

Departures & Variances

USSC National Seminar

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Moderator & Panelists

- Hon. Charles Breyer
 - Vice Chair, U.S. Sentencing Commission
 - U.S. District Judge, Northern District of California
- Hon. Julie Robinson
 - U.S. District Judge, District of Kansas
- Nina Goodman, Esq.
 - Senior Counsel for Appeals, Criminal Division, DOJ
- Jon Sands, Esq.
 - Federal Public Defender, District of Arizona

Sentencing in the Advisory Guidelines System

- District judges have discretion to impose sentences based on the broad factors in 18 USC § 3553(a)(1)-(7)
- Correct guideline calculation is the required starting point in sentencing
- Sentences are reviewed for “reasonableness”

18 USC § 3553(a)

The court is to impose a sentence *sufficient but not greater than necessary* to comply with the “purposes of sentencing” in Section 3553(a)(2)

§ 3553(a)(1) - (7) Factors

The court shall consider:

(1) Nature & circumstances of offense;
history & characteristics of defendant

(2) “Purposes of sentencing”

Punishment, deterrence, incapacitation & rehabilitation, **BUT**
court may not impose or lengthen prison term to promote
defendant’s rehabilitation *Tapia v. U.S.*, 131 S. Ct. 2382 (2011)

§ 3553(a)(1) - (7) Factors (cont.)

(3) Kinds of sentences available

(4) The sentencing guidelines

(5) The guideline policy statements

(6) Avoiding unwarranted sentencing disparities

(7) Need to provide restitution

3-Step Approach to Federal Sentencing

3-Step Approach to Federal Sentencing

1. Correctly calculate and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines (pursuant to § 3553(a)(4))

3-Step Approach to Federal Sentencing (cont.)

2. Consider the guidelines policy statements, including those addressing departures (pursuant to § 3553(a)(5)), and decide whether a guidelines departure is warranted.

Guidelines Manual

Policy Statements

- Express the Sentencing Commission's policy judgments regarding various sentencing considerations
- Include the Commission's policy regarding departures from the calculated guideline range

3-Step Approach to Federal Sentencing (cont.)

3. Consider the factors in § 3553(a) and select the appropriate sentence, which may be:
- Within the advisory guideline system:
 - a sentence within the guideline range, or
 - a “*departure*” (under the guidelines policy statements)

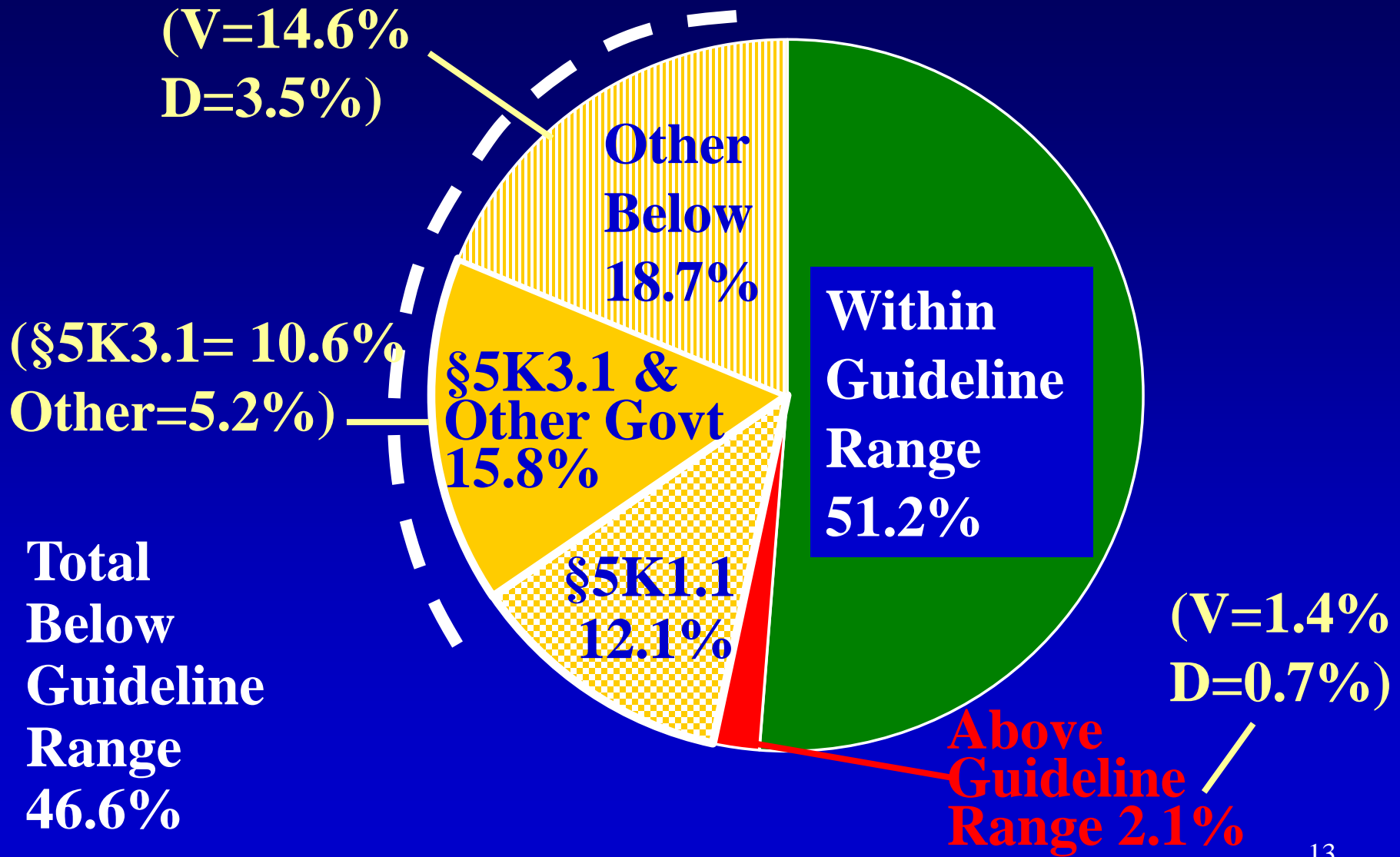
OR

 - Outside the advisory guideline system:
 - a “*variance*” (under the § 3553(a) factors)
- ❖ In exercising its sentencing discretion, the district court may not presume that a guideline sentence is appropriate.
Nelson v. U.S., 555 U.S. 350 (2009).

Sentences Resulting Under 3-Step Approach

- One within the advisory guideline system:
 - a sentence within the guideline range: **51.2%**
 - a “*departure*”: **32.1%**
 - One outside the advisory guideline system:
 - a “*variance*”: **16.0%**
- Unknown: 0.7%

Position of Sentences in Relation to Guideline Range National - FY 2013



SOURCE: U.S. Sentencing Commission, 2012 Datafile USSCFY12: 78,628 of 80,035 cases

Departures

Policy Statements Regarding Departures

- Chapter One, Part A
- Chapter Five, Part K
 - **§5K1.1 Substantial Assistance**
 - §5K2.0 Grounds for Departure
 - §5K2.1 – 2.23 Various bases for departures
 - **§5K3.1 Early Disposition Programs (“Fast Track”)**

Policy Statements Regarding Departures (cont.)

- Chapter Five, Part H - Specific Offender Characteristics
- §4A1.3 - Inadequacy of Criminal History Category
- Other specific commentary
- **Note:** comprehensive List of Departure Provisions in back of *Guidelines Manual*

Variations

Variations Based on Case-Specific Factors

- District courts may vary from the guidelines based on case-specific circumstances, including factors that are taken into consideration by the guidelines (*e.g.*, criminal history) or that are discouraged or forbidden grounds for departures (*e.g.*, a defendant's family circumstances).

Variations Based on Policy Disagreements

- District courts may also vary from the guidelines based on a policy disagreement with the Commission.
 - *Kimbrough v. U.S.*, 128 S. Ct. 558 (2007)
 - *Pepper v. U.S.*, 131 S. Ct. 1229 (2011)
- Regardless of the basis for the variance, the court must give a reasoned explanation of the sentence.

Notice for Sentences Outside the Applicable Guideline Range

- Notice is required for a departure
 - *Burns v. U.S.*, 501 U.S. 129 (1991)
 - Federal Rule of Criminal Procedure 32(h)
 - Can be satisfied if the ground is identified in the presentence report or in prehearing submissions
- Notice is NOT required for a variance
 - *Irizarry v. U.S.*, 553 U.S. 708 (2008)

Standards of Review: De Novo, Clear Error, & Reasonableness

- Appellate courts review challenges to guideline calculations, applying
 - **De novo** review for questions of law
 - **Clear error** review for factual determinations
- Appellate courts review the ultimate sentence for **reasonableness**, applying a deferential abuse-of-discretion standard

Procedural Reasonableness and Substantive Reasonableness

- Sentences are first reviewed for procedural reasonableness, *e.g.*,
 - Correct guideline application
 - Proper consideration of the § 3553(a) factors
 - The court did not treat the guidelines as mandatory or presumptively reasonable.
 - The court addressed all non-frivolous arguments made by the parties.
 - The court adequately explained the sentence.

Procedural Reasonableness and Substantive Reasonableness (cont.)

- *If* the sentence is procedurally reasonable (or any procedural error is harmless), the court of appeals reviews the sentence for substantive reasonableness
 - In reviewing for substantive reasonableness, “the appellate court will take into account the totality of the circumstances, including the extent of any variance from the Guidelines range, * * * but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”

Gall v. U.S., 552 U.S. 38, 51 (2007)

Departures & Variances

Hypothetical Scenarios

Felon in Possession

- Defendant convicted at trial under 18 U.S.C. § 922(g)
- OL 15, CHC V: 37-46 months
- Defendant absconded from parole, apprehended by police after a high-speed chase, a pistol was found under the passenger seat.

Felon in Possession (cont.)

- Defendant's prior offenses are non-violent: drug possession and check kiting
- Defendant struggled with a meth addiction, relapsing in the months prior to the instant offense
- Claims his PO had said it was OK for his wife to own a gun, and she had accidentally left it in the car.

Felon in Possession (cont.)

- Would a departure or variance be appropriate in this case?
- What if:
 - The gun was stolen or obtained illegally?
 - Defendant had violent priors? (GL range would be significantly higher under §2K2.1)
 - Defendant had allowed a juvenile to borrow the gun on previous occasions?

Felon in Possession cont.

- In FY2013, the average sentence for a defendant sentenced under §2K2.1 at OL 15 and CHC V (37-46 months) was 40 months.
- 63% were sentenced within the guidelines range; 7.4% above range; 7.4% gov't-sponsored below range; 22.2% non-gov't-sponsored below range.

Immigration

- Pled guilty to 8 U.S.C. § 1326(b); illegal reentry by an aggravated felon.
- OL 21, CHC II: 41-51 months
 - enhancement for prior drug trafficking offense
 - reductions for acceptance & “fast track”
- Sole prior conviction was delivery of a kilo of cocaine 3 years earlier.

Immigration (cont.)

- Def. claims he served as a courier on a single occasion as a “favor” to a friend
- Def. is now 28, first entered U.S. at 20 and has worked landscaping and construction jobs – no family in this country
- Defendant does not have a substance abuse problem.

Immigration (cont.)

- Is a departure or variance appropriate?
- What if:
 - Def. had multiple prior deportations? DUIs?
 - Def. had a drug addiction at the time of the prior offense?
 - Def. had first been brought to the U.S. by his parents at age 9, and had no family in his native country?
 - Fast track was unavailable?

Immigration cont.

- In FY2013, a defendant sentenced under §2L1.2 at OL 21 and CHC II (41-51 months) received an average sentence of 30 months.
- 29.5% were sentenced within range; 0.1% above range; 39.3% gov't-sponsored below range; 31.1% non-gov't-sponsored below range.

Drugs

- Defendant convicted at trial of 21 U.S.C. §841(a)(1) & (b)(1)(D); PID 45 kilos of marijuana.
- Def. was caught driving a tractor trailer across the border with the drugs hidden in wheel wells. He claims a stranger at a Mexican truck stop asked him to transport the load in exchange for \$5,000.

Drugs cont.

- OL 17, CHC II: 27-33 months
- Defendant is an Afghanistan war veteran who has been diagnosed with PTSD
- His prior convictions for misdemeanor assault and DUI occurred after his return from the war.

Drugs cont.

- Departures under §5H1.11 (military service), §5K2.13 (diminished capacity), or §5K2.20 (aberrant behavior)?
- Is a departure or variance otherwise appropriate?
- What if:
 - Def. was a passenger and claims he only helped load the drugs under pressure from driver?
 - Def. admits he carried a similar load once before?

Drugs cont.

- In FY2013, defendants sentenced under §2D1.1 at OL 17 and CHC II (27-33 months) received an average sentence of 23 months.
- 38.9% were sentenced within the guidelines range; 0.9% above range; 38.9% gov't-sponsored below range; 21.3% non-gov't-sponsored below range.

Child Pornography

- Defendant pled guilty to one count of distributing child porn via a P2P network; 18 U.S.C. § 2252A(a)(2)(A)
- OL 37 (SOCs for 600+ images, sadistic conduct, use of a computer, prepubescent minor, and distribution for a thing of value)
- CHC I
- 210-262 months, with the guideline range capped by statutory max of 240 months.

Child Porn (cont.)

- Def. claims he was molested by his grandfather from 8-10 years old, and began collecting C.P. after inadvertently discovering it on the internet several years before instant offense
- Def. was a guidance counselor, but there is no indication that he committed any contact offenses.

Child Porn (cont.)

- Under §5K2.0(b), downward departures in child sex cases are limited to grounds specifically identified in Chapter 5 Part K, among other restrictions.

Child Porn (cont.)

- Is a variance appropriate?
 - Is the extension of the guideline range past the stat. max. significant in itself?
 - Did the number of SOCs lead to an excessive offense level?
 - What if the def. communicated with other C.P. collectors on a message board, rather than using P2P only?

Child Porn cont.

- In FY2013, the average sentence for a def. sentenced under §2G2.2 at OL 37 and CHC I (210-262 months) was 124 months.
- 12.6% were sentenced within range; 0.0% above range; 27.8% gov't-sponsored below range; 59.6% non-gov't-sponsored below range.

Fraud

- Defendant, a Bureau of Indian Affairs employee, pled guilty to embezzling in excess of \$5,000 from a tribal organization; 18 U.S.C. § 1163
- OL13, CHC I: 12-18 months

Fraud (cont.)

- Def. embezzled a total of \$75K by submitting false expenses reports in connection with a project she was supervising
- Def. claims that she began the false claims when suffering financial difficulties as a single mother after her divorce, and intended to repay the money

Fraud (cont.)

- Because the defendant falls in Zone C, a split sentence is possible without departing or varying;
- Possible grounds for departure under §5H1.6 (family ties), but requirements are fairly restrictive.

Fraud (cont.)

- Is a variance appropriate?
 - If defendant supervised multiple similar projects over decades with no improprieties?
 - If the tribe was unable to complete a community center because of the embezzlement?
 - If some of the funds were spent on luxury goods?

Fraud cont.

- In FY2013, the average sentence for a defendant sentenced under §2B1.1 at OL 13 and CHC I (12-18 months) was 9 months.
- 34.7% were sentenced within range; 1.0% above range; 25.6% gov't-sponsored below range; 38.7% non-gov't-sponsored below range.