*, 560 F.3d 539 (6th Cir. 2009) (reversing as procedurally unreasonable where the district court failed to address the defendant's non-frivolous argument); *United States v. Gapinski*, 561 F.3d 467, 474-75 (6th Cir. 2009) (reversing a ten-year, below-guideline sentence for marijuana manufacturing where the court was “not satisfied [] that the district court adequately considered [the defendant's] argument for a lower sentence based upon his substantial assistance to the government”).

<sup>28</sup> See, e.g., *United States v. Grossman*, 513 F.3d 592, 598 (6th Cir. 2008) (affirming as procedurally reasonable a below-guideline sentence in a child pornography case where district court adequately explained its sentence); *United States v. Weller*, Nos. 07-6020, 07-6120, 2009 WL 1349779, \*1 (6th Cir. May 13, 2009) (affirming a downward variance from the advisory range of 324-405 months, resulting in a 120 month sentence, finding the district court's stated reasons for the sentence were sufficient); *United States v. McKinney*, 299 Fed. Appx. 538 (6th Cir. 2008) (affirming upward variance as procedurally reasonable because “[i]t is clear that the district court understood the Guidelines range, its authority to deviate from it, and articulated a reason for doing so”); *United States v. Erpenbeck*, 532 F.3d 423, 438 (6th Cir. 2008) (affirming as procedurally reasonable an above-guideline sentence because the district court “adequately explained why a 300-month sentence was appropriate”).

advisory guideline range as procedurally unreasonable when the district court's explanation for choosing the sentence was insufficient.<sup>29</sup>

The appellate process is working as it should in the Sixth Circuit. As Judge Sutton, writing for the *en banc* court, observed after the Supreme Court's decisions in *Rita*, *Gall*, and *Kimbrough*:

One theme runs through all three cases: *Booker* empowered district courts, not appellate courts and not the Sentencing Commission. Talk of presumptions, plain error and procedural and substantive rules of review means nothing if it does not account for the central reality that *Booker* breathes life into the authority of district court judges to engage in individualized sentencing within reason in applying the § 3553(a) factors to the criminal defendants that come before them. If there is a pattern that emerges from *Rita*, *Gall* and *Kimbrough*, it is that the district court judges were vindicated in all three cases, and a court of appeals was affirmed just once—and that of course was when it deferred to the on-the-scene judgment of the district court.

*United States v. Vonner*, 516 F.3d 382, 392 (6th Cir. 2008) (en banc).

This endorsement of the sentencing judge as the primary decisionmaker comes with an active insistence that sentencing judges give detailed reasons for their sentences. In this manner, the Sixth Circuit not only receives better information upon which to base its review, but also paves the way for unfettered feedback to the Commission that can, if the Commission chooses to act on it, help the guidelines to constructively evolve over time. It is through this evolution that the guidelines will remain an important component in federal sentencing.

The Sixth Circuit has demonstrated a similar commitment to regulating the outer bounds of a district court's discretion with respect to the substantive reasonableness of a sentence, though it has used this power to reverse sentences with relative restraint. It has reversed sentences, both inside and outside the guideline range, when it has concluded

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<sup>29</sup> See, e.g., *United States v. Peters*, 512 F.3d 787, 788-89 (6th Cir. 2008) (reversing as procedurally unreasonable a within-guidelines sentence where the district court made only a cursory statement acknowledging defendant's arguments in mitigation, but never addressed them explaining why it was rejecting those arguments); *Stephens*, 549 F.3d at 467 (reversing as procedurally unreasonable a within-guidelines sentence because the court was left "in doubt as to whether the court fully considered its discretion to vary from the sentencing Guidelines range" and remanding for a "more thorough response" to the defendant's arguments for a downward variance"); *United States v. Delgado*, 318 Fed. Appx. 380 (6th Cir. 2009) (reversing as unreasonable a within-guidelines sentence of 235 months for a first-time nonviolent drug offender where the district court only briefly mentioned 18 U.S.C. § 3553(a) and never mentioned the defendant's mitigating evidence; remanding for a more detailed discussion of the factors in § 3553(a), including rehabilitation, as well as an explanation why the 10-year mandatory minimum sentence was not sufficient to achieve the purposes of sentencing).

that the district court has imposed a sentence that may simply be too long<sup>30</sup> or is based on considerations that lie outside the realm of the district court's discretion or have been given improper weight.<sup>31</sup> In doing so, the court remains cognizant of its limited role:

We are ever mindful of ensuring that we conduct a review for reasonableness, not a review that subtly substitutes our judgment as to the proper weighing of certain factors relevant to sentencing. . . . We do not have authority to vacate and remand each time we determine that a district court has not weighed the sentencing considerations just as we might have done.

*United States v. Hughes*, 283 Fed. Appx. 345, 352 (6th Cir. 2008).

Of course, I do not always agree with the Sixth Circuit, but I am encouraged overall that it requires adequate explanations whether the sentence is within or outside the guideline range, and that it has demonstrated a willingness to consider arguments that a sentence is substantively unreasonable, including because it is greater than necessary to achieve the purposes of sentencing.

The government has recently claimed that it is filing fewer appeals in the past several months, the implication being that that it can no longer win, and that appeals by defendants are increasing. Neither is true. The Sixth Circuit, as explained above, readily reverses downward departures and variances it finds to be procedurally or substantively unreasonable. Further, the government's claims are not supported by the available

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<sup>30</sup> *Delgadillo*, 318 Fed. Appx. at 380 (vacating and remanding a within-guideline sentence of 235 months for the district court to consider, *inter alia*, whether the mandatory minimum sentence of ten years was sufficient to serve the purposes of sentencing).

<sup>31</sup> *United States v. Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008) (reversing as procedurally and substantively unreasonable an above-guideline sentence of 24 months that was based on the district court's view of the offense of possessing false identification documents as "egregious" and "probably the most disrespectful thing a person can do for the laws of the United States, and in fact it undermines the integrity of our country," with no explanation why Commission's and Congress's penalties were insufficient); *United States v. Hunt*, 521 F.3d 636 (6th Cir. 2008) (reversing as substantively unreasonable a below-guideline sentence of probation for health care fraud where the district court appeared to rely on its doubt regarding the defendant's intent to commit the offense, a factor deemed "improper"); *United States v. Hughes*, 283 Fed. Appx. 345 (6th Cir. 2008) (reversing as substantively unreasonable a below-guidelines sentence where the district court "placed an unreasonable amount of weight" on the defendant's attempts to repay the bank victim and "unreasonably speculated about the timing of the prosecution and [the bank's] desire for the court to impose a particular sentence"; noting also, however, that it did "not hold that such a sentence is necessarily substantively unreasonable"); *United States v. (William) Davis*, 537 F.3d 611 (6th Cir. 2008) (reversing as substantively unreasonable a below-guideline sentence because the district court improperly considered a 14-year delay between the offense and sentencing); *United States v. Harris*, No. 07-4175, 2009 WL 2222085, at \*4 (6th Cir. Jul. 27, 2009) (reversing as substantively unreasonable a below-guideline sentence on the ground that the district court's articulated reasons for the variance did not justify the size of the variance).

statistics. In 2003, when 4,925 defendants were sentenced in the Sixth Circuit, the government filed 8 appeals involving sentencing issues and won 50% of them. In 2005, when 5,353 defendants were sentenced in the Sixth Circuit, the government filed 15 appeals involving sentencing issues and won 60% of them. In 2008, when 5,409 defendants were sentenced in the Sixth Circuit, the government filed 15 appeals involving sentencing issues and won 73.4% of them.<sup>32</sup> The number of defendant appeals was 370 in 2003, increased to 573 in 2005 due to *Booker*, and was down to 446 in 2008.<sup>33</sup>

The nationwide appeals data for 1996 through 2008 is set forth in Appendix 1. The government appealed more sentencing issues in 2008 than it did in any year except 2006 and 2007, and it won on all sentencing issues at a rate that was higher than or about the same as in 1996-1999 and 2005. The government won 55.7% of appeals on issues relating to departures or variances, compared to 39% in 1999 and 44% in 2005. In contrast, defendants in 2008 won on issues relating to departures or variances only 5.9% of the time. Appeals by defendants involving sentencing issues are dropping, from 11.2% in 2006 to 9% in 2007 to 8.2% in 2008. Likewise, appeals by the government involving sentencing issues are dropping, from .29% in 2006, to .24% in 2007 to .20% in 2008. As the law settles, this is to be expected.

We fail to see why the government would be discouraged from filing appeals of below-guideline sentences when it was winning 55.7% of such appeals in 2008. While the government won more of its appeals of below-guideline sentences in many other years, the standard of review has changed. This was necessary to maintain the constitutionality of the guidelines, and it is a healthy development. Sentencing judges are in the best position to decide what sentence is sufficient but not greater than necessary to satisfy the purposes of sentencing, and can now communicate their judgments to the Commission so that the guidelines can constructively evolve.

## **II. The Commission Can Improve the System by Revising the Guidelines, and Advising Congress, Based on Feedback from Judges and Empirical Data and Research.**

We are glad to see that the Commission plans to study and possibly address some of the outstanding problems in federal sentencing, including mandatory minimums, policy statements limiting or prohibiting departures, the need for alternatives to incarceration, and the child pornography guidelines. We understand that most of the problems in the guidelines are traceable to mandatory minimums, congressional directives, and less visible political pressures.<sup>34</sup> The Commission should take this

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<sup>32</sup> See 2003, 2005, 2008 USSC Sourcebook of Federal Sentencing Statistics, Table 56A; 2003, 2005, 2008 USSC Statistical Information Packet, Sixth Circuit, Table 1.

<sup>33</sup> See 2003, 2005, 2008 USSC Sourcebook of Federal Sentencing Statistics, Table 56.

<sup>34</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal*

opportunity to revise those guidelines that it can without violating a specific congressional directive, and to educate Congress about how and why its mandatory minimums and specific directives have resulted in sentences that are unnecessarily severe. This is contemplated by the Sentencing Reform Act,<sup>35</sup> and has been strongly urged by the Supreme Court,<sup>36</sup> invited by the leadership in Congress,<sup>37</sup> and urged by the judges, defense lawyers, probation officers, and academics who have testified before you.<sup>38</sup>

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*Criminal Justice System Is Achieving the Goals of Sentencing Reform* at xvii, 77 (Nov. 2004) (hereinafter “Fifteen Year Review”); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999); Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001); Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 752 (2001).

<sup>35</sup> See, e.g., 28 U.S.C. § 991(b)(1)(C), (2); § 994(o); § 995(a)(12)-(16); § 995(a)(20).

<sup>36</sup> *Rita*, 127 S. Ct. at 2469; *Booker*, 543 U.S. at 264.

<sup>37</sup> See *Plenary Speech by Mr. Robert C. “Bobby” Scott* at 11-13, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section, October 24, 2008.

<sup>38</sup> See, e.g., Testimony of the Honorable Gerald B. Tjoflat Before the U.S. Sentencing Commission at 24 (Feb. 10, 2009) (discussing need to revise arbitrary drug guidelines based on empirical evidence), <http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf>; Testimony of the Honorable Vaughn R. Walker Before the U.S. Sentencing Commission, May 28, 2009, at 6-22 (same), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Testimony of the Honorable Charles Breyer Before the U.S. Sentencing Commission, May 27, 2009, at 110 (“variances should be explained in detail so that . . . there will be empirical evidence on a nationwide basis to support [the Commission’s] changes.”); Testimony of the Honorable Susan Mollway Before the U.S. Sentencing Commission, May 27, 2009, at 123 (“using the Commission’s voice to suggest that a particular directive isn’t based on evidence would go a long way toward educating Congress”), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission, February 11, 2009 (urging the Commission to revise the drug and career offender guidelines so as not to go further than Congress required), [http://www.ussc.gov/AGENDAS/20090210/Hinkle\\_statement.pdf](http://www.ussc.gov/AGENDAS/20090210/Hinkle_statement.pdf); Testimony of Marilyn Grisham, Probation Officer, Before the U.S. Sentencing Commission, May 27, 2009, at 157, 159 (sentences for methamphetamine and illegal re-entry are too severe and should be revised), [http://www.ussc.gov/AGENDAS/20090527/Transcript\\_20090527-28.pdf](http://www.ussc.gov/AGENDAS/20090527/Transcript_20090527-28.pdf); Statement of Rachel E. Barkow, Professor of Law, Before the U.S. Sentencing Commission, July 10, 2009 (recommending that the Commission untie the guidelines from mandatory minimums and “conduct a wholesale review of the current system to assess its fiscal impact and where costs could be reduced without increasing crime rates.”), [http://www.ussc.gov/AGENDAS/20090709/Barkow\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Barkow_testimony.pdf).

Twenty-five years' experience under the mandatory system has shown that when sentencing policy is based on politics, it fails to result in sentences that are sufficient, but not greater than necessary, to achieve the purposes of sentencing. In our democracy, the people's representatives are, of course, the members of Congress. But the genius of our Constitution, and of progressive legislation like that which created the Sentencing Commission as an independent expert agency in the Judicial Branch, is to recognize that simplistic expressions of popular will can sometimes trample on individual rights, on good government, and on justice itself. The careful procedures set forth in the Sentencing Reform Act were meant to ensure that sentencing policy was based on research and consultation with those charged with implementing that policy, not demagoguery or media sensationalism. But the politics of crime has led Congress to often ignore the wise policy development procedures that Congress itself put into place.

A sure sign that politicized sentencing policy has failed is when the rules produce sentences that fail even to mirror popular will regarding fair sentencing. Political policy making focuses on extreme examples rather than the typical or mitigated case, reacts to the headlines of the day rather than the long-term goals of the system, and fosters competition among partisans in the currency of tough talk rather than smart policy. We do not believe that public opinion should dictate sentencing policy, but it is striking that research has consistently shown that sentencing policies driven by politics fail even to reflect public opinion. To paraphrase Judge Woodcock at the Commission's last regional hearing, at the end of the day the citizens of this country want to be sentenced by a judge, not their Congressman. Despite the conclusions one might draw from bumper stickers or talk radio, when asked to give thoughtful consideration to sentencing, rather than react to sensationalism, the public understands that tough is not smart and is not just.

**A. Empirical evidence shows that the guidelines recommend, and mandatory minimums require, punishment that is greater than fully informed members of the public believe is just.**

The Commission should be encouraged to reduce severity by the results of a study conducted by a federal judge in my district showing that fully informed members of the public believe that the guidelines and mandatory minimums are unjustly harsh.

Judge James S. Gwin of the Northern District of Ohio has conducted a study aimed at answering the question, "Do the Sentencing Guidelines accurately reflect community sentiment on just punishment?" Judge Gwin's study, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, will be published in Volume 4.1 of the Harvard Law & Policy Review. He has graciously allowed me to share the results of his study in my testimony before the Commission.

A few years ago, Judge Gwin became interested in whether the guidelines are consistent with community views on just punishment. Judge Gwin believes that the guidelines are in fact, or should be, based on just deserts, and that for such a system to be effective, it must be aligned with community sentiment on just punishment. He and two

other district court judges undertook the practice of polling jurors after the jurors issued a verdict of guilt. The jurors were given a questionnaire with a listing of the defendant's past convictions, and asked for a single response: "State what you believe an appropriate sentence is, in months." The jurors responded anonymously and without discussion or deliberation with other jurors. The questionnaires were collected by law clerks and were not revealed to Judge Gwin until after sentencing.

Judge Gwin ultimately obtained juror polls from 20 criminal trials, 16 presided over by him and four presided over by the other two judges. I tried two of the cases in which Judge Gwin polled jurors, though I was unaware of his polling practice until I later heard him speak about it during a presentation he gave at a local law school. The trials involved a spectrum of common federal crimes, including drug trafficking, firearms and child pornography offenses. The jurors were diverse in gender and age, predominantly White, mostly middle class, and employed in a variety of occupations. City residents made up only 16 percent of the jury pool, with the balance from suburban areas and rural counties, and this was reflected in the composition of the juries.

Judge Gwin reports: "Combining all 20 cases, the median juror sentence recommendation was only 16% of the median Guideline range and only 20% of the bottom of the Guidelines recommended ranges. Stated another way, the lower end of the respective Guidelines range was, on average, five times more than the median juror's recommendation." In several cases, "the recommended median Guideline range was more than ten times greater than the median jurors' recommendations." "Averaged over all 20 cases, jurors recommended sentences that were 21% of the minimum Guidelines recommended sentences and 17% of the maximum Guidelines recommended sentences." Of 239 jurors, 221 (92%) recommended a sentence below the low end of the guideline range, and 231 (97%) recommended a sentence below the high end of the guideline range. The juror responses also "suggest that congressional mandatory minimums depart from community sentiment even more than the Guidelines generally." Jurors also recommended sentences much lower than the sentences imposed by Judge Gwin. Across those sixteen cases, the average sentence recommended by the jurors was half the average sentence imposed.

Judge Gwin raises a salient question: "If a system of sentencing should impose deserved punishment, can it be credible if it is so dissonant from community beliefs?"

One of the purposes the guidelines are required to meet is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."<sup>39</sup> Although the Commission has never formally adopted "just deserts" as the principal purpose of the guidelines, academics have observed that this is in fact the focus of the guidelines.<sup>40</sup> If so, the

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<sup>39</sup> 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2)(A).

<sup>40</sup> See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 908-09 (1991); Frank O. Bowman, III, *Fear of Law:*

guidelines should reflect the seriousness of the offense, measured by the harm it causes and the offender's blameworthiness for that harm.<sup>41</sup>

Several of the factors Congress directed the Commission to consider in developing the guidelines relate to this purpose, including circumstances that "mitigate or aggravate the seriousness of the offense," the "nature and degree of the harm caused by the offense," the "community view of the gravity of the offense," and the "public concern generated by the offense."<sup>42</sup> As to the first two factors, the only mitigating factor bearing on blameworthiness that the guidelines include is role in the offense, and that factor is underused and often dwarfed by quantity or amount-based adjustments. The Commission's research and other empirical research show that quantity is a poor proxy for offense seriousness and does not correlate with the offender's role in the offense.<sup>43</sup>

As to the latter two factors, Congress thought that significant changes in community views might justify increasing or decreasing the guidelines' recommended penalties. Such adjustments were not to be undertaken in response to public outcry about a particular case, but were to be based on research and data collection.<sup>44</sup>

The original Commission rejected public opinion polling as an accurate source for ranking criminal behavior because it believed that it was not sufficiently advanced or detailed.<sup>45</sup> Indeed, public opinion surveys are not a good way to measure the moral

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*Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 St. Louis U. L. J. 299, 316 (2000).

<sup>41</sup> Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24 (2003).

<sup>42</sup> See 28 U.S.C. § 994(c)(2), (3), (4), (5).

<sup>43</sup> See USSC, *Cocaine and Federal Sentencing Policy* at 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to lengthy penalties intended for more serious offenders); USSC, *Cocaine and Federal Sentencing Policy* at 48-49 (2002) (showing drug quantity not correlated with offender function); Fifteen Year Review at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-73 (1992) (discussing the imbalance between aggravating and mitigating circumstances in all of the guidelines, with the problem many more times as frequent and serious in drug cases); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009) (describing results of empirical study showing that drug quantity "is not significantly correlated with role in the offense," and that this "lack of association" provides "fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing.").

<sup>44</sup> S. Rep. No 98-225 at 170, 178 (1983).

<sup>45</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon*

seriousness of offenses for many reasons. Survey respondents are misinformed by media coverage, are not fully informed of the details of any offense, and are far removed from the consequences of their answers.<sup>46</sup> In Judge Gwin's study, however, the jurors sat through the trials, heard detailed and specific evidence of how the offenses were committed, were instructed on the mental state the government needed to prove before the jury could convict, and were given the defendant's criminal history.

Judge Gwin's study indicates that the guidelines do not accurately reflect community views regarding just punishment. It shows that informed members of the public are considerably less harsh than Congress and the Commission assume them to be, and less harsh than judges applying advisory guidelines. It is consistent with the feedback the Commission has been receiving from judges, and with the Commission's empirical research indicating that certain guidelines and mandatory minimums are greater than necessary to achieve the purposes of punishment.

Surveys conducted by the Commission show that both the public and judges believe that guidelines that are based on mandatory minimums and congressional directives are overly harsh. A 1997 public opinion survey, based on vignettes incorporating elements of the guidelines, revealed that the guidelines produced "much harsher" sentences in drug trafficking cases than survey respondents would have given, and that respondents did not support the severity of increases under "habitual offender" rules like the career offender guideline.<sup>47</sup> In a 2002 Commission survey of judges, 73.7 % of district court judges and 82.7 % of appeals court judges rated drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.<sup>48</sup> While the judicial survey did not ask about the career offender guideline, judges frequently sentenced below the career offender guideline range even when the guidelines were mandatory.<sup>49</sup> In 2008, judges departed or varied below the guideline range in 22% of

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*Which They Rest*, 17 Hofstra L. Rev. 1, 16 (1988).

<sup>46</sup> See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 William & Mary L. Rev. 397 (2006); Michelle D. St. Armand & Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 L. & Hum. Behav. 515, 516-17, 525 (2001); Deirdre Golash & James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy*, 22 American J. of Criminal L. 703, 718-29 (1995); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 Crime and Justice 99, 103-127 (1992).

<sup>47</sup> See Peter H. Rossi & Richard A. Berk, *National Sample Survey: Public Opinion on Sentencing Federal Crimes* (Mar. 14, 1997).

<sup>48</sup> USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapters II & III (Feb. 2003).

<sup>49</sup> A decade before *Booker*, a Commissioner and former Commissioner conducted a study of departures, which found "extensive use of [downward] departures from sentences generated by the career offender guideline," and that these were "quite substantial," "typically" to the sentence that would have applied absent the career offender provision. See Michael S. Gelacak, Ilene H.

career offender cases, and the government sponsored a below guideline sentence in 32.8% of such cases.<sup>50</sup>

Judge Gwin does not advocate jury sentencing and neither do we. He suggests that juror studies like his on a broader scale could provide the Commission with meaningful insight regarding the public's views of just punishment. It seems that this would be well worth doing and far superior to assuming that the public supports severe sentences. Congress directed the Commission to take community views into account, and Judge Gwin has found a way to identify community views that does not suffer from the problems of public opinion polls. The results could be used to educate Congress that mandatory minimums and congressionally-directed guidelines are more severe than the public believes is just.

**B. The Commission should amend the guidelines consistent with judicial feedback and empirical research.**

The guidelines discussed below present problems in the districts in the Sixth and Seventh Circuits, as in most districts. These guidelines recommend sentences that are greater than necessary to achieve the purposes of sentencing in the majority of cases to which they apply and/or result in unwarranted disparities. Judges can correct for these problems in individual cases, and it is surely better to have five good sentences and five bad ones than to have ten bad but uniform sentences. If the Commission revises the guidelines, there will be more good sentences overall. The Commission can “avoid excessive sentencing disparities” through “ongoing revision of the Guidelines in response to sentencing practices,”<sup>51</sup> and “as that occurs, district courts will have less reason to depart from the Commission’s recommendations.”<sup>52</sup>

**Drug guidelines.** We join the many judges who have urged the Commission to de-link the drug guidelines from the arbitrary quantity-based punishment levels in the mandatory minimum statute. We urge the Commission to create a set of drug guidelines based primarily on functional role in the offense, with quantity given lesser weight. Congress may have thought that quantity would approximate functional role, but empirical research and experience have shown that it was mistaken.<sup>53</sup>

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Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996).

<sup>50</sup> See USSC FY 2008 Monitoring datafile.

<sup>51</sup> *Kimbrough v. United States*, 128 S. Ct. 558, 573-74 (2007), quoting *Booker v. United States*, 543 U.S. 220, 264 (2005).

<sup>52</sup> *Rita*, 127 S. Ct. at 2482-83 (Scalia, J., concurring).

<sup>53</sup> See USSC, *Cocaine and Federal Sentencing Policy* at 28-30 (2007); USSC, *Cocaine and Federal Sentencing Policy* at 48-49 (2002); Fifteen Year Review at 47-55; Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009).

Congress did not require the Commission to calibrate the drug guidelines to mandatory minimums, and doing so is contrary to the Commission's basic responsibilities set forth in § 991(b)(1)(A), (B) and (C) and § 994(g) of the Sentencing Reform Act.<sup>54</sup> Nor is this required by a later legislative provision, added in 2003, stating that the guidelines must be "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). The guidelines are "consistent" with any applicable mandatory minimum because a mandatory minimum trumps a lower guideline range by operation of law and as explicitly stated in USSG § 5G1.1(b).

Linking the drug guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are arbitrary and overly severe, and then magnifies that disproportionality by spreading it to every offender at every quantity level. In addition, this inevitably drives up the severity of the guidelines for all offenses to maintain proportionality among punishments for different crimes. As the Judicial Conference has said, "the goal of proportionality should not become a one-way ratchet for increasing sentences."<sup>55</sup>

The Commission has the power to de-link the guidelines from mandatory minimums. *See Neal v. United States*, 516 U.S. 284 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute's "mixture or substance" methodology); *Kimbrough*, 128 S. Ct. at 573 (holding that Congress did not require the guidelines to be tied to mandatory minimums and relying on *Neal* to reject the government's argument that judges could not disagree with the crack guidelines because this would create sentencing "cliffs."). If the drug guidelines were amended across the board to reflect a more accurate measure of culpability, such as functional role, there would be "cliffs" from the mandatory minimums, but the "cliffs" would be caused by mandatory minimums that fail to reflect the seriousness of the offenses subject to them.

If the Commission still feels bound by the mandatory minimum statute, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels.<sup>56</sup>

**Career Offender.** The career offender guideline, promulgated in response to 28 U.S.C. § 994(h) and broadened beyond the statutory terms, does not advance the purposes of sentencing, according to the Commission's research and common sense. One possible justification for the career offender guideline is that it targets dangerous

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<sup>54</sup> *See* Comments of the Criminal Law Committee of the Judicial Conference on Sentencing Commission amendments (March 16, 2007).

<sup>55</sup> Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

<sup>56</sup> *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007).

recidivists for lengthy incarceration. The Commission has found, however, that the career offender guideline fails to do this and makes the criminal history score a worse predictor of recidivism than it would be without that guideline. The recidivism rate for career offenders who qualify on the basis of prior drug trafficking offenses more closely resembles the recidivism rates of offenders in the lower criminal history categories in which they would be placed under the normal criminal history rules. Further, the Commission has heard testimony that lengthy imprisonment of retail drug traffickers prevents little, if any, drug crime, because they are readily replaced as long as demand remains high. The Commission has suggested that criminal history can indicate increased culpability. But neither Congress nor the Commission has explained why repeat drug or violent offenders are any more culpable than repeat tax evaders, stock swindlers or offenders of any other kind, such that they alone should be sentenced at or near the statutory maximum. In fact, the disparate treatment of criminal history under the career offender guideline is arbitrary and unwarranted, and this disparate treatment is made worse by the fact that the career offender guideline has a disparate impact on African Americans.<sup>57</sup>

Many of the sixteen districts in the Sixth and Seventh Circuits have a high number of career offender cases. In these districts, African Americans comprise 42.5% of all offenders, but 73.1% of defendants classified as career offenders.<sup>58</sup> In my district, we had 53 career offender cases in 2008, about 6% of our whole caseload. The vast majority are drug cases, and there are a few bank robberies. The predicates are usually minor state drug offenses for which the defendants served very little time. People who live in poor neighborhoods have priors because they stand around on street corners and take or sell drugs. And while bank robbers may look glamorous in the movies, most of our clients who rob banks are addicted, mentally ill, desperate, or all three. I think it is safe to say that, but for the astronomical sentences available under the career offender guideline, most of these cases would be dealt with in state court. In my district and others, task forces cherry pick these cases for federal prosecution.

We urge the Commission to recommend to Congress that § 994(h) be repealed. In the meantime, the Commission should accurately explain the career offender guideline so that judges can evaluate whether it is necessary to satisfy sentencing purposes in particular cases. The Commission should delete the commentary that suggests that the guideline punishes recidivist offenders appropriately and avoids unwarranted disparity. *See* USSG § 4B1.1, comment. (backg'd). In its place, the Commission should add commentary that explains that the guideline is based on a congressional directive and that informs judges of the Commission's research on the career offender guideline or provides a citation to that research in the Fifteen Year Review.

The Commission should also narrow the career offender guideline so that it applies no more broadly than necessary.

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<sup>57</sup> Fifteen Year Review at 133-34.

<sup>58</sup> This data was obtained from the 2008 USSC Monitoring datafile by Paul J. Hofer.

First, the Commission should narrow the definition of “crime of violence.” The guideline’s definition is broader than that contained in either 18 U.S.C. § 16 or 18 U.S.C. § 924(e), the courts have repeatedly urged the Commission to narrow it, and the courts are now interpreting the term consistent with the definition of “violent felony” under *Begay v. United States*, 128 S. Ct. 1581 (2008). We suggest that the definition be revised as follows:

“Crime of violence” includes burglary of a dwelling, arson, extortion, and offenses involving the use of explosives. Other offenses are included as “crimes of violence” if (A) the offense has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) the elements of the offense of which the defendant was convicted (i) require purposeful, violent and aggressive conduct on the part of the defendant and (ii) present a serious potential risk of physical injury to another.

Second, the Commission should limit the definition of “controlled substance offense” to the federal offenses set forth in § 994(h), and, if state offenses must be included, only those that are analogous to the required federal offenses and punishable by a maximum of ten years, consistent with 18 U.S.C. § 924(e):

A “controlled substance offense” is a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503, or that is an analogous offense under state law, and that is punishable by imprisonment for at least ten years.

Third, the Commission should amend the definition of “prior felony conviction,” consistent with 21 U.S.C. § 802(13), as follows:

“Prior felony conviction” means a prior adult federal or state conviction for an offense classified as a felony by the convicting jurisdiction.

Fourth, the Commission should remove the limit to one criminal history category for departures under USSG § 4A1.3(b)(3)(A), p.s. This limitation was adopted in response to the PROTECT Act, but was not required by the PROTECT Act. If the Commission wants courts to follow encouraged departures, it should remove this limitation.

**Firearms.** The firearms guideline results in some of the same problems as the career offender guideline. All but two of the districts in the Sixth and Seventh Circuits have a higher than average firearms caseload, some as high as 20-30%. Many firearms cases, and most in some districts, are taken from state court where the sentences are much lower. Many of the offenses have no connection to violence or drugs. In the sixteen

districts in the Sixth and Seventh Circuits, African Americans comprise 42.5% of all offenders, but 63.4% of firearms offenders.<sup>59</sup>

In Ohio, the average time served for possessing a weapon under disability is 1.15 months.<sup>60</sup> Over 15% of the caseload in the Northern District of Ohio is firearms cases. The defendants are often young black men caught with a gun in a traffic stop or on the street in the neighborhoods where they live, not doing anything with the gun related to violence or drugs. Judges in my district and other districts are amenable to sentencing below the guideline range when violence and drugs are not involved in the instant offense.

The rate of below-guideline sentences imposed by judges in firearms cases has increased from 9.2% in 1995 to 19.5% in the first two quarters of 2009.<sup>61</sup> In 1991, the Commission increased the base offense level by 8 levels -- from 12 to 20 -- if the defendant had even one prior conviction for a “controlled substance offense” or “crime of violence” as defined in the career offender guideline, and by 12 levels -- from 12 to 24 -- if the defendant had two or more such prior convictions.<sup>62</sup> It appears that this was done, contrary to the empirical evidence, in order to make the guideline consistent with the Armed Career Criminal Act, 18 U.S.C. § 924(e).<sup>63</sup> The Commission should consider deleting subsections (a)(2) and (a)(4)(A), which double count criminal history and were never justified by empirical evidence.

I have a case now where ATF agents and local police were conducting surveillance at a gun show in a semi-rural community where few African Americans live. They observed a Black woman with a Black man buy two guns, and simply assumed that one or both was a straw purchaser or a convicted felon. They followed the couple more than 20 miles into Cleveland and observed the man give my client one of the guns. My client confessed to being a convicted felon on the spot. His friend had purchased the gun

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<sup>59</sup> *Id.*

<sup>60</sup> Ohio Department of Rehabilitation and Correction, Time Served Report (2007), *available at* <http://www.drc.ohio.gov/web/Reports/Time/Time%20Served%202007.pdf>.

<sup>61</sup> USSC, 1995 Statistical Information Packet, Table 9; USSC, Preliminary Quarterly Data Report, 2d Quarter Release 2009, Table 5.

<sup>62</sup> USSG, App. C, Amend. 374 (1991); USSG § 2K2.1(a)(2), (4)(A).

<sup>63</sup> A Commission working group thought that guideline ranges in effect at the time were “generally insufficient” because the upward departure rate was 8.4% and 25% of cases were sentenced at the upper end of the range. *See* USSC, *Firearms and Explosive Materials Working Group Report* at 8 & 10 (Dec. 11, 1990). However, these higher sentences were *not* imposed disproportionately on defendants with prior convictions for drug-related offenses or crimes of violence. *Id.* Tab D at 10. Nonetheless, the working group proposed doubling the base offense level based on the existence of these types of prior convictions, and the rationale was to achieve consistency with the Armed Career Criminal Act. *Id.* at 19-20.

for him to give to his father (with whom my client lives) for his upcoming birthday because their home had just been broken into. This was traumatic for my client and his father because, ten years previously, they had a break-in in which my client's father was seriously injured and my client found him lying in a pool of blood. My client, age 26, is in Criminal History Category IV. His criminal history consists of two misdemeanor convictions for attempted drug possession (2 points), one conviction for public gambling (1 point), three convictions for driving with a suspended license (3 points), and one conviction for drug trafficking for which he received no jail time (1 point). He has been out of trouble and working at a steady job for the past year. His guideline range, with the one prior felony conviction for a drug trafficking offense, is 51-63 months, 37-46 months with acceptance of responsibility. Fortunately, the guidelines are no longer mandatory, and I can seek a variance.

**Acquitted conduct.** The Commission should state expressly that acquitted conduct may not be considered in calculating the guideline range. As put by Judge Marbley of the Southern District of Ohio, laypersons would “undoubtedly be revolted by the idea that, for example, a person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.” *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005). And jurors, who have faithfully executed their duties at trial, are especially disturbed to learn that their verdict is effectively ignored at sentencing.

In a recent case, a juror wrote a letter to the sentencing judge and called it a “tragedy” that the jury’s work, resulting in acquittal on all counts but one, would not be given “the credit it deserves” at sentencing: “What does it say to our contribution as jurors,” Juror # 6 asked, “when we see our verdicts, in my personal view, not given their proper weight?”<sup>64</sup> Judge Merritt of the Sixth Circuit recently cited this juror’s dismay as evidence that the use of acquitted conduct promotes disrespect for law, expressing his belief that the juror’s reaction is “the same . . . as the reaction that the drafters of the Declaration of Independence, the Constitution, and the Sentencing Reform Act of 1984 would have upon learning of this 14-year additional sentence for acquitted conduct imposed on the defendant” in the case before the court. *United States v. White*, 551 F.3d 381, 397 (6th Cir. 2008) (*en banc*) (Merritt, Martin, Daughtrey, Moore, Cole, and Clay, JJ., dissenting). Many other judges, including quite a few who were on the bench before the guidelines, have expressed similarly strong concerns.<sup>65</sup>

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<sup>64</sup> See Jim McElhathtton, *A \$600 drug deal, 40 years in prison*, Washington Times, June 29, 2008, at M04 (May 16, 2008 Letter from Juror # 6 to The Honorable Richard W. Roberts). The letter is available at <http://video1.washingtontimes.com/video/docs/letter.pdf>.

<sup>65</sup> See *United States v. Canania*, 532 F.3d 764, 778 & n.4 (8<sup>th</sup> Cir. 2008) (Bright, J., concurring) (quoting the letter from Juror # 6 as evidence that the use of acquitted conduct is perceived as unfair, calling it “uniquely malevolent,” and “wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of ‘not guilty’ for practical purposes may not mean a thing”); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (“[W]e understand why defendants find it unfair [and] [m]any judges and commentators have similarly argued that using acquitted conduct to increase a defendant’s

At the regional hearing in July, Judge Kavanaugh, Judge Gertner and Professor Barkow urged the Commission to exclude acquitted crimes from calculation of the guideline range. In response, some Commissioners indicated that the guidelines do not direct judges to consider acquitted conduct when calculating the guideline range. If so, then the Commission has allowed to go uncorrected an erroneous interpretation of the guidelines that has resulted in many hundreds or thousands of years of imprisonment that not only were unauthorized by jury verdicts but were unauthorized by the guidelines.

Under the “relevant conduct” rule, courts are directed to calculate the guideline range for a broad class of common offenses based on conduct for which the defendant has been acquitted. For offenses of a character for which § 3D1.2(d) would require grouping of multiple counts (such as fraud, drug trafficking, firearms, and child pornography), courts are directed to consider all acts and omissions described in §1B1.3(1)(A) and (B) “that were part of the same course of conduct or common scheme or plan as the offense of conviction.” USSG § 1B1.3(a)(2).

Application note 3 of the rule states: “Application of [§ 1B1.3(a)(2)] does not require the defendant, in fact, to have been convicted of multiple counts.” USSG § 1B1.3, comment. (n.3). The background commentary states: “Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses.” *Id.*, comment. (backg’d.).

Although neither § 1B1.3 nor its commentary uses the word “acquitted,” the courts have naturally concluded that the reference to counts for which a conviction was

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sentence undermines respect for the law and the jury system.”); *United States v. Lombard*, 103 F.3d 1, 5 (1st Cir. 1996) (“many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct;” though a “lawyer can explain the distinction logically,” as a “matter of public perception and acceptance, the result can often invite disrespect for the sentencing process.”); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) (“[T]his justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The ‘law,’ however, has retreated from that standard into its own black hole of abstractions.”); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) (“[T]his is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, ‘Acquittal first, sentence afterwards.’”); *United States v. Hunter*, 19 F.3d 895, 897-98 (4th Cir. 1994) (Hall, J., concurring) (“As regards uncharged ‘relevant’ conduct, this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong.”); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (*en banc*) (“If the former Soviet Union or a third world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”).

not obtained means counts of which the defendant was acquitted.<sup>66</sup> By the mid-1990s, § 1B1.3(a)(2) was viewed by every court of appeals except the Ninth<sup>67</sup> as creating a “mandate” requiring the consideration of acquitted crimes – if found by a preponderance of the evidence as with every other guideline component -- in determining the guideline range. *See, e.g., United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., concurring) (setting forth the state of the law at the time). The Commission, too, understood § 1B1.3 to include acquitted crimes, as demonstrated by its several proposals to exclude it.

At the end of 1992, the Commission proposed an amendment to revise § 1B1.3 “to provide that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant’s offense level but may, in an exceptional case, provide a basis for an upward departure.” *See* 57 Fed. Reg. 62,832 (Dec. 31, 1992) (proposed Amendment 1). The Practitioner’s Advisory Group also proposed a similar amendment. *See id.* (proposed Amendment 35). In December 1993, the Practitioner’s Advisory Group again proposed an amendment to § 1B1.3 to provide that “conduct of which the defendant has been acquitted after trial may not be used in determining the guideline range but may, if found by a preponderance of the evidence, provide the basis for an upward departure.” *See* 58 Fed. Reg. 67,522, 67,541 (Dec. 21, 1993) (proposed Amendment 18). No action was taken on these proposals. Of course, they would not have been made if the guidelines did not direct courts to consider acquitted conduct.

In the years that followed, Commission staff began to look at the “the success of this modified [real offense] system,” and to “investigate ways of incorporating state practices; e.g., using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range.” *See* Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512 \*3 (1995).

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<sup>66</sup> *See, e.g., United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989) (in rejecting a constitutional challenge, noting that a guideline range based in part on acquitted conduct was properly and “meticulously calculated”); *United States v. Mocchiola*, 891 F.2d 13, 16 (1st Cir. 1989) (holding that the district court properly applied an enhancement based on acquitted conduct, noting that that § 1B1.3 requires courts to consider all relevant conduct); *United States v. Dawn*, 897 F.2d 1444, 1450 (8th Cir. 1990) (holding that “[t]he court properly applied the guidelines to enhance the defendants’ sentences based on the use of a firearm,” conduct for which they had been acquitted); *see also, e.g., United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180 (2d Cir. 1990) (upholding enhancement against constitutional challenge while assuming it was properly calculated); *United States v. Concepcion*, 983 F.2d 369, 388 (2d Cir. 1992) (interpreting the cross-reference in § 2K2.1, which is governed by the relevant conduct rules in § 1B1.3, to evidence the Commission’s intent that courts apply the guideline applicable to “an offense with which the defendant was charged but of which he was acquitted” if the resulting offense level is greater); *United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992) (interpreting § 1B1.3(a)(2) and its commentary to include acquitted conduct).

<sup>67</sup> *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991).

In a discussion paper intended to facilitate public comment, staff explained that “[r]elevant conduct, as it is now defined, can include uncharged conduct, acquitted conduct, conduct described in dismissed counts, and conduct of co-conspirators.” USSC, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*, available at <http://www.ussc.gov/SIMPLE/relevant.htm>. The staff explained that subsection (a)(2) “is the provision that allows consideration of uncharged conduct, acquitted conduct, and conduct described in dismissed counts.” *Id.* Staff suggested that one way to simplify the relevant conduct guideline (and to respond to criticism) would be to “limit the way uncharged, acquitted, or dismissed counts could be used in the sentence calculation.” *Id.*

In July 1996, the Commission announced as a priority for the 1996-97 amendment cycle “developing options to limit the use of acquitted conduct at sentencing.” 61 Fed. Reg. 34,465 (July 2, 1996). The Commission published three options “address[ing] whether acquitted conduct may be considered for sentencing purposes.” 62 Fed. Reg. 152,161 (Jan. 2, 1997).

Four days later, the Supreme Court decided *Watts v. United States*, 519 U.S. 148, 156 (1997), rejecting the Ninth Circuit’s view that district courts could not “rely on facts of which the defendant was acquitted.” *Id.* at 797. In the process, the Court recognized that “[w]ith respect to certain offenses, such as [the defendant’s] drug conviction, USSG § 1B1.3(a)(2) requires the sentencing court to consider ‘all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.’” *Id.* at 153. The Court emphasized the language in the background commentary that relevant conduct is to be considered “regardless of the number of counts . . . on which a conviction is obtained,” *id.*, and concluded that the lower court’s decision to exclude acquitted conduct in calculating the guideline range conflicted with “the implications of the guidelines.” *Id.* at 154.

Justice Breyer, one of the original Commissioners, “agree[d] with the Court that the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted that defendant.” *Id.* at 159 (Breyer, J., concurring). He suggested, however, that “[g]iven the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future,” emphasizing that “the power to accept or reject such a proposal remains in the Commission’s hands.” *Id.*

No amendment was promulgated at the end of the public comment period, and the Commission has never explained why it abandoned amending § 1B1.3 to exclude acquitted conduct. But at no time during the course of the proceedings in 1993, 1994, or 1997 did the Commission – or anybody else – suggest that § 1B1.3(a)(2) does not *actually* require courts to consider acquitted conduct in calculating the guideline range, as Commissioners suggested at the regional hearing in New York this past July. Indeed, in 2008, John Steer, General Counsel of the United States Sentencing Commission at its inception and recently retired Vice Chair, acknowledged that “the federal guidelines [are] alone among sentencing reform efforts in using acquitted conduct to construct the guideline range,” and now believes that acquitted conduct should be excluded from the

guideline calculation. See John R. Steer, *An Interview with John R. Steer: Former Vice Chair of the U.S. Sentencing Commission*, 32 *Champion* 40 (Sept. 2008). Mr. Steer said that before leaving the Commission, he left a draft amendment that would exclude acquitted conduct from mandatory consideration under § 1B1.3 and move it to chapter 5 as a discretionary departure. *Id.*

These proposals, along with the Supreme Court’s decision in *Watts*, make clear that there has never been any question that the relevant conduct rule directs judges to consider conduct for which a defendant was acquitted. If this was not the Commission’s intent, and courts have misinterpreted § 1B1.3 for the past twenty-five years, we urge the Commission to clarify as soon as possible that acquitted conduct should not be used in calculating the guideline range. If, on the other hand, the Commission intended for acquitted conduct to be used in calculating the guideline range, we urge the Commission to amend § 1B1.3 to explicitly exclude it.

**Uncharged Conduct.** The Commission should eliminate uncharged offenses, including cross-references to more serious offenses, from the guidelines. This also creates disrespect for law and is fundamentally unfair. The theory behind this rule has been disproved in practice. It was thought that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining, USSG, Ch. 1, Pt. A, ¶ 4(a), but it has transferred sentencing power *to* prosecutors. The relevant conduct rule “is not working as intended” and “tend[s] to work in one direction,” that is, by increasing sentences.<sup>68</sup>

The Commission should therefore reform the relevant conduct guideline to state in the commentary that uncharged offenses are not included in the definition of “relevant conduct,” and eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3 and all cross-references in the Chapter Two guidelines.

**Jointly Undertaken Activity.** In the Sixth and Seventh Circuits, some probation officers and judges continue to misunderstand § 1B1.3(a)(1)(B) and its commentary to require inclusion of conduct of others if it was merely “reasonably foreseeable.” The courts of appeals reverse when asked,<sup>69</sup> but there is no relief when the defendant waives the right to appeal, which occurs all too often.

This rule has been a problem since the inception of the guidelines, resulting in *extreme* unwarranted disparities.<sup>70</sup> The problem remains unaddressed. Instead of using

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<sup>68</sup> Fifteen Year Review at 92.

<sup>69</sup> See *United States v. Fox*, 548 F.3d 523, 531-33 (7th Cir. 2009), *United States v. Lewis*, 88 Fed. Appx. 898, 2004 WL 376828, at \*2 (6th Cir. 2004), *United States v. Campbell*, 279 F.3d 392, 400-01 (6th Cir. 2002).

<sup>70</sup> See Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant*

abstract terms like “reasonably foreseeable” and “scope of the specific conduct and its objectives embraced by the defendant’s agreement,” the Commission should try something more direct. For example:

In order for the defendant to be sentenced based on acts or omissions of another person, the government must prove through actual evidence and not conjecture or surmise that the defendant directly conspired with or aided and abetted that person, and knew about, intended and agreed to that person’s acts or omissions.

**Immigration.** In immigration cases in 2008, the national average for below-guideline sentences for judges was only 8.7%, while it was 14.2% in the Sixth Circuit and 24.5% in the Seventh Circuit. Of course, the national rate is low because the government rate is so high in districts with a fast track program.

None of the districts in the Sixth or Seventh Circuit has a fast track program but all of them have immigration cases. Because the illegal re-entry guideline often results in sentences that are greater than necessary, the judicial rate *should* be higher when there is no fast program. In those districts where judges follow the illegal re-entry guideline in nearly every case, defendants are receiving sentences that are greater than necessary.

The Commission has found that the government’s selective use of fast track programs creates unwarranted disparity because defendants sentenced in districts without authorized fast track programs receive longer sentences than similarly situated defendants in districts with such programs.<sup>71</sup> However, what makes fast track possible are the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis.<sup>72</sup>

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*Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997) (in a sample test administered by Commission researchers for the Federal Judicial Center in 1997, probation officers applying the rule sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant). *See also United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

<sup>71</sup> *See USSC, Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (Oct. 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

<sup>72</sup> Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

The Commission could address this unwarranted disparity by encouraging judges, in a note to § 5K3.1, to depart or vary downward to take account of it. The underlying and most significant problem, however, is that guideline ranges under § 2L1.2 are too severe. Most of these defendants pose no danger. They are simply here to work. The Commission should reduce the harshness of this guideline.

The Commission should also encourage downward departures or variances to take into account the time that undocumented immigrants spend in immigration custody, and the harder time they serve. Undocumented immigrants (1) receive straight prison sentences at a much higher rate than U.S. citizens,<sup>73</sup> because they are not eligible for community confinement and judges generally do not impose probation because they cannot be supervised after deportation; (2) are held in immigration custody for weeks or months before charges are brought and again after they serve their sentences before deportation, which BOP does not credit; and (3) cannot participate in programs available to U.S. citizens in BOP, such as work and the RDAP program with its sentence reduction, and are often warehoused in private facilities that have harsh conditions and no programs whatsoever.

**Child Pornography.** We are glad to see that the Commission has made it a priority to review the child pornography guideline, and to possibly amend the guideline, report to Congress, and recommend statutory changes. USSG § 2G2.2 is dramatically flawed,<sup>74</sup> and many judges have found it to be unsound and inhumane, as described in numerous published decisions. In the first two quarters of 2009, judges departed or varied in 41.5% of these cases, and the government sponsored below-guideline sentences in 9.9% of cases, 7.6% for reasons other than substantial assistance.

In my district, as in most districts, defendants subject to § 2G2.2 are almost always first offenders who are not predators, yet they face decades of punishment under the guidelines. The guideline should be reduced and the five-year mandatory minimum for receipt should be repealed.

**Mitigating Role Adjustment.** Defenders in several districts in the Sixth and Seventh Circuits report that the mitigating role adjustment is almost never given, or that it is given too infrequently. Like the caselaw on departures, the caselaw on mitigating role that developed during the mandatory guidelines era discourages its use. Indeed, two Defenders report that it is treated like a departure in that the circumstances must be extraordinary. In my district and others, judges who will not grant a role reduction will grant a variance based on the defendant's low-level role in the offense.

The two main problems seem to be that there must be other known participants (and in some districts other participants must also be charged), which means that a lone

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<sup>73</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 4-5 & Tables 4 & 5.

<sup>74</sup> See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, July 3, 2008.

street dealer cannot receive the adjustment, and the notion that any role that is “integral” cannot be minor or minimal, which means that a courier cannot receive the adjustment. While the Commission attempted to address the latter problem through Application Note 3(A), probation officers and judges in some districts essentially override the application note with a finding that the defendant’s role was nonetheless “integral.”

We suggest that, unless the Commission revises the drug guidelines to reflect functional role as suggested above, it should revise the mitigating role adjustment to apply based on the defendant’s functional role as compared to other functional roles in the drug trafficking trade, even if the defendant was the sole known participant and even if his or her role was “integral.” If the adjustment is meant to reflect reduced culpability, it should not depend on the happenstance of whether there are other known participants. There are other participants in every drug trafficking offense, whether known or unknown, charged or uncharged, and every offender’s role is in some sense “integral.”

Failing that, the Commission should clarify that no other participant needs to be charged in the offense, that the reduction can apply to a lone street dealer (much like it can apply to a courier who is accountable only for the drugs she carried), and that playing a role that is in some sense “integral” is not a reason to deny the adjustment. In addition, the word “substantially” should be deleted. Further, because the adjustment, even when given, is often dwarfed by the impact of drug quantity or loss amount, the commentary should say that in some cases, such as those subject to quantity and loss-driven guidelines, the adjustment may not be adequate, in which case the court may “depart” by increasing the impact of the adjustment accordingly.

**Acceptance of Responsibility.** The government motion requirement for the third point for acceptance of responsibility needs to be eliminated and the acceptance of responsibility returned to a straight 3-level reduction. The purpose of the government motion requirement was to ensure that defendants give the government timely notice of intent to plead guilty so the government can avoid preparing for trial. USSG § 3E1.1, comment. (n.6). The government in some districts abuses the rule, however, withholding the motion unless defendants waive their rights to file motions to suppress, to appeal and collateral review, and even to request a non-guideline sentence.

In some districts, judges give the third point as a variance if the government refuses to move despite the defendant’s timely notice, but in others they do not. The government is creating unwarranted disparity that is being corrected by judges in some districts but not others. The Commission should remedy this problem, seeking permission from Congress if necessary.

**USSG § 1B1.8, Use of Certain Information.** This guideline excludes information from use in calculating the guideline range if as part of a cooperation agreement the government agrees that it will not be used. This guideline unfairly punishes defendants who are too naïve or inexperienced to keep quiet until they have a lawyer. It is, however, interpreted in different ways in different districts. In some districts, only information given after an agreement is signed is protected; in others,

information given after appointment of counsel is protected; and in others, all information given at any time is protected if an agreement is signed.

The Commission could easily fix the problem by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements.

### **III. Complaints About the Advisory Guideline System Are Unfounded.**

#### **A. Compliance rates, sentence length, and extent of departure or variance**

As explained by my colleague Carol Brook, the guidelines themselves incorporate unwarranted disparities and unwarranted uniformity, and guideline ranges are calculated differently in cases that are similar. For these reasons, rates of compliance with the guidelines are an overly simplistic and incorrect way to evaluate disparity. Nonetheless, because compliance rates are often the focus of complaints, I will address them here.

**Judges.** The rate at which judges impose below-guideline sentences has increased since *Booker* because some of the most frequently applied guidelines are too severe and because mitigating factors may now be considered. However, judges have exercised their discretion moderately, to say the least. One year after *Booker*, when the guidelines were still being widely enforced, judges sentenced below the guideline range in 12.5% of cases,<sup>75</sup> an increase from 11% in 2001 when the guidelines were mandatory.<sup>76</sup> During the first two quarters of FY 2009, nearly two years after the Supreme Court made clear that judges may consider all relevant circumstances including those placed off limits by the Commission's policy statements, and may disagree with unsound guidelines such as the crack guidelines, judges sentenced below the guideline range in only 15.3% of cases.<sup>77</sup> A 2.8% increase between March of 2006 and March of 2009 is remarkably small, given the clarification of the law in the interim.<sup>78</sup>

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<sup>75</sup> USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* vi-vii (March 2006).

<sup>76</sup> The reported rate in 2001 was 18.3%, *see* 2001 Sourcebook of Federal Sentencing Statistics, Table 26, but it turned out that 40% of these departures were government-sponsored. *See* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* v (October 2003).

<sup>77</sup> USSC, Preliminary Quarterly Data Report, 2d Quarter Release 2009, Table 1.

<sup>78</sup> For at least a year and a half following *Booker*, many courts of appeals continued to enforce the guidelines and policy statements, holding that judges could not consider mitigating factors if discouraged or prohibited by policy statements, and that they could not disagree with the most obviously unsound guidelines, such as crack. This came into doubt on June 21, 2007, when the Supreme Court said that a judge may vary when the guideline itself fails to reflect § 3553(a) considerations, or when the guidelines treat offender characteristics improperly. *Rita*, 127 S. Ct.

The judicial variance rate is also remarkably low, given that a 2002 survey of judges found that most did not rate the guidelines as highly effective at achieving the purposes of punishment, with a plurality rating the guidelines as ineffective at maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors, and at providing defendants with training, medical care, or treatment in the most effective manner. According to the survey, 73.7 % of district court judges and 82.7 % of appeals court judges rated drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.<sup>79</sup> Based on these results, one might have expected judges to vary in 50% or more cases.

Further, while some prosecutors have said they had the “sense” that the extent of downward departure or variance has increased over time, this does not appear to be the case. *See* Appendix 2. And, unfortunately in our view, average sentence length is about the same or higher than it was before *Blakely* or *Booker* was decided.<sup>80</sup> Because the guidelines remain the focal point at sentencing, there is a consistent relationship between average sentence length and the average minimum guideline calculation. Average sentence length initially increased after *Booker* due to increases in guideline ranges for economic and sex crimes,<sup>81</sup> then decreased due to the reduction in the guideline range for crack offenses and lower guideline calculations in illegal re-entry cases.<sup>82</sup>

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at 2465, 2468. These instructions became unmistakably clear on December 10, 2007, when the Court held that judges must consider all of the relevant factors under § 3553(a)(1), *Gall*, 128 S. Ct. at 596-97, and that judges may disagree with a guideline that is not based on empirical evidence when it produces a sentence that is greater than necessary to satisfy sentencing purposes and/or creates unwarranted disparity. *Kimbrough*, 128 S. Ct. at 570, 574-75.

<sup>79</sup> USSC *Summary Report: U. S. Sentencing Commissions Survey of Article III Judges* (December 2002).

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Year	Average Sentence Length (months)
2003	47.9
2004 pre-Blakely	50.1
2004 post-Blakely	45
2005 pre-Booker	46.3
2005 post-Booker	51.1
2006	51.8
2007	51.8
2008	49.6
2009 first two quarters	48

USSC, 2003-2008, Sourcebook of Federal Sentencing Statistics, Table 13; USSC, *Preliminary Quarterly Data Report*, 2d Quarter Release 2009, Table 19.

<sup>81</sup> USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* at 73 (March 2006).

<sup>82</sup> USSC, *Preliminary Quarterly Data Report*, 2d Quarter Release 2009, Figures C-H. The lower average guideline calculation in illegal re-entry cases is due to narrowing constructions by the

When judges do sentence below the guideline range, they are considering factors that are relevant to the purposes of sentencing but that the formal guideline rules do not reflect (*e.g.*, *mens rea*, motive, addiction, non-violence), or undervalue (*e.g.*, role in the offense), or that the Commission’s policy statements discourage, prohibit, or restrict (*e.g.*, first offender status, addiction, need for treatment, age, aberrant conduct, employment, education, need for training or education, family ties and responsibilities). This prevents unwarranted disparity and unwarranted uniformity. In some cases, judges are rejecting unsound rules, such as the 100:1 crack ratio, the career offender guideline, and the child pornography guideline, thus decreasing disparity in the structure of the guidelines.

**Prosecutors.** Prosecutors sought a below-guideline sentence in 24.7% of cases in the first two quarters of 2009, over one and a half times the rate at which judges imposed a below-guideline sentence without a government motion.<sup>83</sup> The Commission’s statistics do not include Rule 35 reductions, which are used in 80-100% of cooperation cases in several districts.<sup>84</sup> While the government’s rate has increased in some districts, it has stayed about the same in most districts and overall, as *Booker* did not affect the reasons the government ordinarily gives for a below-guideline sentence. In the first two quarters of 2009, the government sponsored below-guideline sentences based on substantial assistance in 12.4% of cases, fast track in 8.6% of cases, and other unspecified reasons in 3.7% of cases.<sup>85</sup> The differences between the lowest and highest government rates by circuit and by district are greater than the differences between the lowest and highest judicial rates by circuit and by district.<sup>86</sup>

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courts of “drug trafficking offense” and “crime of violence,” and because the government is bringing more § 1326(a) prosecutions.

<sup>83</sup> USSC, *Preliminary Quarterly Data Report, 2d Quarter Release 2009*, Table 1. The government rate was slightly less than the judicial rate in the First, Second and Seventh Circuits, and greater than the judicial rate in the other nine circuits. *Id.*, Table 2. The government rate exceeded the judicial rate in 62 of the 94 judicial districts and was equal to the judicial rate in two districts. *Id.*

<sup>84</sup> Defenders who answered a survey reported that Rule 35s are used in 80-100% of cooperation cases in the Eastern District of Arkansas, the Southern District of Illinois, the Southern District of Louisiana, the District of Nebraska, the Eastern District of Virginia, and the Western District of Wisconsin; and are used over half the time in one division of the Western District of Virginia.

<sup>85</sup> USSC, *Preliminary Quarterly Data Report, 2d Quarter Release 2009*, Table 1.

<sup>86</sup> The difference between the highest and lowest government rates by circuit is 26.5 percentage points (16.5% in the Fifth Circuit, 43% in the D.C. and Ninth Circuits), while the difference between the lowest and highest judicial rates by circuit is 20.2 percentage points (9.2% in the Fifth Circuit, 29.4% in the Second Circuit). The difference between the highest and lowest government rates by district is 57.8 percentage points (3.2% in Western Louisiana, 61% in Arizona), while the difference between the lowest and highest judicial rates by district is 37.6 percentage points (6.6% in Eastern North Carolina and Eastern Texas, 44.2% in Massachusetts). The Northern Mariana Islands district was excluded because its rate was zero for both the government and judges. USSC, *Preliminary Quarterly Data Report, 2d Quarter Release 2009*,

Unlike judges, prosecutors are not required to consider the purposes of sentencing in their charging and plea bargaining decisions, nor are their decisions made in public or subject to appellate review. The government’s policies regarding § 5K1.1 motions and Rule 35s vary widely from one district to another (and often depending on who the U.S. Attorney, supervisor, or line assistant is), both in what qualifies as substantial assistance (ranging from a proffer to testimony at a trial or wearing a wire or a controlled buy) and the extent of the requested reduction. Some districts with relatively small immigration caseloads have a fast track program, some with the same or larger immigration caseloads do not, and every district has a growing number of immigration cases. The government’s policies on the third point for acceptance of responsibility vary widely, with some offices interpreting it reasonably to require fair notice, and others abusing it to coerce unconscionable concessions. Mandatory minimums are used, not to satisfy sentencing purposes, but as a bludgeon to coerce the waiver of constitutional rights or to punish the exercise of constitutional rights, and the Commission has found a racially disparate impact in their use.<sup>87</sup> While the Commission has been unable to obtain high-quality data on prosecutorial practices,<sup>88</sup> it has found, based on a variety of evidence including surveys and field studies, that disparity is commonly created by prosecutors and law enforcement agents before a judge ever sees the case for sentencing.<sup>89</sup>

**State Systems.** The Sentencing Commission defines the “conformance rate” as “within-range sentences and government-sponsored, below-range sentences.”<sup>90</sup> For the first two quarters of 2009, the conformance rate, so defined, was 82.9%.<sup>91</sup> (Another 1.8% of cases were sentenced above the guideline range, most presumably at the government’s request.<sup>92</sup>)

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Table 2.

<sup>87</sup> Fifteen Year Review at 89-90.

<sup>88</sup> See USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (1998) (describing obstacles to obtaining data: “there are no standards given to the individual U.S. attorney offices defining how the information is to be maintained, nor are the data required to be compiled or reported to the central DOJ offices in Washington, D.C. Consequently, the working group’s request for such data could not be honored by the DOJ.”).

<sup>89</sup> Fifteen Year Review at 81-92.

<sup>90</sup> See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* vi (March 2006).

<sup>91</sup> USSC, *Preliminary Quarterly Data Report, 2d Quarter Release*, Table 1.

<sup>92</sup> *Id.*

The six states with the most mandatory systems have compliance rates of 84.6% (Kansas),<sup>93</sup> 71% (Minnesota),<sup>94</sup> 72% (North Carolina),<sup>95</sup> 81% (Oregon),<sup>96</sup> 75% or 90% (Pennsylvania),<sup>97</sup> and 87.8% (Washington).<sup>98</sup> States with advisory systems have similar compliance rates, with Maryland at 79.2%,<sup>99</sup> Missouri at 80.2%,<sup>100</sup> Virginia at 79.8%,<sup>101</sup>

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<sup>93</sup> Kansas Sentencing Commission, FY 2008 Annual Report 57 (2008), available at <http://www.accesskansas.org/ksc/2008Annual/08%20total%20report-color.pdf>.

<sup>94</sup> Where the guidelines recommended imprisonment, 71% of offenders received an executed prison sentence. The downward dispositional departure rate in 2007 for presumptive commitments was 26%, and the durational departure rate for offenders receiving executed prison sentences also was 26%, all of which were downward departures. Minnesota Sentencing Guidelines Commission, Report to the Legislature 10 (Jan. 2009), available at [http://www.msgc.state.mn.us/data\\_reports/jan\\_leg\\_report/leg\\_report\\_jan09.pdf](http://www.msgc.state.mn.us/data_reports/jan_leg_report/leg_report_jan09.pdf).

<sup>95</sup> This rate refers to the rate of compliance with the presumptive range for offenders receiving “Active” punishments for felony convictions (straight incarceration), which constitute only 39% of punishments for felony convictions. Forty-four percent of felony convictions resulted in an Intermediate punishment (which includes split sentences), and 17% resulted in a Community punishment. Where courts have the discretionary authority to impose either an Active or an Intermediate sanction, courts imposed an Active punishment only 38% of the time, and an Intermediate sanction 54% of the time. North Carolina Sentencing and Policy Advisory Commission, Structured Sentencing Statistical Report for Felonies and Misdemeanors FY 2007/2008, at 15-17 (2009), available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/07-08statisticalreportR.pdf>.

<sup>96</sup> Oregon Criminal Justice Commission., Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001, at 13 (2003), available at <http://www.oregon.gov/CJC/SG01v2.pdf>.

<sup>97</sup> Seventy-five percent were within the “standard” range, 15% were in the mitigated or aggravated range, and 8% departed from the guidelines. Pennsylvania Commission on Sentencing, Sentencing in Pennsylvania: Annual Report 2008, at 45 (2008), available at <http://pcs.la.psu.edu/PCS2008AnnualReportFinalCompressed.pdf>.

<sup>98</sup> Washington State Sentencing Guidelines Commission, Statistical Summary of Adult Felony Sentencing 21 (2008), available at [http://www.sgc.wa.gov/PUBS/Statistical\\_Summaries/Adult\\_Stat\\_Sum\\_FY08\\_All\\_Pages.pdf](http://www.sgc.wa.gov/PUBS/Statistical_Summaries/Adult_Stat_Sum_FY08_All_Pages.pdf).

<sup>99</sup> Maryland State Commission on Criminal Sentencing Policy, Annual Report 2008 at 22, available at <http://www.msccsp.org/Files/Reports/ar2008.pdf>.

<sup>100</sup> Missouri Sentencing Advisory Commission, Recommended Sentencing, Biennial Report 4 (Sept. 2007), available at <http://www.mosac.mo.gov/file/MOSAC%20Commission%20Report%202007%20Final.pdf>.

<sup>101</sup> Virginia Sentencing Commission, 2008 Annual Report 16 (2008), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/\\$file/RD415.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf).

and the District of Columbia at 89.7%.<sup>102</sup> A compliance rate of 80%, or a departure rate of 20%, is taken as a measure of success in the states.<sup>103</sup>

While direct comparisons are difficult because of differences among systems,<sup>104</sup> it is worth noting that state judges choose to comply with guidelines that are entirely voluntary (*e.g.*, with no appellate review) at rates similar to or greater than under mandatory systems.<sup>105</sup> According to state guideline experts, this is because judges have been given a meaningful role in the development of the guidelines,<sup>106</sup> and are provided detailed information about what other judges are doing, risk assessment tools, and effective sentencing options.<sup>107</sup>

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<sup>102</sup> FY 2008 DCSC Perf. Accountability Report 3, *available at* <http://capstat.oca.dc.gov/docs/fy08/DCSC-FY08PAR.PDF>. The vast majority of offenses in the District of Columbia are violent crimes.

<sup>103</sup> Written Statement of Kim S. Hunt, Ph. D, Executive Director, District of Columbia Sentencing Commission at 3, February 16, 2005, [http://www.ussc.gov/hearings/02\\_15\\_05/Hunt\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Hunt_testimony.pdf).

<sup>104</sup> For example, in some states, the ranges are narrow (*e.g.*, Minnesota and North Carolina); in others, they are broad (*e.g.*, District of Columbia, Pennsylvania, and Washington). Some states include prosecution-sponsored departures in their compliance rate (*e.g.*, District of Columbia, Maryland). Departures based on cooperation are not used as frequently in the states as in the federal system. In states that have mandatory guidelines with jury factfinding (*e.g.*, Kansas, Minnesota, North Carolina, Washington), the overwhelming majority of sentences are the product of a charge or fact bargain and are counted as compliant.

<sup>105</sup> Written Statement of Kim S. Hunt, Ph. D, Executive Director, District of Columbia Sentencing Commission at 3-4, February 16, 2005, [http://www.ussc.gov/hearings/02\\_15\\_05/Hunt\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Hunt_testimony.pdf); Statement of Ronald F. Wright Before the U.S. Sentencing Commission, Feb. 11, 2009, [http://www.ussc.gov/AGENDAS/20090210/Wright\\_statement.pdf](http://www.ussc.gov/AGENDAS/20090210/Wright_statement.pdf).

<sup>106</sup> See Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the post-Blakely Era*, 17 Fed. Sent. Rep. 233, 237 (2005) (an important “strength of advisory guidelines systems is the potential for judicial ‘buy-in’ to the system, if judges are involved in their construction and allowed regular meaningful feedback.”); Testimony of Daniel F. Wilhelm, Director, State Sentencing and Corrections Program, Vera Institute of Justice, Before the U.S. Sentencing Commission, Feb. 16, 2005, at 3 (“judges have been actively involved in the creation and regular adjustment of guidelines in Virginia [which has a compliance rate of 80% and no appellate review] and the guidelines themselves were based on a study of actual historical sentences served by defendants for specific offenses. These factors, not present to the same extent in the federal regime, may also help promote judicial compliance . . . because [judges] believe that recommended sentences are fair, just and proportionate.”), [http://www.ussc.gov/hearings/02\\_15\\_05/wilhelm\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/wilhelm_testimony.pdf).

<sup>107</sup> For example, Missouri has a website showing actual sentencing data for each offense over the past three years, sentencing options, the sentencing commission’s recommendation, an individualized risk assessment score and a management plan for the particular defendant. See Michael A. Wolff, *Missouri’s Information-Based Discretionary Sentencing System*, 4 Ohio St. L. J. 95 (2006). Virginia provides a recidivism risk assessment tool for judges to apply. This has

## B. Anecdotes

Dana Boente, the U.S. Attorney for the Eastern District of Virginia, testified before the Sentencing Commission in New York City on July 9, 2009. In his written testimony, he offered anecdotes in an apparent attempt to demonstrate that judges are creating unwarranted disparity and manipulating the facts. Michael Nachmanoff, the Federal Defender for the Eastern District of Virginia, has investigated these allegations. We would like to correct the record now.

Regarding the drug and gun case in which the judge varied from 180 months to 120 months because the guns were used for barter rather than violence, this is a perfect example of a judge creating proportionality in sentencing. It should be obvious that trading guns is not as serious or dangerous as using guns for violence. Mr. Boente also described a 120-month sentence in a case involving 775 grams of crack. If the crack/powder disparity were eliminated, as the Department of Justice says it should be, the mandatory minimum would have been 60 months and the guideline range would have been 120-150 months, assuming the defendant was in criminal history category VI.

Mr. Boente also described a case in which the judge reduced the number of victims from 400 to 1. The court concluded that a single financial entity had been the “victim” for guidelines purposes despite the fact that the parties “agreed” that the number was between 50 and 250. The defense had entered into this agreement based upon the government’s threat to seek a four-level upward departure for more than 250 victims based upon the theory that the 400 homeowners’ associations whose funds were deposited into the single account that was looted by the defendant should be considered separate victims. The court correctly found that a single entity had suffered the loss. Rather than “manipulation of the facts,” the judge prevented manipulation of the facts by the parties. She then departed upward from a guideline range of 51-63 months to a sentence of 66 months based on the extended period of time over which the criminal conduct took place. This was not a “below-range variance.” As the Commission noted when the guidelines were mandatory: “There are many different ways in which similar sentencing outcomes below those prescribed by a strict application of the sentencing guidelines can be achieved.” USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 70 (Oct. 2003). These various ways, as the Commission noted, are controlled by prosecutors – substantial assistance motions, Rule 35(b) motions, and charge and fact bargaining practices. *Id.*

The theory behind this example – that a judge would purposely decline to find facts under the proper legal analysis and then depart upward in order to hide what was in

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been used to divert 53% of otherwise prison bound non-violent offenders to alternatives without risk to public safety. Rates of incarceration, recidivism, and crime have all dropped. See Dr. Richard Kern, USSC, Symposium on Alternatives to Incarceration, July 15 2008, Testimony at [http://www.ussc.gov/SYMPO2008/Material/11\\_FINAL\\_StatesImplementation.pdf](http://www.ussc.gov/SYMPO2008/Material/11_FINAL_StatesImplementation.pdf); Power Point at <http://www.ussc.gov/SYMPO2008/Material/Kern.pdf>.

fact a “below-range variance” is totally unfounded. This is especially true given the fact that the court was aware at the time of sentencing that the defendant faced a minimum of 23 years of mandatory imprisonment as a result of state charges that were pending against him for engaging in a shoot-out with police officers in Fairfax, Virginia. The court simply had no reason to “manipulate” the sentencing process as suggested by Mr. Boente. As the Commission has noted, when the guidelines were mandatory, judges, prosecutors and defense lawyers, alone or together, found ways to avoid the strict application of the guidelines in order to reach a sentence that was more just. USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 32, 82, 87 (Nov. 2004). This is no longer necessary.

Mr. Boente also compared two fraud cases with different results, claiming that these cases were “similar” and that the difference in the sentences (sentences of five defendants convicted in the AIG case ranging from 12 months and a day to 24 months to four years versus nine years for the defendant in the PurchasePro case) was “difficult to reconcile or understand.” The cases are apples and oranges. In the AIG case, the indictment originated in the Eastern District of Virginia and was subsequently transferred to the District of Connecticut. The Assistant United States Attorney who indicted the case in the Eastern District of Virginia tried the case along with prosecutors in the District of Connecticut. After a heated battle of the experts regarding the loss calculation, the court found that defendants’ securities fraud had caused more than \$500 million in damages to AIG shareholders; however, the defendants did not personally gain or expect to gain from the fraud. All but one of the defendants was more than sixty years of age and several had devoted substantial time and effort to charitable endeavors. More than 400 letters of support were submitted on behalf of one defendant alone.

The PurchasePro case, by contrast, involved a defendant who had none of the redeeming qualities of the defendants in the AIG case. In this case, there was extensive evidence of self-enrichment and gross excess on the part of the defendant, Charles “Junior” Johnson. The defendant lived a lavish lifestyle in Las Vegas off the proceeds of his crime, from which he personally received approximately \$9.7 million. The case against Mr. Johnson was brought after two related cases involving AOL had ended in failure in the Eastern District of Virginia. The first case resulted in an acquittal by the court and the second case resulted in acquittals by the jury. The court had declared a mistrial as to Mr. Johnson during the second trial after his counsel resigned because he had been provided forged emails by Mr. Johnson. Mr. Johnson was convicted of obstruction of justice along with securities fraud.

Far from creating unwarranted disparity or manipulating the facts, judges are imposing proportionate sentences and avoiding unwarranted disparities, openly and honestly.

## APPENDIX 1

Fiscal Year	Total Cases	Defendant					Government				
		Number of appeals involving sentencing issue(s)/% of cases	% appeals won	Number of sentencing issues appealed	Win rate on all issues	Win rate on Departure/Variance issues*	Number of appeals involving sentencing issue(s)/% of cases	% appeals won	Number of sentencing issues appealed	Win rate on all issues	Win rate on Departure/Variance issues*
1996	42,436	Unknown	unknown	6,636	8.1%	8.4%	Unknown	unknown	176	61.9%	79%
1997	48,848	Unknown	unknown	5,552	8%	7.4%	Unknown	unknown	113	60.2%	90.5%
1998	50,754	Unknown	unknown	5,389	6.6%	6.9%	Unknown	unknown	122	50.8%	63.4%
1999	55,557	Unknown	unknown	6,749	9.5%	10.4%	Unknown	unknown	54	31.5%	39%
2000	59,846	Unknown	unknown	5,839	8%	7.5%	Unknown	unknown	77	81.8%	86.7%
2001	59,897	unknown	unknown	7,563	8.2%	3%	Unknown	unknown	94	69.2%	76%
2002	64,366	unknown	unknown	9,100	7.2%	4.8%	Unknown	unknown	183	71.6%	80.8%
2003	70,258	4,313/6.1%	11%	7,719	6.7%	4.9%	112/.16%	78.6%	176	72.2%	72.4%
2004	70,068	4,500/6.4%	11.6%	8,504	7.4%	8.9%	133/.19%	82%	233	72.5%	93%
2005	72,462	6,133/8.5%	37.5%	13,230	30.4%	13.3%	127/.18%	63%	206	62.1%	44%
2006	72,585	8,145/11.2%	23.8%	21,178	17.4%	5.3%	212/.29%	75.9%	474	71.5%	71%
2007	72,865	6,525/9%	13.1%	16,017	7%	3.3%	177/.24%	75.7%	350	70%	74.8%
2008	76,478	6,246/8.2%	13.2%	13,839	7.9%	5.9%	150/.20%	69.3%	291	60.8%	55.7%

1996 USSC Sourcebook of Federal Sentencing Statistics, Tables 50, 51; 1997, 1998 USSC Sourcebook of Federal Sentencing Statistics, Tables 55, 56; 1999-2002 USSC Sourcebook of Federal Sentencing Statistics, Tables 57, 58; 2003-2008 USSC Sourcebook of Federal Sentencing Statistics, Tables 56, 56A, 57, 58.

\*These statistics do not include appeals relating to § 5K1.1.

**APPENDIX 2**

		<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>First two quarters 2009</b>
<b>GOVERNMENT</b>					
5K1.1	Number of cases	10,134	10,049	10,048	4,639
	Median Sentence	37	36	36	36
	Median Decrease	30	29	30	30
	Median % Decrease	47.8	47.4	47.8	48.6
5K3.1	Number of cases	5,166	5,233	5,894	3,225
	Median Sentence	18	18	18	18
	Median Decrease	8	7	7	6.4
	Median % Decrease	28.3	27.8	28.6	31.7
Other Govt	Number of cases	1,939	2,614	3,121	1,377
	Median Sentence	24	24	21	25
	Median Decrease	12	10	10	12
	Median % Decrease	33.2	26.8	27.4	33.3
<b>JUDGES</b>					
Downward Departure	Number of cases	1,903	1,757	1,544	749
	Median Sentence	24	24	24	24
	Median Decrease	10	10	10	10
	Median % Decrease	29.8	26.8	28.6	28.6
Downward Departure w/3553(a)	Number of cases	1,432	1,013	915	405
	Median Sentence	24	24	24	24
	Median Decrease	15	15	15	18

	Median % Decrease	40.3	39.1	40.5	42.8
3553(a)	Number of cases	4,243	4,957	6,678	4,124
	Median Sentence	24	27	27	27
	Median Decrease	12	12	12	12
	Median % Decrease	34.3	33.3	33.3	33.3
Other Judicial	Number of cases	929	706	835	443
	Median Sentence	16.5	12	13	13
	Median Decrease	8	6	6	6
	Median % Decrease	39.3	45.9	39.2	39.2

Source: USSC, *Preliminary Quarterly Data Report*, 2006, 2007, 2008, 2d Quarter Release 2009, Tables 1, 7-13.