

**Statement of Alexander Bunin
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**Public Hearing Before the
United States Sentencing Commission**

**“The Sentencing Reform Act of 1984: 25 Years Later”
New York, New York
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I thank the Commission for inviting me to testify on behalf of the Federal Public and Community Defenders regarding how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted, and what changes can be made to improve it. 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).

My career as a lawyer tracks the history of the sentencing guidelines. In 1986, I began practicing law as a criminal defense lawyer in Houston, Texas. During those first years, the majority of my cases were in state courts, but I also represented federal criminal defendants in the Southern and Western Districts of Texas. In 1993, I was hired as an Assistant Federal Public Defender in the newly created office for the Eastern District of Texas. In 1995, I was chosen to establish and operate a new federal defender organization in the Southern District of Alabama.

In 1999, I was appointed by the United States Court of Appeals for the Second Circuit to establish Federal Public Defender offices for the Northern District of New York and the District of Vermont. I am in my third four-year term as Federal Public Defender for Northern New York.¹

In most of the thousands of cases in which I either personally appeared or oversaw, the defendants were sentenced under the federal sentencing guidelines and many were controlled by mandatory minimum punishments. During those 23 years of practice under the guidelines, in different parts of the United States, I have come to two conclusions. The first is that a prosecutor’s decision to charge a defendant in federal court, and what federal charges to bring, is vastly more determinative of the sentence than any other factor in the process – much more than the identity of the particular judge hearing the case. My second conclusion is that the sentencing practices of individual judges have not contributed to unwarranted disparity.

When I was an Assistant Federal Public Defender in Beaumont, Texas, a large portion of my cases involved illegal drugs transported east on Interstate 10. About 20

¹ In 2006, Vermont separated and now has its own Federal Public Defender.

miles southwest of Beaumont is the line dividing Chambers and Jefferson counties. Chambers County is in the Southern District of Texas and Jefferson County is in the Eastern District. If a person is transporting 100 kilograms of marijuana on I-10 it makes a world of difference where they are stopped and arrested. In Chambers County there is virtually no chance that charges will be filed in federal court. It is too small a case. The defendant will be prosecuted in state court, and might pay a large fine and receive probation. In Jefferson County, the case will likely become a federal prosecution in which there is a mandatory five-year prison sentence. There is no difference between the two cases except an imaginary line on the highway and two districts' charging policies.

However, during my entire time in Beaumont, I never saw a federal immigration crime charged. It was not because there were no non-Citizens living in Southeastern Texas in violation of federal law. It was because there was no active Border Patrol or Immigration and Customs Enforcement office looking to make cases. In the Northern District of New York, a large portion of our docket is comprised of immigration offenses. Even persons entering the United States with legitimate political asylum claims are prosecuted.² Therefore, decisions made by the federal government regarding where federal criminal laws will be enforced, and where they will not, has a drastic effect on national sentencing disparity.

These are systemic disparities that occur because United States Attorneys have different priorities based upon factors like urban vs. rural population, the coordination between state and federal law enforcement, proximity to an International Border, and the peculiarities within different prosecutors' offices. It has also been recognized that some regional disparities are simply inherent and unavoidable.³ Many other disparities are merely fortuitous.

For instance, in a multi-defendant case, when a defendant is debriefed pursuant to a cooperation agreement, self-incriminating information may not be used to calculate his guidelines. *See* U.S.S.G. § 1B1.8. However, by incriminating others, that first defendant prevents the others from receiving that same benefit, even if their assistance to the government was not motivated by his cooperation, because it will be deemed as coming from an independent source. It is equally arbitrary that even the initial cooperating defendant will lose this opportunity if the statements are not made pursuant to a negotiated agreement, which he may neither have the understanding to pursue, nor a lawyer to assist him.

My conclusion -- that sentencing disparity is largely driven by charging disparity - is within the province of the Commission in two ways. First, it is responsive to 28 U.S.C. § 994(o), which says, "the Commission shall review and revise ... the guidelines

² *See U.S. v. Malenge*, 294 Fed. Appx. 642, 2008 WL 4420023 (2d Cir. 2008).

³ *See e.g.*, Michael O'Hear, *Federalism and Drug Control*, 57 Vand. L. Rev. 783, 821-22 (2004) (discussing the distortion of drug policy by federalization and the understandable regional differences).

... [and in doing so] consult with ... representatives of ... the Federal criminal justice system,” and also 28 U.S.C. § 995(a)(20), requiring the Commission to recommend to Congress changes to statutes to “carry out an effective, humane and rational sentencing policy.” To the extent that statutes, particularly mandatory minimum punishments, skew the system by encouraging and compounding charging disparity, the Commission should recommend to Congress that those statutes be eliminated.

Second, charging disparity is relevant to understanding my other conclusion -- that the sentencing practices of individual judges across the United States do not themselves contribute to unwarranted disparity in any significant way, and often help check disparity, under the present sentencing system. In other words, the current method of advisory guidelines works well.

I have appeared as defense counsel in federal sentencing hearings before at least 18 different United States District Judges in a half-dozen districts. Some judges spent their entire time on the bench implementing the sentencing guidelines. A few preceded that model. In Beaumont, I appeared before the now deceased Hon. Joe Fisher, who had been appointed by President Eisenhower, and spent 35 years as the sole federal district judge for Eastern Texas. For 38 years, he sentenced defendants without any guidelines.

Among the various judges before whom I appeared, virtually all expressed dissatisfaction with mandatory minimum punishments, particularly in drug crimes. Some did not like mandatory guidelines. However, none of those judges indicated they wanted to go back to a system without guidance of any kind except the top and bottom of the statutory range. All appreciated the assistance of the guidelines and only felt unnecessarily constrained when some requirement, whether a mandatory minimum, a prohibition on departure, or a restrictive appellate interpretation, kept them from fairly and individually addressing the defendant before them.

Like most of the judges, probation officers, academics, and community representatives who have testified before you, the Defenders believe that the current advisory guideline system is better than what preceded it. Judges must now impose a sentence that is sufficient, but not greater than necessary, in order to achieve just punishment, respect for law, deterrence, protection of the public, and rehabilitation. In doing so, judges must consider the applicable guideline range, all of the circumstances of the offense, and the history and characteristics of the defendant. Judges can openly disagree with a guideline sentence, even in an ordinary case.⁴

The Defenders support this system because sentences are more just, honest, and respectful. Except when a mandatory minimum statute applies, judges are no longer required to impose sentences that they believe are too severe. Defendants are no longer

⁴ See *Cunningham v. California*, 549 U.S. 270, 279-81 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

told that the judge has no choice but to impose an excessive sentence, unless a mandatory minimum applies. Judges can explain the sentence in terms of the defendant's situation and what purpose the sentence is meant to accomplish.

The Defenders also support the advisory guideline system because it can result in the evolution of more humane and rational guidelines. As the Supreme Court has said, when judges sentence outside the guideline range based upon the purposes and factors set forth in § 3553(a), those judges are providing “relevant information” to the Commission so that the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw.” *Rita*, 127 S. Ct. at 2469. The “Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.” *Booker*, 543 U.S. 264.

Because judges are comfortable with the process of calculating and applying guidelines and because the guideline range is still the initial benchmark, the change from mandatory to advisory guidelines has had little effect. The national rate of below-guideline sentences -- both those requested by prosecutors and those imposed by judges without the government's agreement -- has moderately increased since before *Booker*. The fact is, many of the new below-guideline sentences imposed by judges actually prevent rather than increase unwarranted disparity. The guideline sentence in many cases is too severe given the seriousness of the crime, because the guidelines fail to take into account many relevant mitigating factors, such as the culpability of the defendant. By sentencing below the guideline range, the judge is able to impose a sentence more similar to other offenses of comparable seriousness. A sentence within the guideline range would create, rather than prevent, true disparity.

At the same time, because there is a consistent relationship between recommended guideline ranges and the sentences imposed, average sentence length initially rose due to increases in guideline ranges for economic and sex crimes, USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* at 73 (March 2006), then decreased due to the Commission's reduction in the guideline range for crack offenses and lower guideline calculations in illegal re-entry cases.⁵ USSC, *Preliminary Quarterly Data Report*, Figures C-H (through March 31, 2009). The difference between the average minimum guideline range and the average sentence length does not appear to have widened over time. *Id.*

Even if one accepts the concept that “disparity” is defined only as sentences below the guideline range, the government is more of the cause than are judges. The nationwide rate of below-guideline sentences sought by the government is twice that at which judges impose below-guideline sentences without the government's approval (judges 13.4% and government-recommended 25.6%). The government rate for

⁵ The lower average guideline calculation in illegal re-entry cases is due to narrowing constructions by the courts of “drug trafficking offense” and “crime of violence,” and because the government is bringing more § 1326(a) prosecutions.

sponsoring below-guideline sentences is about equal to the judicial rate in the Seventh Circuit, is less than the judicial rate in the First and Second Circuits, and is greater than the judicial rate in the other ten circuits. *See* USSC, 2008 Sourcebook, Tables N-N-11. The government rate exceeds the judicial rate in 69 of the 94 judicial districts. *Id.*, Appendix B. The differences between the lowest and highest government rates by circuit and by district are greater than the differences between the lowest and highest judicial rates by circuit and by district.⁶ The government rate excludes Rule 35 reductions, which are used frequently in some districts. Concern with disparity should be focused on judicial departures and variances only if one accepts the premise that any non-guideline sentence sought by the prosecution is warranted, a premise at odds with the Commission's own research and Congress's concern with unwarranted disparity caused by plea bargaining.⁷

Judges are required to impose sentences that are sufficient but not greater than necessary to achieve the purposes of sentencing. Those sentences are based on all of the relevant facts of the offense and the offender. They are announced in public and are subject to appellate review. On the other hand, DOJ policies require federal prosecutors to seek the harshest sentence possible. Although this is supposed to be a national directive, some offices follow it and others do not. Most often, it is used as a threat to induce guilty pleas and cooperation, or as punishment for going to trial. The disparities in whether and how this policy is implemented depend on different philosophies among U.S. Attorneys, of supervisors within their districts, and of individual line prosecutors. Each U.S. Attorney's Office has its own standards for rewarding cooperation, and these may vary even among divisions in the same district.

My district has no fast track program even though we have a substantial number of immigration cases (about 21%), and a lengthy International Border. It is difficult to see any relevant difference between some of the districts that lack fast track programs and those that have them. All of these decisions by prosecutors are made in secret and are not subject to appellate review.

Even when the guidelines were mandatory, there were variations among districts and circuits,⁸ and these variations increased in drug trafficking cases as prosecutors and

⁶ The difference between the highest and lowest government rates by circuit is 26.7 percentage points (15.9% in the First Circuit, 42.6% in the D.C. Circuit), while the difference between the lowest and highest judicial rates by circuit is 21 percentage points (7.2% in the Fifth Circuit, 28.2% in the Second Circuit). The difference between the highest and lowest government rates by district is 58.82 percentage points (1.12% in Eastern Oklahoma, 59.94% in Arizona), while the difference between the lowest and highest judicial rates by district is 36.51 percentage points (5.56% in the Northern Mariana Islands, 42.07% in Delaware).

⁷ USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998); *Fifteen Year Review* at 10, 81-92.

⁸ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 99-102 (Nov. 2004) (hereinafter "Fifteen Year Review").

judges compensated for the unwarranted severity of the drug trafficking guidelines.⁹ Regional variations are unavoidable. Judges must consider “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹⁰ The kinds of offenses and their seriousness, as well as community views of just punishment, differ by district. Since “retribution imposes punishment based upon moral culpability and asks [what] penalty is needed to restore the offender to moral standing within the community,”¹¹ the “community view of the gravity of the offense” and the “public concern generated by the offense” are relevant, as Congress itself recognized.¹² See *United States v. Cavera*, 550 F.3d 180, 195 (2d Cir. 2008) (en banc); *United States v. Politano*, 522 F.3d 69, 72 (1st Cir. 2008). By failing to take into account local conditions and norms a blind application of the guidelines can foster unwarranted disparity.¹³

I have reviewed the Commission’s statistics for the four circuits and 23 districts in the region covered by this hearing. I have conferred with my colleagues in most of the districts. As compared to 2001, the rate of government-sponsored below-guideline sentences has increased in nine districts, stayed about the same in eight districts, and decreased in six districts. The rate of judicial below-guideline sentences has stayed about the same in four districts, and has increased in the other 19 districts. Increases appear to be caused by the composition of the cases, prosecution policies, or both.

In particular, there have been more judicial below-guideline sentences in cases involving guidelines that frequently recommend punishments that are greater than necessary (e.g., drug cases, career offender cases, crack cases, immigration cases without fast track, certain kinds of firearms cases, and child pornography cases). Other increases are related to the charging and plea bargaining practices of the government. The following observations document those trends.

⁹ *Id.* at 140; Hofer, Blackwell & Ruback, *supra* note 46, at 303-04; Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1134 (2001).

¹⁰ See 18 U.S.C. § 3553(a)(2)(A).

¹¹ *United States v. Cole*, slip op., 2008 WL 5204441 *4 (N. D. Ohio Dec. 11, 2008).

¹² See 28 U.S.C. § 994(c)(4), (5); see also S. Rep. No 98-225 at 170 (1983) (“community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense.”).

¹³ See Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721, 741-43 (2002) (explaining why federal-state disparities should be considered at sentencing); Vincent L. Broderick, *Local Factors In Sentencing*, 5 Fed. Sentencing Rep. 314, 314 (1993) (“Local variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government.”).

D.C. Circuit. In the District of Columbia, the rate of government sponsored below-guideline sentences is 42.6%, while the judicial rate is 18%. The judicial rate has increased from 11.2% in 2001, and the government rate has increased from 13.8% in 2001 and from 31.1% in 2002. Drug cases comprise 52% of the cases (up from 1/3 in 2001), with 30% powder cocaine and 43% crack cocaine. The increase in judicial and government-sponsored below-guideline sentences comes primarily from these cases. There is a high number of multi-defendant international drug trafficking cases where defendants frequently cooperate and receive substantial assistance departures (D.C. is the default venue for international drug trafficking cases brought under 21 U.S.C. § 959). In addition, judges frequently vary downward from the guideline range in cases involving crack cocaine. The government has moved for below-guideline sentences for reasons other than substantial assistance in 8-11% of cases since *Booker* was decided. The unusually high rate of these government-sponsored departures is probably explained by *United States v. Smith*, 27 F.3d 649 (D.C. Cir. 1994), which allows for a minor departure for deportable aliens who will be removed without receiving the benefits of halfway house placement and supervision.

First Circuit. In the First Circuit, the rate of government sponsored below-guideline sentences is 15.9%, while the judicial rate is 19.8%. In Maine, the government and judicial rates mirror the national averages, with 13.4% for judges, 23.3% for the government. In New Hampshire and Puerto Rico, the government and judicial rates are about equal, with a fairly significant increase for judges in New Hampshire (from 10.2% in 2001 to 24.6% in 2008), and a fairly significant increase for the government in Puerto Rico (from 6.8% in 2001 to 12% in 2008). Prosecutors in New Hampshire increasingly agree with defense motions for variance, including in crack cases, since the time the Attorney General's support for eliminating the disparity was announced.

The largest increases in the judicial rate, and the least movement in the government rate, were in Massachusetts and Rhode Island. This is the result of the types of cases and prosecutorial policies. Like many districts, Massachusetts has had an increase in immigration cases, but has no fast track program. Judges often find the guideline range to be excessive in these cases (29.7%).

Under the outgoing U.S. Attorney in the District of Massachusetts, a large number of minor drug cases were prosecuted in federal court that previously would have been state cases. One-gram crack cases, resulting in decades-long career offender sentences, were not uncommon. The predicate crimes were often misdemeanors because in Massachusetts they are punishable by up to two and a half years.

At the same time, it was the policy of the Massachusetts U.S. Attorney (before and after *Booker*) to bring every available mandatory minimum in every case, including §851s, §924(c)s, and §924(e)s, to refuse to bargain them away in most cases, and to infrequently file substantial assistance motions. As a result, judges exercised their discretion more frequently in order to cure inequities, resulting in an increase from 22.8% in 2000 to 31.4% in 2008. In contrast, the government rate decreased from 22.1% in

2000 to 15.9% in 2008. More recently, the government has agreed to sentences below the guideline range for reasons other than substantial assistance in some cases, and has a new policy that prosecutors can agree to a sentence up to 20% below the guideline range for reasons under § 3553(a) with approval of the unit head.

In Rhode Island, the government rate (9.1%) has stayed the same or even decreased since *Booker*. The judicial rate has increased from 13% in 2001 to 29.6% in 2008. There were only 89 cases in Rhode Island in 2008. About a quarter of those were drug cases, two thirds of which were crack cases. Most of the crack defendants are low-level dealers. In the typical case, an agent or CI buys two eight balls to get the quantity over 5 grams, so the mandatory minimum can be charged. The defendants do not have much information to give, and the government's standard for moving for a substantial assistance departure is demanding. Judges frequently sentence below the guideline range in these cases when they are not constrained by a mandatory minimum. In addition, Rhode Island has no fast track program, though the percentage of immigration cases in its caseload (14.6%) is higher than some districts that have fast track programs. Judges found that the illegal re-entry guideline was inappropriate in 23.1% of those cases.

Second Circuit. In the Second Circuit, the government and judicial rates of below-guideline sentences are about the same (28.2% for judges, 25.7% for the government), as has always been the case (in 2001 it was 20.4% for judges, 21.7% for the government). In Connecticut, Vermont, and the Eastern, Northern, and Western Districts of New York, there has been little or no change in the judicial below-guideline rate compared to 2001. In Connecticut and the Eastern District of New York, the government rate has increased significantly since *Booker*, while it has stayed about the same, more or less, in the other districts.

The only change of note in the Second Circuit is the increase in the judicial rate of below-guideline sentences in the Southern District of New York, from 12.2% in 2001 to 35% in 2008. The below-guideline rates in drug (31.7%) and fraud (34.6%) cases reflect a longstanding and widespread recognition that drug and loss quantities frequently are not a good measure of culpability. Cumulative enhancements under the fraud guideline in some of the types of cases prosecuted in the district can otherwise produce excessive sentences. In addition, because the illegal re-entry guideline frequently recommends a sentence that is greater than necessary, and there is no fast track program, judges sentence below the guideline range in 39.8% of these cases.

Third Circuit. In the Third Circuit, the government rate of below-guideline sentences is 25.8%, while the judicial rate is 19%.

In the Middle District of Pennsylvania, there was a small increase in the judicial rate from 9.3% in 2001 to 12.3% in 2008, and slight fluctuations for the government (33.4% in 2001, 39.6% in 2007, 29.9% in 2008). The District of New Jersey saw a relatively modest increase in both the judicial and government rates of below-guideline sentences as compared to 2001 (from 11.2% to 17.8% for judges, 25.7% to 29.5% for the government). A third of New Jersey's cases are drug cases.

In the Western District of Pennsylvania, the rate of below-guideline sentences imposed by judges increased from 8.5% in 2001 to 19.4% in 2008, while the government rate decreased from 19.2% in 2001 to 11.7% in 2008. Judges in this district often impose sentences below the guideline range in career offender cases. A very active state/federal joint task force chooses which cases will be prosecuted in federal or state court, based upon where the highest sentence can be obtained. As a result, this district has a large number of career offender and ACCA cases. The career offender guideline applies to many low-level drug offenders, and the predicates are often state misdemeanors, such as simple assault, punishable in Pennsylvania by up to two years. The district has a fairly high drug caseload (28.7%), half of which are crack cases. Judges in this district rarely follow *Kimbrough*'s invitation to disagree as a matter of policy with the crack guidelines, but impose below-guideline sentences based on individual circumstances under § 3553(a). The low rate of government-sponsored below-guideline sentences may be explained by the increase in child pornography and firearms possession prosecutions, which do not often involve cooperation.

In the Eastern District of Pennsylvania, the judicial rate of below-guideline sentences has increased from 7% in 2001 to 22.8% in 2008. Over 30% of the caseload are drug cases, and over 30% of those are crack cases. The U.S. Attorney's Office in this district has always filed the maximum possible mandatory minimum charges, and refuses to bargain them away. Defendants typically have no choice but to plead guilty to the maximum charges and attempt to cooperate, or go to trial and risk a severe mandatory sentence.

While making no change in the maximum charging policy, the U.S. Attorney over the past eight years has cut back on the rate of substantial assistance motions in drug cases (from 52% to 58%). Sentence length in drug cases in the Eastern District of Pennsylvania has always been above the national average. Judges now impose below-guideline sentences in drug cases more frequently when they can (5.9% in 2001, 15.7% in 2008). A recent trend in firearms cases (21.7% of the caseload) is to split cases between state and federal court. In these cases, some judges adjust the sentence downward to acknowledge credit for time on the related state matter. There are also a number of minor straw purchaser cases, *e.g.*, girlfriends buying guns, in which some judges find the guideline overstates the seriousness of the offense. Further, this is another district with a growing number of immigration cases (8.7%) and no fast track program; the government has moved for a below-guideline sentence in 15.4% of these cases, and judges imposed a below-guideline sentence in 13.8% of these cases.

In Delaware, there were only 146 criminal cases in 2008. The judicial rate of below-guideline sentences was 42.1%. Delaware has no fast track program, though the percentage of immigration cases in its caseload (14.4%) is higher than some districts that have fast track programs. Judges in the District of Delaware sentence below the guidelines in 28.5% of illegal re-entry cases, and in 45.4% of drug cases. The Federal Defender in Delaware believes that the variance/departure rate in drug cases arises from a combination of two factors: over half the drug cases were crack cases, and the Third

Circuit's early recognition that judges have the power to vary based on the crack cocaine/powder cocaine sentencing disparity. *See United States v. Ricks*, 494 F.3d 394, 402-03 (3d Cir. 2007) ("the courts may consider the crack/cocaine differential as it applies to the particular case before them"). As in other districts, judges in Delaware have occasionally found the child pornography guideline to be greater than necessary.

In the Virgin Islands, there were only 82 cases in 2008. There was an increase in the judicial rate of below-guideline sentences from 6.7% in 2001 to 17.2% in 2008, while the government rate stayed about the same. The percentage of immigration cases in the Virgin Islands' caseload was 28.2% in 2008, and judges found the guideline greater than necessary in 35.7% of those cases.

Fourth Circuit. In the Fourth Circuit, the government rate of below-guideline sentences is 19%, while the judicial rate is 12.3%, both below the national average. Not much has changed in the District of Maryland, where the rate of below-guideline sentences imposed by judges has increased moderately, from 15.9% in 2001 to 20.7% in 2008, and the government rate has remained the same at about 28%.

In the Western District of Virginia, the rate of judicial below-guideline sentences is only 10.3%, though it has increased from only 2 or 3% in the early 2000s. There are a fair number of crack cases in this district, but the judges still decline to impose sentences based upon less than a 100:1 ratio. The government's below-guideline rate is 21.7%, about the same as it was in 2002, but Rule 35s are used in the Western District of Virginia more often than § 5K1.1 motions.

The Commission's statistics show a higher rate of judicial below-guideline sentences than government-sponsored below-guideline sentences in three of the five districts of the Fourth Circuit covered by this hearing. In the Eastern District of Virginia, there were 328 crack prosecutions in 2008, the highest number in the country. Nonetheless, the rate of judicial below-guideline sentences increased from 3.5% in 2001 to only 14.7% in 2008, and the increase appears to be largely in drug cases. Though the Commission's statistics show that the government rate is 7.6% (up from 6.9% in 2001), the government has always relied heavily on Rule 35 reductions. Rule 35 reductions vary but are frequently generous -- typically a 50% reduction or more.

In the Northern District of West Virginia, the judicial rate of below-guideline sentences increased from 6% in 2001 to 15.4% in 2008, and the government rate increased from 6% to 11.3%. However, the government regularly uses Rule 35s. The judicial rate nearly doubled between 2007 and 2008 in response to *Kimbrough*. In this district, 68.8% of the caseload are drug cases, and 70% of those are crack cases, with 222 crack cases in 2008. Low-level dealers never receive a reduction for substantial assistance because they have too little information to give.

In the Southern District of West Virginia, the judicial rate of below-guideline sentences increased from a mere 3% in 2001 to 19.5% in 2008, while the government rate stayed the same at about 10%. The judicial rate jumped from 4.4% in 2007 to 19.5% in

2008 in response to *Kimbrough* and *Gall*. Fifty-eight percent of the caseload are drug cases, and over 57% of those are crack cases, with 90 crack cases in 2008. The crack cases consist of low and mid-level offenders. There are a number of cases involving low-level drug offenders subject to the career offender guideline, for whom the guideline sentence is often greater than necessary. The relatively low rate of § 5K1.1 motions in drug cases (13.2%) may be explained by the fact that a controlled buy is required to receive a government motion, so those in custody are generally not eligible.

The above statistics and circumstances plainly show a stable sentencing system. No federal judges today are likely to receive the moniker “Maximum” before their given name. We are also unlikely to see a return to a practice in which business crimes are not treated seriously. This is because § 3553(a), including advisory guidelines, requires judges to impose a sentence that is both sufficient and no greater than necessary.

The Commission Should Respond to Judicial Feedback by Reducing Severity.

As judges impose sentences based on sentencing purposes, they are issuing more below-guideline sentences. This is because the guidelines recommend sentences that are often greater than necessary to achieve sentencing goals. Judges are also using their discretion specifically to avoid unwarranted disparity and excessive uniformity. If the Commission reacts by reducing the severity of the guidelines, there will be more sentences within the guideline range.

Under the mandatory guidelines, judges, prosecutors and defense lawyers, alone or together, often circumvented the guidelines to reach a sentence that was more just,¹⁴ but this “institutionalized subterfuge” is no longer necessary or acceptable. *See Spears v. United States*, 129 S. Ct. 840, 844 (2009). Since judges must explain their disagreements on a reasoned basis in terms of the § 3553(a) purposes and factors, this explains the rationale for the sentence to the defendant and the public, and provides useful information to the Commission. Judges can now avoid both unwarranted disparity and unwarranted uniformity because they must consider all of the “nature and circumstances of the offense and characteristics of the offender” that are relevant to sentencing purposes. *See* 18 U.S.C. § 3553(a)(1); *Gall v. United States*, 128 S. Ct. 586 (2007). And judges can now act as a check on the unwarranted disparity created by prosecutorial charging and plea practices.

The SRA did not call for “uniformity” in sentencing, but rather avoidance of unwarranted sentencing disparities. Unwarranted disparity is different treatment of offenders who are similar in ways that are relevant to the purposes of sentencing, and uniform treatment of offenders who differ in ways that are relevant to the purposes of sentencing.¹⁵ When judges decline to follow guidelines that create unwarranted disparity

¹⁴ Fifteen Year Review at 32, 82, 87, 141-42.

¹⁵ Fifteen Year Review at 80, 113.

or excessive uniformity, they are preventing these problems. As the Supreme Court has suggested, “advisory guidelines . . . and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” 128 S. Ct. at 573-74, quoting *Booker*, 543 U.S. at 264. As “the Commission revis[es] the advisory Guidelines to reflect actual sentencing practices consistent with the statutory goals,” “district courts will have less reason to depart from the Commission’s recommendations.” *Rita*, 127 S. Ct. at 2482-83 (Scalia, J., concurring).

The guidelines discussed below recommend sentences that are greater than necessary to achieve the purposes of sentencing. Sentencing data and decisions show that judges view these guidelines as being too severe. Empirical research, including the Commission’s own research, indicates that these guidelines recommend excessive punishment and create unwarranted disparity.

Drugs. The drug guidelines are too severe, and should be amended to reflect empirical data and national experience. As Judge Tjoflat said at the hearing in Atlanta and Judge Walker said at the hearing in California, the quantity-based drug guidelines are not justified by empirical research and are simply arbitrary. The Commission should give serious consideration and study to creating a set of drug guidelines based primarily on functional roles (*e.g.*, importer/high-level supplier, manufacturer/producer, launderer, wholesaler, street level dealer, courier/mule, etc.), with quantity perhaps as a secondary factor.

Calibrating the drug guidelines to mandatory minimums is contrary to the Commission’s basic responsibilities described in § 991(b)(1)(A), (B) and (C) and § 994(g). *See* Comments of the Criminal Law Committee of the Judicial Conference on Sentencing Commission amendments (March 16, 2007). It is not required by the general provision, added in 2003, that the promulgation of guidelines be “consistent with all pertinent provisions of any Federal statute,” § 994(a), as a mandatory minimum trumps a lower guideline, according to USSG § 5G1.1(b).

If the Commission still feels bound by the mandatory minimum statute, it can reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels. *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007).

Relevant Conduct. The Commission should eliminate uncharged and acquitted offenses, including cross-references to more serious offenses, from the guidelines. It is fundamentally unfair to sentence a defendant convicted of one offense based on another offense that was never charged, or of which he was acquitted. This creates disrespect for law. Attempts to explain it to clients, or indeed to any non-lawyer or any lawyer who does not practice federal criminal law, are met with disbelief. Moreover, the relevant rule does the opposite of the theory upon which it was based. It was thought that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining,

USSG, Ch. 1, Pt. A, ¶ 4(a), but the use of uncharged, dismissed, and acquitted crimes in calculating the guideline range has transferred sentencing power to prosecutors, and always has created hidden and unwarranted disparities.¹⁶ The relevant conduct rule “is not working as intended” and “tend[s] to work in one direction,” that is, by increasing sentences.¹⁷

The Commission should therefore reform the relevant conduct guideline to (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of “relevant conduct,” and (2) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3 and all cross-references in the Chapter Two guidelines.

In the Northern District of New York, the probation officers include the entire drug quantity or dollar amount from the moment the defendant joined the conspiracy as “jointly undertaken activity.” This is included on the basis that it was “foreseeable,” which is interpreted as “should have known.” Probation officers typically assume that the conduct was within the scope of the agreement, and shift the burden to the defendant to show that it was not. If the probation officer does not fix the problem, some of our judges accept the probation version wholesale.

Despite attempts to clarify the commentary, ambiguity in this rule has been a problem since the inception of the guidelines, resulting in extreme unwarranted disparities.¹⁸ Instead of using abstract terms like “reasonably foreseeable” and “scope of

¹⁶ See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the Guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the Guidelines, and “occurs in a context that forecloses oversight and obscures accountability”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission's mission of eliminating disparity based on race); Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”).

¹⁷ Fifteen Year Review at 92.

¹⁸ See Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997) (in a sample test administered by Commission researchers for the Federal Judicial Center in 1997, probation officers applying the rule sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant).

the specific conduct and its objectives embraced by the defendant's agreement," the Commission should try something more direct. For example:

In order for the defendant to be accountable for the acts or omissions of another person, the government must prove through concrete evidence that the defendant directly conspired with or aided and abetted that person, and knew about, intended and agreed to that person's acts or omissions.

Career Offender. The career offender guideline, promulgated in response to 28 U.S.C. § 994(h) and then broadened beyond the statutory terms, is contrary to the Commission's own research, the sentencing data, and judicial decisions.¹⁹ According to the Commission's research, the guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies, *i.e.*, those involving prior drug convictions, and has a disproportionate impact on African Americans.²⁰ We urge the Commission to present these findings to Congress with a recommendation that § 994(h) be repealed.

In the meantime, the Commission should narrow the guideline so that it applies no more broadly than required by statute. *See* Defender Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 8-19, September 8, 2008.

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

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

¹⁹ *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Marshall*, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Hodges*, slip op., 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009).

²⁰ Fifteen Year Review at 133-34.

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

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

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

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

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

Immigration. Many of the districts addressed here today have a significant percentage of immigration crimes on their dockets, but no authorized fast track programs. For example, immigration crimes account for 21% of the cases prosecuted in the Northern District of New York, and yet the government’s only concession is that it will not oppose an expedited plea and sentencing when the potential guideline range is zero to six months.

The Commission has found that the government’s selective use of fast track programs creates unwarranted disparity because defendants sentenced in districts without authorized fast track programs receive longer sentences than similarly situated defendants in districts with such programs.²¹ However, what makes fast track possible are the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis.²² Like the threat of a mandatory minimum, this guideline is used by prosecutors to coerce guilty pleas and dictate sentencing outcomes.

²¹ See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 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).

²² Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

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

Undocumented immigrants are treated more harshly than U.S. citizens because (1) they receive straight prison sentences at a much higher rate than U.S. citizens,²³ because they are not eligible for community confinement and judges generally do not impose probation because they cannot be supervised after deportation; (2) they are held in immigration custody for weeks or months before charges are brought and again after they serve their sentences before deportation, which BOP does not credit; and (3) they cannot participate in programs available to U.S. citizens in BOP, such as work and the RDAP program with its sentence reduction, and are often warehoused in private facilities that have harsh conditions and no programs whatsoever. The Commission should encourage downward departures or variances to take into account the time these defendants spend in immigration custody, and the harder time they serve.

Child Pornography. We are glad to see that the Commission has made amendments to and/or a report to Congress regarding this guideline a priority. USSG § 2G2.2 is dramatically flawed,²⁴ and many judges have found it to be unsound and inhumane.²⁵ Even the government increasingly agrees that this guideline is too severe. See USSC, Preliminary Quarterly Data Report, 2d Quarter Release, Table 5.

In the Northern District of New York, however, the guideline sentence is routinely imposed. In non-distribution cases, some prosecutors always file a receipt charge. Others charge only for possession, but with a threat to supercede if the defendant will not plead guilty quickly. In distribution cases, the government either offers nothing

²³ USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 4-5 & Tables 4 & 5.

²⁴ See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, July 3, 2008.

²⁵ See *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009); *United States v. Grober*, 595 F.Supp.2d 382 (D. N.J. 2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F.Supp.2d 997 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M. D. Fla. Dec. 19, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008).

or a plea to receipt and distribution. First offenders with no prior criminal record face punishments that are effectively life sentences.

Fraud. The fraud guideline, USSG § 2B1.1, can easily produce sentences that are greater than necessary to satisfy sentencing purposes. First, it “place[s] undue weight on the amount of loss involved in the fraud,” which in many cases “is a kind of accident” and thus “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”²⁶ Because loss often is not the best indicator of culpability, a guideline driven by loss treats different offenders the same. Second, § 2B1.1 imposes cumulative enhancements for many closely related factors which can make the recommended sentence in a run of the mill case as much as life.²⁷ Approximately forty specific offense characteristics replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3. This exemplifies “factor creep,” where “more and more adjustments are added” and “it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”²⁸

The initial Commission increased sentences for economic crimes above past practice to provide a “short but definite period of confinement for a larger proportion of these ‘white collar’ cases” in the belief that this would “ensure proportionate punishment and . . . achieve deterrence.”²⁹ As to deterrence, research has shown no difference in deterrent effect for white-collar offenders, presumably the most rational group of offenders, even between probation and imprisonment.³⁰ The Commission should now reduce the severity of this guideline, based on empirical data and national experience.

Mitigating Role Adjustment. The mitigating role adjustment does not work well in practice. One problem is that its effect is dwarfed by drug quantity or dollar amount, which often has nothing to do with culpability. Unless the Commission significantly reduces the effect of dollar amount and drug quantity, the commentary should say that in

²⁶ *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004).

²⁷ Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006); *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp.2d 506 (S.D.N.Y. 2006).

²⁸ Fifteen Year Report at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (Complexity of Guidelines has created a “façade of precision” which “undermines the goals of sentencing.”).

²⁹ Fifteen Year Review at 56.

³⁰ See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995); Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35 (Cambridge University Press) (2002).

some cases, such as those subject to quantity and loss-driven guidelines, the adjustment may not be adequate, and if not, the court should “depart” by increasing the impact of the adjustment accordingly.

In addition, unless and until the drug guidelines are revised to be based on role in the offense, the mitigating role adjustment should apply based on the defendant’s functional role as compared to other functional roles in the drug trafficking trade, even if the defendant was the sole participant. If the adjustment is meant to reflect reduced culpability, it should not depend on the happenstance of whether there are other known participants. The requirement that there be other known participants may explain why mitigating role adjustments are given so infrequently, and even less frequently in crack and methamphetamine cases, despite the fact that the government is not targeting kingpins. In FY 2008, only 20.7% of all drug offenders received mitigating role adjustments. Only 5.2% of crack offenders, and 13.8% of methamphetamine offenders received mitigating role adjustments; 19.8% of powder cocaine offenders, 41.8% of marijuana offenders, and 22.5% of heroin offenders received mitigating role adjustments.

Deleting the word “substantially” would be helpful. Examples should be given to illustrate that a defendant’s having been “integral” to the offense does not preclude the reduction, and to illustrate the proper application of Note 3(A).

Acceptance of Responsibility. The Commission should remove the government motion requirement for the third point for acceptance of responsibility under USSG § 3E1.1, or seek permission from Congress to do so if necessary. In many districts, the government uses this requirement as an offensive weapon, threatening the loss of the third point if defendants do not waive appeal and post conviction relief, or if they pursue motions to suppress. This is contrary to the language of the guideline, *i.e.*, “the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty,” and its stated purpose, *i.e.*, because the government “is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.” USSG § 3E1.1, comment. (n.6). However, since prosecutors are in sole control of the motion, they are free to apply whatever interpretation they wish.

USSG § 1B1.8, Use of Certain Information. This guideline excludes information from being used in calculating the guideline range if as part of a cooperation agreement the government agrees that it will not be used. The guideline can be read as only applying to information given after there is an agreement or as applying to information given before there is an agreement if the government later agrees.

The guideline is not applied consistently. Based on a survey of Defenders, the practice differs among districts, among prosecutors within a single district, and among cases. Some prosecutors agree that information provided before there is an agreement will not be used to calculate the guideline range. Others, as in my district, refuse to agree that pre-agreement statements are protected.

The problem can easily be cured by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements. Leaving it up to prosecutors creates unwarranted disparity.

The Commission Should Create an Alternatives Guideline Providing for Probation Where Permitted by Statute and a Split Sentence Where Probation is Not Permitted by Statute.

My colleagues Tom Hillier and Davina Chen covered alternatives to incarceration in some detail in their testimony before the Commission in May 2008. The issue was raised at that hearing that a number of drug trafficking offenders are not eligible for probation because the statutory maximum is more than 25 years.

It appears that 66% of drug trafficking offenders are not eligible for a sentence of probation because their statutory maximum is more than 25 years.³¹ See 2008 Sourcebook, Table 43; 21 U.S.C. § 841(b)(1)(A) and (B). Defendants convicted of an offense with a statutory maximum of more than 25 years are, however, statutorily allowed to be sentenced to prison for even one day. If, as the Commission has found, sentencing zone is the principal factor determining whether offenders are sentenced to alternatives,³² then these offenders, most of whom are in Zone D, are not receiving shorter prison terms with sensible supervisory conditions in appropriate cases as often as they should be.

We therefore suggest that the Commission adopt an alternatives guideline, including both the “in/out” option if probation is allowed by statute, and the option to impose a split sentence if probation is prohibited by statute.

The Department’s Proposed Rule Change Regarding Notice of Grounds for a Non-Guideline Sentence is Unworkable, Unnecessary, and Inconsistent with Supreme Court Sentencing Law.

The Department has proposed a change to Fed. R. Crim. P. 32(f)(1) that would require the parties to provide written notice of “any basis for departure or sentence otherwise outside the guideline range” at the time they file objections to the pre-sentence report, and a change to Rule 32(d)(1) that would require the Probation Officer to identify in the presentence report any basis for a sentence outside the guideline range. The Defenders oppose these proposals because they are unworkable, unnecessary, and inconsistent with Supreme Court law.

³¹ Sixty percent (43,251) of defendants sentenced in 2008 were U.S. citizens and 71% (17,150) of them were drug trafficking offenders. See 2008 Sourcebook, Table 9.

³² USSC, *Alternatives to Incarceration in the Federal Criminal Justice System*, at 12 (Jan. 2009).

My district has language similar to the Department's proposal in its Uniform Sentencing Order, which is entered in each case at the time of conviction.³³ The order is not enforced. First, the initial disclosure of the report by Probation to the parties virtually never occurs 45 days before the sentencing hearing as required. In most cases, we get the report about 21 days in advance of the hearing. This means that after the 14-day deadline for submitting objections and other grounds to Probation, there may only be about a week until the hearing. During this time, disputes among the parties are discussed, Probation must complete its final report and addendum, and then the parties must file sentencing memoranda. Therefore, rarely are the parties able to file their memoranda the full 14 days prior to the hearing. Sometimes the parties then even file responses to the other side.

The failure to rigidly enforce these, and other sentencing deadlines, has not caused anyone undue hardship in the Northern District of New York. Whenever someone needs more time, they ask for and receive it. Rule 32(b)(2) recognizes and approves such flexibility: "The court may, for good cause, change any time limits prescribed by this rule." Making the rule more specific and rigid is unlikely to change any local district practices, which seem to be working fine in any event.

The Department's witness at the last hearing testified that "variances are generally made without prior notice to the government" in the District of Oregon. Immergut Testimony at 6-7. The Defender in the District of Oregon has informed me, however, that notice of any grounds for a sentence outside the guideline range is provided to the government first in any plea negotiation letter, then in the sentencing memorandum, which is filed by local rule the Wednesday before the sentencing hearing. If the witness meant that judges do not give prior notice, they are not required to do so. *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

Based on my survey of Defenders across the country, the vast majority provide notice after the final presentence report is received from the probation officer, the week before sentencing, usually in a sentencing memorandum. The final report is due to the parties seven days before the sentencing hearing, about two weeks after objections are filed. Fed. R. Crim. P. 32(g). In many districts, objections are used in response to the initial draft of the report to dispute guideline application issues and guideline facts, and infrequently or never to identify grounds for a sentence outside the guideline range. It is often too soon to fully identify the grounds for a non-guideline sentence at the time of objections, and probation officers in many districts do not view it as their function to include such grounds in the presentence report. Instead, it is considered to be up to the parties to identify such grounds in their sentencing submissions. Several Defenders noted that they had attempted to have such information included in presentence reports, to no avail. The proposed change to Rule 32(d)(1) would require more work for probation

³³ "Objections to the presentence report, either by the government or defense counsel, shall be submitted in writing (in letter form) to the U.S. Probation Office, and opposing counsel within *fourteen (14)* days of disclosure of the report. The government shall, at the same time, make known whether it is their intention to make a motion under U.S.S.G. Section 5K1.1, for substantial assistance to the authorities. Both the government and defense counsel shall, at the same time, make known their intention to make any other motion for departure."

officers, and may appear to authorize them to decide an issue that is for the sentencing judge.

Because districts differ widely in their caseloads and local norms, the issue of notice by the parties is best left to local rules and practices. In my district, for example, the sentencing memorandum is due 14 days before the sentencing hearing, but is typically filed later because the final report is late. It is in the sentencing memo where the parties typically discuss departures or variances. Although the Order states that all departures are to be reported to Probation with objections,³⁴ even when we do, Probation rarely includes them in the final report, but merely refers to them in the addendum. My impression is that probation officers are uncomfortable adopting grounds alleged by defendants in what they consider to be their official version of the sentencing facts.

In most districts in this region, the parties identify grounds for a sentence outside the guideline range after the final presentence report is disclosed, usually in a sentencing memorandum. Sentencing memoranda are due four days before sentencing in the District of New Hampshire, five days before sentencing in the Middle District of Pennsylvania, five days or less in the District of Massachusetts, a week before sentencing in the Eastern District of Virginia and the Southern District of West Virginia, and ten days in the Districts of Maryland and Rhode Island. In the Eastern and Southern Districts of New York, there is no rule, but the defense usually files a sentencing letter a week before sentencing as a matter of local practice. In the District of Maine, a pre-sentence chambers conference is held right before or at most a week before sentencing, at which the parties disclose any grounds for departure or variance and provide exhibits in support. In these districts, when information comes to the parties' attention after the due date, they are not precluded from bringing it to the judge's attention, and sufficient time is given to the other side to respond.

The practice in the Northern District of West Virginia and the District of Vermont are similar to Northern New York, in that the basis for a sentence below the guideline range is supposed to be alleged with objections. Depending on the probation officer, the basis may or may not be included in the report at all or may not be completely included. Whether or not the basis makes it into the report, it is included in the sentencing memorandum, which is due three days before sentencing in the Northern District of West Virginia and seven days before sentencing in the District of Vermont. In both districts, if something comes up after objections or after the sentencing memorandum, the parties are not barred from presenting it, and the other side is given sufficient time to respond.

Disclosure of grounds for a sentence outside the guideline range before receipt of the final report is often premature and inefficient. First, the grounds often cannot be known or intelligently described until guideline application issues and factual disputes are resolved. For example, it is difficult for a lawyer to know how to frame an argument that the guidelines overstate the client's criminal history, or whether such an argument is even necessary, until she learns whether the probation officer and/or prosecutor will

³⁴ We presume this also includes variances since the Order was created prior to *Booker*, and has never been amended since.

concede previous objections to scoring prior convictions. Likewise, whether and how to frame arguments about the seriousness of the offense depends on how objections to guideline enhancements, such as drug quantity and loss amount, are resolved. Further, sentencing memoranda are better drafted and more useful to the judge when they cite pertinent paragraphs of the final presentence report.

Second, a basis for a sentence outside the guideline range is often not known until after the objections stage and much closer to the sentencing date or even, on rare occasions, during the sentencing hearing. Sometimes, through no fault of the defendant or defense counsel, we do not receive information justifying a variance from doctors, psychiatrists, employers, or family members until well after the objections stage. Further, when sentencing hearings are continued, for example to permit cooperation or for the convenience of the judge or the parties, important things can happen in the interim. For example, a client may provide stellar cooperation, get a job, complete drug treatment, or regain custody of her children. Further, the defendant has a right at sentencing “to speak or *present any information to mitigate the sentence.*” Fed. R. Crim. P. 32(i)(4)(A)(ii) (emphasis supplied). Victims also have a right to be “reasonably heard” at sentencing, Fed. R. Crim. P. 32(i)(4)(B), on the basis of which the government often argues for an above-guideline sentence. In situations like these, the Department’s proposed change to Rule 32(f)(1) would invite litigation over what consequences, if any, flow from not having disclosed a basis for a non-guideline sentence at the objection stage.

The better practice is that recommended by the Supreme Court and already followed in practice -- when a factual basis comes as a surprise to a party, the other party should seek a continuance and the judge should grant it. *Irizarry*, 128 S. Ct. at 2203. In my district, we rarely receive the final presentence report on time, so we rarely have our fully allotted 14 days to file our sentencing memoranda, nor does the government. As a result, the parties often do not receive the other’s submission until a few days before sentencing; we sometimes get the government’s response the day before. Whenever one party insists they have not had adequate time to review the other’s submission, a continuance is granted. Stricter rules on timing would not help and, at least in my district, would only be ignored.

In short, the Department’s proposal appears to be a solution in search of a problem. Since notice and an adequate opportunity to respond is given in every district of which I am aware, the proposal is unnecessary to meet the only legitimate interest the government could have. The rule would only embroil judges in disputes over a deadline that is often impractical, and may create issues for appeal. If the government has a problem in any particular district, it should seek a change to the local rules.

Finally, as the Court said in holding that judges were not required to give notice of their intent to sentence outside the guideline range in advance of sentencing, “a sentence outside the Guidelines carries no presumption of unreasonableness. . . . Although the Guidelines, as the ‘starting point and the initial benchmark,’ continue to play a role in the sentencing determination, . . . there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a District Court

may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).” *Id.* at 2202-03. To the extent the Department’s proposal suggests that the guidelines are presumptive, it is inconsistent with the law. *Nelson v. United States*, 129 S. Ct. 890, 892 (2009); *Gall*, 128 S. Ct. at 596-597; *Rita*, 127 S. Ct. at 2465. “Were a mechanical notice rule imposed, some judges would shy away from imposing non-guideline sentences that the parties had not proposed in advance, increasing the ‘gravitational pull’ of the guidelines, and compromising the greater freedom sought by *Booker* and *Rita*.” *United States v. Vega-Santiago*, 519 F.3d 1, 5 (1st Cir. 2008) (en banc). *Cf. United States v. Mejia-Huerta*, 480 F.3d 713, 722-23 (5th Cir. 2007) (“If we were to conclude that the advance notice requirement of Rule 32(h) applies to non-Guidelines sentences, we would re-elevate the Guidelines to a position it no longer enjoys.”).