

**Statement of Jason D. Hawkins
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**Public Hearing Before The
United States Sentencing Commission**

**“The Sentencing Reform Act of 1984: 25 Years Later”
Austin, Texas
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I thank the Sentencing Commission for holding this hearing and inviting me to testify concerning how the Sentencing Reform Act is working twenty-five years later, and what changes could be made now to improve federal sentencing.¹

I began my legal career in the federal system in 1997 as a law clerk to the Honorable Royal Furgeson, former United States District Judge for the Western District of Texas and current Senior Judge with the Northern District of Texas. In 1999, I became an Assistant Federal Public Defender in the Capital Habeas Unit in Phoenix, Arizona, where I represented clients on death row. I moved to Dallas, Texas, in 2001, and for the next six years I was a trial attorney with the Federal Public Defender for the Northern District of Texas. In 2007, I assumed supervisory duties over the Appellate Section, and the Federal Defender recently elevated me to First Assistant.

I begin with an often-told story. Over twenty-five years ago, the Dallas Criminal Defense Lawyers Association held a seminar to introduce attorneys to the new mandatory guidelines. The Honorable Jerry Buchmeyer, then United States District Judge for the Northern District of Texas, served as master of ceremonies. Judge Buchmeyer was a legal giant who spent nearly thirty years on the bench, and he was well-known for his humor. Unfortunately he is no longer with us. As the attorneys nervously looked through the confusing new materials, Judge Buchmeyer took the microphone and announced, “Folks, they have finally, at long last, come up with a way to assure equal justice under the law, to make sure that a defendant in New York, a defendant in Texas, and a defendant in California will all be treated the same.” He paused for a moment and then added, “From now on, everyone goes to jail!”

Almost everyone did go to jail, but everyone was not treated equally and many who were very different were treated the same. This was the result of the mandatory nature of the guidelines and the mandatory minimums enacted at the same time, the severity of those guidelines and laws, and the consequent transfer of sentencing power from neutral judges to prosecutors. My clerkship with Judge Furgeson allowed me to see the struggle a judge endures when required to impose a sentence he believes is unjust and unnecessary. As a defense lawyer, I have watched many of my clients being sentenced to

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).

prison for too long, with no one, including myself or the judge, being able to credibly explain why.

The advisory guideline system instituted by the Supreme Court,² has substantially improved the sentencing process. Judges have a starting point in the guidelines and the discretion to make an independent determination of what sentence best serves society and the offender. They must now consider all relevant circumstances of the offense and of the defendant, and explain the resulting sentence as a function of sentencing purposes. While judges in our district have historically sentenced within the guideline range at a greater than average rate, that has begun to change. The rate of downward departures and variances has doubled, increasing from 6% in 2006 to 12.5% in the first three quarters of 2009. Two of the judges in our district have always sentenced above the guideline range at a higher than average rate, and they continue to do so.³ While I believe that this is a problem, I do not believe that the answer is a stricter standard of review. The Fifth Circuit permitted this when the standard of review was *de novo*, while reversing most downward departures under the same standard.

Sentences in the Northern District of Texas have been, and continue to be, longer than in many other districts. This reflects, for the most part, the kinds of cases that are brought and prosecutorial policies and practices. For example, prosecutors in our district focus on illegal re-entry cases that they expect will be subject to § 2L1.2(b)(1)(A)'s 16-level enhancement. The resulting guideline ranges are often higher than the client deserves or than public safety requires. But, unlike many districts, ours has no fast-track program. In addition, most of our drug cases involve methamphetamine or crack cocaine, and thus are subject to mandatory minimums and high guideline ranges. While prosecutors move for downward departure based on substantial assistance in a relatively high percentage of drug cases (34.1% compared to 25.9% nationwide in 2008⁴), defendants typically receive no more than 2 or 3 levels off, no matter how high the starting point, the extent of their cooperation, or the danger in which they put themselves. This contrasts with other districts where the standard is 50% or more off, as in the Eastern District of Virginia, or 33% off, as in the Northern District of Illinois.

Prosecutors still retain much power over sentencing. Decisions as to whether to charge a mandatory minimum, whether to institute a fast-track program, what constitutes substantial assistance, whether to move for the third level reduction for acceptance of responsibility, what information to give the Probation Officer, all rest in the hands of

² See *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

³ As a result, the rate of above guideline sentences in our district increased after *Booker* from 4.4% in 2006 to a whopping 7.6% in 2007, but it dropped to 6.5% in 2008 and remains the same in 2009.

⁴ USSC, *2008 Statistical Information Packet, Northern District of Texas*, tbl. 10.

prosecutors. These decisions affect, and sometimes dictate, the sentence, long before the judge ever sees the case for sentencing. Unlike sentencing judges, prosecutors are not required to consider the § 3553(a) purposes and factors in making their decisions.

In Part I below, I discuss the disproportionate severity and unwarranted disparity that mandatory minimums create, and address claims that mandatory minimums are necessary for the government to obtain cooperation and that they deter crime. In Part II, I urge the Commission to revise certain guidelines that create particular problems in our district and others, and offer suggestions for doing so. In Part III, I offer suggestions for how the Commission can encourage the use of alternatives to incarceration in appropriate cases. In Part IV, I discuss the standard of review at it is working in the Fifth Circuit and, to a lesser extent, in the Eleventh Circuit.

I. MANDATORY MINIMUMS

I look forward to the Commission's report on mandatory minimums, and I join all of the Defenders and other witnesses who have urged the Commission to recommend that Congress repeal, or at least significantly reduce, mandatory minimums, and that Congress expand the safety valve to all offenses subject to mandatory minimums and to defendants in Criminal History Categories II and III.

Since the Commission's last report on mandatory minimums in 1991, the injustices and unwarranted disparities caused by mandatory minimums are likely to have worsened. In 1993, the Supreme Court interpreted "second or subsequent" in § 924(c) to refer to convictions on separate counts in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993). This has since produced many injustices, including a case described below that was handled by my office. In September 2003, the Ashcroft Memorandum went into effect. Although it has been suggested that this policy was aimed at creating consistency, it has invited the opposite, on the one hand demanding the harshest possible outcome, and on the other telling prosecutors they may forego that result for the government's convenience or strategic advantage.⁵

I understand that the Attorney General is considering adopting a different charging policy. But no charging policy can effectively prevent the unfair and arbitrary use of mandatory minimums. For the past 200 years, every system of mandatory punishment, no matter what constraints are placed on the decision-makers, has produced

⁵ Prosecutors are to "charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence," including any "charge involv[ing] a mandatory minimum sentence that exceeds the applicable guideline range." The use of § 851s (doubling the mandatory minimum or requiring mandatory life) and § 924(c)s (adding a consecutive minimum of 5, 7, 10, 25 or 30 years, or more if stacked) are "strongly encouraged" whenever available, but can be foregone, only through a negotiated plea, to provide an incentive to plead guilty. See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I, Sept. 22, 2003.

wide disparities among cases that are comparable in every way save how they are handled and by whom.⁶ Mandatory minimums are foregone or dropped in some cases, but are used to impose extremely unjust sentences in other cases. These decisions are not made openly, transparently or accountably.⁷

Some prosecutors have said that they believe mandatory minimums are necessary to obtain cooperation and to deter crime. The Commission should carefully examine whether these perceptions are grounded in fact. The Commission should also question whether such considerations, even if true, could justify the substantial harms that mandatory minimums cause.

A. Mandatory Minimums Result in Inhumane Punishment in Some Cases and Extreme Unwarranted Disparity.

The Fifth Circuit has warned that “the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of prosecutors,” which is subject to abuse.⁸ In the Northern District of Texas, the decision to charge a § 924(c), with rare exceptions, does not depend on the seriousness of the conduct.⁹ These cases almost never involve the use of a gun but rather possession of a gun on the defendant’s person or in his home. Instead, whether § 924(c) charges are brought depends on the prosecutor. Inexperienced prosecutors charge § 924(c) counts when possible, and once charged, they cannot easily be dismissed. More experienced prosecutors might threaten a § 924(c) if we indicate the client is interested in going to trial, but not otherwise. Placing this “potent weapon” in the hands of fallible human beings, whose decisions are not subject to judicial review, results in sentences the courts have described as “irrational, inhumane and absurd,” “immensely cruel, if not barbaric,” “unjust, cruel and even irrational,” and “abusive.”¹⁰ Consider the following example, which my office handled at trial and on appeal.

In 2004, Mary Beth Looney’s husband, Donald Looney, began traveling to and from Wichita Falls, Texas, to Arizona to purchase methamphetamine and redistribute it in the Wichita Falls area. LaDonna Harris, a friend of the Looneys, began buying

⁶ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime and Justice: A Review of Research* 65, 67-68, 71-90, 101 (2009) (reviewing history and studies of mandatory minimum systems over the past 200 years).

⁷ *Id.*

⁸ See *United States v. Looney*, 532 F.3d 392, 398 (5th Cir. 2008).

⁹ I am aware of one case in which multiple § 924(c) charges were brought in connection with a string of armed bank robberies. Two defendants were sentenced to over 300 years in prison and a third was sentenced to 42 years. See <http://dallas.fbi.gov/dojpressrel/pressrel08/dl093008a.htm>.

¹⁰ See *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006).

methamphetamine from Donald and sold it to customers just across the border at a casino in Oklahoma.

Ms. Harris became a target of undercover agents with the Bureau of Indian Affairs in Oklahoma. She sold methamphetamine on four separate occasions to undercover agents. On the final purchase, the agents asked for a larger quantity (an ounce), so Ms. Harris arranged a transfer at a convenience store parking lot in Wichita Falls.

Mary Beth Looney was supposed to arrive with the methamphetamine, but never did, so Ms. Harris' ex-husband visited the Looney's home and returned with an ounce of methamphetamine. At that time, Ms. Harris and her ex-husband were placed under arrest and a search warrant was executed at the Looney's residence. There, the agents found 136 grams of methamphetamine and four guns.

LaDonna Harris was transported to the Western District of Oklahoma and charged by indictment with conspiracy to distribute and distribution of methamphetamine. No mandatory minimum counts were charged and the statutory maximum for each count was 20 years. Ms. Harris pled guilty and was sentenced to 37 months imprisonment on each count to be served concurrently. Her charges and sentence did not result from a cooperation agreement. If Ms. Harris had been charged in the Northern District of Texas, she would have been subject to at least a ten-year mandatory minimum, and possibly one or more § 924(c) counts, as she had been staying at the Looney's home.

At the time of her arrest, Mary Beth Looney was a 53-year-old woman with serious health problems, including hypoglycemia and severe swelling and circulatory problems in her legs due to a car accident that severed her right ankle. Ms. Looney had no prior arrests, no prior juvenile convictions, and no prior adult convictions. She was charged in the Northern District of Texas with two mandatory minimum offenses: 1) possession with intent to distribute 50 grams or more of methamphetamine (a 10 year mandatory minimum); and 2) possession of three firearms in furtherance of that drug trafficking crime (a five year mandatory minimum).

The only offer from the prosecutor was to plead to both counts of the indictment which necessitated two mandatory minimum sentences totaling 15 years imprisonment. As the Fifth Circuit noted, there was absolutely no evidence showing that Mary Beth Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.¹¹ Ms. Looney feared that she would die in prison due to her age and health problems, and decided to go to trial.

Before trial, the prosecutor superseded the indictment, adding a count for conspiracy to possess with intent to distribute and a § 924(c) count linked to the conspiracy count, thus adding a 30-year consecutive mandatory minimum. Following the

¹¹ *Looney*, 532 F.3d at 396.

short trial, Ms. Looney was sentenced to 45 years imprisonment – the mandatory minimum sentence for her convictions – effectively a life sentence.

The Fifth Circuit noted its “serious concerns regarding the harshness of Ms. Looney’s sentence,” as well as the poor judgment of the prosecutor, but was powerless to do anything about it:

[S]he was given effectively a life sentence [b]ecause of the way the indictment was stacked by the prosecutor Although thirty years of her sentence can be attributed to possessing guns in furtherance of her methamphetamine dealing, there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.¹²

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Although Congress established the mandatory minimum terms of imprisonment, and further provided that the firearms counts must be served consecutively, it is the prosecutor’s charging decision that is largely responsible for Ms. Looney’s ultimate sentence.¹³

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[W]e must observe that the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence. For example, a defendant who sincerely and fervently believes in his innocence, and who has witnesses and other evidence that support his claim of innocence, could easily be pressured into pleading guilty under a plea agreement that eliminates the threat—rather than face the possibility of life imprisonment based on a prosecutor’s design of an indictment that charges and stacks mandatory minimum consecutive sentences. We merely observe that the possibility of abuse is present whenever prosecutors have virtually unlimited charging discretion and Congress has authorized mandatory, consecutive sentences. We trust that the prosecutors in this Circuit are aware of the potency of this weapon and its potential for abuse, and that they exercise extreme caution in their use of it, all in the interests of justice and fairness.¹⁴

¹² *Id.* at 395-96.

¹³ *Id.* at 397.

¹⁴ *Id.* at 398.

B. Mandatory Minimums Are Not Necessary for the Government to Obtain Cooperation.

At the Commission's hearing in Denver, the defense panel was asked how the Commission could explain to Congress how defendants could be persuaded to cooperate if mandatory minimums were repealed. While some prosecutors say that they believe mandatory minimums are necessary to obtain cooperation, the Commission should examine whether this perception is accurate.

In my experience, mandatory minimums are not necessary to obtain cooperation. We often counsel clients against cooperation, whether or not there is a mandatory minimum, because it is an unacceptable risk to be labeled a government "snitch" in light of the 2-3 level benefit they may receive. Even so, many of our clients cooperate in order to obtain the government's recommendation of even a slightly lower sentence. It does not matter how high or low the initial sentence is, whether it is subject to a mandatory minimum, how uncertain it is that the prosecutor will move for a departure at all, or the fact that the most they can expect to receive is a 2-3 level reduction. Witnesses testified at the Commission's hearing in Chicago that defenders sometimes decline the government's standard cooperation agreement because it precludes them from bringing other factors to the judge's attention. In this situation, defendants cooperate – in the absence of a mandatory minimum – in the hope that the judge will recognize their efforts, in addition to other factors under § 3553(a). This is not an option in our district, because the government will not accept cooperation without an agreement on its terms.

The fact that some prosecutors may *think* that mandatory minimums are necessary to obtain cooperation does not establish that they are. In any case where there was both a mandatory minimum and cooperation, how can we tell whether the prosecutor charged a mandatory minimum because he thought it was necessary to obtain cooperation, or instead, the defendant cooperated because he was charged with a mandatory minimum?

The answer to that question is probably unknowable, but the Commission's statistics indicate that mandatory minimums are *not* necessary to obtain cooperation. In drug trafficking cases, where mandatory minimums are widely available, substantial assistance departures were granted in 25.9% of cases in 2008. In many kinds of cases without mandatory minimums, the rate was comparable or higher: 79.2% in antitrust cases, 20% in arson cases, 28% in bribery cases, 26.1% in civil rights cases, 28.6% in kidnapping cases, 25.9% in money laundering cases, 25.7% in racketeering/extortion cases, and 19.9% in tax cases.¹⁵

In other types of cases where mandatory minimums never or rarely apply, rates of substantial assistance departures are lower, for example, burglary (8.9%), larceny (6.3%), embezzlement (5.8%), sexual abuse (3.5%), pornography/prostitution (3.1%), assault

¹⁵ USSC, 2008 *Sourcebook of Federal Sentencing Statistics*, tbl. 27.

(1.4%).¹⁶ In these kinds of offenses, there is rarely anyone to cooperate against. The same is true of felon in possession cases. I estimate that those make up two-thirds or more of our firearms cases, and this is a primary reason that the rate of substantial assistance departures in firearms cases is 8.2% in our district.¹⁷

Whether a defendant cooperates and receives a departure for substantial assistance depends on many factors that have nothing to do with mandatory minimums. Many defendants have no information to offer because of their position or role in the offense, or there is simply no one to cooperate against. Many attempt to cooperate but the government declines to move for a departure for a variety of reasons depending on prosecutorial policies that vary by district.¹⁸ In cases with more than one defendant, only one or a few are allowed to cooperate against others, depending on who gets to the prosecutor's office first.

C. Mandatory Minimums Do Not Deter Crime and Create Disrespect for Law.

Based on a recent comprehensive review of the research on whether mandatory minimums deter would-be offenders and thereby reduce crime, Michael Tonry concluded that “the clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.”¹⁹ Moreover, drug crimes are “uniquely insensitive to the deterrent effects of sanctions,” because, as many studies of drug marketing have shown, “[m]arket niches created by the arrest of dealers are . . . often filled within hours.”²⁰

The argument has been made that, because authorities in a few cities meet with targeted offenders and tell them that they will receive a mandatory minimum if they re-offend, mandatory minimums deter crime. Nick Drees addressed this claim in his written testimony for your hearing in Denver. *See* Statement of Nicholas T. Drees, Public Hearing Before the U.S. Sentencing Commission at 19-20, October 21, 2009. I re-emphasize two points here.

First, as David Kennedy testified, based on his substantial experience, whether potential offenders are warned that they will receive two days for a supervision violation, a low-level state conviction, or a federal five-year mandatory minimum, the certainty that

¹⁶ *Id.*

¹⁷ USSC, *2008 Statistical Information Packet, Northern District of Texas*, tbl. 10.

¹⁸ For example, in my district, if a debriefing does not produce an arrest, there is no opportunity to make a controlled buy and no departure. In other districts, an arrest is not necessary at all, and in others defendants are given the opportunity to make a controlled buy.

¹⁹ Tonry, *supra* note 6, at 69, 91-100 & 100.

²⁰ *Id.* at 102.

it will occur is what counts, not its severity.²¹ The researchers who evaluated the Project Safe Neighborhoods Program made no mention of federal prosecutions or any kind or length of sentence as the cause of the project's success; the most important thing was positive interactions with police and community leaders.²² As David Kennedy testified, the more extreme federal penalties are not only unnecessary to deter, but create extreme hostility in the community.

Second, most offenders do not attend these meetings and so have no idea what the punishment might be. Indeed, no one knows what the punishment for a given offense might be. Taking just one example, in Mary Beth Looney's case, the punishment could have been the 37 months received by LaDonna Harris, the 15 years Ms. Looney was initially offered, or the 45 years she eventually got. As all of the research shows, the length or kind of punishment does not deter.

II. GUIDELINE RECOMMENDATIONS

USSG § 2L1.2 – Illegal Re-Entry

In 2008, 66.5% of illegal reentry cases were prosecuted in fourteen districts with an applicable fast-track policy.²³ But the Northern District of Texas is not one of them, even though immigration cases represent 16.1% of the caseload,²⁴ and even though there were more illegal reentry cases in this district in 2008 than in half of districts that have applicable fast-track programs.²⁵ In addition, prosecutors in the Northern District of Texas focus on cases that qualify for the 16-level enhancement under § 2L1.2(b)(1)(A), and the Fifth Circuit has held, unlike some other circuits, that district courts may not vary from the guideline range to account for the disparity created by the absence of a fast track program.²⁶

²¹ Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago Illinois, at 171, 175, 177-78, 182, 183-84 (Sept. 9-10, 2009).

²² Tracy Meares, Andrew Papachristos, and Jeffrey Fagan, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program* (Project Safe Neighborhoods in Chicago, Jan 2009), available at http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf (visited Oct 2, 2009).

²³ FY2008 USSC Database; Memorandum from David W. Ogden, Deputy Attorney General, U.S. Dep't of Justice, Re: Authorization for Early Disposition Programs (May 29, 2009), *reprinted at* 21 Fed. Sent. Rep. 318 (2009).

²⁴ USSC, *Statistical Information Packet – Fiscal Year 2008: Northern District of Texas*, tbl. 1. The national average is 20.1 months.

²⁵ FY2008 USSC Database.

²⁶ *See United States v. Gomez-Herrera*, 523 F.3d 554, 561 (5th Cir. 2008). This is in common with the Ninth and the Eleventh, but in contrast to the First, Second, and Third Circuits.

As a result, the average sentence of imprisonment in immigration cases in the Northern District of Texas is 39.4 months, almost *double* the national average.²⁷ And the rate of sentences below the guideline range not identified as “government sponsored” is only 4.0%, less than half the national rate.²⁸

The Commission recognizes that the government’s selective use of fast track programs creates unwarranted disparity because defendants in districts without a fast track program receive longer sentences by accident of geography.²⁹ Of course, neither geographic differences nor differing appellate positions regarding the district courts’ ability to account for those differences reflect any meaningful difference in culpability or correspond to any factor set forth in 18 U.S.C. § 3553(a). Those arrested in the Northern District of Texas routinely pay the price.

The Commission can take action to promote a fairer system. A guideline comment stating that district courts may depart from the guidelines to reduce the disparity created by the absence of early disposition programs would go a long way toward reducing unwarranted disparity as directed by § 3553(a)(6) and mitigating the effect of a circuit split.

But fast track would not be possible or be able to run the way it does if guideline ranges were not so high under § 2L1.2, a guideline that the Commission has never justified with any empirical evidence or by any purpose of sentencing. While we appreciate the Commission’s work in 2001 to decrease offense levels for certain defendants,³⁰ there is more to do. The fact that nearly 40% of defendants sentenced under § 2L1.2 nationwide still receive a sentence below the guideline³¹ is clear evidence

²⁷ 2008 Statistics, *N.D. Texas*, tbl. 7. The median sentence in immigration cases is 36.0 months in the Northern District of Texas, while the median sentence across all districts is 14.0 months. *Id.*

²⁸ *Id.* tbls. 8 & 10. The national rate is 9.6%, but only 4.0% in the Northern District of Texas.

²⁹ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (Oct. 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

³⁰ USSG, App. C, Amend. 632 (Nov. 1, 2001).

³¹ USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbl. 28. I include below guideline sentences identified as “government-sponsored” because we can fairly presume that the government views these lower sentences as sufficient to achieve the purposes of sentencing. I further note that rate of below-guideline sentences does not account for sentences imposed pursuant to a charge-bargaining fast-track program, which generally result in lower sentences than the departure programs. Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 Ariz. St. L.J. 517, 548 (2006).

that the guideline produces sentences more severe than necessary to achieve the purposes of sentencing.³² The Commission should respond to this evidence by reducing the severity of § 2L1.2 and by establishing advisory offense levels that are fully explained and based in evidence.

I do not address here every issue that the Commission might consider in amending § 2L1.2, but focus on several aspects of the guideline that are of particular concern to me.

Culpability. When Congress increased penalties for illegal reentry after conviction of an aggravated felony, it intended to target those who commit very serious offenses – such as murder or drug trafficking of the highest order – and who return to the United States to continue their criminal activities.³³ In other words, Congress intended to distinguish between the “worst of the worst” who returns to commit crimes and less culpable defendants. But § 2L1.2 does not reflect this intent, relying instead on broad categories of prior convictions and length of sentence imposed as the sole measure of differing culpability. Nor does the guideline take into account *when* the prior offense was committed or whether the defendant returned to the United States in order to continue committing crimes or for other reasons. And for the steepest penalties, § 2L1.2(b)(1) applies to offenses, such as some crimes of violence, that are not even aggravated felonies.

³² USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, at 5 (Oct. 2003) [*Downward Departures*] (“[D]epartures serve as an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”); *id.* (“[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.”); *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.”).

³³ Pub. L. No. 100-690, sec. 7435, 102 Stat. 4181 (Nov. 18, 1988). Comments offered in the Congressional debates concerning the creation of an increased penalty under 8 U.S.C. § 1326(b) refer to the need for increased penalties due to the “expansive drug syndicates established and managed by illegal aliens.” 133 Cong. Rec. S4992-01. A sponsor suggested that such serious offenders were typical, citing examples of illegal Haitians running a drug ring in Florida, clandestine Columbian drug cartels, and Nigerians involved in heroin smuggling. Also cited as a particular example of the individuals who should be prosecuted under these strict penalties was “a Columbian . . . [who] was deported previously from the United States and according to the Drug Enforcement Agency (DEA) is linked with 50 drug related murders and is currently the subject of 6 drug killings in the New Orleans area and a series of drug killings in California.” 133 Cong. Rec. S4992-01. The testimony claimed that “these aliens are not exceptions but rather common among the 100,000 illegal alien felons in the United States.” *Id.*

The Commission should make a number of changes that will better reflect differing levels of culpability and Congressional intent that only the worst offenders will receive the highest sentences.

First, the Commission should exclude from the most severe offense level any prior conviction that does not meet the definition of “aggravated felony” in 8 U.S.C. § 1101(a)(43). Congress increased penalties only for those convicted of aggravated felonies. To the extent that the Commission has justified the current 16-level enhancement in response to Congress’s action, the enhancement’s application to offenses that are not aggravated felonies is contrary to Congress’s action and the Commission’s justification.

Second, the Commission should incorporate into the guideline a number of factors already routinely considered by judges in reentry cases so that judges can meaningfully distinguish between differing levels of culpability. These include the defendant’s motivation for reentering, the extent of the defendant’s ties to the United States, whether the defendant had ever lived in the country to which he was deported, whether the defendant was caught in the United States during or after the commission of a new crime, the length of time the defendant remained outside the country before returning, the existence or non-existence of prior legal status, and the number of prior reentries. The Department of Justice, too, has recognized that an “illegal alien drug dealer” who did not return to practice his trade but who had a “sympathetic reason to reside here illegally” should receive a lower sentence.³⁴

Of particular concern to me is the absence of any mechanism to address a tragic situation we repeatedly encounter – the prosecution of defendants who were raised in the United States shortly after birth or from a very young age, enjoy legal status but not citizenship, have no substantial connection to the country to which they were deported, cannot speak that language, and have family and friends exclusively in the United States. Deportation under any circumstances is a “drastic measure and at times the equivalent of banishment or exile.” *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947). Although not a criminal penalty in itself, “in severity it surpasses all but the most Draconian criminal penalties.” *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975). For clients who have never lived in the country to which they were deported, returning to this country reflects not intent to commit crimes, but a desire to come home. .

The case of Cesar Tlatenchi-Enriquez illustrates the harshness of the guidelines in these circumstances. Mr. Tlatenchi-Enriquez was brought to the United States at the age of three. He lived with his family in Nebraska until he was nineteen years old. At that time, he entered into a consensual relationship with a fourteen-year-old girl, with the blessing of her mother. This girl was sexually assaulted by another man, and sought help from the police. Although it does not appear that any action was taken against her assailant, police learned that she lived with Mr. Tlatenchi-Enriquez. They asked

³⁴ U.S. Dep’t of Justice, Statement of Joe Brown Before the U.S. Sentencing Commission, at 8 (March 5, 1991).

Tlatchi-Enriquez about the relationship, which he freely admitted, showing no awareness that it was illegal.

Mr. Tlatchi-Enriquez was prosecuted in state court and convicted of sexual assault of a minor, for which he received probation. His probation was revoked for failing to maintain employment, and he was deported to Mexico, a country in which he had not lived for almost two decades, and where he had no family. One year later, while attempting to return to his family, Mr. Tlatchi-Enriquez was apprehended at a bus station on suspicion of alienage. He freely admitted his prior deportation when he was questioned by ICE agents. He was convicted of illegal reentry under 8 U.S.C. § 1326(b).

At sentencing, Mr. Tlatchi-Enriquez received a 16-level upward adjustment for his prior felony, his only prior offense, and additional points because his re-entry occurred within two years of his release on that offense. The court imposed a guideline sentence, in spite of the pleas of his girlfriend and her mother, and the non-objection of the government to a below guideline sentence.

I believe that if the Commission invited judges to consider the factors I suggest, the outcome for Mr. Tlatchi-Enriquez might well have been different.

Third, the Commission should add a “remoteness” cut-off for prior offenses used to increase the offense level. As the Commission has recognized, a prior conviction that is not countable for criminal history purposes under Chapter 4 because it falls outside the applicable time frame for calculating criminal history points can still be used to increase the offense level under § 2L1.2.³⁵ Counting old prior convictions under § 2L1.2 but not under Chapter 4 adds unnecessary complexity to the guideline calculation and often operates to produce sentences that conflict with Congress’s intent to deter and increase punishment for individuals who return to this country *to continue their illegal activities*. I have never seen a prior offense committed over twenty years ago bear any relationship to the defendant’s reason for committing the current reentry offense or to his current life. Particularly in the context of a guideline whose only measure of culpability is a prior conviction, the relationship between the instant offense and the previous offense should be subject to temporal limitations. And in those exceedingly rare cases where the defendant returned to the United States to continue committing crimes of the very serious nature for which he was deported, the Commission can invite judges to depart upward.

That Congress did not include a “remoteness” cut-off in 8 U.S.C. § 1326 does not mean the Commission is prevented from including one in § 2L1.2 if it determines that it would better advance the purposes of sentencing. The Commission was created to make independent determinations regarding the factors judges should consider under a given guideline that will ensure the purposes of sentencing are met. *See* 28 U.S.C. §§ 991(b)(1)(A), 994(c). The Commission has made such decisions in the past, even when it

³⁵ USSC, *Interim Report Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, at 28 (2006) [*Interim Report*].

differed from Congress's measure of the same factor, and these are respected by courts.³⁶ The Commission should exercise its institutional role to refine § 2L1.2 to better account for offenders of differing culpability.

Status and Recency. Under § 2L1.2, prior convictions are double-counted when a prior conviction is used both to increase the offense level and in the calculation of the criminal history score. As the Commission has recognized, the impact of double counting prior convictions under § 2L1.2 is “further aggravated by the fact that many of these defendants, when found to be in the United States illegally, are discovered while serving time in prison.”³⁷ Because a violation of 8 U.S.C. § 1326 is considered to be a “continuing offense” from the moment of reentry until the defendant is “found” by a federal official, a defendant who is found while serving a state term of imprisonment for an offense he did not commit until he reentered the country will receive an additional increase of up to three criminal history points under § 4A1.1(d) and (e) for being under a criminal justice sentence at the time of the (continuing) offense and for committing the offense within two years of a prior release.³⁸ Status and recency points are also applied under § 4A1.1(e) if the defendant reentered the United States within two years of his last release,³⁹ even if he is found many more years later without an intervening criminal sentence.

The resulting sentencing ranges are driven almost entirely by the double- and triple- weighting of the same conduct, without any evidence that such double- and triple counting serves any purpose of sentencing.⁴⁰ The Commission should exclude recency and status points for § 2L1.2 cases where these circumstances are present.

³⁶ See, e.g., *Neal v. United States*, 516 U.S. 284, 295 (1996) (upholding the Commission's decision to use a presumptive weight for the carrier medium in LSD cases, even though the statute measures the actual weight of the carrier medium for purposes of mandatory minimums: “Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable ‘approach’ to calculating LSD quantities.”); *Kimbrough*, 552 U.S. at 105 n.14 (noting that its opinion in *Neal* “assumed that the amendment was a legitimate exercise of the Commission's authority”).

³⁷ *Interim Report* at 28.

³⁸ See *id.*; see also, e.g., *United States v. Santana-Castellano*, 74 F.3d 593, 595 (5th Cir. 1996) (upholding the application of § 4A1.1(d) where the defendant was found serving a state sentence).

³⁹ See, e.g., *United States v. Zarabia*, 217 Fed. App'x 906, 911-13 (11th Cir. 2007).

⁴⁰ Letter from Jon Sands to Hon. Ricardo Hinojosa Re: Comments on Proposed Amendments Relating to Immigration, at 7-8 (Mar. 2, 2007).

USSG § 2G2.2 – Child Pornography

I am glad to see that the Commission has made it a priority to review the child pornography guideline. The guideline ranges recommended in these cases are draconian and too often amount to a life sentence.

The child pornography guideline is not in step with current reality. Unlike the small sample of cases from 1994-95 involving both child pornography possession, receipt and distribution cases, and child pornography production cases, in which the Commission found a “significant portion” of defendants with sexual abuse or exploitation of children in their histories, very few defendants convicted of possession or receipt of child pornography today have any such history.⁴¹ In my experience, most have no criminal history at all, which seems to be confirmed by the Commission’s statistics.⁴² The research shows that child pornography offenders, without prior contact offenses, have a very low risk of recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision.⁴³

⁴¹ In 1996, the Commission reported that it had studied 112 cases, 90 of which were limited to possession, receipt, or trafficking, as opposed to production, and had found that a “significant portion” had a “criminal history that involves the sexual abuse or exploitation of children and that those with such histories are at a greater risk of recidivism.” USSC, *Report to Congress, Sex Offenses Against Children*, at i, 1-4, 29 (1996). By 2006, 79.9% of child pornography defendants had no prior felonies of any kind. Bureau of Justice Statistics Bulletin, Federal Prosecution of Child Sex Exploitation Offenses, 2006, at 5.

⁴² In the Pornography/Prostitution category, which includes exploitation and other offenses more serious than child pornography possession or receipt, 79.9% were in Criminal History Category I in 2008. USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbl. 14.

⁴³ See Wollert, R. W., Waggoner, J., & Smith, J., *Child Pornography Offenders Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*. Poster session presented at the annual meeting of the Association for the Treatment of Sexual Abusers, Dallas, TX (2009, October) (study of 72 offenders who participated in federally funded outpatient program found that over an average span of 4 years, only one was taken into custody for possessing child pornography, another was apprehended for the commission of a non-contact sex offense, and none were arrested on charges of child molestation); Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., Rossegger, A., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, BMC Psychiatry (July 14, 2009) (study of 231 suspected child pornography users found that “only 1% were known to have committed a past hands-on sex offense, and only 1% were charged with a subsequent hands-on sex offense in the 6 year follow-up. The consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample – at least not in those subjects without prior convictions for hands-on sex offenses”); Webb, L., Craissati, J. & Keen, S., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters* (Nov. 16, 2007) (Study comparing internet and contact sex offenders found that “Internet offenders had only three formal failures: one was a general offense and two were new internet sex offenses. Otherwise, internet offenders appear to be extremely compliant with community treatment and supervision sessions. Internet offenders (14%) did engage in some sexually risky behavior, which mainly related to increased usage of adult pornography or gambling on the internet rather than specific

The guideline does not advise judges about those important public safety considerations. Instead, the two-level computer enhancement, the five-level distribution enhancement (for “thing of value”) or at least the two-level enhancement for “other” distribution, and the five-level enhancement for 600 or more images apply as a matter of course in typical cases. These enhancements are no longer meaningful, and they are not the factors that judges in most districts, using the purposes and factors in § 3553(a) and common sense, use to determine an appropriate sentence.

The best indicator that this guideline needs revision is that, nationally, of the 1,195 sentences imposed under USSG § 2G2.2 in the first three quarters of 2009, 10.7% were “government sponsored below range” (27 under § 5K1.1, 101 for other reasons), and 42.9% were departures or variances not identified as government sponsored.⁴⁴ Many district judges have carefully explained their disagreement with the child pornography guideline in numerous published decisions.

The guideline leads to extreme unwarranted disparity, as demonstrated by the data from my district. The typical defendant we see in the Northern District of Texas is a middle aged white male with no criminal history. As elsewhere, the vast majority of these clients are not predators. As noted above, virtually all of the specific offender characteristic enhancements apply, which drives the guideline range to stratospheric levels. Yet, while the rate of government and non-government sponsored below range sentences for defendants whose guideline range was based on USSG § 2G2.2 in FY 2008 was 44.3% nationally, it was 8.4% in the Northern District of Texas. And the average sentence length was 95.5 months nationally, while it was 183.2 months in the Northern District of Texas.⁴⁵

This unwarranted disparity is the result of a combination of prosecutorial practices, an unduly harsh guideline, and a general unwillingness among our judges to question the guidelines. Prosecutors in our district use the empty difference between possessing and receiving child pornography by requiring all defendants to plead guilty to a receiving charge, which prevents the judge from imposing a sentence less than five years. More importantly, this decision mandates a base offense level of 22, rather than 18, which makes a difference of five to ten years in the low end of the range in typical cases.

child pornography use or ‘approach’ behaviors.”), published online on behalf of the Association for the Treatment of Sexual Abusers, available at <http://sax.sagepub.com/cgi/content/abstract/19/4/449>.

⁴⁴ USSC, *Preliminary Quarterly Data Report, 3d Quarter Release*, tbl. 5.

⁴⁵ This data was extracted from the Commission’s FY 2008 Monitoring datafile by Paul Hofer.

I urge the Commission to study and report on whether possession of child pornography actually correlates with child exploitation, and to revise the guideline to distinguish among differently situated offenders on a rational basis grounded in research.

USSG § 1B1.3 – Relevant Conduct

At the Chicago hearing, Ms. Johnson offered comments on the relevant conduct rules under USSG § 1B1.3, and I incorporate her testimony by reference.⁴⁶ I agree that the Commission should exclude acquitted, uncharged, and dismissed conduct from the guidelines, including cross-references to more serious offenses. It can do this by stating in the commentary to § 1B1.3 that uncharged, dismissed, and acquitted conduct is not included in the definition of “relevant conduct,” and by eliminating cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3 and all cross-references in the Chapter Two guidelines.

These changes would reduce unwarranted disparity, promote respect for the law, and avoid as-applied Sixth Amendment challenges. This would also end a troubling effect of the relevant conduct guideline, which occurs when a defendant faces a higher guideline range because he was acquitted of a § 924(c) count than he would if he had been convicted, or when the government decides not to charge that count with the intent to obtain a higher sentence under a lower standard of proof.⁴⁷

In addition, the Commission should clarify § 1B1.3(a)(1)(B) relating to “jointly undertaken activity.” Some probation officers and judges continue to misunderstand this to include conduct of others that is merely “reasonably foreseeable” but was not within the scope of the defendant’s agreement. The courts of appeals reverse when asked,⁴⁸ but

⁴⁶ Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender for the Northern District of Ohio, Public Hearing Before the United States Sentencing Commission, at 21-26 (Sept. 10, 2009).

⁴⁷ *United States v. Casper*, 536 F.3d 409, 416 (5th Cir. 2008) (recognizing that acquittal of a § 924(c) count can result in a higher guideline range than the range that would apply had the defendant been convicted); *United States v. Smith*, 510 F.3d 603, 606 (6th Cir. 2007) (rejecting defendant’s argument that the government could not dismiss a charge under § 924(c) “so that it could instead pursue a Sentencing Guidelines enhancement under U.S.S.G. § 2B3.1(b)(2), and its lower evidentiary standard, in order to achieve a higher sentence); *United States v. Bolden*, 479 F.3d 455 (6th Cir. 2007) (upholding sentence where the government had elected to seek an enhancement under U.S.S.G. § 2B3.1(b)(2) after dropping charges made under 18 U.S.C. § 924(c)).

⁴⁸ See *United States v. Livingston*, 2009 U.S. App. LEXIS 20101 (5th Cir. Sept. 9, 2009) (reversing sentence because the district court “failed to determine the scope of the criminal activity that Livingston agreed to jointly undertake with individuals other than his co-conspirators” and noting that “[w]e have held that such findings are ‘absolute prerequisites’ to holding a defendant accountable for a third person’s misconduct); *United States v. Phalo*, 283 Fed. App’x 757, 766 (11th Cir. 2008) (reversing sentence where district court committed

there is no relief when the defendant waives the right to appeal, which occurs all too often. More direct language, such as that suggested by Ms. Johnson, would help to lessen the unfairly severe sentences and extreme unwarranted disparities that result from the misunderstanding of this concept.

In addition to these suggestions, I ask the Commission to address the combined effect of the lax procedures under § 6A1.3, and practices relating to relevant conduct and acceptance of responsibility in my district and elsewhere in the Fifth Circuit, which result in sentences that are unreliable and too severe.

In the Northern District of Texas, the Probation Office obtains all information for the guideline calculation directly from the United States Attorney's office. This information consists of multiple level, uncorroborated hearsay contained in FBI, DEA and ATF reports. Under Fifth Circuit law, the district courts are permitted to rely on this unsubstantiated information unless the defendant provides rebuttal evidence.⁴⁹ Making matters worse in one of our divisions, it is an unwritten rule that the defendant loses acceptance of responsibility if he makes a factual objection to relevant conduct alleged in the presentence report.

The "sufficient indicia of probable accuracy" standard the Commission advises under § 6A1.3 fails to prevent, or advise against, these practices, resulting in sentences that are driven by facts that have never been tested by ordinary adversarial process.

At the hearing in Stanford, Judge Winmill, Chief Judge of the District of Idaho, expressed concern about the accuracy with which factfinding is made, particularly when the facts found serve as proxies for culpability. For this reason, he follows a rule in drug cases that a defendant is only "held responsible for the drugs in which the evidence is essentially overwhelming. Either it's a hand-to-hand transaction or there's a tremendous volume of other evidence coming from other persons involved in the drug conspiracy that establish the drug quantities."⁵⁰ Informed by the rule of lenity, Judge Winmill adopted this narrow view of relevant conduct so that drug quantity serves as a fairer measure of culpability.⁵¹ He also recognized that other judges view the relevant conduct rule to apply more broadly, "which results in greater offense levels" and disparity, and suggested that the Commission clarify the relevant conduct rule to address the problem.⁵²

procedural error by not making particularized findings under § 1B1.3(a)(1)(B)).

⁴⁹ See *United States v. Cabrera*, 288 F.3d 163, 174-75 (5th Cir. 2002); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002); *United States v. Caldwell*, 448 F.3d 387, 390 (5th Cir. 2006); *United States v. Washington*, 480 F.3d 309, 320 (5th Cir. 2007).

⁵⁰ Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 78-79 (May 28, 2009).

⁵¹ *Id.*

⁵² *Id.* at 79-80.

I agree with Judge Winmill that the Commission should clarify the relevant conduct rule to promote more fair and accurate factfinding. The Commission should remove the “probably accurate” standard from § 6A1.3, and from the second paragraph of the commentary. It should emphasize in the commentary that the government bears the burden of production and persuasion at sentencing, and that the burden is not on the defendant to rebut hearsay allegations with evidence.⁵³ The Commission should strongly advise against reliance on uncorroborated hearsay. Finally, it should clarify that it is not a basis for denial of the adjustment under § 3E1.1 that the defendant objects to relevant conduct alleged in the presentence report.

USSG § 3E1.1 – Acceptance of Responsibility

In the Northern District of Texas, prosecutors routinely decline to move for the third point for acceptance of responsibility although the defendant “timely notif[ied] the authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” The government refuses to move if the defendant will not waive his right to appeal, if the defendant files a motion to suppress evidence that one way or the other usually obviates the need for trial, and in certain divisions, if the defendant opposed the government’s motion for detention after the initial appearance. The government’s refusal to make the motion under these circumstances not only violates the plain language of § 3E1.1(b), but creates unwarranted disparity, undermines the adversary system, and promotes disrespect for law.

Before and after the government motion requirement was added by the PROTECT Act, the substantive basis for the third point is the same – timely notification of intent to plead guilty, “thereby” permitting the government to “avoid preparing for trial” and the consequent efficient allocation of resources.⁵⁴ The PROTECT Act did not change the substantive basis. Indeed, Congress directly amended Application Note 6 to state: “Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner *that avoids preparing for trial*, an adjustment under subsection (b) may only be granted upon a formal motion by the

⁵³ See, e.g., *United States v. Goodman*, 519 F.3d 310, 324 (6th Cir. 2008) (emphasizing that the “government had the burdens of production and persuasion” at sentencing and prohibiting the government from putting on additional evidence on remand); *United States v. Wyss*, 147 F.3d 631, 633 (7th Cir. 1998) (“[T]he burden is on the government to prove the amount of drugs involved in that conduct.”); *United States v. Leonzo*, 50 F.3d 1086, 1088-89 (D.C. Cir. 1995) (“The government bears the burden of establishing ‘loss’ under § 2F1.1 by a preponderance of the evidence.”).

⁵⁴ The word “thereby” means “by that means.” Webster’s Third New International Dictionary. The defendant is eligible for the third point if he “timely notif[ied] the authorities of his intention to enter a plea of guilty,” and *by that means*, “permit[ed] the government to avoid preparing for trial,” *thus* “permitting the government and the court to allocate their resources efficiently.”

Government at the time of sentencing.”⁵⁵ The Commission’s view, before and after the PROTECT Act, is that the defendant’s notification of intent to plead guilty must be “at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.”⁵⁶

The government in my district and others misreads its power to move for the third point as a power to decline to move on any basis it chooses, not just causing the government to prepare for trial as Congress and the Commission intended. It uses this supposed power to coerce defendants to waive rights other than the right to trial and to punish them if they decline. They must agree to detention or be punished. They must not challenge illegally obtained evidence or be punished. They must agree not to appeal their sentences, before they have any idea whether substantive or procedural errors will be made at sentencing, or be punished.

In the typical gun or immigration prosecution in my district, there is a single count indictment charging the client with a violation of 18 U.S.C. § 922(g) or 8 U.S.C. § 1326(a). The trial issues in these cases are generally not complicated. After the government has provided discovery and we have completed our investigation, we indicate quickly whether we are going to trial or pleading guilty. If the latter, that leaves the sentencing where a number of appealable errors can be made by the probation officer and the judge, such as erroneous interpretations of the guidelines or departure provisions, or whether or not the client’s prior conviction(s) qualify as a “crime of violence,” “controlled substance offense,” or “drug trafficking offense.” These and other issues can all have a dramatic effect on the calculation of the offense level and the ultimate sentence. Yet the government, relying on its misinterpretation of § 3E1.1(b), insists that our clients waive appeal before these matters have even been determined by the probation officer, much less the sentencing judge. This waiver must be completed before the client has been interviewed by the probation officer or has seen the presentence report, when we have no insight as to how the probation officer is going to calculate the advisory guideline range or whether s/he will advocate for an upward variance, as some are prone to do.⁵⁷

Even a defendant who pleads guilty has a right to a detention hearing, to challenge a potentially illegal search, to a sentencing proceeding that is accurate and fundamentally fair, and to appeal. Yet most district court judges and the Fifth Circuit treat the government’s refusal to move for the third point to punish the exercise of those rights as unreviewable, thus gravely undermining those rights. This is not what Congress or the Commission meant when they said the government is in the best position to

⁵⁵ USSG § 3E1.1, comment. (n.6), as amended by Pub. L. 108-21 sec. 401(g)(2) (April 30, 2003) (emphasis added).

⁵⁶ USSG § 3E1.1, comment. (n.6).

⁵⁷ See, e.g., *United States v. Gutierrez-Hernandez*, 581 F.3d 251 (5th Cir. 2009) (reversing upward departure from 10-16 months to 30 months recommended by probation officer based on erroneous interpretations of departure provisions).

determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.

One judge in our district, recognizing the problem, grants the equivalent of one point off in the form of a variance. Alex Bunin and Jacqueline Johnson urged the Commission to remove the government motion requirement or seek permission from Congress to do so. Alternatively, the Commission could add the following language to the commentary:

When the defendant has given notice of his intent to plead guilty sufficiently early in the process to permit the government to avoid preparing for trial, it is an incorrect interpretation of this guideline by the government to decline to move for the third point under subsection (b) based on an action or inaction of the defendant that did not cause the government to prepare for trial. If the government declines to move for the third point on such a basis, the court is encouraged to grant a downward departure of one level.

USSG § 2B1.1 – Fraud

A growing part of our caseload consists of fraud cases, mainly mortgage fraud and bank fraud cases. These clients have no criminal history, and many are low- or mid-level participants. We have been successful in obtaining variances or departures for some of these clients, but most are still going to jail for longer than necessary.

The Commission should consider lowering guideline ranges for white collar offenders who are not the few high-profile offenders in the news. Congress directed the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” *See* 28 USC 994(j). But most people who fit that description are going to prison.

A few have complained that sentences for white collar offenders may not be high enough. But this complaint is unfounded. The U.S. Attorney from Chicago expressed concern regarding a trend to leniency in economic crime cases as a result of *Booker*, based on a perception that 32.4% of fraud offenders received entirely non-prison sentences in FY 2008, as compared with 26.7% in FY 2003.⁵⁸ But the Commission’s data shows the trend is in the opposite direction, with the rate at which fraud offenders receive straight probation decreasing from 20.1% in 2003, to 15.7% in FY 2008, to

⁵⁸ Statement of Patrick Fitzgerald Before the U.S. Sentencing Commission, Chicago, Illinois, at 4 (Sept. 10, 2009); Tr. of Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 244-45 (Sept. 10, 2009).

14.5% in FY 2009, and the rate at which they receive straight prison increasing from 59.6% in FY 2003, to 68.3% in FY 2008, to 72.1% in FY 2009.⁵⁹

The U.S. Attorney from Minnesota expressed concern about the rate of below guideline sentences in economic crime cases after *Booker*.⁶⁰ But the mean and median sentence lengths for fraud have increased since before *Booker*, while staying the same for all offenses combined.⁶¹ And, in fraud cases, the average sentence and average guideline minimum are moving closer together in FY 2009, indicating that the extent of variation from the guideline range in cases receiving a below range sentence is shrinking.⁶²

III. ALTERNATIVES TO INCARCERATION

I appreciate that the Commission has made alternatives to incarceration one of its priorities for this amendment cycle. I understand that the Commission is looking into why judges are not imposing probation and other options less than straight prison more often, now that they have the discretion to do so.

I believe that judges in my district do not sentence people to probation or other alternatives more often because the guidelines do not encourage them to do so. Although many of our clients are not citizens, about two thirds of them are citizens. Many of our fraud clients have gotten into trouble because of an addiction problem, and could benefit from an alternative involving treatment. These clients are released pretrial, and there are treatment programs they can participate in through the Probation Office. All drug trafficking defendants are detained pretrial, but some are minor participants with drug

⁵⁹

Fraud	Probation	Probation & Confinement	Probation/Community Split	Straight Prison
2003	20.1%	12.5%	7.8%	59.6%
2008	15.7%	9.5%	6.6%	68.3%
2009	14.5%	8.1%	5.2%	72.1%

USSC, 2003 and 2008 Sourcebook, Table 12; USSC, Preliminary Quarterly Data Report, 3d Quarter Release 2009, Table 18.

⁶⁰ Statement of B. Todd Jones Before the U.S. Sentencing Commission, Denver, Colorado, at 3-4, (Oct. 20, 2009).

⁶¹

	Fraud Mean	Fraud Median	All Offenses Mean	All Offenses Median
2003	14.4 months	8.0	47.9 months	24.0
2008	21.6 months	12.0	49.6 months	24.0
2009	21.8 months	12.0	47.6 months	24.0

USSC, 2003 and 2008 Sourcebook of Federal Sentencing Statistics, Table 13; USSC, Preliminary Quarterly Data Report, 3d Quarter Release 2009, Table 19.

⁶² USSC, *Preliminary Quarterly Data Report, 3d Quarter Release*, fig. D.

problems who could benefit from treatment. It has been difficult to convince our judges to facilitate or reward participation in treatment through an alternative sentence.

The Commission could do three things to increase the use of effective alternatives in appropriate cases. First, adopt an alternatives guideline, to be consulted in every case, stating (1) that probation is permissible in every case in which prison is not statutorily required, and (2) that the court may impose a split sentence if probation is prohibited by statute, as suggested by Nicholas Drees and other witnesses.⁶³ Second, provide information on treatment and other factors that correlate with reduced recidivism and options that have been found to be effective in addressing particular needs, as suggested by Tom Hillier and Davina Chen.⁶⁴ Third, recommend an open-ended departure for post-offense rehabilitation, as suggested by Ray Moore and other witnesses.⁶⁵

IV. APPEALS

I agree with my colleagues who have testified that the current abuse-of-discretion standard of review for sentencing decisions strikes the appropriate balance between the district and appellate courts. That standard, as clarified by the Supreme Court in *Gall*, *Kimbrough*, *Spears*, and *Nelson*, allows district courts to contribute to the ongoing evolution of the guidelines without fear of their judgments being replaced by the circuit courts without good reason. With their discretion guided by § 3553(a)'s statutory mandates and balanced by meaningful appellate review, district courts can operate as Congress intended when it enacted the SRA and also as the Supreme Court has required after *Booker*.

Ms. Johnson, Mr. Nachmanoff, and Mr. Moore testified previously about the appellate standard of review, and I adopt their testimony by reference.⁶⁶ I would also like

⁶³ See Statement of Nicholas T. Drees Before the U.S. Sentencing Commission, October 21, 2009, at 32.

⁶⁴ See Joint Statement of Thomas W. Hillier II and Davina Chen Before the U.S. Sentencing Commission, May 27, 2009, at 11-15 (suggesting sample guidance relating to education, vocational skills and employment, drug and alcohol abuse and treatment, mental health treatment, age, community service, first or near-first offenders, drug, larceny and fraud offenders, and sex offenders).

⁶⁵ See Statement of Raymond Moore Before the U.S. Sentencing Commission, October 21, 2009, at 24-27.

⁶⁶ 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); Statement of Raymond Moore, Federal Public Defender for the Districts of Colorado and Wyoming, Public Hearing Before the U.S. Sentencing Commission, Denver, Colorado, at 6-18 (Oct. 21, 2009).

to add my thoughts about the standard of review as it operates in the Fifth Circuit (the circuit where I practice), with additional observations about the Eleventh Circuit.⁶⁷ The state of appellate review in these circuits confirms earlier witnesses' testimony that the Commission could best serve the purposes of appellate review by improving and explaining the guidelines.

A. The Fifth and Eleventh Circuits Recognize Their Power To Review a Sentence for Procedural Error While Respecting the District Court's Broad Discretion.

As is the case in every other circuit, procedural review in the Fifth and Eleventh Circuits ensures that 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.⁶⁸ After *Gall* and *Kimbrough*, the Fifth Circuit has corrected district courts that erroneously believed they had no discretion to vary from a guideline sentence, or that applied a presumption of reasonableness to a guideline sentence.⁶⁹ Both have remanded

⁶⁷ Several districts represented at this hearing are in the Eleventh Circuit.

⁶⁸ See, e.g., *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); *United States v. Miles*, 2009 U.S. App. LEXIS 18599 (5th Cir. Aug. 18, 2009) (reversing sentence at statutory maximum of 240 months (based on an upward departure) where the district court incorrectly determined that the defendant was a career offender); *United States v. Neal*, 578 F.3d 270, 274 (5th Cir. 2009) (reversing within guideline sentence of 188 months where district court erroneously found the defendant to be an armed career criminal under § 4B1.4); *United States v. Dison*, 2009 U.S. App. LEXIS 10501 (5th Cir. May 14, 2009) (reversing as procedural error the district court's application of § 2B1.5 in a case involving bleached notes, under the guidelines in place before the amendments of November 1, 2009); *United States v. Skilling*, 554 F.3d 529, 595 (5th Cir. 2009) (reversing sentence because district court erred in applying enhancement under § 2F1.1); *United State v. Guerrero-Parra*, 326 Fed. App'x 766 (5th Cir. 2009) (reversing sentence because district court improperly counted two misdemeanors as separate sentences under § 4A1.2(a)(2) and improperly added one point for a misdemeanor crime of violence under § 4A1.1(f)); *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) (reversing sentence where district court improperly added two points based on an unproven assertion that he was on probation for a previous conviction); *United States v. Klein*, 543 F.3d 206, 213 (5th Cir. 2008) (in a case involving convictions for health care fraud, reversing for procedural error where the district court did not discount the actual loss by the value of the drugs dispensed, as required under § 2B1.1); *United States v. Simone*, 2009 WL 2168944, *2 (11th Cir. July 22, 2009) (reversing above-guideline sentence of 24 months because "the district court's failure to consider the Guidelines sentencing range, which the parties agree would have called for imprisonment of 7 to 13 months, constituted procedural error").

⁶⁹ *United States v. Jones*, 283 Fed. App'x 254, 257 (5th Cir. 2008) (reversing for procedural error because "[w]e know now that Jones was entitled to have his sentence calculated by a judge who understood the discretion described in *Kimbrough*."); *United States v. Warfield*, 283 Fed. App'x 234, 236 (5th Cir. 2008) (on remand from the Supreme Court after *Gall*, remanding to the district court so that it could "consider whether Warfield's age, health, family responsibilities, and role in

cases when the district court's explanation for the sentence was insufficient.⁷⁰ And, post-*Gall*, the Fifth Circuit has affirmed substantial variances from the advisory guideline range, variances it had previously rejected under its pre-*Gall* precedent.⁷¹ In short, the Fifth and Eleventh Circuits recognize their power to review a sentence for procedural error, while respecting the sentencing judge as the primary decision-maker.

The Fifth Circuit has also made clear that a district court may disagree with the policy underlying any guideline, so long as the court "explain[s] itself in such a way as to permit 'meaningful review' and satisf[ies] the need that sentencing fairness be perceived." *United States v. Simmons*, 568 F.3d 564, 569 (2009).⁷² The requirement that a district court provide sufficient explanation is especially meaningful in the discretionary landscape, both for the reasons given by the court in *Simmons* and so that district courts

the offense are factors that warrant an additional variance from the Guidelines range"); *United States v. Perrin*, 278 Fed. App'x 298, 299 (5th Cir. 2008) (on appeal for the second time (after having reversed a below-guideline sentence before *Gall*), reversing again (now after *Gall*) because the district court erroneously believed it had to impose a within guideline sentence on remand after the first appeal); *United States v. Carbajal-Alvarado*, 275 Fed. App'x 427 (5th Cir. 2008) (reversing for procedural error because "the district court applied a presumption of reasonableness for sentences within the guidelines range and required the existence of extraordinary circumstances to impose a sentence outside of the guidelines range").

⁷⁰ *United States v. Aguilar-Rodriguez*, 288 Fed. App'x 918, 921 (5th Cir. 2008) (reversing above-guideline sentence of 18 months because the district court failed to explain adequately reasons for upward variance); *United States v. Tisdale*, 264 Fed. App'x 403 (5th Cir. 2008) (reversing within-guideline sentences of 97 months for two defendants because, *inter alia*, the district court did not articulate sufficient reasons why it rejected the defendants' arguments for sentences below the guidelines); *United States v. Narvaez*, 285 Fed. App'x 720, 725 (11th Cir. 2008) (remanding for resentencing where the "district court gave absolutely no reason for imposing the 210-month [within-guideline] sentence" despite defense arguments relating to several 3553(a) factors); *United States v. Prather*, 279 Fed. App'x 761, 775 (11th Cir. 2008) (reversing within-guideline sentence of 110 months for one defendant and a below-guideline sentence of 180 months for another because the district court failed to adequately explain the sentence); *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008) (after finding guideline calculation incorrect, reversing alternative below-guideline sentence under § 3553(a) as insufficiently explained).

⁷¹ *United States v. Duhon*, 541 F.3d 391 (5th Cir. 2008) (where court had previously reversed the sentence of five years' probation in a case involving the possession of child pornography, affirming same sentence after remand by Supreme Court for reconsideration in light of *Gall*); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2009) (same).

⁷² *United States v. Burns*, 526 F.3d 852, 862 (5th Cir. 2008) (remanding to district court so that it could consider the defendant's request for the court to disagree with the policy rationale for the disparity between crack and powder cocaine); *United States v. Leatch*, 270 Fed. App'x 274, 275 (5th Cir. 2008) ("On resentencing, the district court must take care – especially if it decides to deviate from the Guidelines – to articulate how its sentence satisfies the statutory criteria.").

can provide unfettered feedback to the Commission to promote the ongoing development of the guidelines.⁷³

Finally, as Mr. Moore explained in his written statement, a remand for fuller explanation is not an empty exercise. When required to explain a previously unexplained sentence, district judges very often impose a different sentence on remand.⁷⁴ By insisting that district judges better analyze and explain their sentences, appellate courts help to achieve fairer sentences, which in turn promotes respect for the law. *See Rita*, 551 U.S. 338, 356 (2007) (“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.”). The Fifth Circuit has demonstrated this principle.⁷⁵

B. The Commission Can Promote Meaningful Procedural Review Under the Current Standard.

Unfortunately, the Fifth Circuit has not always remanded cases where the district court gave no reasons at all for imposing a within-guideline sentence, although the defendant made “nonfrivolous” arguments for a lower sentence. This is because the Fifth Circuit has adopted a “strict” version of plain-error review for within-guideline sentences, requiring the defendant to show “substantial prejudice” by proving that the error affected the sentencing outcome.⁷⁶ If the defendant cannot show that “an explanation by the district court would have changed his sentence,” his sentence will be affirmed.⁷⁷ Of course, it is virtually impossible to prove that the sentence would be different when the district court gave no reasons at all in the first place for the sentence imposed.

⁷³ *See United States v. Mondragon-Santiago*, 564 F.3d 357, 367 (5th Cir. 2009) (recognizing that a district court’s adjustment of a sentence to account for a disagreement with a guideline policy can be viewed as a “refinement” that the Commission can then incorporate in the Guidelines in the ongoing evolution of sentencing policy).

⁷⁴ Statement of Raymond Moore, Federal Defender for the Districts of Colorado and Wyoming, Before the U.S. Sentencing Commission, Denver, Colorado, at 15 (Oct. 21, 2009) (collecting cases).

⁷⁵ *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).

⁷⁶ *Mondragon-Santiago*, 564 F.3d at 364.

⁷⁷ *United States v. Sandoval-Rodriguez*, 2009 U.S. App. LEXIS 16108 (5th Cir. July 21, 2009).

The circuit court has also affirmed sentences on plain error review where the district court miscalculated the guideline range but the defendant could not show with “reasonable probability” that the sentence would have been different had the district court started with a correctly calculated guideline. For example, in *United States v. Cruz-Meza*, 310 Fed. App’x 634, 637 (5th Cir. 2009), the court found no plain error where the defendant was sentenced at the *bottom* of the incorrect guideline range, because that same sentence was the *top* of the correct guideline range. In other words, the district court was not required to explain why a sentence at the top of the correct guideline range was the appropriate sentence in light of the factors in § 3553(a). This practice is one which would likely be rejected by at least one other sister circuit.⁷⁸

In another line of cases, the Fifth Circuit has affirmed a number of cases in which the district court improperly calculated the guideline range, often by a substantial margin, because the district court stated that even if its guideline calculation was incorrect, it would have imposed the same sentence anyway under § 3553(a).⁷⁹ In some instances, the district court said little more than “this is the sentence I would impose in any event” under § 3553(a), which the court of appeals then cited with approval to affirm the sentence without deciding whether the guideline calculation was incorrect.⁸⁰ The same is

⁷⁸ Compare, e.g., *United States v. Langford*, 516 F.3d 205, 215-16 (3d Cir. 2008) (reversing where correct guideline range overlapped with incorrect guideline range, noting precedent holding that even under the more “exacting plain error” review, application of an incorrect guideline range “presumptively affects substantial rights, even if it results in a sentence that is also within the correct range,” and explaining that it is not the overlap but the “sentencing judge’s reasoning” that will be determinative); *United States v. Goodman*, 519 F.3d 310, 323 (6th Cir. 2008) (“[I]n this case there is no indication that the district court would have selected the same sentence even without the one-level enhancement. Thus, the miscalculation, even though Goodman’s sentence would be within the Guidelines range either with or without the one-level enhancement, was not a harmless error.”); *United States v. Story*, 503 F.3d 436, 440-41 (6th Cir. 2007) (reversing a below guideline sentence for plain error where the district court misstated the applicable guideline range because “it is certainly possible that the overall sentence was incorrect as well”; rejecting the government’s argument that remand would be a “waste of time” because the district court “may decide that using the proper lower-end range,” a lower sentence of less than 300 months is merited”: “While it may be a close call, we think the district court’s plain error counsels in favor of a remand.”).

⁷⁹ *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (affirming sentence where the district court erroneously applied a sixteen-level crime-of-violence enhancement because the district court stated, “[E]ven if I am wrong about the guidelines, this is the sentence that I would impose in any event.”); *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir. 2008) (affirming below guideline sentence because district court stated it would have imposed the same sentence under § 3553(a) even if it had miscalculated the guideline range).

⁸⁰ *United States v. Goodman*, 2009 U.S. App. LEXIS 19897 (5th Cir. Sept. 3, 2009) (declining to address the issue of the proper calculation of drug quantity under the relevant conduct rules because “the district court explained that even if it had determined that Goodman was responsible for less than 15 kilograms of cocaine, it would have chosen the same 188-month sentence”); *United States v. Jiminez-Garcia*, 327 Fed. App’x 515, 516 (5th Cir. 2009) (not addressing the defendant’s claim that the district court erred in applying the 16-level enhancement under § 2L1.2

true in the Eleventh Circuit, where district courts have been invited to simply state that the sentence would be the same under § 3553(a) even if the guideline calculation was incorrect, without also requiring the court to explain why the alternative sentence would be appropriate under those circumstances.⁸¹

Thus, unlike its sister Second, Seventh, and Tenth Circuits,⁸² the Fifth and Eleventh Circuits do not require sentencing courts to explain in any detail or with any cogent rationale why an *alternative* sentence, which often represents a substantial upward variance from the properly calculated guideline range, achieves § 3553(a) sentencing purposes.

I make these observations not because I believe the Commission can or should take any action aimed at giving the appellate standard of review more “teeth.” I do not. Rather, I believe that the results in these cases conflict with the Supreme Court’s current requirements that a district court properly calculate the guideline and explain its ultimate sentence under § 3553(a).⁸³ It also undermines the goals of the SRA by effectively short-

and affirming the sentence because the “district court explained that, even if the application of the 16-level increase was incorrect, it would have imposed the same sentence ‘in any event after considering all of the factors contained in Section 3553(a)’”; *United States v. Ruiz-Arriaga*, 565 F.3d 280, 282 (5th Cir. 2009) (not deciding whether a statutory rape conviction is a crime of violence under § 2L1.2(b)(1)(A)(ii) because the district court stated that it “believe[d] that a sentence of 46 months in custody would be reasonable, even if the court is not correct about the guideline range”).

⁸¹ *United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005) (Carnes, J., concurring); *see also United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006) (upholding alternative sentence when district court stated simply that “even if the guideline calculations are wrong, my application of the sentencing factors under Section 3553(a) would still compel the conclusion that a 10-year sentence is reasonable and appropriate under all the factors that I considered”); *United States v. Scott*, 441 F.3d 1322, 1330 (11th Cir. 2006) (“[I]f it had wished to do so the district court could have stated that it would reach the same sentence regardless of how the disputed § 2A6.1(b)(1) issue was decided. A statement like that would have convinced us the error was harmless.”); *United States v. Fisher*, 2009 U.S. App. LEXIS 5475, 2-3 (11th Cir. Mar. 16, 2009) (assuming without deciding that the district court made a guideline calculation error about the quality of the drug involved, but affirming the assumed above-guideline sentence because the district court stated that it would impose the same sentence even if it had made a guidelines calculation); *United States v. Acuna*, 313 Fed. App’x 283, 298 (11th Cir. 2009) (“[W]e need not resolve disputed guidelines issues where the district court has stated, as it did here, that ‘the guidelines advice that results from the decision of those issues does not matter to the sentence imposed after the § 3553(a) factors are considered,’ and we conclude that ‘the sentence imposed through the alternative or fallback reasoning of § 3553(a) [is] reasonable.’”).

⁸² Statement of Raymond Moore, Public Hearing Before the U.S. Sentencing Commission, Denver, Colorado, at 17-18 (Oct. 21, 2009).

⁸³ *Gall v. United States*, 128 S. Ct. 586, 596-97 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and commits “significant procedural error” when it fails to properly calculate the guideline range); *Rita v.*

circuiting the feedback loop between the district court and the Commission. *See Rita v. United States*, 551 U.S. at 382 (“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.”). Because we think the Fifth Circuit’s practice contravenes Supreme Court law and evinces a circuit split, we are seeking certiorari review of the practice. We understand that the government would not be opposed to review of this issue, and we hope that the Supreme Court will soon instruct the courts of appeals to use the better practice.

That said, I agree with Mr. Moore that, when properly reviewed by the court of appeals, cases in which a district court struggles with the guideline application can be useful in illustrating the complexity of the guidelines and the difficulty courts sometimes experience in applying unexplained rules.⁸⁴ But, too often, that is not happening in the Fifth Circuit. The Fifth Circuit is not fully exercising the power it has to correct guideline errors, insist on useful explanation, and foster the constructive evolution of the guidelines. But the solution for this problem must come from the Supreme Court.

The Commission could promote meaningful procedural review by providing relevant information for judges to consider when determining the appropriate sentence under § 3553(a). I note in particular a number of cases affirmed by the Fifth Circuit in which the district or appellate court summarily cited the “need for deterrence” in support of an otherwise unexplained (or minimally explained) sentence, or in support of what turns out to be a significant upward variance.⁸⁵ The Eleventh Circuit has been equally

United States, 551 U.S. 338, 347-48 (2007) (the sentencing judge “at the time of sentencing” must “state in open court the reasons for its imposition of the particular sentence”); *id.* at 351 (emphasizing the importance of the sentencing court’s subjecting the sentence to “thorough adversarial testing”); *see also United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (“Without a correct Guidelines range, a sentencing court will fail to comply with the Supreme Court’s holding that a sentencing court must properly justify a sentence based on the record and Guidelines calculation before it.”); *id.* at 218 (“A ‘blanket statement’ that the sentence imposed is fair is not sufficient; a district court must determine a Guidelines range without the miscalculation error and explain any variance from it based on § 3553(a) factors.”).

⁸⁴ *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005) (Carnes, J., concurring) (suggesting the Eleventh Circuit’s approach because so many guideline provisions “are mind-numbingly complex and others [] are just mind-numbing”).

⁸⁵ *See, e.g., United States v. Harrison*, 2009 U.S. App. LEXIS 23823 (5th Cir. Oct. 28, 2009) (finding adequate explanation where district court summarily stated that the sentencing imposed meets the “objectives of punishment and deterrence”); *United States v. Aguillar-Guerrero*, 2009 U.S. App. LEXIS 21006, at *2-3 (5th Cir. Sept. 22, 2009) (“The district judge rejected the Guidelines range and imposed a sixty-month sentence stating: ‘I’ve considered the Guidelines, and I just don’t think they’re adequate to address Mr. Aguillar’s tendency to reenter illegally. I think the only way to keep him from doing so is to keep him in jail’”); *United States v. Momah*, 330 Fed. App’x 470, 473 (5th Cir. 2009) (in a drug trafficking case, affirming sentence

undemanding, holding that a district court need not cite any authority for the proposition that a longer sentence increases deterrence, as “it is enough that deterrence is one of the § 3553(a) factors.”⁸⁶ These decisions are premised on the belief that imprisonment (or a longer term of imprisonment) will further the goals of both general and specific deterrence. But this belief is not supported by the evidence.

Current empirical research on general deterrence shows that while *certainty* of punishment has a deterrent effect, “increases in severity of punishments do not yield significant (if any) marginal deterrent effects.”⁸⁷ Another review of this issue concluded: “There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms.”⁸⁸

A study involving federal white-collar offenders (presumably the most rational of potential offenders) in the pre-guideline era found no difference in deterrence effect even between probation and imprisonment.⁸⁹ That is, offenders given terms of probation were no more or less likely to reoffend than those given prison sentences.

because the district court “determined the 235-month sentence was necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment and deterrence from further crime”); *United States v. Rodriguez*, 523 F.3d 519, 535-26 (5th Cir. 2008) (affirming sentence at the high end of the applicable guideline range where district court believed that sentence “adequately addressed the objectives of punishment and deterrence”); *United States v. Aleman-Martinez*, 2009 U.S. App. LEXIS 2806 (5th Cir. Feb. 12, 2009) (affirming within guideline sentence where the district court simply stated, “I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.”).

⁸⁶ *United States v. Scott*, 245 Fed. App’x 942, 945 (11th Cir. 2007); *see also United States v. Phalo*, 283 Fed. App’x 757, 766 (11th Cir. 2008) (affirming as reasonable a sentence where the district court committed procedural error by not making particularized findings under § 1B1.3(a)(1)(B) in part “because the repeated instances of misconduct illustrated a need to deter future transgressions”); *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008) (reversing a below-guideline case as insufficiently explained in part because the district court “provided nothing more than a conclusory statement that a variance from the advisory Guideline range . . . satisfied Congress’s important concerns of deterrence,” but not explaining itself why the district court was wrong).

⁸⁷ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006); *see also* Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 *Criminology* 587 (1995).

⁸⁸ Gary Kleck et al., *The Missing Link in General Deterrence Theory*, 43 *Criminology* 623 (2005).

⁸⁹ *See* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion

And in a very recent study of drug offenders sentenced in the District of Columbia, researchers tracked over a thousand offenders whose sentences varied substantially in terms of prison and probation time.⁹⁰ The results showed that variations in prison and probation time “have no detectable effect on rates of re-arrest.”⁹¹ In other words, “at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior.” Thus, a sentencing court’s imposition of a longer sentence to achieve “deterrence” is a fanciful hope, at best, and is not a decision based upon empirical evidence.

As the expert body charged by Congress with establishing sentencing policies and practices that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process,” 28 U.S.C. § 994(b)(1)C), the Commission should publish a review of the actual research to educate judges about current knowledge regarding the deterrent effect of incarceration. This information would do much to assist sentencing courts (and the parties) to understand deterrence in terms of empirical evidence rather than unstudied assumptions, and to focus on what works in reality to reduce crime.⁹²

C. The Commission Can Promote Meaningful Substantive Review Under the Current Standard.

Since *Gall* and *Kimbrough* clarified the appropriate standard of review, the Fifth Circuit has not reversed a sentence as substantively unreasonable, while the Eleventh Circuit has reversed only a few.⁹³ These circuits, like every other circuit, understand

that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”).

⁹⁰ Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, __ Criminology __ (forthcoming 2009), electronic copy available at: <http://ssrn.com/abstract=1477673>.

⁹¹ *Id.* (“Those assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame.”).

⁹² *See, e.g., id.* (noting that the study’s finding that incarceration does not reduce the risk of re-arrest is “consistent as well with evidence suggesting that traditional sanctions are less effective at preventing recidivism than treatment options mandated by drug courts”).

⁹³ *United States v. Lopez*, 2009 WL 2634039, at *2 (11th Cir. Aug. 28, 2009) (reversing an above guideline sentence as substantively unreasonable, finding that the “district court abused its discretion in concluding that this 60-month sentence was sufficient but not greater than necessary”); *United States v. Puche*, 282 Fed. App’x 795, 800 (11th Cir. 2008) (reversing as substantively unreasonable three below guideline sentences of time served (66 months) “because the district court based its *Booker* variance on a legally erroneous factor”); *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008) (reversing as substantively unreasonable a sentence of probation in a case involving the possession of child pornography).

their role to be deferential regarding the substantive reasonableness of the district court's sentence.

The Commission has not heard a chorus of judges asking for a standard of review with more “teeth.” In fact, only two appellate judges have suggested that the current standard of review does not provide enough “constraint” on district courts. Both were more concerned about courts of appeals’ lesser authority to correct sentences they believe are too *high*, and both said that the most useful thing the Commission can do is to provide information to facilitate more informed decision making by the district courts and thus more meaningful review in the courts of appeals.

At the Stanford hearing, Judge Kozinski made a somewhat unrealistic suggestion, in light of Supreme Court law, that the Commission provide “protocols” for substantive review while acknowledging that such protocols may not impinge on Sixth Amendment rights.⁹⁴ Ultimately, he said “the most important thing the Commission can do is to provide information to judges.”⁹⁵

Interestingly, Judge Kozinski’s concerns were aimed at sentences that are too high. He noted that it is usually the defendant whose hopes for a lower sentence are not answered by appellate review,⁹⁶ and that the more serious problem for defendants is above guideline sentences that are now affirmed when they might not have been before *Booker*.⁹⁷ As an example, he described a hypothetical judge who varies from the guidelines to impose consecutive sentences based on factors already taken into account in the guidelines.⁹⁸

In Denver, Judge Hartz said that he had found comfort in the former *de novo* appellate review standard (excised by *Booker*) because it had been a “useful, and by-and-large successful, tool to obtain evenhandedness.”⁹⁹ He noted that he personally would prefer more lenient sentences. He also said that it was very difficult to say that a sentence is unreasonable because “district court judges are reasonable.”

⁹⁴ See Tr. of Public Hearing Before the U.S. Sentencing Comm’n, Stanford, California, at 67-79 (May 27, 2009).

⁹⁵ *Id.* at 66.

⁹⁶ *Id.* at 47.

⁹⁷ *Id.* at 76.

⁹⁸ *Id.*

⁹⁹ Hon. Harris Hartz, Tenth Circuit Court of Appeals, Remarks Before Sentencing Commission, at 2 (Oct. 20, 2009).

Most tellingly, Judge Hartz did not suggest a return to a less deferential standard in order to achieve more evenhandedness. Rather, he suggested that the Commission “expan[d] the guidelines manual to include additional commentary providing the rationale for various provisions.”¹⁰⁰ He explained that this would help judges decide whether a guideline should be followed in a particular case, and courts of appeals to decide whether the court abused its discretion in doing so.¹⁰¹ He added that, in cases where the judge finds that the Commission’s rationale does not apply, variances from the range “are quite proper and should even be encouraged; treating unlike cases the same is not the sort of evenhandedness one should strive for.”¹⁰²

In short, these judges, along with every other witness who has addressed the question, do not believe that a standard of review with “more teeth” is needed. Rather, they recommend that the Commission provide sentencing judges with more information.¹⁰³ And to the extent that these two judges might wish for more ability to reverse district court judges on a substantive basis, both were more concerned with sentences that are too high than with sentences that are too low. Their concerns are reminiscent of Judge Marvin Frankel, who regarded sentences as too harsh before the guidelines but chose evenhandedness (“less disparity”) as the guiding force of his proposal, hoping that sentencing commissions in the long run would “help educate legislators and the public to accept a more civilized (generally less harsh) sentencing regime” and serve as “bulwarks against harshness.”¹⁰⁴

This is exactly what we ask the Commission to do now. We are confident that if the Commission provides a sound and well-explained set of 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,” *see* 28 U.S.C. § 991(b)(1)(C), sentences imposed would be less severe and more judges would follow them.¹⁰⁵ 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.”

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2-3.

¹⁰² *Id.* at 4.

¹⁰³ 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).

¹⁰⁴ *See* Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 Berkeley J. Crim. L. 239, 243-45 (2008).

¹⁰⁵ Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 Marq. L. Rev. ____ (forthcoming 2009) (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.”),

D. Imbalance Results When Substantive Review Has “More Teeth.”

Although I appreciate in theory Judge Kozinski’s desire to reverse sentences that are unreasonably high, experience shows that this is generally not the way appellate review works in practice. When courts of appeals believed that review for substantive unreasonableness had more teeth -- after *Booker* and before *Rita*, *Gall*, and *Kimbrough* -- they reversed only 3.5% of above guideline sentences appealed by defendants, while reversing 78.3% of below guideline sentences appealed by the government.¹⁰⁶ The Fifth Circuit reversed 1% of above guideline sentences appealed by defendants, and 100% of below guideline sentences appealed by the government.¹⁰⁷ This created an imbalance in results in cases, and in the development of the law.

Even now, we must guard against the institutional tendency of courts of appeals to affirm as substantively reasonable sentences above and within the guidelines, but reverse as unreasonable sentences below. As Judge Barkett recently observed:

When we ask if the district court has imposed a sentence “sufficient, but not greater than necessary,” we essentially pose two separate questions: (1) Is the sentence enough punishment? and (2) Is the sentence too much punishment? Appellate courts have had no difficulty finding unreasonableness when asking the former. We should likewise be willing to find that, in a case that warrants it, “a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing,” *Kimbrough*, 128 S. Ct. at 564 (quoting § 3553(a)). Our appellate sentencing review should not develop into a one-way ratchet upwards. Just as the district court has an obligation not to assume the Guidelines are automatically reasonable, we too – as a circuit that does not apply a reasonableness presumption – are obligated to ask whether a within-Guidelines sentence is reasonable without any thumb on the scale.

United States v. Docampo, 573 F.3d 1091, 1111 (11th Cir. 2009) (Barkett, J., concurring in part and dissenting in part) (footnote and citation omitted).

The Commission should not promote any action that would fuel this tendency toward imbalance.

electronic copy available at <http://ssrn.com/abstract=1433581>.

¹⁰⁶ Brief Amici Curiae of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioner, *Rita v. United States*, No. 06-5754, Appendix at *8a, 2006 WL 3760844 (sentences appealed December 1, 2005 through November 30, 2006).

¹⁰⁷ *Id.* at *14a.