

**Statement of Raymond Moore
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**Public Hearing Before the United States Sentencing Commission
“The Sentencing Reform Act: 25 Years Later”
Denver, Colorado
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I thank the Commission for the opportunity to testify about the federal sentencing system after *Booker* and the ways in which it can improve.¹ While my perspective is far from unique, I have been fortunate over the years to practice criminal law in federal court from both sides of the advocate’s aisle – as an assistant U.S. Attorney for the District of Colorado and as a defense attorney both in limited private practice and as a member of the Office of the Federal Public Defender for the District of Colorado. I have practiced in the pre-guideline system, the mandatory guideline system, and now the advisory guideline system.

Like others in the Defender community, I strongly believe that the current advisory guideline system is far superior to the mandatory system it replaced. Judges can now consider all of the factors set forth in § 3553(a) and all of the relevant circumstances of the offense and the offender in order to impose a sentence that is not greater than necessary to serve the purposes of sentencing in the individual case. They can now contribute to the long-term improvement of the advisory guidelines by engaging in a meaningful dialogue with the Commission. The Commission, in turn, can use the feedback judges provide to build better guidelines.

I believe that those working to improve the guidelines would benefit by looking back to the pre-guidelines era and embracing those positive concepts and values that were part of the criminal justice system before the guidelines, but lost their impact in the mandatory system. These concepts were neither “defense values” nor “prosecution values,” but considered by all to be fundamentally important to the fairness and integrity of the criminal justice system.

One such value was the importance of providing the sentencing court with information about what was occurring - both nationally and locally - with respect to sentences imposed for the offense of conviction. The sophistication of the data runs was admittedly crude and limited. The state of computers and data reporting was embarrassing by today’s standards. But for each sentencing, the judge was presented by the probation department with statistics advising him or her of the numbers of cases and the percentage, both locally and nationally, that received probationary or incarceration

¹ 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).

sentences. Despite the simplicity of the information made available, the clear message was that judges should not be required to craft sentences in an informational vacuum.

A second value was providing incentives for defendants to develop strategies and plans for addressing their needs and shortcomings. Before the guidelines reduced sentencing to mathematical formulae, it was not uncommon for defendants to develop and implement plans for addressing their educational needs, their addictions, their mental health or other needs. Indeed, there were businesses and entities in the community – frequently staffed by retired probation officers with backgrounds in social work or psychology rather than criminology and law enforcement – that specialized in developing such plans for defendants.

It comes as no surprise that a major motivation for such efforts was to convince the sentencing court that incarceration or protracted incarceration was unnecessary. But regardless of motivation, there was value in having defendants invested in rehabilitation and improvement efforts. And there was value in having those efforts begin at the outset of the proceedings rather than await the imposition of conditions by a sentencing judge. At least in this district, it was not uncommon for judges to ask at sentencing, “What is he doing about....?” and to have the answer matter. And because it mattered, defendants were motivated to identify and attempt to correct their shortcomings at early stages.

A third value was balance. There was balance among the voices of the participants in the system. Probation had a voice. Defense counsel had a voice. Prosecutors had a voice. But no voice was more powerful than the others. Sentencing was not perceived as a moment in the justice system when one participant should be empowered or automatically have greater ability than another to influence the ultimate outcome. Whether the government prepared for trial or not was not a relevant factor to the purposes of sentencing. Whether a particular sentence advanced a government program – such as improving the efficiency of “processing” illegal immigration detainees – was not a relevant consideration. And whether the government “sponsored” or otherwise endorsed a particular sentence was not taken as automatic indicia of the propriety of that sentence.

During the mandatory guideline era, these values suffered. The value of data and information was superseded by guidelines which had to be followed regardless of their informational underpinnings. What data the Commission did publish was too general to be meaningful in an individual sentencing.² Investment in rehabilitation at early stages

² Although one of the Commission’s most important missions is to systematically collect, study, and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. *See* 28 U.S.C. § 995(a)(12)-(16), the reasons it publishes are general and not tied to specific guidelines or categories of offenses. As a result, judges who looked to the Commission’s data for information regarding the kinds and length of sentences imposed in a particular category of case with particular circumstances found little to guide them. *See* Written Statement of Alan Dubois, Senior Appellate Attorney, Eastern District of North Carolina, and Nicole Kaplan, Staff Attorney, Northern District of Georgia, Public Hearing Before the U.S. Sentencing Commission, Atlanta,

was often futile, while guideline ranges mandated increasingly longer terms of incarceration. And over time, the voice of the government acquired more volume than that of other participants in the system, including the judge.³

Of course, I am not suggesting that we return to the pre-guidelines era, where judges had complete discretion to impose any sentence for any reason and with very little guidance. I am suggesting that, as we move forward in analyzing, discussing and trying to shape the advisory guideline system, suggestions for change are sometimes viewed as radical, extreme or untested, when in reality they are little more than revitalized ideas that have been lost and forgotten due to the passage of time and the inherent consequences of a mandatory guideline system.

One consistent theme from these hearings is that district and appellate judges, as well as defense lawyers and prosecutors, want useful information. They want useful data regarding sentences in similar cases and the reasons for them. They want the Commission to explain what purpose or purposes a guideline is meant to accomplish, how the specific guideline elements are meant to achieve those purposes, and the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving the intended purposes.

Incentives for meaningful, early efforts at rehabilitation and improvement should be encouraged rather than viewed with suspicion. And sentencing policy should divorce itself from advancing government interests unrelated to the purposes of sentencing under 18 U.S.C. § 3553(a).

In addition to these more global observations, I will address the following:

In Part I, I discuss how the Supreme Court's decisions in *Booker* and subsequent cases have improved sentencing. In Part II, I discuss how appellate review is working as it should and explain why the current abuse-of-discretion standard has sufficient "teeth." This part also explains that the appellate courts' deference to the discretion to consider the soundness of a guideline does not mean that district judges may base their sentences on "personal sentencing philosophies" or "personal views" without fear of reversal. In Part III, I discuss practice in the Eighth and Tenth Circuits with respect to departures, and make a number of proposals for open-ended departures, including one for post-offense rehabilitation. In Part IV, I demonstrate that the variation across the districts in below guideline sentences in immigration cases in large part depends on prosecutorial practice with respect to illegal reentry cases, and ask the Commission to reduce the severity of USSG § 2L1.2. In Part V, I discuss Native Americans and federal sentencing, and propose a number of ways the Commission could address circumstances unique to them.

Georgia, at 14-15 (Feb. 10, 2009).

³ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 50, 86, 92 (2004) ["Fifteen Year Review"].

Finally, in Part VI, I propose an application note to § 1B1.10 that would encourage coordinated efforts in the judicial districts should Congress make retroactive any amendment eliminating the crack/powder disparity.

I. DISTRICT COURT DISCRETION

With the guidelines now advisory, judges can once again consider all the relevant information concerning the person standing before them in the courtroom. They may consider, and assign appropriate weight to, factors that the guidelines have never addressed (*mens rea*, motive, addiction, non-violence), or undervalue (role in the offense), or that the Commission's policy statements discourage, prohibit, or limit (first offender status, addiction, need for treatment, age, aberrant behavior, employment education, need for training or education, family ties and responsibilities). At the same time, judges have the benefit of guidelines even as they are empowered to critically evaluate them and participate in their evolutionary improvement.

Sentencing judges now operate in the crucible of sentencing policy, appropriately balanced between guidance and discretion.

The Case of Jorge Antonio Garcia-Gonzales

Mr. Garcia-Gonzales came to Colorado with his parents when he was approximately 15 years old and was employed almost continuously from the time of his arrival. When Mr. Garcia-Gonzales was 19 years old, his girlfriend Vivian, who was fourteen years old at the time, got pregnant. During her pregnancy, Mr. Garcia-Gonzales acted as a father and spouse, attending the 2007 birth of his son and visiting the baby and mother in the hospital. The baby's grandparents (his parents and her mother) approved of Mr. Garcia's relationship with Vivian. In fact, Mr. Garcia-Gonzales' mother was 15 years old when she had given birth to his oldest sister. Following his son's birth, Mr. Garcia was arrested by the state, whereupon he pled guilty to attempted sexual assault on a child (predicated on the mere fact of statutory rape), was given probation and was deported.

After being deported, Mr. Garcia-Gonzales returned illegally to be with his new family. He worked to support them, and helped his siblings and in-laws. He lived with each family from time to time and became the primary male figure for each. After a minor speeding offense, Mr. Garcia-Gonzalez was arrested for illegal reentry after deportation. At the time, Vivian, now "of legal age," was expecting another baby.

Mr. Garcia-Gonzales' adjusted offense level was 24, the result of the 16-level enhancement for the statutory rape conviction, which was his only prior offense. With acceptance of responsibility, his advisory guideline range was 41 to 51 months. Even the government agreed that the 16-level increase in this case made no sense, but would not agree to a sentence of time-served. In light of all the circumstances presented, including Mr. Garcia-Gonzales' lack of criminal history aside from the one conviction, his commitment to his family and the reasons he returned to the United States, his record of

employment, his age, and the difference in cultural perspectives between him and his family and Colorado state law, the court varied the sentence to credit for time served, a sentence that would not have been possible before *Booker*. Mr. Garcia-Gonzalez is being deported, and his wife and family are now preparing to move to Mexico.

The Case of Stephen O'Shea

From the District of Nebraska, as conveyed to me by my colleague, David Stickman, comes the case of Stephen O'Shea, who, at 51 years old, was addicted to cocaine. He had struggled with cocaine addiction for many years, having begun using the drug in 1979. He entered treatment at the Hastings Regional Center in 1984 and maintained sobriety until approximately 2001. Several events in Mr. O'Shea's life converged which caused his relapse. First, Mr. O'Shea's mother passed away in 1997. In 1998, he was injured at work and unable to work for about two years. He still has chronic pain from this injury. To relieve the pain, Mr. O'Shea was prescribed Oxycontin which ultimately led to his addiction to that drug. In 2002, Mr. O'Shea's father passed away. This was particularly traumatic for Mr. O'Shea as he was caring for his father and he watched his father die.

Mr. O'Shea was distributing cocaine to others whom he believed were also users of cocaine. His actions were related to his own consumption of cocaine to satisfy his personal addiction.

After his arrest and detention, Mr. O'Shea entered the NOVA Therapeutic Community in Omaha, Nebraska for in-patient treatment for his addiction. He successfully completed that program and has resided at The Arch Halfway House since March 2008. He has been on urinalysis testing since his pre-trial release with no positive test results. He attends AA and NA meetings regularly. Mr. O'Shea has had no relapses since his treatment began. Fortunately, he has now conquered his substance abuse problems. Mr. O'Shea is a rare individual to have completed both NOVA and The Arch's rigorous drug treatment programs.

Mr. O'Shea was a valued resident at The Arch Halfway House. He used his skills as a painter to help remodel The Arch facility. He did this even while maintaining full time employment with Frank Bevins Painting.

Mr. O'Shea's sentencing guidelines placed him in a sentencing guideline range of 37 to 46 months. Although his count of conviction carried a mandatory minimum sentence of five years, he met the requirements of the safety-valve. Taking Mr. O'Shea's post-offense rehabilitation into account, the judge sentenced him to the twenty-three days he had served following his arrest plus four years of supervised release, a sentence that would have been highly unlikely, if not impossible, before *Booker*. Mr. O'Shea continues to be a law abiding member of society and is drug free.

These cases illustrate that the advisory guidelines allow courts to begin with the guidelines, consider all relevant guideline factors, and then consider the other factors

unique to that individual to craft a sentence that is truly “sufficient but not greater than necessary” to meet the goals of sentencing in the individual case.

II. APPELLATE REVIEW

I agree with my colleagues, Jacqueline Johnson and Michael Nachmanoff, who testified at the last two regional hearings that the current standard of review for sentencing decisions strikes the appropriate balance between the district and appellate courts. With the SRA, Congress envisioned that courts of appeals would not displace the discretion of district courts with rigid enforcement of the guidelines, but would correct only “clearly unreasonable sentences” and “reduce *unwarranted* sentencing disparity.”⁴ This limited form of review was never realized, however, first because courts of appeals enforced the guidelines more rigidly than expected or required, and then, in 2003, because Congress formally enacted a *de novo* standard of review in the PROTECT Act.

With *Booker*, the Supreme Court excised that standard and ruled that sentences would now be reviewed for “unreasonableness.”⁵ With further explicit instructions set forth in *Rita*, *Gall*, *Kimbrough*, *Spears*, and *Nelson*, the Court made clear that courts of appeals may no longer replace the judgments of the district courts with their own judgments,⁶ and may no longer create unwarranted uniformity through rigid enforcement of the guidelines. Instead, their review is deferential, recognizing that there is a range of reasonable sentences and allowing district courts to contribute to the ongoing evolution of the guidelines.⁷

⁴ S. Rep. No. 98-225 at 150 (1983) (emphasis added).

⁵ *Booker v. United States*, 543 U.S. 220, 259-60 (2005).

⁶ “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).

⁷ *Rita v. United States*, 551 U.S. 338, 382 (2007) (“By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts.”) (internal citation omitted).

Ms. Johnson and Mr. Nachmanoff testified regarding the appellate standard of review, and I incorporate their testimony by reference.⁸ I would also like to add my thoughts about the standard of review as it operates in the Eighth and the Tenth Circuits, and address the concerns voiced by some Commissioners at the last hearing.

A. Appellate review is working as it should in the Eighth and Tenth Circuits.

Although the Supreme Court's *Booker* jurisprudence has been slow to take root in the Eighth Circuit, that court has finally come to conduct appellate review with the appropriate level of deference. Like every other circuit, the Eighth and the Tenth Circuits engage in robust procedural review for all sentences, whether within or outside the advisory guideline range. Procedural errors that may affect the kind or length of a sentence, like improperly calculating the guidelines, overlooking relevant factors, considering irrelevant information, or clearly erroneous fact-finding, are caught and remedied on remand.⁹ District courts that continue to believe that they do not have the

⁸ Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender for the Northern District of Ohio, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 2-10 (Sept. 10, 2009); Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Public Hearing Before the U.S. Sentencing Commission, New York, New York, at 16-20 (July 9, 2009).

⁹ See, e.g., *United States v. Vega-Iturrino*, 565 F.3d 430, 434 (8th Cir. 2009) (reversing sentence as procedurally unreasonable because the district court improperly calculated the guideline range); *United States v. Lyons*, 556 F.3d 703, 709 (8th Cir. 2009) (reversing sentence as procedurally unreasonable where the district court improperly calculated the guideline range by applying an unproven special offense characteristic); *United States v. Kemp*, 530 F.3d 719, 723 (8th Cir. 2008) (reversing above-guideline sentence where the district court failed, *inter alia*, to calculate the defendant's advisory guideline range); *United States v. Aleman*, 548 F.3d 1158, 1168 (8th Cir. 2008) (reversing sentence as procedurally unreasonable where district court incorrectly concluded that the defendant was subject to the career offender guideline); *United States v. Lovelace*, 565 F.3d 1080, 1088-93 (8th Cir. 2009) (reversing within-guideline sentence where district court procedurally erred by considering information known to court personally about defendant's prior offense); *United States v. Viezcas-Soto*, 562 F.3d 903, 906 (8th Cir. 2009) (reversing within-guideline sentence where district court erroneously calculated guideline range); *United States v. Blankenship*, 552 F.3d 703, 704-06 (8th Cir. 2009) (reversing within-guideline sentence as procedurally unreasonable where district court erred in guidelines calculation); *United States v. Azure*, 536 F.3d 922, 932 (8th Cir. 2008) (reversing as procedurally unreasonable in part because the district court improperly failed to assign the burden of proof on absence of self defense to the government and failed to make a finding on self defense); *United States v. Egbert*, 562 F.3d 1092, 1104 (10th 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. Todd*, 515 F.3d 1128, 1139 (10th Cir. 2008) (reversing sentence as procedurally unreasonable where the district court clearly erred in calculating drug quantity in a methamphetamine case, in conflict with the factually uncontested quantity admitted by the defendant to law enforcement); *United States v. Gallant*, 537 F.3d 1202, 1234 (10th Cir. 2008)

discretion to vary from a guideline sentence, or that apply departure analysis to a request for a variance, are corrected.¹⁰ And both circuit courts are careful to require district courts to adequately explain the reasons for the sentence imposed, and have remanded cases involving sentences within, below, and above the guideline range when the district court's explanation for the sentence was insufficient or when it failed to address a defendant's nonfrivolous arguments.¹¹

(reversing sentences as procedurally unreasonable because district court improperly calculated the guideline ranges); *United States v. Tatum*, 518 F.3d 769, 773 (10th Cir. 2008) (reversing sentence as procedurally unreasonable where the district court improperly calculated the guideline range).

¹⁰ *United States v. [Josiah] Williams*, 557 F.3d 556, 564 (8th Cir. 2009) (reversing as procedurally unreasonable a within-guideline sentence where the district court, relying on pre-*Kimbrough* circuit precedent, rejected the defendant's argument regarding the crack-powder disparity; remanding for the district court to consider the argument); *United States v. Alexander*, 556 F.3d 890, 893 (8th Cir. 2009) (reversing as procedurally unreasonable within-guideline sentences where district court indicated that it believed "that it was bound to apply the guidelines, without even a minor variance, unless the advisory sentence was unreasonable and there were strong reasons that compelled a non-guideline sentence," which amounted to an impermissible presumption of reasonableness); *United States v. Davis*, 538 F.3d 914, 919 (8th Cir. 2008) (reversing as procedurally unreasonable a below-guideline sentence because district court believed that it could not disagree with the crack-powder disparity in the guidelines); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (reversing within-guideline sentence where district court failed to properly exercise its discretion under § 3553(a) by analyzing defendant's variance arguments (age, medical condition, prior military service, family obligations and employment history) under same standards required for departures); *United States v. Smith*, 573 F.3d 639, 662 (8th Cir. 2009) (reversing as procedurally unreasonable a within-guideline sentence of 360 months where district court decided not to vary downward to the statutory minimum of 240 months because it believed that, despite "some merit" in the defendant's motion for a lower sentence, the court of appeals, under its pre-*Gall* precedent, would automatically reverse it); *United States v. Garcia-Salas*, 260 Fed. App'x 27 (10th Cir. Dec. 27, 2007) (unpublished) (reversing sentence at the bottom of the advisory guideline range even though it thought a lower sentence would be appropriate, based on assumption it would otherwise be reversed based on its view of pre-*Gall* circuit precedent: "[I]t is clear that the district court has more discretion than it thought it did."); *United States v. Cerno*, 529 F.3d 926, 938-939 (10th Cir. 2008) (reversing as procedurally unreasonable a within-guideline sentence of life imprisonment because the district court believed it could not consider the relative amount of force the defendant used to commit the sexual abuse); *United States v. Santillanes*, 274 Fed. App'x 718, 718-19 (10th Cir. 2008) (reversing as procedurally unreasonable within-guideline sentence in a methamphetamine case where the district court erroneously stated that he did not have the authority to disagree with the guideline as a matter of policy); *United States v. Trotter*, 518 F.3d 773, 774 (10th Cir. 2008) (remanding to the district court "to clarify why it rejected [the defendant's] request for a variance based on the crack/powder disparity" and stating that, if the court "rejected this request based on a belief that it did not have discretion to specifically consider whether the disparity resulted in a disproportionately harsh sentence, [it] is to conduct resentencing in light of *Kimrough*").

¹¹ *United States v. Thomas*, 524 F.3d 855, 860 (8th Cir. 2008) (reversing within-guideline sentence where the district court did not address the defendant's request for a downward variance); *United States v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008) (reversing below-guideline sentence as procedurally unreasonable because the district court "failed to adequately explain [the] sentence

Using this same robust but deferential review, both courts have affirmed substantial variances from the advisory guideline range, some when they had previously refused to do so under their pre-*Gall* precedent.¹² These courts now endorse the sentencing judge as the primary decisionmaker and recognize the district courts as having institutional strengths that they lack.¹³

Procedural review is meaningful. By insisting that district courts provide adequate reasons for the sentences imposed, the courts of appeals not only receive better information upon which to base their review, but also permit unfettered feedback to the Commission that will in turn help the guidelines to constructively evolve over time. This

with sufficient justifications for the downward variance); *United States v. Kemp*, 530 F.3d 719, 723 (8th Cir. 2008) (reversing above-guideline sentence of 78 months (guideline range of 33-41 months) in a counterfeiting case where the district court, *inter alia*, did not “adequately account for the two factors it relied on to depart upward by not explaining their relative weight and citing a guideline enhancement as a basis for departure”); *United States v. Azure*, 536 F.3d at 932 (reversing sentence as procedurally unreasonable in part because the district court failed to adequately explain an upward departure from Criminal History Category I to VI); *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1109 (10th Cir. 2008) (reversing as procedurally unreasonable a below-guideline sentence of 121 months (where guideline range was potentially 325-405 months) because district court did not provide a sufficient explanation for its denial of two guideline enhancements, and its “alternative holding that the 121-month sentence ‘would be imposed even if the advisory guideline range was determined to be improperly calculated’ was likewise procedurally unreasonable”).

¹² See, e.g., *United States v. Garate*, 543 F.3d 1026 (8th Cir. 2008) (on remand from Supreme Court in light of *Gall*, affirming below-guideline sentence where it had previously reversed the sentence as an abuse of discretion); *United States v. Burns*, 577 F.3d 887 (8th Cir. 2008) (en banc) (on remand from Supreme Court in light of *Gall*, affirming district court’s reduction for cooperation beyond that requested by the government under § 5K1.1 where it had previously reversed it as an abuse of discretion); *United States v. Bueno*, 549 F.3d 1176 (8th Cir. 2008) (after *Gall*, affirming sentence of probation where it had previously reversed a sentence of 18 months’ imprisonment as an abuse of discretion); *United States v. Huckins*, 529 F.3d 1312 (10th Cir. 2008) (affirming below-guideline sentence where the government relied in its opening brief on pre-*Gall* precedent but did not file a reply brief after *Gall* or challenge the defendant’s request for affirmance under *Gall*); *United States v. Tom*, 327 Fed. App’x 93, 97-99 (10th Cir. 2009) (after reversing as procedurally unreasonable a below-guideline sentence in a second-degree murder case, affirming the same sentence on government’s second appeal, now after *Gall*, as substantively reasonable).

¹³ See, e.g., *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008) (in affirming a below-guideline sentence in a case involving inducing a minor to engage in sexually explicit conduct for the purpose of producing videotapes, recognizing that “[w]e lack the district courts institutional experience of imposing large numbers of sentences, the vast majority of which are never appealed”); *United States v. Burns*, 577 F.3d 887 (8th Cir. 2008) (en banc) (recognizing that the district court’s institutional advantage, as recognized in *Gall*, applies with equal force to determinations under § 3553(e): “We appellate judges can claim no knowledge superior to that of the district court in making the evaluations and findings required by § 5K1.1.”).

aspect of procedural review plays a crucial role in the evolution of federal sentencing policy, informing the Commission’s deliberations when it considers whether and how to amend particular guidelines and illuminating differences in sentencing between defendants that may be treated the same under the guidelines. As Mr. Fitzgerald said in Chicago, “the duty to explain a sentencing decision promotes better decision-making and gives defendants, law enforcement and victims more confidence in the fairness of the sentencing process, even if a particular party disagrees with the sentence itself.”¹⁴

Even more important for the parties, a remand for fuller explanation has substantive results. When forced to explain a previously unexplained sentence, district judges very often impose a different sentence on remand.¹⁵ By insisting that district

¹⁴ Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 247 (Sept. 9-10, 2009).

¹⁵ *United States v. Sevilla*, 541 F.3d 226, 232-33 (3d Cir. 2008) (reversing within-guideline sentence of 72 months where district court failed to address defendant’s arguments for below guideline sentence and did not adequately explain sentence; sentenced to 57 months on remand); *United States v. Grant*, 323 Fed. App’x 189, 192 (3d Cir. 2009) (reversing as procedurally unreasonable an above-guideline sentence of 36 months where district court failed to “explain why the variance is justified in terms of this particular defendant and this particular offense”; sentenced to 30 months on remand); *United States v. Terry*, 2009 WL 1845598, *3 (4th Cir. June 29, 2009) (reversing within-guideline sentence of 51 months where district court made no findings justifying guideline calculation; sentenced to 21 months on remand, to run concurrent with 42-month sentence); *United States v. Batts*, 317 Fed. App’x 329, 331-33 (4th Cir. 2009) (reversing 168-month sentence as procedurally unreasonable because court failed to move incrementally through Sentencing Table and adequately explain sentence; sentenced to 84 months on remand, to run consecutive to 57-month sentence that was not part of appeal); *United States v. Maynor*, 310 Fed. App’x 595, 597 (4th Cir. 2009) (reversing above-guideline sentence of 72 months where district court did not explicitly address § 3553(a) factors or defendant’s arguments and failed to adequately explain sentence; sentenced to 24 months on remand); *United States v. Troupe*, 307 Fed. App’x 715, 717-18 (4th Cir. 2008) (reversing within-guideline sentence of 224 months where district court erred in calculating guideline range; sentenced to 144 months on remand); *United States v. Moreno-Flores*, 542 F.3d 445, 457 (5th Cir. 2008) (reversing within-guideline sentence of 57 months where district court erred in calculating guideline range; sentenced to 21 months on remand); *United States v. Aguilar-Rodriguez*, 288 Fed. App’x 918, 921 (5th Cir. 2008) (reversing above-guideline sentence of 18 months where district court failed to adequately explain reasons for upward variance; sentenced to time served on remand); *United States v. Tisdale*, 264 Fed. App’x 403 (5th Cir. 2008) (reversing within-guideline sentences of 97 months for two defendants 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); one defendant sentenced to 72 months on remand, the other sentenced to 84 months on remand); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009) (reversing above-guideline sentence of 48 months where district court failed to adequately address the defendant’s arguments or explain its chosen sentence; sentenced to 37 months on remand); *United States v. Kemp*, 530 F.3d 719 (8th Cir. 2008) (sentenced to 51 months on remand for fuller explanation, down from 78 months); *United States v. Oba*, 2009 WL 604936, at *1 (9th Cir. Mar. 9, 2009) (reversing 72-month sentence as procedurally unreasonable where court failed to adequately explain upward variance where factors were already considered in guidelines and did not address defendant’s § 3553(a)

judges better analyze and explain their sentences, appellate courts thus help to achieve fairer sentences, which in turn promotes respect for the law. *See Rita*, 127 S. Ct. at 2468 (“Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.”).

Less common, of course, is a reversal of a sentence as substantively unreasonable. Since *Gall* and *Kimbrough* clarified the appropriate standard of review, the Eighth Circuit has not reversed a sentence as substantively unreasonable, while the Tenth Circuit has reversed only a few sentences as substantively unreasonable.¹⁶ These circuits, like the other circuits, understand their role to be deferential regarding the substantive reasonableness of a district court’s chosen sentence. The *en banc* Eighth Circuit recently acknowledged that substantive appellate review is “narrow and deferential” and that “it will be the *unusual case* when we reverse a district court sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable.” *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (*en banc*) (quoting *United States v. Gardellini*, 545 F.3d 1089, 1090 (D.C. Cir. 2008) (emphasis added) (affirming substantial downward variance from a guideline range of 360 months to life imprisonment to the mandatory minimum of 120 months in a crack case as procedurally and substantively reasonable)).

Through both components of review, these circuits 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 reasonableness. They retain a “limited yet important” responsibility “to ensure that a substantively reasonable sentence has been imposed in a procedurally fair way.”¹⁷

arguments; sentenced to 51 months on remand); *United States v. Santillanes*, 274 Fed. App’x 718 (10th Cir. 2008) (sentenced to 78 months on remand for fuller explanation, down from 121 months); *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (sentenced to 180 months on remand, up from 121 months).

¹⁶ *United States v. Friedman*, 554 F.3d 1301, 1308-10 (10th Cir. 2009) (reversing as substantively unreasonable a 57-month sentence for a defendant classified as a career offender convicted of bank robbery). In *United States v. Lente*, 323 Fed. App’x 698 (10th Cir. 2009), a majority of the panel reversed and remanded for resentencing on divided grounds in an involuntary manslaughter case, with one judge concluding that the sentence of 216 months (nearly four times the top of the guideline range) for drunk driving offenses committed on Indian Country and resulting in three deaths was substantively unreasonable. *Id.* at 699-717 (engaging in extensive policy discussion regarding the history and development of the manslaughter guideline and concluding that “the district court’s decision here to deviate from the guidelines cannot survive scrutiny because the court completely failed to establish the requisite nexus between its policy disagreement and [the defendant’s] sentence”) (Holmes, J., concurring in the judgment).

¹⁷ *United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008).

B. The appellate standard of review does not need “more teeth.”

It is true that the deferential abuse-of-discretion standard allows different district court conclusions regarding the soundness a particular guideline as a categorical matter. At the hearing in Chicago, Commissioner Friedrich pointed to two cases, one from the Sixth Circuit and one from the Seventh, in which the appellate courts reviewed for reasonableness differing district court conclusions regarding the soundness of USSG § 2L1.2, the illegal reentry guideline. In *United States v. Herrera-Zuniga*, the Sixth Circuit affirmed a district court’s exercise of discretion to sentence well above the guideline range based on the court’s view that the Commission had set the offense level as “arbitrary” and “out of balance” in relation to the statutory maximum. 571 F.3d 568, 583-84 (6th Cir. 2009). In *United States v. Aguilar-Huerta*, the Seventh Circuit affirmed a sentence within the guideline range, upholding the district court’s exercise of discretion to reject the defendant’s argument that the guideline was not empirically based or the product of the Commission’s characteristic institutional role. 576 F.3d 365, 368-69 (7th Cir. 2009). Although the district court could have considered such an argument and based its sentence on a conclusion that the guideline is not empirically based or otherwise the product of the Commission’s characteristic institutional role, it was not *required* to do so. *Id.* (“[W]e do not think a judge is *required* to consider . . . an argument that a guideline is unworthy of application in any case because it was promulgated without adequate deliberation.”).

In the Eighth Circuit, district judges have reached similarly differing conclusions regarding the soundness of particular guidelines, which remain undisturbed either because the government chose not to appeal or because they were affirmed. For example, in *United States v. Stults*, 575 F.3d 834 (8th Cir. 2009), the government did not appeal a below-guideline sentence in a child pornography case arising out of the District of Nebraska where the district court did not follow USSG § 2G2.2 upon a finding that the guideline is not the product of the Commission’s characteristic institutional role as an independent expert body.¹⁸ Meanwhile, in *United States v. Battiest*, 553 F.3d 1132 (8th Cir. 2009), the Eighth Circuit affirmed a within-guideline sentence in a child pornography case arising out of the District of Missouri where the district court followed the same guideline over the defendant’s argument that it is unsound as a matter of policy. *Id.* at 1137; *see also United States v. Jones*, 563 F.3d 725, 730 (8th Cir. Ark. 2009) (affirming a within-guideline sentence in a child pornography case where district court chose not to disregard the guideline on policy grounds).

In *United States v. Pahu-Martinez*, 2009 U.S. Dist. LEXIS 56499 (D. Neb. July 2, 2009), the government did not appeal a below-guideline sentence in an illegal reentry case based on a finding that § 2L1.2 is not empirically based, while in *United States v. Loreda-Olvera*, 2009 U.S. App. LEXIS 10687 (8th Cir. May 15, 2009), the Eighth

¹⁸ The government likewise has not appealed similar conclusions by other district courts in both the Eighth and the Tenth Circuits. *See, e.g., United States v. Beiermann*, 599 F. Supp. 2d 1087 (N. D. Iowa 2009); *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 1298 (D. Colo. 2008); *United States v. Noxon*, 2008 U.S. Dist. LEXIS 87477 (D. Kan. Oct. 28, 2008).

Circuit affirmed a within-guideline sentence in an illegal reentry case where the district court rejected the defendant's argument that the Commission did not "exercise its characteristic institutional role in crafting [§ 2L1.2]."

Commissioner Friedrich expressed concern that such differing outcomes regarding the soundness of a guideline as a categorical matter result in "unwarranted disparity" and as a result, the appellate standard of review needs "more teeth." We disagree. The problem is not the standard of review. The problem is that courts do not know the underlying bases of these guidelines or what purposes of sentencing a given guideline is trying to accomplish. In other words, the solution is *better guidelines*, ones that are empirically based, fully explained in a rational and transparent fashion, responsive to judicial feedback and informed public comment, and reflecting "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). Those concerned with consistency should "promote district court acceptance of the content of the Guidelines by encouraging the Commission to explain and (where appropriate) revisit its policy decisions that have shaped the Guidelines."¹⁹ As Judge Easterbrook said, the Commission's task is not to concern itself with the appellate standard of review, but "to create the best set of guidelines."

In *Rita*, the Supreme Court said that a within-guideline sentence "will not necessarily require a lengthy explanation" only when it is "clear that the judge rests his decision upon the *Commission's own reasoning* that the Guideline sentence is a proper sentence (in terms of § 3553 and other congressional mandates) in the typical case." *Rita*, 127 S. Ct. at 2468 (emphasis added). As Judge Tjoflat said, if the Commission explained the underpinning of its guidelines, judges could better articulate why or why not they were following the guidelines' advice, and there would then be a rationale for reviewing sentences on appeal.²⁰ With this information, judges would be better able to decide whether to follow a guideline, and courts of appeals would be better able to assess the reasonableness of the sentence in light of the reasons given by the Commission and the reasons given by the judge.²¹

We are confident that if the Commission developed a sound and well-explained set of advisory guidelines, those judges who have previously exercised their discretion to reject flawed guidelines in mine-run cases would be more apt to follow them, and judges who follow guidelines in any event will continue to do so. Thereafter, if district courts

¹⁹ Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 Marq. L. Rev. ____ (forthcoming 2009), electronic copy available at <http://ssrn.com/abstract=1433581>.

²⁰ Tr. of Public Hearing Before the U.S. Sentencing Commission, Atlanta, Georgia at 14, 23-24 (Feb. 10-11, 2009).

²¹ As Judge Sutton put in, "appellate judges really don't have the tools to perform substantive reasonableness review." Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 209-10 (Sept. 9-10, 2009).

continue to express concerns with one or several of these improved guidelines, their analyses, combined with the appellate courts' decisions on the adequacy of those explanations in light of the evidence presented, will provide the Commission with ever more refined feedback, which it can then consider as it builds *even better* guidelines. This is the evolutionary process envisioned by Congress and by the first Commission, but it was stifled by a form of review that came to simply enforce the guidelines.

It is also exactly the process expected by the Supreme Court. Indeed, in *Kimbrough*, the Supreme Court expressly dismissed the concern that different sentencing judges would adopt disparate approaches to the crack cocaine guidelines, stating that “ongoing revision of the Guidelines in response to sentencing practices will help to avoid excessive sentencing disparities.” *Kimbrough*, 552 U.S. at 574. And in *Spears v. United States*, 129 S. Ct. 840 (2009), the Supreme Court effectively *directed* the Eighth Circuit to affirm, as within the district court’s discretion, a sentence below the guidelines in a crack case where the district judge adopted a 20:1 ratio for crack cases because the guideline ratio is not empirically based. *Id.* at 833-34.²² With these decisions, the Court made clear that if excessive disparities emerge as the result of differing methods of correcting an unsound guideline, the Commission should respond by revising the guideline. If it does so, and its revisions are explained and rationally based, the incidence of such disparities will be reduced.

C. Having discretion to consider the soundness of a guideline does not mean district judges base their sentences on “personal sentencing philosophies” or “personal views.”

Some are concerned that the abuse-of-discretion standard allows district judges to decide whether to follow a guideline based on their “personal sentencing philosophies” or their “personal views.”²³ This is not what we advocate, first, because it is not persuasive, and second, because we want the sentence to stand up on appeal. Rather, we ask sentencing courts to look at objective evidence of the development of the guideline, as well as current statistical and criminological information relating to the statutory

²² The same judge has since reconsidered his position, and has now adopted a 1:1 ratio in crack cases. See *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009). Several district courts have followed his lead. *United States v. Lewis*, 623 F. Supp. 2d 42, 46 (D.D.C. 2009); *United States v. Medina*, 2009 U.S. Dist. LEXIS 82900 (S.D. Cal. Sept. 11, 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 70722, 2009 WL 2485842 (W.D. Pa. Aug. 12, 2009); *United States v. Luck*, 2009 U.S. Dist. LEXIS 71237, 2009 WL 2462192 (W.D. Va. Aug. 10, 2009); *Henderson v. United States*, 2009 U.S. Dist. LEXIS 83208 (E.D. La. Sept. 10, 2009); *United States v. Griffin*, Case No. 5:09-CR-008 (N.D. Ohio July 15, 2009). The government has not appealed in any of these cases, while district courts who continue to follow the guideline ratio over the defendant’s objection have been generally affirmed on appeal, so long as they recognize their authority to vary if they so choose. See, e.g., *United States v. Johnson*, 574 F.3d 570 (8th Cir. 2009); *United States v. Clay*, 524 F.3d 877, 878 (8th Cir. 2008).

²³ See, e.g., *United States v. Feemster*, 572 F.3d 455, 468 (8th Cir. 2009) (en banc) (Colloton, J. concurring) (“We must now confer to the wide range of personal sentencing philosophies that are reflected in the ranks of judges.”).

purposes of sentencing in the context of the particular case. We present evidence that the guideline is not empirically based, as well as evidence upon which to base a different sentence.

We present such evidence because we understand that, like every conclusion in a court of law, a sentence must be based on the evidence presented and viewed in light of the appropriate legal standard. In doing so, we also rely on the district court's general competence in examining administrative decisions, both as a general matter and within the specialized framework created by the *Booker* jurisprudence. District court judges have wide latitude in determining whether empirical or other expert evidence is reliable and relevant, subject to deferential review. See *Cavera*, 550 F.3d 180, 196 n.15 (2d Cir. 2008); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). And we expect that the court of appeals will affirm a district court's reliance on such evidence, particularly when the government presents no countervailing evidence in support of its requested sentence. See *United States v. Stall*, ___ F.3d ___, 2009 U.S. App. LEXIS 20245 at *27 (6th Cir. Sept. 11, 2009) ("Our authority to intervene is limited, especially in cases where [the government] never developed the underlying arguments of its appeal at the sentencing hearing and we have only a one-sided record to review.").

It has always been the case that a district court "necessarily abuse[s] its discretion if it based its ruling on . . . a clearly erroneous assessment of the evidence." See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (cited in *Booker*, 543 U.S. at 260, 262 and *Rita v. United States*, 551 U.S. 338, 362 (2007) (Stevens, J., concurring)). This aspect of abuse-of-discretion review ensures that district courts will not base sentences on their "personal sentencing philosophies," but on the evidence before them, which includes any evidence the Commission may provide regarding the underlying basis of the guideline as well as any countervailing evidence presented by the parties. See *United States v. Cavera*, 550 F.3d 180, 209 (2d Cir. 2008) (Katzmann, J., concurring) (identifying "no clear error in the district court's finding that gun trafficking to New York City is a sufficiently more serious crime than the mine-run case based on the high population density of the city as well as the likely illegal disposition and use of such guns"). Although some have noted that "generalist judges may not be the best equipped for this type of sociological and statistical analysis," *Cavera*, 550 F.3d at 212 n.3 (Straub, dissenting), district court judges make decisions based on such statistical and sociological evidence all the time. Again, the answer is not to stifle these analyses by district judges, but for the Commission to explain its guidelines and provide the empirical evidence upon which they are based.

I believe that prosecutors, too, would like to see guidelines that are rationally based and transparently explained. With every guideline subject to challenge in the district court, meaningful explanation by the Commission would give prosecutors tools to justify the requested sentence and to defend it on appeal. Mr. Fitzgerald testified in Chicago that with respect to the child porn guidelines, for example, "it would be a useful thing to educate prosecutors" and everyone else involved in the criminal justice system

with evidence about the harms and risks associated with child pornography offenses.²⁴ He suggested that, currently, prosecutors may often act on good faith beliefs and emotion rather than evidence-based knowledge, such as the recidivism rates (and type of recidivating events) for different offenses or the relative seriousness of the harms associated with them.²⁵

This is true for other guidelines as well. For example, in a methamphetamine case in the District of New Mexico, a prosecutor was unable to show that a four-level increase based on the actual amount of methamphetamine (150 g) contained in a mixture of methamphetamine (400 g), *see* USSG § 2D1.1(c) (note B to Drug Quantity Table), was the result of the Commission's exercise of its characteristic institutional role:

AUSA: But the Sentencing Commission has evolved its calculation of the guidelines based upon the evolution of whatever information was available to them.

THE COURT: Which may or may not be politics.

AUSA: Right, sir. . . . I don't know that it has any scientific basis. All I know, Your Honor, it's been looked at over time and has changed and evolved, which would imply that there has been -- it could have been political, but it would certainly imply that somebody has looked at something . . .

THE COURT: I find that there is no empirical data or study to suggest that actual purity should be punished more severely by an arbitrary increase of the four levels in this case or at the higher level. It seems to be black box science, as best I can determine. I probably would not allow it under *Daubert*, based on what I know at present. It seems to be contrary to any empirical evidence, and really undermines Section 3553(a), as it does create an unwarranted disparity. It seems to me that this is not even a rough approximation to comply with 3553, and is not really based on any consultation or criminal justice goals or data.²⁶

Without an independent, evidence-based rationale for a guideline sentence, prosecutors trying to support a request for a guideline sentence are often left with little to carry their burden.

²⁴ Tr. of Public Hearing before the U.S. Sentencing Commission, Chicago, Illinois, at 278 (Sept. 9-10, 2009).

²⁵ *Id.* at 251, 278-79.

²⁶ Tr. of Sentencing Hr'g, *United States v. Santillanes*, No. 07-619 (D.N.M. Sept. 19, 2009), available on PACER at <https://ecf.nmd.uscourts.gov/doc1/12111917143>.

D. The practice of affirming alternative sentences will not lead judges to skip entirely the guidelines calculation.

The Second Circuit recently held that a district court judge facing a difficult and ambiguous assessment under the guidelines that will not make a difference in the sentence does not have to reach a final conclusion, but can take both suggestions into account in considering all the factors under § 3553(a). *United States v. Dhafir*, 577 F.3d 411, 414 (2d Cir. 2009) (“[T]here was no need for the district judge to pigeonhole the case into § 2S1.1(a)(2) to avoid an illogical result and run the risk of setting a bad precedent . . . the judge could simply look at all of the facts, take both suggestions into account, consider the § 3553(a) factors, and come up with a ‘hybrid’ approach if he so chose.”). There, without ruling on the correctness of the district court’s guideline calculation, the case was remanded for the district court to engage in this more flexible approach. *Id.* In *United States v. Abbas*, the Seventh Circuit considered whether the district judge’s erroneous application of a particular guideline (with a higher guideline range) required reversal as procedurally unreasonable. 560 F.3d 660, 667 (7th Cir. 2009). The court held the error harmless because the district judge “expressly stated that she would have imposed the same sentence even if § 2C1.1 did not apply to the defendant’s sentence,” and supported her decision with a detailed explanation based on the § 3553(a) factors. *Id.* As the court put it, “this was not just a conclusory comment tossed in for good measure.”

The Tenth Circuit has also ruled that if a district court cogently explains why it would impose the same sentence even if it had engaged in improper factfinding regarding a prior conviction, then it will find the procedural error harmless. *United States v. Springer*, 315 Fed. App’x 703, 708-09 (10th Cir. 2009) (no procedural error where the district court amply explained her reasons for imposing a sentence above what should have been the guideline range had she properly calculated it).

These cases do not mean that district courts have free rein to jettison the whole guideline calculation process. A sentencing court is not encouraged or permitted simply to “toss in a conclusory comment” that it would impose the same sentence if its guideline calculation is wrong.²⁷ Rather than foreshadow total abandonment of the guidelines, such cases illustrate their complexity and the difficulty courts sometimes experience in applying unexplained rules. As Judge Boggs stated, instead of being forced to decide on a single correct calculation despite confusion about the proper resolution of the issue, district courts can now honestly explain why they did not reach a single calculation and why the sentence imposed is appropriate either way under § 3553(a). Such explanations provide valuable feedback regarding difficult or confusing application issues that should

²⁷ See, e.g., *United States v. Pena-Hermosillo*, 522 F.3d 1108, 111 (10th Cir. 2008) (reversing below-guideline sentence where the district court did not explain its reasons for rejecting disputed enhancements and stating, in cursory fashion, that it would impose the same sentence even if the guideline range had been improperly calculated).

assist the Commission in making the guidelines clearer. If anything, the Commission should consider advising judges to do just what these courts of appeals have sanctioned.

E. The government does not appeal because the sentence is fair.

In her written statement for the Chicago hearing, Ms. Johnson demonstrated that it is not true that the government is filing fewer appeals because they can no longer win under the abuse-of-discretion standard.²⁸ At the hearing, Judge Carr attributed the government's low appeal rate to "one very simple thing: That even when we vary, the prosecutors, who are the ones more likely to appeal because we more often vary down, look at it and say, you know, that is acceptable under the law."²⁹ In his view, "the low rate of appeals is a sign that even the prosecutors, in 95 percent of the cases, think we get it right when we vary, when we exercise that discretion that we now have."³⁰

From the perspective of an appellate judge, Judge Sutton said that, even when his first reaction to a sentence is "wow," "when [he] read[s] the whole thing, there are not too many of them" that he cannot understand why the district court judge imposed the sentence.³¹

The data do not conflict with these judges' perceptions. From what we can glean from the Commission's 2009 data, of 4,137 instances of a defense motion for a below range sentence in cases not identified as "government sponsored," the government did not object to 42% (1,738) of those motions.³² And we do not know for certain the government's position regarding 5,387 additional "attributions" in cases where a below range sentence is not identified as "government sponsored."³³ We can safely guess that the government agreed to the sentence or at least did not object in some portion of those cases as well. In my experience, prosecutors will *pro forma* "object" to an argument for a below-guideline sentence, but will not do much in the way of supporting the objection because they, too, believe a below guideline sentence would be fair and appropriate.

²⁸ Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender for the Northern District of Ohio, Public Hearing Before the U.S. Sentencing Commission, at 9-10 & App. 1 (Sept. 10, 2009).

²⁹ Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 79-80 (Sept. 9-10).

³⁰ *Id.* at 80.

³¹ *Id.* at 208-09.

³² USSC, *Preliminary Quarterly Data Report, 3d Quarter Release 2009*, tbl. 6.

³³ *Id.*

III. DEPARTURES

I note that the Commission has made it a priority for this amendment cycle to review its departure provisions, including whether pertinent provisions of the Sentencing Reform Act prohibit, discourage, or encourage certain factors, as well as possible revisions to the departure provisions in the Guidelines Manual.

I join my colleagues who have testified at previous hearings in urging the Commission to take the following steps:

- Delete policy statements that prohibit, discourage, or restrict consideration of offender characteristics and offense circumstances (Chapter 5, Part H and Chapter 5, Part K.2) and move them to a historical note;
- Retain or add only open-ended invited departures such as those in USSG § 2B1.1, comment. (n.19) and USSG § 4A1.3;
- Not assign values to or attempt to specifically define mitigating offender characteristics;
- Delete all references to § 3553(b);
- Delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders; and
- Revise the language of USSG § 1B1.4 and Application Note 1(E) to USSG § 1B1.1 consistent with current law.³⁴

I will add a few thoughts based on my experience in the District of Colorado and the law of the Eighth and Tenth Circuits, as well as additional suggestions.

A. The Commission’s restrictive policy statements, and its description of sentencing procedure, are inconsistent with current law and practice.

In the Eighth and Tenth Circuits, as in some other circuits, the existence of restrictive policy statements in the Guidelines Manual alongside § 3553(a)(1) created confusion and unfairness after *Booker* as some judges and the courts of appeals thought the policy statements were still controlling. Even after the Supreme Court made clear that this was incorrect in *Rita* and *Gall*,³⁵ the Eighth Circuit continued to allow, and even

³⁴ See Statement of Carol A. Brook, Public Hearing Before the U.S. Sentencing Commission, at 26-35 (Sept. 10, 2009); Statement of Michael Nachmanoff, Public Hearing Before the U.S. Sentencing Commission, at 22-25 (July 9, 2009); Joint Statement of Thomas W. Hillier II and Davina Chen, Public Hearing Before the U.S. Sentencing Commission, at 31-36 (May 27, 2009); Testimony of Alan Dubois and Nicole Kaplan Public Hearing Before the U.S. Sentencing Commission, at 47-50 (Feb. 10, 2009).

³⁵ See *Gall v. United States*, 128 S. Ct. 586 (2007) (upholding a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines’ policy statements prohibit or deem “not ordinarily relevant”); *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007) (stating that the court

require, district courts to follow restrictive departure policy statements and caselaw to deny variances under § 3553(a).³⁶ It was only in March of 2009, after the circuit had been twice reversed for refusing to recognize the district court’s discretion (in *Gall* and then in *Spears*), that it finally held that restrictive policy statements do not override § 3553(a) and may not be used to deny a sentence outside the guideline range.³⁷ In the meantime, many defendants were sentenced without full consideration of the relevant factors and purposes of sentencing set forth in § 3553(a) and without meaningful recourse in the court of appeals.

Thus far in 2009, in the Eighth Circuit, below guideline sentences not identified as “government sponsored” were based on a “departure” in whole or in part in only 2.8% of cases and on § 3553(a) or other reasons in 18.6% of cases. In other words, only 13% of these sentences were based in whole or in part on a departure. In the Tenth Circuit, below guideline sentences not identified as “government sponsored” were based on a “departure” in whole or in part in only 2.9% of cases, and on § 3553(a) or other reasons in 8.5% of cases, *i.e.* departures only 25% of the time. In my district, “departures” are relied upon in whole or in part only 20% of the time.³⁸

The reasons for this are obvious. First, most departure provisions do not *invite* departures, but prohibit, discourage, or define them in restrictive terms, although these factors bear directly on culpability, risk of recidivism, and the need for (or accomplishment of) rehabilitation. Second, caselaw strictly interpreting the policy statements is still on the books and is not going to change. In the District of Colorado and most other districts of which I am aware, Defenders do not ask for a “departure” unless they are certain that the circumstances exactly fit the requirements of a policy statement as interpreted by the court of appeals, or when the circumstances qualify for an encouraged departure under Chapter 2 or 4. In my office, we tend to ask for a “statutory sentence or variance.” Every sentence must comply with § 3553(a) and “departures” too often lead to confusion and waste of time.

This brings me to another point: It is not accurate, as stated in the introduction to the Guidelines Manual, that “[t]he district court, in determining the appropriate sentence in a particular case, therefore, *must consider* the properly calculated guideline range, *the*

may conclude that the guidelines “do not generally treat certain defendant characteristics in the proper way”).

³⁶ See, e.g., *United States v. Charles*, 531 F.3d 637, 641 (8th Cir. 2008) (using restrictive test for departures under USSG § 5H1.4 to affirm the district court’s denial of variance based on the defendant’s physical condition); *United States v. Feemster*, 531 F.3d 615, 619-20 (8th Cir. 2008) (holding that district court abused its discretion by imposing a variance based on age because the guidelines’ policy statement says age is “not ordinarily relevant,” relying on a pre-*Gall* opinion which was vacated and remanded without opinion by the Supreme Court based on *Gall*).

³⁷ See *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009).

³⁸ USSC, *Preliminary Quarterly Data Report*, 3d Quarter Release 2009, tbl. 2.

grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a).” USSG, Ch. 1 Pt. A(2) (emphasis added). This suggests either that judges are required in every case to peruse the Manual to determine whether a departure applies, or that they are required to determine what the Manual has to say regarding potentially applicable mitigating or aggravating factors in the case and to take that into account, perhaps even to override § 3553(a), as under previous Eighth Circuit law. For this proposition, the Manual cites *Rita*, 127 S. Ct. at 2465, but this is contrary to both *Rita* and *Gall*.

The Supreme Court said that Mr. Rita could have argued for a departure within the Manual, *or* he could have argued that the sentencing factors set forth in § 3553(a) warranted a lower sentence, *or* he could have argued both in the alternative. 127 S. Ct. at 2461. At page 2465, the page cited in the introduction to the Manual, the Court listed the arguments the sentencing judge is to consider *if raised*. The sentencing judge:

may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the “heartland” to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.

Id. at 2465. It also said that a party may “argue[] that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way-or . . . for departure.” *Id.* at 2468. The only arguments the sentencing judge is required to address are the nonfrivolous arguments raised by the parties. *Id.* at 2468.

In *Gall*, the Court said: “As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” which “should be the starting point and the initial benchmark,” but because “[t]he Guidelines are not the only consideration,” “after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall*, 128 S. Ct. at 596. It is “not incumbent on the District Court Judge to raise every conceivably relevant issue on his own initiative.” *Id.* at 599. The Court approved a below-guideline sentence based on circumstances of the offense and characteristics of the defendant which the guidelines’ policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy, or deem “not ordinarily relevant,” *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs, without mentioning those policy statements. *Id.* at 598-602.

In sum, although a party may argue for a departure and if so the judge must consider the argument, the judge is not otherwise required to consider departure policy statements. The Eighth and Tenth Circuits are in accord.

The Eighth Circuit has correctly described the process as follows: “The district judge should allow ‘both parties an opportunity to argue for whatever sentence they deem appropriate,’ and then should ‘consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.’” *Hill v. United States*, 552 F.3d 686, 691 (8th Cir. 2009) (quoting *Gall*, 128 S. Ct. at 596). It has urged sentencing judges to consider and explain “departures” and “variances” separately, *if a departure is raised*. See *United States v. Washington*, 515 F.3d 861 (8th Cir. 2008); *United States v. Spotted Elk*, 548 F.3d 641 (8th Cir. 2008). There is no requirement to consider departure policy statements unless a departure is raised.

The Tenth Circuit has similarly instructed the following: “[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *United States v. Burgess*, 576 F.3d 1078, 1101 (10th Cir. 2009) (quoting *Gall*, 128 S. Ct. at 596). While emphasizing that “[d]epartures and variances are analytically distinct,” *United States v. Martinez-Barragan*, 545 F.3d 894, 901 (10th Cir. 2008), and noting that district courts “should . . . continue to apply the Guidelines departure provisions in appropriate cases,” *id.* at 901 (quoting *United States v. Sierra-Castillo*, 405 F.3d 932, 936 n.2 (10th Cir. 2005)), the Tenth Circuit does not require district courts to consider the Commission’s policy statements regarding departures when a party instead asks for a variance. See, e.g., *United States v. Tom*, 327 Fed. Appx. 93, 97-99 (10th Cir. 2009); *United States v. Huckins*, 529 F.3d 1312, 1319 (10th Cir. 2008).

The Commission should replace the above-quoted passage in the introduction in the Manual with the procedure set forth in the Supreme Court’s decisions, *i.e.*, calculate the guideline range and then consider the parties arguments, which may be for a guideline sentence, or for a departure, or that a guideline sentence should not apply because it fails properly to reflect § 3553(a) considerations, or that the guideline sentence does not treat defendant characteristics in the proper way.

B. The Commission is free to delete its restrictive policy statements because they are not required by statute and are inconsistent with congressional intent.

The policy statements set forth in Chapter 5, Parts H and K.2 are not required by, and are inconsistent with, the Sentencing Reform Act. First, Congress directed the Commission to assure that its guidelines and policy statements were entirely neutral, in determining the nature, extent, place of service, or other incidents of a sentence, as to the defendant’s race, sex, national origin, creed, and socioeconomic status.³⁹ By this,

³⁹ See 28 U.S.C. § 994(d); S. Rep. No. 98-225 at 171 (1983) (“Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education

Congress clearly meant that the sentence not be determined *because of* such factors. It did not mean that the Commission should promulgate guidelines or policy statements discouraging or prohibiting judges from considering mitigating or aggravating factors, although such factors might occur with more frequency in defendants of a particular race, religion, sex, or socioeconomic status. I am aware that the Commission, or some Commissioners, have attempted to justify the restrictive policy statements on the theory that these factors correlate with race or socioeconomic status. But this does not withstand scrutiny, for it fails to explain the array of restrictions on mitigating factors that the Commission has promulgated.⁴⁰ Indeed, as Carol Brook pointed out in her testimony, consideration of many of these factors would have helped reduce *unwarranted* racial disparities created by guidelines that fail to satisfy the purposes of sentencing, such as the drug trafficking and career offender guidelines.

Second, Congress directed and intended that the Commission would assure that its guidelines and policy statements did not recommend straight prison over probation or a split sentence, or a lengthier prison sentence, based on *lack of* education, vocational skills, employment record, family ties and responsibilities, or community ties.⁴¹ It did not direct or intend the Commission to rule out these or any other offender characteristics for purposes of mitigating the kind or length of sentence of any offender of any race, religion, gender or socioeconomic status.⁴²

and vocational training.”).

⁴⁰ Factors deemed prohibited or not ordinarily relevant include education, employment, vocational skills, family ties and responsibilities, community ties, age, mental, emotional and physical conditions, military service, other charitable or public service, “lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing,” “physical appearance, including physique,” “personal financial difficulties and economic pressures,” “drug or alcohol dependence,” “addiction to gambling,” “post-sentencing rehabilitative efforts,” diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, and a single aberrant act if the instant offense was drug trafficking subject to a mandatory minimum of five years or greater even if the defendant is eligible for the safety valve. *See* USSG, Chapter Five, Part H; USSG, Chapter 5, Part K, Subpart 2.

⁴¹ *See* 28 U.S.C. § 994(d); S. Rep. No. 98-225 at 175 (1983) (“The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.”).

⁴² The original Commission was aware that employment history, as well as education, age, the nature of prior offenses, and living arrangement predicted reduced risk of recidivism. *See* Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. Crim. Just. 195, 199-200 (1974), *cited in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 n.96 (1988). The Commission confirmed these and other findings in 2004. *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004).

C. Proposed open-ended departures.

We propose the following open-ended invited departures.

Post-offense rehabilitation.

At the Chicago hearing, Judge McCalla noted that in 2008, 28% of all defendants sentenced in his district chose to cooperate in order to receive a departure under USSG § 5K1.1, demonstrating that the guidelines can have a “strong positive effect on behavior.”⁴³ He suggested that the guidelines could be used to affect “other, perhaps even more favorable behavior,” such as a defendant’s significant progress toward rehabilitation up to the day of sentencing.⁴⁴ He described a case in which he granted the defendant’s motion for a continuance of sentencing so that he could complete an anger management course while in pretrial detention and would be able to show the judge his certificate of completion. The defendant’s steps toward dealing with his problems were “of course, important” to Judge McCalla, and he suggested that the Commission provide a mechanism in the guidelines to reward those who demonstrate significant progress toward rehabilitation before sentencing.⁴⁵ Doing so would “incentivize the type of rehabilitative conduct that could reduce recidivism and achieve the goals of our justice system.”⁴⁶

Judge McCalla is right. We ask the Commission to encourage judges to take available and appropriate measures to facilitate a defendant’s post-offense rehabilitation, and to invite downward departure in consideration of the defendant’s efforts toward that goal.

This is not a new concept, but merely a forgotten one. Before we had guidelines, the federal criminal justice system expended a tremendous amount of effort toward rehabilitation before sentencing. In fact, an entire industry was built up around programmatic rehabilitation, often staffed by retired probation office employees, and encouraged by judges. Defendants participated in these programs and presented their efforts to the court, which in turn would have a mitigating impact on the kind and length of sentence. Before the guidelines, judges found “drug use” to be a relevant mitigating factor at sentencing in drug cases.⁴⁷ When it enacted the SRA, Congress suggested that

⁴³ Statement of Jon P. McCalla, Chief Judge of the United States District Court, Middle District of Tennessee, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 5 (Sept. 9, 2009); Tr. of Public Hearing Before the U.S. Sentencing Commission, at 91-94 (Sept. 9-10, 2009).

⁴⁴ *Id.*

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

⁴⁷ U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and*

the Commission recommend probation for a drug-addicted defendant, in order for the defendant to participate in a community drug treatment program, possibly with an initial brief stay in prison for “drying out.” S. Rep. No. 98-225 at 173 (1983).

It is now well-established that substance abuse and dependence cause crime, that treatment within the criminal justice system is effective in reducing substance abuse and addiction and the accompanying crime and costs, and that community-based treatment is more effective and less costly than prison without treatment or treatment in prison.⁴⁸ For example, the Washington State Institute for Public Policy found that treatment-oriented intensive supervision reduces recidivism by 16.7%, that community drug treatment reduces recidivism by 9.3%, and that prison drug treatment programs reduce recidivism by only 5.7%.⁴⁹ At the Commission’s recent Symposium on Alternatives to Incarceration, evidence-based research was presented to show that properly matched treatment programs for addicted offenders are effective in reducing recidivism. See USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008).⁵⁰

Policy Statements, tbl. 1(b) (1987), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

⁴⁸ See Chandler, Fletcher & Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, *Journal of the American Medical Association*, Vol. 301, No. 2, January 14, 2009; Government Accountability Office, Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, Feb. 2005 at 72-74; Testimony of Faye S. Taxman, Ph.D., Before the Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives, at 1, 6, March 10, 2009, http://appropriations.house.gov/Witness_testimony/CJS/faye_taxman_03_10_09.pdf; USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008); Nat’l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006) (concluding that “treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. . . . Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings” because every dollar spent toward effective treatment programs yields a \$4 to \$7 dollar return in reduced drug-related crime, criminal costs and theft); Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment “Pay for Itself?”*, 41 *Health Services Res.* 192-213 (2006); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 5-6 (March 2004) (“Dollar for dollar, treatment reduces the societal costs of substance abuse more effectively than incarceration does.”); see also *id.* at 18 (“A prison setting is ill-suited for the most effective approach to persistent drug abuse, which consists of a broad framework of substance abuse counseling with “job skill development, life skills training, [and] mental health assessment and treatment.”).

⁴⁹ See Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Ex. 4 at 9 (Oct. 2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

⁵⁰ The Sentencing Project recently reviewed the evidence on drug courts, which address addiction

Today, of course, most defendants are detained before trial. But as Judge McCalla explained, such a defendant could be encouraged to participate in educational programs, life skills development, or programs addressing addiction or mental health needs. Those released on bond could participate in similar programs in the community, and could also work toward obtaining a GED, obtaining regular employment, receiving counseling, or make early payments toward restitution. Defendants ultimately sentenced to prison who have received a lower sentence in recognition of post-offense rehabilitative efforts would be more likely to continue on that path by taking advantage of BOP programs with an eye toward reentry. Others may do so well that it becomes clear that incarceration would disrupt progress and would not serve any purpose of punishment.

Some districts are already very active in recognizing the value of post-offense rehabilitation. My colleague, David Stickman, reports that in the District of Nebraska, post-offense rehabilitation is the most common reason for a sentence below the guideline range. A good example of the impact of pre-trial rehabilitation is the case of Stephen O'Shea, described above in Part I. A defendant who is connected with the right programs can pull his life together to become a law-abiding citizen without extensive incarceration.

Probation offices around the country have begun to recognize once more the value of post-offense rehabilitation, and have created organized pretrial programs for offenders who have not yet been sentenced but who are released on pretrial supervision.⁵¹ My colleague Jacqueline Johnson told you about a “workforce program” operating in the Northern District of Ohio, which is available to such offenders even when they face likely prison time.⁵² As requested, Ms. Johnson has provided additional information about this program, which Mr. Drees describes in his written statement regarding alternatives to incarceration. The point I would like to make here is that when one of Ms. Johnson’s clients did well in the workforce program, a probation officer took the unusual step of amending the presentence report to say that the client’s efforts at rehabilitation should serve as the basis of a downward departure or a variance, and that she should remain in the community to complete the program rather than go to prison. The court heeded the advice, and sentenced her to 1 day custody in the Marshal’s Office (for ten minutes), ten months home confinement, and three years’ supervised release. She is currently employed and completing the post release workforce program.

through drug treatment “instead of solely relying upon sanctions through incarceration or probation,” and reported that graduates of drug court programs are “less likely to be rearrested than persons processed through traditional court mechanics.” *See* Ryan S. King and Jill Pasquarella, The Sentencing Project, *Drug Courts: A Review of the Evidence*, at 1, 5 (April 2009) (collecting findings of drug court evaluations).

⁵¹ When asked, Richard Tracy, Chief Probation Officer, Northern District of Illinois, also agreed that the Commission should amend the guidelines “to incentivize” pretrial rehabilitative programs. *See* Tr. of Public Hearing before the U.S. Sentencing Commission, at 147 (Sept. 9-10, 2009).

⁵² *Id.* at 341.

I am sorry to say that there is no such organized program in either of my districts, nor is there sufficient availability of any other kind of rehabilitative programming available for those held in pretrial detention or released on bond. But some clients do manage to participate in such programs, such as anger management or life skills classes, while detained, while some others might be released on the condition that they participate in mental health or substance abuse treatment. But it is not a widespread practice. From my perspective, any mechanism that would encourage judges to reward such rehabilitative steps is long overdue. Even more important, I would expect that recognition by the Commission of the value of post-offense rehabilitation would have the effect of encouraging increased availability of appropriate, evidence-based programming in those districts that are currently lacking such programs, and encouraging judges to use them more often.

Although Judge McCalla indicated at the hearing that perhaps the Commission might assign a specific number of points for post-offense rehabilitation,⁵³ the cases described above show why the Commission should not do so. The Commission cannot predict in the abstract how a particular offender should be treated to best advance sentencing purposes, or how many points will be necessary to do so. Instead, it should encourage courts to facilitate a defendant's rehabilitation when appropriate and available, to consider the rehabilitative efforts in the particular context of the individual case, and to depart downward to an appropriate sentence that will further the purposes of sentencing, including a non-prison or split sentence. The Commission should not try to limit the reduction to a certain number of levels.

Finally, the Commission should not concern itself with the possibility that some defendants will "game the system" by participating in rehabilitative programs merely in order to obtain a downward departure. As James Van Dyke, Executive Director of the Salvation Army in Chicago, testified, the Commission's focus should be on outcomes, not motive. Even individuals "ordered to pursue substance treatment who otherwise might not have done so who, once they become involved, embrace it for other than simply compliance reasons."⁵⁴ As noted above, studies show that treatment within the criminal justice system is effective in reducing substance abuse and addiction.⁵⁵ For many, it is only by becoming involved in the criminal justice system that "they experience[] the interventions they need to become productive citizens."⁵⁶

⁵³ *Id.* at 116-17.

⁵⁴ *Id.* at 359.

⁵⁵ *See* authorities cited *supra*, note 46.

⁵⁶ Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 359 (Sept. 9-10).

Role in the offense.

As initially promulgated, § 5H1.7 simply stated that role in the offense “is relevant in determining the appropriate sentence,” citing Part B of Chapter 3, which described the circumstances for a limited adjustment for role in the offense and stated that in any other case, no adjustment to the offense level was allowed for role in the offense. *See* USSG § 3B1.4 (Nov. 1, 1987). Thus, neither the original policy statement nor the Chapter Three guidelines restricted, by their terms, consideration of role in the offense for purposes of *departure*.

In 1999, Commission staff reported that average time served had doubled since the guidelines’ inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively.⁵⁷ The year before, Justice Breyer had given a speech in which he criticized the “false precision” created by the guidelines, and called upon the Commission to “know when to stop,” to “act[] forcefully to diminish significantly the number of offense characteristics,” to “broaden[] the scope of certain offense characteristics, such as ‘role in the offense,’” and to move in the direction of “greater judicial discretion” in order to provide “fairness and equity in the individual case.”⁵⁸

Despite Justice Breyer’s plea, and despite that judges recognized that the defendant’s role in the offense was an appropriate basis to depart where the adjustment under chapter 3 did not adequately capture the degree of mitigated culpability, the Commission amended § 5H1.7 in 2003 to put an end to role in the offense as a basis for departure by adding that a defendant’s role in the offense “is not a basis for departing from that range,” USSG, App. C, Amend. 651 (Oct. 27, 2003), and added a citation to new subsection (d) of § 5K2.0, which specified that a defendant’s role in the offense, among other things, was a “prohibited departure.” This amendment was not required or suggested by the PROTECT Act, but was “in addition to the departure prohibitions in § 5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act.” *Id.* (Reason for Amendment). It was “never [an] appropriate ground for departure” for reasons that were unexplained, other than that this was part of the Commission’s ongoing work, in response to the PROTECT Act, to “substantially reduce the incidence of downward departures.” *Id.*

As the only guideline that subtracts points based on reduced personal culpability, § 3B1.2 (Mitigating Role) is far too restrictive. First, the two- to four-level reduction often does little to offset both the size of quantity-based aggravating factors and other

⁵⁷ Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

⁵⁸ Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14 Crim. Just. 28, 35 (Spring 1999) (reprinting speech given in November 1998 at the University of Nebraska College of Law).

cumulative and often duplicative upward adjustments.⁵⁹ Second, it appears the Commission capped the mitigating role adjustment at four levels, *see* § 3B1.2(a), because if it were greater, sentences would fall below the mandatory minimum sentence in a large number of drug cases.⁶⁰ As a result, both the limitation on role reduction in § 3B1.2 and the prohibition on any further reduction through departure under § 5H1.7 are not the product of empirical evidence regarding culpability, but another casualty of the Commission’s decision to link the drug guideline to the mandatory minimums. *Gall*, 128 S. Ct. at 594 n.2 (“[T]he Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.”).

Despite the limitation on the role reduction and the prohibition on a departure for role, courts continue to sentence below the guideline range based on role in the offense. In fiscal year 2008, “mule/role in the offense” was cited as a reason for sentences below the guidelines in 281 cases, representing approximately 3% of cases in which a below-guideline sentence was granted, whether styled as a departure or a sentence under § 3553(a).⁶¹

Unless and until the Commission bases the drug guidelines primarily on role in the offense rather than quantity, and in any event for application to other cases, the commentary of the mitigating role adjustment, or a separate departure provision, should say that in some cases, such as those subject to quantity and loss-driven guidelines, the adjustment may not be adequate, and if not, the court should depart accordingly. If the Commission wishes to see more cases based on a guideline-sanctioned “departure,” this would accomplish that result.

Native Americans.

We make several proposals for invited downward departures in Part V, *infra*.

IV. IMMIGRATION

For the first three quarters of 2009, the national average for below-guideline sentences not identified as “government sponsored” in immigration cases was 9.6%.⁶²

⁵⁹ *See, e.g., United States v. Cabrera*, 667 F. Supp. 2d 271, 272-73 (D. Mass. July 25, 2008) (“[D]eductions for a defendant’s minor role . . . are limited and do not come close to offsetting the high quantity-driven offense level.”).

⁶⁰ Fifteen Year Review, at 48-49.

⁶¹ USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, & 25B [“2008 Sourcebook”]. Commission data do not show how many of these cases involved drug trafficking.

⁶² USSC, *Preliminary Quarterly Data Report*, 3d Quarter 2009, tbl. 5.

While the average in the Tenth Circuit in 2008 was approximately the same, at 9.5%, rates within the circuit vary considerably, from 3.1% in the District of Kansas to 26.8% in the District of Wyoming.⁶³ In the Eighth Circuit, the average for 2008 was only 4.9%, with variations in the districts represented in this hearing from 0.7% in the Northern District of Iowa to 15.6% in the District of Minnesota.

The wide variation in these rates is due to the variation in prosecutorial practices in immigration cases, at both the charging and sentencing stages, and the extent to which judges act to counterbalance those practices to impose a sentence that is not greater than necessary.

The twelve districts represented in this hearing all have illegal reentry cases, but the government currently operates fast track programs only in Nebraska and Utah. In both, the rate of below guideline sentences not identified as “government sponsored” is relatively low. In the District of Nebraska, where prosecutors sponsor fast track departures in 26.4% of cases and formally sponsor or agree to below guideline sentences in another 9.7% of cases, the rate of below guideline sentences not identified as “government sponsored” is only 5.6%. In Utah, where prosecutors sponsor fast track departures in 69.5% of cases and formally sponsor or agree to below guideline sentences in another 2.3% of cases, the rate of below guideline sentences not identified as “government sponsored” is only 2.3%.⁶⁴

The decision to establish a fast track program does not depend on the size of the immigration caseload or the number of illegal reentry cases. Of the two districts that have fast track programs, the immigration caseload in Nebraska is 11.2%, while in Utah it is 30.5%. Yet there is no fast track program in the District of Colorado or the Northern District of Iowa, whose immigration caseloads are higher, at 33.7% and 49.7% respectively.

In districts without fast track programs, other prosecutorial practices play a part in the varying rates of below-guideline sentences not identified as “government sponsored.” For example, in the District of Colorado, prosecutors tend to focus on individuals who have illegally re-entered the country after having been convicted of an aggravated felony. In the District of Wyoming, prosecutors are less focused on those with aggravated felonies, but still focus on illegal reentry offenses under 18 U.S.C. § 1326(b). Thus, in both districts, the majority of immigration cases are sentenced under § 2L1.2. Not surprisingly, the rate of below guideline sentences not identified as “government sponsored” is relatively high, at 18.9% and 26.8% respectively, because the courts

⁶³The statistics for this section are drawn from Table 10 of the relevant FY 2008 *Statistical Information Packets*, available at <http://www.ussc.gov/JUDPACK/JP2008.htm>.

⁶⁴ In North Dakota, the fast-track program was discontinued in January 2008. The Defender from that district reports that most immigration cases there are document cases or illegal reentry cases under § 1326(a).

recognize that the guideline range recommends a sentence greater than necessary to achieve any purpose of sentencing.

In the Northern District of Iowa, which has a very large number of immigration cases (49.5% of the caseload) but no fast track program, the rate of below guideline sentences not identified as “government sponsored” is only 0.7%. In 2008, however, the government prosecuted very few illegal reentry cases under § 1326(b), instead prosecuting a large number of immigration offenses that with no criminal history and whose guideline range is very low. In fact, the vast majority of immigration convictions in 2008 were for false use of an immigration document in violation of 18 U.S.C. § 1546(a). The prosecution of nearly 300 workers at a meat-packing plant in Postville, Iowa, explains this. Nearly all had no criminal history and pled guilty to immigration document fraud, 18 U.S.C. § 1546, or social security fraud, 42 U.S.C. § 402, under an 11(c)(1)(C) agreement with a stipulated sentence of 5 months.

In the Western District of Missouri, where there is no fast track program, prosecutors sponsored below guideline sentences in only 1.7% of cases, yet the rate of below guideline sentences not identified as “government sponsored” is still only 3.3%. Again, this is because the government prosecuted proportionately few illegal reentry cases under 8 U.S.C. § 1326(b). This is borne out by the within-guideline rate of 90% of immigration cases, but a median sentence length of 15 months.

In the District of Kansas, where there is no fast track program, prosecutors nevertheless sponsor below guideline sentences at the relatively high rate of 11.8% of cases, and the rate of below guideline sentences not identified as “government sponsored” is only 3.1%. There, the government charges a good number of illegal reentry cases under § 1326(b), but also document cases and illegal reentry under § 1326(a). Notably, while the rate of above-guideline sentences is 40.5%, the median sentence length is only 13 months.

But in every district, there is some number of defendants sentenced for illegal reentry after having been convicted of another offense and who face an enhanced guideline range under § 2L1.2. 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.⁶⁵ However, what makes fast track possible and makes it run is the high guideline ranges under § 2L1.2, a guideline without empirical basis.⁶⁶ Providing plea bargaining leverage to the

⁶⁵ See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003) (“Downward Departures”); 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).

⁶⁶ 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*

government is not a purpose of sentencing. Those arrested in a district without a fast track program pay the price.

Although some judges act to counterbalance unnecessarily high guideline sentences in the absence of a fast track program, not all do. The Commission could address the problem by encouraging judges, in a note to § 5K3.1, to depart or vary downward to take account of the unwarranted disparity created by the absence of a fast track program.

More to the point, the Commission should address the underlying problem, which is that guideline ranges recommended by § 2L1.2 are too high. Defendants sentenced under § 2L1.2 receive a sentence below the guideline in nearly 40% of cases.⁶⁷ By the Commission's own analysis and practice, the high rate of below guideline sentences under § 2L1.2 indicates that the guideline does not adequately reflect the considerations before the court in illegal reentry cases and should be amended to recommend lower guideline sentences.

The Commission has long recognized that “departures serve as an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”⁶⁸ As envisioned by the original Commission, “such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform act to periodically review and revise the guidelines.”⁶⁹ The Commission has explained that “a high or increasing rate of departures for a particular offense . . . might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.”⁷⁰ For example, in 1991 the Commission found that the rate of upward departure for those sentenced under § 2K2.1 was 8.4%, which led to a steep increase in the guideline ranges.

In fiscal year 2001, the rate of downward departure in immigration offenses was 35.6% and accounted for one-third of all downward departures.⁷¹ This prompted the Commission to amend § 2L1.2 to provide graduated enhancements based on the prior

Simplified and Principled Sentencing, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

⁶⁷ *2008 Sourcebook*, tbl. 28.

⁶⁸ Downward Departures at 5; *see* USSG ch. 1, intro, pt. 4(b); *see also* 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

⁶⁹ Downward Departures at 5.

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 38, 41-42.

conviction in an effort to reduce the rate of downward departures.⁷² At the time, the Commission explained that the amendment “responds to concerns raised by a number of judges, probation officers, and defense attorneys . . . that § 2L1.2 sometimes results in disproportionate penalties because of the 16-level enhancement” and that the “criminal justice system has been addressing this inequity on an *ad hoc* basis in such cases by increased use of departures.”⁷³

However, the Commission’s action in 2001 has not operated to reduce the rate sentences below the guidelines for illegal reentry, which is now even higher. Further, inequities continue to be addressed by the criminal justice system on an *ad hoc* basis. The Commission should reduce the severity of § 2L1.2, setting new advisory offense levels that are fully explained, based in evidence, and reflect that judges believe that lower sentences are sufficient.

Finally, the Commission should encourage downward departures or variances to take into account the time that undocumented immigrants spend in immigration custody, and the harder time they serve. The Bureau of Prisons does not credit the weeks or months undocumented immigrants spend in immigration custody before charges are brought and after sentence is served, but before deportation. Undocumented immigrants also receive straight prison sentences at a much higher rate than U.S. citizens,⁷⁴ because they are not eligible for community confinement and because they cannot be supervised after deportation. Once in prison, they cannot participate in programs available to U.S. citizens, 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.

V. NATIVE AMERICANS

Offenses committed in Indian Country and prosecuted under the Major Crimes Act, 18 U.S.C. § 1153, are part of the caseload in several districts represented in this hearing: Colorado, Wyoming, North and South Dakota Minnesota, Nebraska, and Utah. I am not alone in saying that some of the most heart-wrenching cases we see arise from the federal prosecution of these offenders, which often result in sentences several times more severe than any state or tribal sentence, sometimes even after such a sentence has been imposed and served.

Proportionate to their percentage of the population (1%), more Native Americans are serving federal prison time than any other racial group, at 249 per 100,000 residents.⁷⁵

⁷² *Id.* at 16-17.

⁷³ See USSG, App. C, Amend. 632 (Nov. 1, 2001).

⁷⁴ USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 4-5 & Tables 4 & 5.

⁷⁵ See Gary Fields, *On Tribal Land, Tragic Arson Case Leads to a Life Sentence: Justice Can Be Unequal in Reservation Crimes*, Wall St. J., at 1, Aug. 13, 2007.

Native Americans represent only 4% percent of federal offenders, but approximately 39.8% of offenders sentenced for assault, 29.9% of offenders sentenced for sex abuse offenses, and 85.2% of offenders sentenced for manslaughter.⁷⁶ We are pleased that the Commission did not increase the manslaughter and assault guidelines in the last amendment cycle, because that would have disproportionately impacted Native Americans. There remain, however, several issues of continuing concern relating to Native Americans prosecuted in the federal system. I do not purport to address every issue, but highlight some that are of particular concern to me.

First, unwarranted disparity continues to exist between state and federal punishments for assault offenses, which disproportionately impacts Native Americans. In 2002, responding to concerns regarding the disproportionate impact of federal sentencing policy on Native Americans, the Commission created the Ad Hoc Advisory Group on Native American Sentencing Issues.⁷⁷ As recognized by that group, alcohol and poverty play a devastating role in reservation crime.⁷⁸ The Advisory Group found significant unwarranted disparity in sentences for Native Americans sentenced for assault in the state system versus those sentenced in the federal system.⁷⁹ It strongly recommended that the Commission lower the offense level for aggravated assault by two levels, which represented a “conservative approach” to the disparity found by the group.⁸⁰ In response, the Commission lowered by one level the base offense level in § 2A2.2 (from 15 to 14), but at the same time increased by one level each of the specific offense characteristics in § 2A2.2 addressing degrees of bodily injury. Given that nearly 79% of aggravated assault convictions involve bodily injury, this amendment is not likely to have reduced the disparity found by the Ad Hoc Advisory Group. The Commission should lower offense levels for assault to eliminate this problem. In the alternative, the Commission should encourage judges to examine the disparity between state and federal sentences for the same offense, and to depart downward to account for it when it exists.

Second, the Commission should invite judges to depart downward in recognition that life on a reservation can differ in extreme ways from life in mainstream America.

⁷⁶2008 Sourcebook, tbl. 23 & App. A (showing 39.8% of assault offenders, 29.9% of sex abuse offenders, and 85.2% of manslaughter offenders categorized as “Other,” which includes Native Americans, Alaskan Natives, Asians and Pacific Islanders). Commission data do not show the exact percentage of Native Americans convicted of assault, and thus we are assuming that the majority of “Others” are Native Americans. In 2003, the Ad Hoc Advisory Group reported that about 34% of offenders in federal custody for assault and close to 75% of manslaughter cases involved Native Americans. USSC, *Report of the Native American Advisory Group*, at 14, 58 (Nov. 4, 2003) (“Native American Report”).

⁷⁷ *Id.* at 10-11.

⁷⁸ *Id.* at 17, 35-37.

⁷⁹ *Id.* at 32-33.

⁸⁰ *Id.* at 34.

Life on the reservation can be brutally hard, with high rates of unemployment, alcohol and drug abuse, lack of educational opportunities, extreme poverty, and physical isolation, and the myriad social problems associated with lack of resources and gainful employment. This is the poorest minority group in the United States,⁸¹ with the rate of Native Americans living in poverty double the rate of the total U.S. population.⁸² Not only are Indian reservations located in some of the most “remote and wild landscapes in the country,” but

[r]eal economies do not exist on the vast majority of the 300 Indian reservations in the forty-eight states or in Alaska Native villages. . . . Adequate roads and housing, clean water and sanitation, telephones and electricity are also in short supply on many reservations. Most Indian people on reservations today live under conditions that other Americans would not believe.⁸³

In addition, there is a severe shortage of residential chemical dependency treatment facilities in Indian country.⁸⁴ As one commentator put it, Native Americans “are the most deprived and isolated minority group in our nation. On virtually every scale of measurement – employment, income, education, health, the condition of the Indian people ranks at the bottom.”⁸⁵

As I have explained, Congress did not intend for the Commission to preclude judges from considering socioeconomic conditions as a *mitigating* factor when determining whether or how long to send an individual to prison.⁸⁶ Courts should be encouraged to take into account the profoundly depressed socioeconomic conditions on many reservations, and to examine the relationship between these conditions and a defendant’s need, not to be incarcerated for a long period of time, but for educational or vocational training, substance abuse treatment, or other cognitive behavior modification.

⁸¹ *The State of Native Nations: Conditions Under U.S. Policies of Self-Determination* 115 (Harvard Project on American Indian Economic Development ed. 2008).

⁸² Stella U. Ogunwole, U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States*, at 12 (Feb. 2006).

⁸³ Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 *Ariz. St. L.J.* 1297, 1298-99 (2008).

⁸⁴ The Problem of Methamphetamine in Indian Country: Hearing Before the Senate Comm. On Indian Affairs, 109th Cong. 5 (2006 (statement of Ivan D. Posey, Chairman of the Eastern Shoshone Business Council), available at http://www.indian.senate.gov/public/_files/Posey040506.pdf).

⁸⁵ Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 *Ariz. L. Rev.* 245, 252 (2005).

⁸⁶ See Part III.B, *supra*.

Courts should also be encouraged to depart downward when sentencing a Native American defendant who, despite unusually difficult conditions, has managed to overcome the hardships and deprivations attendant to life on a reservation. *See, e.g., United States v. Decora*, 177 F.3d 676 (8th Cir. 1999); *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993); *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990). We propose the following language:

In cases involving a defendant who lives on an American Indian reservation, Alaska Native village, or similar location, a downward departure may be warranted in consideration of unusually adverse conditions and in order to fashion a sentence that will serve the purposes of sentencing.

Third, for Native American defendants living on a reservation, opportunities for post-offense or post-sentence rehabilitation can be severely limited. Too often, these clients return to the same devastating conditions that surrounded their offense in the first place, no better able to cope with them. The Commission should encourage courts to place those who would benefit from rehabilitative programs into inpatient or residential treatment programs whenever possible. This should include the period between arrest and sentencing, and should be encouraged as a condition of probation and supervised release.

VI. CRACK

I join those who have praised the Commission for efforts at correcting the fundamental unfairness of crack cocaine sentencing. The Commission's empirical research and reports enabled it to take the first step of reducing the crack guidelines by two levels and give that reduction retroactive effect. The Commission's work also played an integral role in the Supreme Court's decision in *Kimbrough v. United States*, the Department of Justice's new commitment to eliminating the disparity between crack and powder cocaine sentences, and the decisions of several district courts across the country, including at least one in my own, to adopt a 1:1 ratio in crack cases.⁸⁷

Unfortunately, it appears that some prosecutors have expressed a belief that it is "not worth it" to prosecute a low-level street dealer if the sentence is less than five years. As Judge Sessions put it, they claim that eliminating the disparity would "put the government out of the crack business."⁸⁸ I personally find this position to be offensive, and hope that the Commission will stand against it. Eliminating the disparity would not prevent the government from prosecuting crack cases, or from pursuing enhancements in cases involving violence or weapons. The guideline sentence for a first offender with 5

⁸⁷ *See supra* note 22 (collecting cases).

⁸⁸ Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 123 (Sept. 9-10).

grams of crack would be 10 to 16 months, instead of the mandatory minimum of five years.

We are heartened by H.R. 3245, the Fairness in Cocaine Sentencing Act of 2009, and S. 1789, the Fair Sentencing Act of 2009, each of which would equalize penalties for offenses involving the same quantity of crack and powder cocaine without raising the current penalty level for powder cocaine, and repeal the mandatory minimum for simple possession of crack cocaine. We hope that the Commission will urge Congress to make these changes.

The Commission should also urge Congress to make retroactive any amendment that eliminates the disparity. Data collected by the Administrative Office of the U.S. Courts shows that the 6,524 inmates released early as a result of the retroactive application of the 2-level reduction have the exceedingly low recidivism rate of 3.8%, disproving dire predictions by the former Department of Justice.⁸⁹ As Commissioner Castillo noted last May at the Eighteenth Annual Seminar on Federal Sentencing Guidelines in Clearwater, Florida, the retroactive crack amendment is “the untold story of sentencing.” The Commission should tell this story to Congress.

If Congress does not make the change retroactive, the Commission should nevertheless make retroactive its guideline amendments implementing the change, for the same reasons it made retroactive the 2-level reduction.⁹⁰ Either way, the Commission should suggest, through an application note to USSG § 1B1.10, that judicial districts adopt a coordinated and cooperative process to address and effectively manage retroactive amendments in the manner that best ensures justice and fairness. In many districts, courts efficiently handled large numbers of § 3582(c) motions with the coordinated assistance of the probation office, the Defender office, and the U.S. Attorney’s office to identify potentially affected defendants, categorize them according to appropriate limits, agreements and special issues, and negotiate agreed dispositions.

In some districts, such as my own, the district court did not engage in any such coordinated process, but treated the § 3582(c) motions as any other motion. The result was something of a scramble, hindering our ability to ensure that every defendant entitled to a reduction was able to seek and obtain one in the most effective and timely manner. We propose the following new application note:

Application Note 6:

District courts are encouraged to coordinate with the Bureau of Prisons, the U.S. Attorney’s office, the U.S. Probation office and the Federal

⁸⁹ Remarks of Pat Nolan, President, Prison Ministries, “Crack the Disparity” coalition of the Justice Roundtable legislative briefing, *Crack Cocaine Sentencing: Exploring & Examining the Issues*, available at <http://www.c-span.org/Watch/Media/2009/10/13/HP/A/24240/ACLU+Discussion+on+Crack+Cocaine+Sentencing.aspx>.

⁹⁰ See USSG, App. C, Amend. Nos. 706, 713 (2008).

Defender office to identify defendants potentially affected by amendments included in subsection (c) and to implement their retroactive application in a manner that best promotes efficiency and fairness.