

How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today

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In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court rendered the guidelines advisory, and then in a subsequent series of cases clarified the extent of a district court's discretionary sentencing authority. Under the advisory system in place today, sentencing judges are no longer bound by the constraints of the mandatory guideline system, but must consider all factors relevant to the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) and impose a sentence that, in their reasoned assessment, is "sufficient, but not greater than necessary" to serve the statutory purposes of sentencing under 18 U.S.C. § 3553(a)(2). They are free to decline to follow the recommended guideline range for reasons based on individualized mitigation circumstances, on a policy disagreement with the guideline range itself, or both. The applicable guideline range, now only one of several considerations under § 3553(a), is only the "starting point" and "initial benchmark" from which courts vary downward in a large percentage of cases.

Most clients sentenced before *Booker*—or after *Booker* but before the courts of appeals fully accepted the full scope of a district court's discretion—will be able to show that the sentencing judge would likely impose a sentence below the guideline range that would apply today under the advisory guideline system, whether that range is the same, lower, or higher.

When a client sentenced either before or after *Booker* would not be subject to a mandatory minimum today that previously trumped and made the guideline range irrelevant, whether because the prosecutor would not charge drug quantity to trigger a mandatory minimum, or would not file one or more § 851 notices, or in a crack case because of the Fair Sentencing Act, or because a prior offense would no longer qualify as a predicate, or for any other reason removing or lowering a previously applicable mandatory minimum, the guideline range that would apply today will become the relevant starting point from which the judge would likely vary downward today.

Part I of this memo describes the mandatory guideline system that was in place when most clients were originally sentenced. Part II describes the 2005 Supreme Court decision that rendered the guidelines advisory (*Booker*), the series of subsequent decisions in which the Supreme Court clarified the extent of a district court's discretion to vary from the advisory range (*Gall*, *Kimbrough*, *Spears*, *Pepper*), and how the courts of appeals ultimately accepted these decisions. Part III describes how to use these Supreme Court decisions to show that a sentence would likely be lower today under the advisory system, points to useful resources and information, and provides an example in a methamphetamine case.

I. The Mandatory Guideline System

From the time of its enactment as part of the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a) has directed judges (1) to consider the "nature and circumstances of the offense," the "history and characteristics of the offender," the "kinds of sentences available" by statute, the

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guidelines and pertinent policy statements promulgated by the Sentencing Commission, and the “need to avoid unwarranted sentence disparities,” and (2) in light of these considerations, to impose a sentence “sufficient, but not greater than necessary” to serve four sentencing purposes: “just punishment” in light of the seriousness of the offense, deterrence, incapacitation, and rehabilitation.¹

But from November 1, 1987 to January 12, 2005, § 3553(a) did not govern the sentencing process. Instead, under § 3553(b), a judge was required to impose a sentence within the guideline range unless it found “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b)(1). In making that determination, the judge could “consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.” *Id.* Meanwhile, the Commission promulgated guidelines and guideline amendments that consist primarily of aggravating factors and policy statements that prohibit or deem “not ordinarily relevant” most conceivable mitigating offender characteristics as grounds for departure, absent “extraordinary” or “exceptional” circumstances under the Commission’s “heartland” standard at USSG § 5K2.0.²

Taken together, 18 U.S.C. § 3553(b) and USSG § 5K2.0 were interpreted to mean that a district court’s authority to sentence outside the guideline range was controlled by the Commission’s departure policy statements and commentary, so that a district court abused its discretion if it departed from the guideline range for reasons prohibited by the Commission or not sufficiently extraordinary or unusual to meet its “heartland” standard. *See Koon v. United*

¹ The full text of 18 U.S.C. § 3553(a) is set out in Appendix 1.

² The very first Guidelines, through policy statements, deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be “not ordinarily relevant” as grounds for departure. USSG §§ 5H1.1 (age), 5H1.2 (educational and vocational skills), 5H1.3 (mental or emotional conditions), 5H1.4 (physical condition), 5H1.5 (employment record), 5H1.6 (family circumstances) (Nov. 1, 1987). Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited grounds. USSG §§ 5H1.4, 5K2.12 (Nov. 1, 1987). Over the years, the Commission placed further prohibitions and restrictions on mitigating factors as grounds for departure, further constraining district courts’ discretion to consider grounds for departure unless permitted by the Commission. *See, e.g.*, USSG §§ 4A1.3(b)(3)(A) (overstated criminal history for career offenders); 5H1.4 (gambling addiction), 5H1.6 (family ties and circumstances), 5H1.7 & 5K2.0(d)(3) (role in the offense), 5H1.11 (military, civic, charitable, employment-related contributions and similar good works), 5H1.12 (lack of youthful guidance, disadvantaged upbringing), 5K2.0(b) (sex crimes, crimes against children), 5K2.0(c) (multiple circumstances), 5K2.0(d)(2) (acceptance of responsibility), 5K2.0(d)(5) (restitution as required by law), 5K2.19 (post-sentencing rehabilitation), 5K2.13 (diminished capacity), 5K2.16 (voluntary disclosure), 5K2.20 (aberrant behavior).

States, 518 U.S. 81, 95-96 (1996). Departures based on a policy disagreement with a guideline, no matter how unjustified or misguided the guideline, were prohibited.³

Under this restrictive regime, sentences became increasingly severe while judges granted departures in only a small minority of cases. By 2001, the rate of non-government-sponsored (i.e., judicial) departures in all cases was at most 10.9%.⁴ In October 2003, Congress passed the PROTECT Act, which directly amended the *Guidelines Manual* to eliminate or restrict specific grounds for departure, instructed the Commission to reduce the incidence of departure, and authorized courts of appeals to review *de novo* any departure granted by the district court. See Pub. L. 108-21, § 401 (2003). After the passage of the PROTECT Act, judicial departures became even less common, with the rate dropping to just 5.2% in 2004.⁵

II. The Advisory System

A. *United States v. Booker*: The Supreme Court held the mandatory system violated the Sixth Amendment and made the guidelines advisory.

In *United States v. Booker*, 543 U.S. 220 (Jan. 12, 2005), the Supreme Court held that the mandatory guideline system violated the Sixth Amendment right to jury trial because judges, not juries, found the facts (such as drug quantity) that increased the maximum of the mandatory guideline range, which for Sixth Amendment purposes operated as the statutory maximum.⁶ To remedy the constitutional problem, the Court excised the two provisions that made the guidelines mandatory: § 3553(b) (limiting departures to those permitted by the Commission) and § 3742(e) (directing courts of appeals to review all departures under the *de novo* standard).

With § 3553(b) excised, § 3553(a) emerged as the controlling sentencing law. Under it, judges “shall impose a sentence sufficient but not greater than necessary, to comply with the purposes” of sentencing, in consideration of *all* relevant facts under § 3553(a). They are to treat

³ For example, the unjustified disparity caused by the 100:1 powder-to-crack quantity ratio was not a permissible ground for departure because that circumstance was “typical” of all crack cocaine cases under the guidelines and thus did not distinguish the case from the “heartland.” See *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996); *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004).

⁴ See U.S. Sent’g Comm’n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

⁵ See U.S. Sent’g Comm’n, *2004 Sourcebook of Federal Sentencing Statistics*, tbl. 26A (2004).

⁶ Later, in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court held that facts that increase a mandatory minimum must also be proved to a jury beyond a reasonable doubt. Thus, under *Booker* and *Alleyne*, any fact that increases the mandatory guideline *range*, not just the guideline maximum, violates the Sixth Amendment.

the guidelines as advisory only, and courts of appeals are to review all sentences for “reasonableness” under a deferential abuse of discretion standard.

The full import of *Booker* was not immediately recognized or fully accepted by courts of appeals. They quickly fashioned and applied a strict form of “reasonableness” review, called “proportionality review,” by which they required “extraordinary circumstances” to justify “extraordinary variances.” This type of review allowed courts of appeals to continue to enforce excised § 3553(b) by requiring judges to impose a sentence within or very near the guideline range absent “extraordinary” or “compelling” circumstances.⁷ In addition, several courts of appeals announced that district courts could not vary from a guideline based on a policy disagreement with it—*i.e.*, a finding that the guideline itself recommended sentences greater than necessary to serve sentencing purposes—but could vary under § 3553(a) only to account for individualized circumstances.⁸

⁷ See, e.g., *United States v. Richardson*, 232 F. App'x 267, 269 (4th Cir. 2007) (defendant's prior good character, lack of criminal record and effect of relationship with co-conspirator on criminal activities were not “so extraordinary as to support” non-guideline sentence and sentence “failed to account for the seriousness of [defendant's] criminal conduct”); *id.* (district court erred in relying on factors Commission considered “not ordinarily relevant” (defendant's youth) or “not appropriate” (defendant's post-sentencing rehabilitative efforts)); *United States v. Thurston*, 456 F.3d 211, 220 (1st Cir. 2006) (independently reviewing the record to hold that, based on the facts presented, the district court could plausibly impose a “modest” variance “somewhat” below the guideline range, but “a sentence of fewer than 36 months' imprisonment would fail reasonableness review in the present circumstances”); *United States v. Cage*, 451 F.3d 585, 595 (10th Cir. 2006) (appellate court disagreed with “the weight the district court placed on” lack of any caretaker for defendant's child, small role in conspiracy, unlikelihood of recidivism, lack of criminal history, lack of current drug problem, and time already spent in jail); *United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir. 2006) (reversing sentence of two years' probation where guidelines called for 12 to 18 months in prison, in part, because “[t]he Court's logic does not convince us that [defendant's] age and health are so extraordinary that they eliminate the need for imprisonment”); *United States v. Borho*, 485 F.3d 904, 921-13 (6th Cir. 2007) (district court must offer “compelling justification” if discouraged factors under the guidelines form basis of a “substantial variance” from guideline range); *United States v. Simmons*, 470 F.3d 1115, 1130-31 (5th Cir. 2006) (advising in supervisory capacity that “[a]lthough consideration of age does not appear to be *per se* unreasonable post-*Booker*, . . . [a trial court] should explain why the prohibited or discouraged factor, as it relates to defendant, is so extraordinary that the policy statement should *not* apply”); *United States v. Repking*, 467 F.3d 1091, 1095-06 (7th Cir. 2006) (reversing sentence because “we do not share the district court's view that [defendant's] charitable works were so extraordinary that they should be given weight despite the contrary view of the Sentencing Commission”); *United States v. Wallace*, 458 F.3d 606, 611 (7th Cir. 2006) (district court's statement that culpability in the case should be measured by actual loss “was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts”).

⁸ See, e.g., *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007) (*per curiam*); *United States v. Johnson*, 474 F.3d 515, 522 (8th Cir. 2007); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006); *United States v. Miller*, 450 F.3d 270, 275-76 (7th Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633-34 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53, 62-63 (1st Cir. 2006).

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This went on for nearly three years, until December 10, 2007, when the Supreme Court decided *Gall* and *Kimbrough*, which together clarified the extent of the district court's discretion and the proper deference to be accorded that discretion.

B. *Gall v. United States*: The Supreme Court clarified that sentencing judges may impose a below-guideline sentence based on relevant mitigating circumstances without regard to departure policy statements in the *Guidelines Manual*.

In *Gall v. United States*, 552 U.S. 38 (Dec. 10, 2007), the Supreme Court ended the appellate practice of "proportionality review" because it is inconsistent with the abuse of discretion standard adopted in *Booker*. *Id.* at 41, 46. The Court expressly rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," *id.* at 47, as well as "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.* at 47. Proportionality review came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range," *id.*, and in *Gall*'s case, "more closely resembled *de novo* review of the facts presented." *Id.* at 56, 59. Instead, on abuse-of-discretion review, the appellate court "may consider the extent of [any] deviation, 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." *Id.* at 51.

As a matter of process, the Court explained, "the Guidelines should be the starting point and the initial benchmark," but "are not the only consideration." *Id.* at 49. The parties are to be given an "opportunity to argue for whatever sentence they deem appropriate," and the sentencing judge "should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.* at 49-50. In so doing, the judge "may not presume that the Guidelines range is reasonable," but "must make an individualized assessment based on the facts presented." *Id.* at 50.

In reaching its decision, the Court made clear that the sentencing judge *must* consider mitigating offense circumstances and offender characteristics regardless of whether the Commission's departure policy statements restrict or prohibit their consideration. In the Court's view, the district court "quite reasonably attached great weight to the fact that *Gall* voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life," which "len[t] strong support to the District Court's conclusion that *Gall* is not going to return to criminal behavior and is not a danger to society." *Id.* at 57. The district court also "quite reasonably attached great weight to *Gall*'s self-motivated rehabilitation, which . . . lends strong support to the conclusion that imprisonment was not necessary to deter *Gall* from engaging in future criminal conduct or to protect the public from his future criminal acts." *Id.* at 59. The Court made no mention of the Commission's policy statements to the contrary, instead stating that § 3553(a)(1) is a "broad command to consider 'the nature and circumstances of the offense

and the history and characteristics of the defendant.’”⁹

C. *Kimbrough v. United States*: The Supreme Court clarified that sentencing judges may impose a below-guideline sentence based on a policy disagreement with the guidelines in the ordinary case.

On the same day that *Gall* was decided, the Supreme Court decided *Kimbrough v. United States*, 552 U.S. 85 (Dec. 10, 2007). There, the Supreme Court considered whether a district court may vary from the crack range based on a policy disagreement with the 100-to-1 powder-to-crack ratio without regard to individualized circumstances. The Court held that “courts may vary [from the guideline range] based solely on policy considerations, including disagreements with the Guidelines.” *Id.* at 101-02 (internal citations and quotation marks omitted). The Court held that, because “the cocaine Guidelines, *like all other Guidelines*, are advisory only,” it is not “an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.” *Id.* at 91, 110 (emphasis added). It also made clear that district courts may disagree with a guideline that does “not exemplify the Commission’s exercise of its characteristic institutional role,” (i.e., is not based on empirical evidence and national experience), and that disagreement will be reviewed under a deferential abuse of discretion standard. *Id.* at 109-10.¹⁰

In reaching this conclusion, the Supreme Court explained that for *all drug trafficking guidelines* (not just crack), the Commission did not use an “empirical approach” based on average time served before the guidelines. *Id.* at 96. Instead, it set ranges to meet and exceed the two mandatory minimum punishment levels specified in the Anti-Drug Abuse Act of 1986 and spread the scheme across many quantity levels. *Id.*¹¹ The Court examined the assumptions underlying the 100-to-1 powder-to-crack ratio reflected in the punishment levels and the

⁹ *Id.* at 50 n.6.

¹⁰ The authority of judges to vary from a guideline range based on reasons other than case-specific facts, *i.e.*, to disagree with a guideline for policy reasons, is necessary to ensure that the guidelines are advisory only and constitutional. See *Cunningham v. California*, 549 U.S. 270, 274-75, 278-81, 292-93 (2007) (holding that California’s sentencing scheme violated the Sixth Amendment because it authorized sentencing courts to sentence outside a middle range based only on case-specific facts, and did not authorize them to do so based on a “policy judgment” in light of the “general objectives of sentencing”); *Rita v. United States*, 551 U.S. 338, 351, 357 (2007) (holding that because there can be no “legal presumption” that the federal advisory guidelines should apply, judges may find that the “Guidelines sentence itself fails properly to reflect § 3553(a) considerations” or “reflects an unsound judgment”).

¹¹ See also *Gall*, 552 U.S. at 46 n.2 (“[T]he Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.”).

scientific and criminological evidence showing that they were unfounded. This included research concerning crack cocaine's pharmacological properties, its methods of manufacture, ingestion and distribution, and the harms that were mistakenly thought to be associated with crack. The Court reviewed the legislative history, circumstances and assumptions underlying enactment of the 100:1 quantity ratio in the Anti-Drug Abuse Act of 1986, as well as its effects on the perception of fairness and confidence in the criminal justice system. It recounted how the guidelines did not evolve in a manner consistent with current experience and research. It noted that the district court was aware of this history, and that in light of the district court's "reasoned appraisal" of this evidence, a reviewing court could not rationally conclude that the district court abused its discretion when it determined that a lower sentence would better serve sentencing purposes. *See id.* at 94-100, 110-11.

After *Kimbrough*, district courts should have been free to engage in a similar process and vary from any guideline on the ground that the guideline itself does not serve sentencing purposes in the ordinary case. But some judges and courts of appeals continued to reject or constrain policy-based variances. For example, they held that a district court could not vary from the 100:1 powder-to-crack ratio by substituting a different ratio, such as 20:1 or 1:1. Some expressly held that *Kimbrough* did not apply to guidelines developed in response to specific congressional directives, such as the career offender guideline. It would take still more time for these mistaken views to be corrected.

D. *Spears v. United States*: The Supreme Court clarified that sentencing judges may vary by rejecting the guideline range and replacing it with a lower range that better serves sentencing purposes.

In *Spears v. United States*, 555 U.S. 261 (Jan. 21, 2009), the Supreme Court made clear that a sentencing judge has the authority to reject an unsound guideline range as a matter of policy and to replace it with a range that reflects a better policy. There, the sentencing judge determined that the 100:1 powder-to-crack ratio yielded an excessive sentence in the ordinary case, and varied downward to the offense level that would apply based on a 20:1 ratio. The Eighth Circuit reversed, ruling that the judge had erred by categorically substituting a different ratio for the 100:1 ratio. In a summary *per curiam* opinion, the Supreme Court reversed. It emphasized that "the point of *Kimbrough*" was "a recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Id.* at 264. As a matter of logic, "the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio." *Id.* at 265. The Court held that a "categorical disagreement with and variance from the Guidelines is not suspect." *Id.* at 264. A disagreement with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role" is entitled to as much appellate "respect" as an "outside the heartland" departure. *Id.* at 264.

E. The courts of appeals eventually recognized that *Kimbrough* extends to all guidelines, not just crack, including those developed in response to congressional directives.

Every court of appeals eventually recognized that a district court's authority to disagree with a guideline because the guideline itself does not serve sentencing purposes applies to all guidelines, not just crack,¹² including those developed in response to specific directives from Congress, such as the career offender guideline¹³ and the child pornography guideline.¹⁴

¹² *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track and all guidelines); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (*en banc*) (firearms trafficking, all guidelines); *United States v. Carr*, 557 F.3d 93, 106 (2d Cir. 2009) (“the sentencing court has discretion to deviate from the Guidelines-recommended range based on the court’s disagreement with the policy judgments evinced in a particular guideline”); *United States v. Jones*, 531 F.3d 163, 180 (2d Cir. 2008) (all guidelines); *United States v. Tomko*, 562 F.3d 558, 570 (3d Cir. 2009) (“*Kimbrough* . . . involved the district court’s authority to vary from the Guidelines based on policy disagreement with them”); *United States v. Rivera-Santana*, 668 F.3d 95, 101 (4th Cir. 2012) (illegal reentry, § 2L1.2, and all guidelines); *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008) (“In *Kimbrough*, the Court reiterated what it had conveyed in *Rita*; a sentencing court may vary from the Guidelines based solely on policy considerations, including disagreements with the Guidelines, if the court feels that the guidelines sentence fails properly to reflect § 3553(a) considerations.”); *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (illegal reentry, § 2L1.2); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (*en banc*) (acquitted conduct, § 1B1.3, and all guidelines); *United States v. Branch*, 537 F.3d 582, 594 (6th Cir. 2008) (“*Kimbrough* . . . provided that district courts may deviate from sentences under the advisory guidelines on the basis of policy disagreements with its provisions”); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008) (all guidelines); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008) (“defendants certainly may attack the effect of the Sentencing Guidelines by arguing that they reflect overbroad or mistaken policy priorities”); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (illegal reentry, § 2L1.2); *United States v. Smart*, 518 F.3d 800, 808-09 (10th Cir. 2008) (“district courts must be allowed to consider whether other § 3553(a) policies outweigh the Guidelines in a given case”); *United States v. Gardellini*, 545 F.3d 1089, 1092 (D.C. Cir. 2008) (*Kimbrough* “held that district courts are free in certain circumstances to sentence outside the Guidelines based on policy disagreements with the Sentencing Commission – and that appeals courts must defer to those district court policy assessments”).

¹³ *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (career offender); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (career offender); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (career offender, all guidelines).

¹⁴ See, e.g., *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008) (computer enhancement, § 2G1.3); *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009) (child pornography, § 2G2.2); *United States v. Dorvee*, 616 F.3d 174, 184, 188 (2d Cir. 2010) (child pornography, § 2G2.2); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (child pornography); *United States v. Geister*, 455 F. App'x 352, 353 (4th Cir. 2011) (child pornography, § 2G2.2, and all guidelines).

In *Vazquez v. United States*, the Solicitor General conceded in the Supreme Court that sentencing judges may disagree with guidelines directed by Congress. There, the Eleventh Circuit had held that a judge may not disagree with the career offender guideline because, unlike the drug guidelines that the Commission merely chose to link to mandatory minimums, Congress specifically directed the Commission to promulgate a career offender guideline. In its brief supporting the petition for certiorari, the Solicitor General argued that the “premise that congressional directives to the Sentencing Commission are equally binding on the sentencing courts . . . is incorrect” and that “the very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a).”¹⁵ The Supreme Court granted the petition, vacated the judgment, and remanded for reconsideration.¹⁶

F. *Pepper v. United States*: The Supreme Court held that post-sentencing rehabilitation is “highly relevant” to sentencing purposes and the parsimony clause.

Despite these Supreme Court decisions, the Eighth Circuit continued to prohibit district courts from considering post-sentencing rehabilitation at a resentencing on remand. In *Pepper v. United States*, 131 S. Ct. 1229 (Mar. 2, 2011), the Supreme Court reversed the Eighth Circuit, ruling that post-sentencing rehabilitation may be “highly relevant to several of the § 3553(a) factors,” such as the need for deterrence, incapacitation, and to provide needed educational or vocational training or other correctional treatment. 131 S. Ct. at 1242. In *Pepper*’s case, the Supreme Court said, there was “no question” that *Pepper*’s post-sentencing rehabilitation was relevant to his history and characteristics, shedding light on his likelihood of committing further crimes, suggesting a diminished need for treatment, and “bear[ing] directly on the District Court’s overarching duty to ‘impose a sentence sufficient, but not greater than necessary’ to serve the purposes of sentencing.” *Id.* at 1242-43. Moreover, the Court emphasized, *id.* at 1241, 18 U.S.C. § 3661 provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court may receive and consider for the purpose of imposing an appropriate sentence.”

The Court also expressly rejected the proposition that the Commission’s policy statement at USSG § 5K2.19, which prohibited consideration of a defendant’s post-sentencing rehabilitative efforts, “should be given effect.” *Id.* at 1247. Not only were the Commission’s reasons for promulgating § 5K2.19 “wholly unconvincing,” but a sentencing judge may not “elevate” departure policy statements above factors that are relevant to the purposes of sentencing. *Id.* at 1249-50.¹⁷

¹⁵ Brief for the United States, *Vazquez v. United States*, 558 U.S. 1144 (2010) (No. 09-5370), 2009 WL 5423020 at *9, *11.

¹⁶ *Vazquez v. United States*, 558 U.S. 1144 (2010).

¹⁷ The following year, the Commission deleted § 5K2.19 from the *Guidelines Manual*. See USSG, App. C, amend. 768 (Nov. 1, 2012).

III. How to Show that the Judge Would Sentence Below the Guideline Range Under the Advisory Guidelines

As in sentencing proceedings today, you should rely on these Supreme Court decisions to show that a judge would likely vary below the guideline range that would apply in your client's case today, regardless whether the range would be the same, lower or higher than before. In virtually any case, you will be able to show with reliable, empirical evidence that a large percentage of judges do not follow the guideline's current recommendations, that the guideline was not promulgated or amended by the Commission based on empirical data and national experience and is greater than necessary in the ordinary case, and that a lower sentence would better serve sentencing purposes. You will also likely be able to show how the client's mitigating individualized circumstances would support a lower sentence in light of the § 3553(a) considerations, but that, at the time of sentencing, the district court was prohibited from considering them except in "extraordinary" circumstances.

In addition, if the sentencing judge made any statement on the record indicating that, but for the constraints that existed at the time of sentencing, she would have imposed a lower sentence, you should quote it (do not paraphrase) and attach the relevant part of the transcript.

If the judge did not make such a statement on the record, this does not mean that she would impose the same sentence with the discretion she has today. Either way, consider asking the judge for a letter, which you can quote in, and attach to, your memorandum.¹⁸ If the judge is willing, it will be helpful if she can say that she would have imposed a sentence less than or equal to that already served.

The following is an overview of the kinds of evidence you may use to show that the judge would likely impose a sentence below the applicable range.

A. Statistical evidence of the rate and extent of below-guideline sentences

In *Kimbrough*, the Supreme Court noted that "district courts must take account of sentencing practices in other courts." 552 U.S. at 108. Today, national sentencing statistics, drawn from the Commission's *Sourcebook of Sentencing Statistics* and/or online *Interactive Sourcebook of Sentencing Statistics*, are often the most compelling evidence that a guideline does not serve sentencing purposes because judges are not following it, increasingly on the prosecutor's request. In fiscal year 2014, judges imposed a sentence below the guideline range in 38% of all federal cases in which the prosecutor did not seek a substantial assistance or fast-track departure.¹⁹ For several types of cases, the rate is substantially higher.

¹⁸ If litigation is currently pending before the judge, check with the prosecutor before approaching the judge for a letter.

¹⁹ See U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl.N (2014) (showing that out of 57,700 cases in which the government did not seek a substantial assistance or fast-track departure,

For example, in powder cocaine cases in fiscal year 2014, judges sentenced below the guideline range in just under 50% of all cases in which the prosecutor did not seek a substantial assistance or fast-track departure.²⁰ In crack cases in fiscal year 2014, even under the guidelines incorporating the lower 18:1 powder-to-crack ratio of the FSA, judges sentenced below the guideline range in 56% of all cases in which the prosecutor did not seek a substantial assistance or fast-track departure.²¹ In methamphetamine cases, the rate was 64%;²² in heroin cases, the rate was 58%;²³ in marijuana cases, the rate was 50%;²⁴ and in ecstasy cases (fiscal year 2013), the rate was 67%.²⁵ In career offender cases in fiscal year 2012, the most recent year for which statistics are available, judges sentenced below the range in 56.9% of all cases in which the prosecutor did not seek a substantial assistance or fast track departure.²⁶ In fraud cases governed by § 2B1.1 in fiscal year 2014, judges sentenced below the range in 43% of all cases in which the prosecutor did not seek a substantial assistance or fast-track departure.²⁷

judges sentenced below the guidelines in 21,938 cases, which includes 6,068 cases in which the sentence was below the range on the government's request).

²⁰ *See id.* tbl.45 (1,681 out of 3,393 cases). This includes 569 cases in which the sentence was below the range on the government's request.

²¹ *See id.* (1,024 out of 1,842 cases). This includes 295 cases in which the sentence was below the range on the government's request.

²² *See id.* (2,537 out of 3,939 cases). This includes 1,026 cases in which the sentence was below the range on the government's request.

²³ *See id.* (1,001 out of 1,724 cases). This includes 368 cases in which the sentence was below the range on the government's request.

²⁴ *See id.* (1,327 out of 2,640 cases). This includes 480 cases in which the sentence was below the range on the government's request.

²⁵ *See* U.S. Sent'g Comm'n, *Interactive Sourcebook of Federal Sentencing Statistics*, Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type, tbl.45 (2013) (Option 5, Eight Categories) (84 out of 126 cases), available at www.ussc.gov. This includes 15 cases in which the sentence was below the range on the government's request. FY 2013 is the most recent year for which data on ecstasy cases is available.

²⁶ *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2014) (926 out of 2,232 cases). This includes 301 cases in which the sentence was below the range on the government's request.

²⁷ *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl.28 (2014) (2,993 out of 6,963 cases). This includes 594 cases in which the sentence was below the range on the government's request.

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The rate of below-guideline sentences in non-contact child pornography cases governed by § 2G2.2 (possession and receipt) is extraordinarily high. In 2014, judges sentenced below the range in 68% of all such cases in which the prosecutor did not seek a substantial assistance departure.²⁸

When cases involving substantial assistance and fast-track departures are included, the rate of below-guideline sentences in all federal cases is just under 52%,²⁹ and is substantially higher for several types of cases. Judges rarely impose a sentence above the guideline range (2.2% of all cases).³⁰

Type of case	Rate of below-guideline sentences by judges – cases with no § 5K1.1 or § 5K3.1 departure ³¹	Rate of below-guideline sentences – all cases	Rate of within-guideline sentences – all cases	Rate of above-guideline sentences – all cases
Crack ³²	56%	67%	33%	1.0%
Powder cocaine ³³	50%	65%	34%	0.7%
Methamphetamine ³⁴	64%	78%	22%	0.3%
Heroin ³⁵	58%	70%	28%	1.5%
Marijuana ³⁶	50%	67%	32%	1.4%

²⁸ *Id.* (1,059 out of 1,566 cases). This includes 301 cases in which the sentence was below the range on the government’s request.

²⁹ See U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics* tbl.N (2014).

³⁰ *Id.*

³¹ Rates were determined by subtracting the number of sentences below the range based on substantial assistance or fast-track departures from the total number of cases and dividing the number of remaining sentences below the range (including “other” government-sponsored below-range sentences) by the result.

³² U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics*, tbl.45 (2014).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Type of case	Rate of below-guideline sentences by judges – cases with no § 5K1.1 or § 5K3.1 departure ³¹	Rate of below-guideline sentences – all cases	Rate of within-guideline sentences – all cases	Rate of above-guideline sentences – all cases
Ecstasy (FY 2013) ³⁷	67%	80%	19%	0.9%
Career offender (FY 2012) ³⁸	57%	69%	30%	1.1%
Fraud § 2B1.1 ³⁹	43%	52%	46%	1.7%
Child pornography § 2G2.2 ⁴⁰	68%	69%	39%	2.5%
Firearms § 2K2.1 ⁴¹	35%	40%	56%	3.4%

In its *Quick Facts* series available on its website, the Commission has reported the average extent of reduction for a number of offenses and for career offenders.

Type of case	Average extent of reduction – non-government sponsored departure or variance
Heroin ⁴²	36.1%
Crack ⁴³	34.2%
Powder Cocaine ⁴⁴	35.0%

³⁷ U.S. Sent’g Comm’n, *Interactive Sourcebook of Federal Sentencing Statistics*, Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type, tbl.45 (2013) (Option 5, Eight Categories), available at www.ussc.gov.

³⁸ See U.S. Sent’g Comm’n, *Quick Facts – Career Offenders* (FY 2012).

³⁹ U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics* tbl.28 (2014).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² U.S. Sent’g Comm’n, *Quick Facts – Heroin Trafficking* (FY 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Heroin_Trafficking_2013.pdf.

⁴³ U.S. Sent’g Comm’n, *Quick Facts – Crack Cocaine Trafficking* (FY 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine.pdf.

⁴⁴ U.S. Sent’g Comm’n, *Quick Facts – Powder Cocaine Trafficking* (FY 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Powder_Cocaine.pdf.

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Type of case	Average extent of reduction – non-government sponsored departure or variance
Methamphetamine ⁴⁵	31.3%
Marijuana ⁴⁶	42.5%
Oxycodone ⁴⁷	46.5%
Career offender ⁴⁸	32.7%
Fraud ⁴⁹	54.1%
Felon in possession of firearm ⁵⁰	33.5%

The Commission counts life sentences as 470 months.⁵¹ To calculate the likely reduced sentence for a defendant with a guideline range of life, figure the average extent of reduction by multiplying 470 by the average extent of reduction for that offense, then subtract the result from 470. For example, the average extent of reduction for an inmate convicted of a powder cocaine offense with a guideline range of life would be 470 x .35, or 164.5 months, for a likely reduced sentence of 305.5 months (470 – 164.5).

B. Evidence that the guideline is unsound

In addition to citing statistics, cite other evidence showing that the guideline (1) has no basis in empirical evidence or national experience and (2) is greater than necessary in the ordinary case. You can briefly summarize the development of the relevant guideline and the

⁴⁵ U.S. Sent’g Comm’n, *Quick Facts – Methamphetamine Trafficking* (FY 2013), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Methamphetamine_2013.pdf.

⁴⁶ U.S. Sent’g Comm’n, *Quick Facts – Marijuana Trafficking* (FY 2013), <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts-Marijuana-Trafficking-2013.pdf>.

⁴⁷ U.S. Sent’g Comm’n, *Quick Facts – Oxycodone Trafficking* (FY 2013), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Oxycodone_2013.pdf.

⁴⁸ U.S. Sent’g Comm’n, *Quick Facts – Career Offenders* (FY 2012), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf.

⁴⁹ U.S. Sent’g Comm’n, *Quick Facts – Theft, Property Destruction, and Fraud* (FY 2014), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quickfacts/Quick_Facts_Theft_Property_Destruction_Fraud_FY14.pdf.

⁵⁰ U.S. Sent’g Comm’n, *Quick Facts – Felon in Possession of a Firearm* (FY 2014), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY14.pdf.

⁵¹ U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics* (2013), App. A (“[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.”).

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Commission’s reasons (or lack of reasons) for promulgating it and amending it, usually to increase penalties, as well as social science and other empirical evidence demonstrating that the sentence the guideline recommends fails to serve sentencing purposes. When possible, rely on the numerous written opinions in which judges have expressly declined to follow a guideline because the Commission did not base it on empirical evidence or otherwise failed to provide sound policy reasons for its severity or repeated upward amendments to it—such as the guideline for offenses involving methamphetamine,⁵² heroin,⁵³ MDMA (ecstasy),⁵⁴ career offenders,⁵⁵ fraud,⁵⁶ and possession, receipt, or distribution of child pornography⁵⁷—and found that a lower

⁵² See *United States v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa 2013) (disagreeing with and varying from the methamphetamine guideline because it was not developed based on empirical data and national experience and recommends excessive sentences); see also, e.g., *United States v. Woody*, 2010 WL 2884918, *10 (D. Neb. July 20, 2010) (affording less deference to the methamphetamine Guidelines range because it was “promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission’s unique area of expertise” and varying downward where quantity does not accurately reflect culpability).

⁵³ See *United States v. Diaz*, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (after concluding that the Commission “should ‘de-link’ the drug trafficking Guidelines ranges from the ADAA’s weight-driven mandatory minimum sentences and use its resources, knowledge, and expertise to fashion fair sentencing ranges for drug trafficking offenses”; that its “stated reasons for refusing to de-link the drug trafficking Guidelines ranges from the mandatory minimum sentences are wrong”; and that it should “stop ignoring” the federal judiciary’s repeated request that the Commission do so, announcing that “[u]ntil the Commission does the job right, . . . the current ranges will be given very little weight by this Court”).

⁵⁴ *United States v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (explaining that, in selecting a 500:1 marijuana-to-MDMA ratio, the Commission’s engaged in “opportunistic rummaging” by “focus[ing] on the few ways in which MDMA is more harmful than cocaine, while disregarding several significant factors suggesting that it is in fact less harmful,” —a “selective analysis [] incompatible with the goal of uniform sentencing based on empirical data”; adopting a 200:1 ratio; and indicating it may adopt an even lower ratio if it had more evidence regarding the relative harms of MDMA and marijuana).

⁵⁵ *United States v. Newhouse*, 919 F. Supp. 2d 955, 971 (N.D. Iowa 2013) (“For reasons unknown, the Sentencing Commission did not follow the plain terms of [the career offender] statutory directive[,]” but expanded it to apply to low-level offenders with minor prior state offenses.).

⁵⁶ *United States v. Corsey*, 723 F.3d 366, 377-78 (2d Cir. 2013) (Underhill, D.J., concurring) (in wire fraud case involving \$3 billion in “intended loss” in a scheme described as “farcical,” “clumsy, almost comical” and with no chance of succeeding, explaining how the loss table has been increased repeatedly for no sound policy reason and is “fundamentally flawed” and “valueless,” and why he would find a sentence at 20-year statutory maximum, where guideline range was life, substantively unreasonable); *United States v. Gordon*, 710 F.3d 1124, 1164 (10th Cir. 2013) (in securities fraud case, where guideline range was life for defendant in Criminal History Category I, district court “made clear that its sentence was not driven by the loss calculation and corresponding Guidelines range” and noted that ranges specified by the securities fraud Guidelines “are patently absurd on their face”); *United States v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012) (the fraud guideline “reflect[s] an ever more draconian approach to white collar crime, unsupported by empirical data,” is “irrational on [its] face,” with “numbers assigned

sentence better serves sentencing purposes. (A non-exhaustive list of helpful decisions is contained in Appendix 2.)

In crack cases, be sure to point out that the 18:1 powder-to-crack ratio adopted by Congress in the Fair Sentencing Act, while a great improvement over the 100:1 ratio, is still without sound basis, and that the current crack guidelines incorporating the 18:1 ratio is still greater than necessary to serve sentencing purposes, as recognized by judges,⁵⁸ and by the Department of Justice, which supported a 1:1 ratio.⁵⁹

by the Sentencing Commission . . . [that] appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice”); *United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010) (“The [fraud] Guidelines were of no help; if not for the [five-year] statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment” for a defendant who made no money.); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (“Although I began the sentencing proceeding ‘by correctly calculating the applicable Guidelines range,’ . . . it is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance.”); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), *aff’d*, 301 F. App’x 93 (2d Cir. 2008) (The “Guidelines . . . in an effort to appear ‘objective,’ tend to place great weight on putatively measurable quantities, such as . . . the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors.”).

⁵⁷ See, e.g., *United States v. Dorvee*, 616 F.3d 174, 187-88 (2010) (explaining that USSG § 2G2.2 has been increased several times since its inception without empirical basis, often in response to congressional directives opposed even by the Commission, and concluding that “[d]istrict judges are encouraged to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2[,] . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1101 (N.D. Iowa 2009) (“[T]he prosecution identifies not one whit of empirical analysis by the Commission supporting the repeated amendments to the child pornography guidelines at Congress’s behest since 1991.”); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D. W. Va. 2009) (child pornography guideline at § 2G2.2 “is not entitled to the usual deference due the Guidelines” because it is “not grounded in empirical analysis,” and as a result, “the Guidelines for consumers of computer-based child pornography are skewed upward”).

⁵⁸ See, e.g., *United States v. Williams*, 788 F. Supp. 2d 847, 880 (N.D. Iowa 2011) (after exhaustively describing the history of the crack guideline as tied to the mandatory minimums in the absence of independent rationale and contrary to empirical evidence, explaining that the Commission’s reasons for using the 18:1 ratio in the Fair Sentencing Act “do[] not indicate any independent findings by the Commission or any independent analysis of medical, chemical, physiological, or other scientific or social science evidence explaining why the 18:1 ratio is appropriate” and adopting a 1:1 ratio). For additional cases in which the judge adopted a 1:1 ratio, see Appendix 2.

⁵⁹ See *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att’y Gen.).

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C. Evidence of mitigating circumstances and how they relate to sentencing purposes

In any case, point to evidence of both the existence of individualized mitigating circumstances at the time of sentencing and how these circumstances relate to sentencing purposes and why the sentence that the applicant would request today would better serve those purposes. For example, Commission data on recidivism shows that certain categories of offenders present a lower risk of recidivism (i.e., drug offenders, offenders over 40, offenders with some education, who have been employed, ever married, or abstained from drug use, offenders in CHC I or who have zero criminal history points).⁶⁰ Other empirical data demonstrates that young offenders are less culpable and reform in a shorter period of time, that long prison sentences are not necessary for general or specific deterrence, and that drug treatment and mental health treatment work to reduce recidivism, while long terms of imprisonment can increase the risk of recidivism.⁶¹ When relevant, evidence of the client's rehabilitation efforts during the period between the offense and sentencing show that a long term incarceration was not necessary to prevent the client from committing further crimes.

D. Resources

The Federal Defenders have posted a wealth of useful materials and resources on their website, www.fd.org. They include a detailed roadmap for supporting requests for lower sentences in terms of 18 U.S.C. § 3553(a),⁶² sample sentencing memoranda in a fraud case and in a child pornography possession case, and examples of arguments for lower sentences in methamphetamine, MDMA,⁶³ firearms, tax, and career offender cases. If you need assistance finding resources or determining how best to use them:

⁶⁰ See U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004); U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* (2004).

⁶¹ See Denise C. Barrett and Laura Mate, *Using Social Science at Sentencing* (May 2014) (collecting recent research in criminology and social science relevant to sentencing purposes), [http://www.fd.org/docs/select-topics/sentencing-resources/using-social-science-at-sentencing-\(may-2014\).pdf?sfvrsn=4](http://www.fd.org/docs/select-topics/sentencing-resources/using-social-science-at-sentencing-(may-2014).pdf?sfvrsn=4); Amy Baron-Evans and Jennifer N. Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions* (July 2011), http://www.fd.org/docs/select-topics---sentencing/No_More_Math_Without_Subtraction.pdf (collecting empirical evidence to support mitigating factors). For the most recent evidence regarding the failure of long sentences to deter crime, see the sources cited in the Example, *infra*, at notes 61-62.

⁶² See Amy Baron-Evans, *Sentencing by the Statute* (rev. 2010), <http://www.fd.org/docs/select-topics/sentencing-resources/sentencing-by-the-statute>.

⁶³ For updated arguments and statistics regarding MDMA offenses, see Letter from Margorie Meyers, Chair, Fed. Defender Sent'g Guidelines Comm., to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014, at 8-13 (July 15, 2013), available at <http://www.fd.org/docs/select-topics/sentencing-resources/defender->

- If you are a pro bono lawyer, refer to the reference material on the subject posted at <https://clemencyproject2014.org/reference>, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.
- If you are a Federal Defender, contact abaronevans@gmail.com.

E. Example

The following example of a client convicted of a methamphetamine offense uses the kinds of evidence described above show how a judge would likely vary downward today under the advisory system, guided by materials available on www.fd.org. It can be modified as appropriate to apply in cases involving other drugs. It reflects and incorporates the relevant steps set forth in *How a Sentence for a Drug Offender May Be Lower if Imposed Today*.

EXAMPLE

When she was arrested and sentenced in 2003, Client A, age 24, had been living in the streets and in homeless shelters since she was 13 years old.⁶⁴ Her mother died when she was 11, and she ran away to escape sexual abuse by a step-father, who was later imprisoned for many years for various drug offenses.⁶⁵ Over time, Client A became addicted to methamphetamine.⁶⁶ To support her habit, she started selling methamphetamine for a friend who manufactured the drug, in exchange for which she got methamphetamine for her own use and, at times, a place to sleep.⁶⁷ Over a period of several months in 2002 and early 2003, Client A sold small amounts of methamphetamine, mostly 1 and 2 grams, to a confidential informant.⁶⁸ She was arrested during a sale of 2 grams, and charged under 21 U.S.C. § 841(b)(1)(A) with possession with intent to distribute 50 grams or more of methamphetamine (actual), which carries a statutory penalty of 10 years to life.

comment-on-ussc's-notice-of-proposed-priorities-for-amendment-cycle-ending-may-1-2014.pdf?sfvrsn=6.

⁶⁴ PSR ¶ 22.

⁶⁵ PSR ¶ 28-29.

⁶⁶ PSR ¶ 25.

⁶⁷ PSR ¶ 25-26; Sent'g Tr. 17-18.

⁶⁸ PSR ¶ 10-12, 26; Sent'g Tr. 18.

Original sentence imposed

Under the guidelines' relevant conduct rules and based on information provided by the confidential informant, the PSR stated that Client A sold 502 grams of methamphetamine (actual) over the course of 18 months. Client A objected to the calculation. At sentencing, the district judge adopted the PSR's finding, which set her base offense level at 36. Because she had been previously sentenced in state court for several petty shoplifting offenses (for which she was sentenced to 60 days in jail, suspended in two of the cases), once for possession of drug paraphernalia (for which she was sentenced to 60 days in jail), and once for driving without a license (for which she received probation), her criminal history category was VI. With a base offense level of 36, three levels off for acceptance of responsibility, USSG § 3E1.1, and in CHC VI, her guideline range was **235-293** months.

Client A requested a downward departure based on her youth, drug addiction, and disadvantaged childhood, but the judge said he was "bound to deny the request" under the restrictive and prohibitive departure policy statements at USSG § 5H1.1 (age), § 5H1.4 (physical condition), and § 5H1.12 (lack of guidance as a youth).⁶⁹ The judge added that it was "a very harsh sentence, but the law gives me no choice." On December 4, 2003, Client A was sentenced to 235 months in prison. The sentence was summarily affirmed by the court of appeals on August 23, 2004.

Sentence that the judge would likely impose today

Today, the prosecutor would be unlikely to charge drug quantity under Attorney General Holder's August 12, 2013 charging policy because, although Client A had 14 criminal history points, they were for petty non-violent offenses, one of which was for "conduct that itself represents non-violent low-level drug activity," committed while she was addicted to methamphetamine. Client A fits every other criteria of a low-level non-violent drug offender. Thus, if Client A were sentenced today, she would not be subject to a mandatory minimum and her statutory range would be 0-20 years. *See* 21 U.S.C. § 841(b)(1)(C).

If Client A were sentenced under the November 1, 2014 Manual, her base offense level would be reduced by two levels, to level 34, reducing her guideline range to 188-235 months.

For the reasons that follow, the judge would likely conclude that, like the crack guideline range at issue in *Kimbrough*, the sentence recommended by the methamphetamine guideline is greater than necessary to serve sentencing purposes even in the ordinary case, and further that, considering Client A's individualized circumstances, a sentence of ten years – less than what she has already served – is more than sufficient to serve those purposes.

⁶⁹ *See* Sent'g Tr. at 22-23.

First, judges vary downward at an exceptionally high rate and by an average of one-third the guideline range. Judges today recognize that the methamphetamine guideline is too severe and does not serve sentencing purposes. In fiscal year 2014, judges varied downward in 64% of all methamphetamine cases in which the government did not seek a substantial assistance or fast-track departure.⁷⁰ Including those government-sponsored departures, judges varied downward in a total of 78% of all methamphetamine cases.⁷¹ When granting a non-government-sponsored variance or departure, judges sentenced on average 31.3% below the guideline range.⁷²

Second, the methamphetamine guideline is not based on empirical evidence or national experience, but on the unjustified and repudiated pre-FSA crack penalties. As with the guideline for crack offenses, the Commission did not use an empirical approach based in past practice or the purposes of sentencing in developing guideline sentences for methamphetamine offenses. Instead, as it did with all drug offenses, *see Kimbrough v. United States*, 552 U.S. 85, 96 (2007); *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007), it set the base offense levels for methamphetamine offenses to meet and exceed the 5- and 10-year mandatory minimums that Congress originally intended would apply to “serious” and “major” traffickers.⁷³ The Commission corresponded these statutory quantity triggers to base offense levels 26 and 32,⁷⁴ and set the remaining offense levels across the Drug Quantity Table “through processes of proportionate interpolation and extrapolation.”⁷⁵

Today, it takes only 5 grams and 50 grams of methamphetamine (actual) to trigger the 5- and 10-year mandatory minimums, respectively. *See* 21 U.S.C. § 841(b)(1)(A), (b)(1)(B). In enacting these quantity triggers, Congress intended to make the penalties the same for

⁷⁰ *See* U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics*, tbl.45 (2014) (2,537 out of 3,939 cases).

⁷¹ *Id.*

⁷² U.S. Sent’g Comm’n, *Quick Facts – Methamphetamine Trafficking Offenses* (2012).

⁷³ *See* U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 & n.26 (2007). As defined by the House Subcommittee on Crime, “serious” drug traffickers are “managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.” *See* H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986). “Major” drug traffickers were defined as “manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities.” *Id.*

⁷⁴ *See* U.S. Sent’g Comm’n, *Methamphetamine: Final Report of the Working Group* 7-8 & n.18, 18 (1999) [*Methamphetamine Report*], http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf.

⁷⁵ *Methamphetamine Report* at 7 n. 18.

methamphetamine (actual) as for crack.⁷⁶ As a result, the mandatory minimums to which guideline ranges for methamphetamine are tied are the same as the mandatory minimums for crack before 2007.

Had Client A been sentenced in 1987, her guideline range would have been 92-115 months. USSG § 2D1.1 (1987). Instead, due solely to the Commission’s practice of linking guideline ranges to mandatory minimums and Congress’s desire to punish methamphetamine the same as crack, Client A’s sentencing range has more than doubled to 188-235 months. USSG § 2D1.1 (2014).

Third, the methamphetamine guideline is greater than necessary to serve sentencing purposes. Though Congress has partially rectified the mistake it made with respect to crack offenses, and the Commission amended the crack guidelines in response, Congress did not change the statutory penalties for methamphetamine offenses, and the guidelines remain tied to the repealed penalties for crack. Yet, as with crack, the severe penalties for methamphetamine are not justified by any purpose of sentencing.

As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine is less physically dangerous or addictive than heroin or cocaine, and results in far fewer emergency room visits when controlling for rates of use, yet methamphetamine is punished more severely than any other drug.

Type of Drug	Number of Users, 2011 ⁷⁷	Emergency Room Visits, 2011 ⁷⁸	Emergency Room Visits Per 100,000 Users	Rate of Emergency Room Visits
Heroin	620,000	258,482	41,691	41.7%
Cocaine (crack and powder)	3,857,000	505,224	13,099	13.1%

⁷⁶ See Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998). See also H.R. Rep. No. 105-711, pt. 1, at 8 (1998); 144 Cong. Rec. S4035 (May 1, 1998) (Sen. Ashcroft); 144 Cong. Rec. S12834 (Oct. 21, 1998) (Sen. Feinstein). Notably, a number of members of the House Judiciary Committee dissented from the Committee’s favorable report on the 1998 legislation, arguing that “modeling any sentencing policy after the crack cocaine sentencing policy is unwise” in part “because mandatory minimum sentences have failed to significantly reduce trafficking in crack cocaine.” H.R. Rep. No. 105-711, pt. 1 at 11(1998).

⁷⁷ U.S. Dep’t of Health and Human Servs., *Results from 2011 National Survey on Drug Use and Health* tbl. 1.1A (2011), available at <http://www.samhsa.gov/data/NSDUH.aspx>.

⁷⁸ U.S. Dep’t of Health and Human Servs., *Drug Abuse Warning Network, 2011: National Estimates of Drug-Related Emergency Department Visits* tbl. 4 (2011), available at <http://www.samhsa.gov/data/DAWN.aspx>. This chart uses 2011 data because that is the most recent data available for calculating rates of emergency room visits per 100,000 users.

Type of Drug	Number of Users, 2011 ⁷⁷	Emergency Room Visits, 2011 ⁷⁸	Emergency Room Visits Per 100,000 Users	Rate of Emergency Room Visits
combined)				
Methamphetamine	1,033,000	102,961	9,967	9.9%
Marijuana	29,739,000	455,668	1,532	1.5%
MDMA/Ecstasy	2,422,000	22,498	928	0.93%

Moreover, Client A was not a “major” trafficker as Congress defined that term in 1986 and to which the 10-year mandatory minimum was intended to apply. She was not a manufacturer or head of any organization, creating and delivering large quantities. She was not even a “serious” trafficker. She did not manage retail traffic, or package drugs in substantial street quantities. She was a low-level, street-level dealer who sold small quantities over a multi-year period.

Researchers are unanimous that lengthy prison sentences do not deter others, 18 U.S.C. § 3553(a)(2)(B), or have any crime control effect.⁷⁹ The National Institute of Justice, Department of Justice, recently issued a summary of the current state of empirical research stating that “prison sentences are unlikely to deter future crime,” and “increasing the severity of punishment does little to deter crime.”⁸⁰ Because drug offenses are driven by user demand, drug crime is not prevented by incarceration of low-skill drug traffickers, who are readily replaced in the drug market.⁸¹ Indeed, the supply and consumption of methamphetamine have steadily increased

⁷⁹ See Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are “not an effective deterrent”); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Justice* 199, 202 (“[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.”); see also Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, *Prison Journal* 91: 48S (2011); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* 10 *Criminology & Pub. Pol’y* 13, 37 (2011); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 *J. of Pub. Econ.* 2043, 2043 (2004) (“it is unlikely that the dramatic increase in drug imprisonment was cost-effective”).

⁸⁰ U.S. Dep’t of Justice, Office of Justice Programs, Nat’l Inst. of Justice, *Five Things to Know About Deterrence* (July 2014) (relying on Nagin, *Deterrence in the Twenty-First Century*, *supra*), available at <https://ncjrs.gov/pdffiles1/nij/247350.pdf>.

⁸¹ See Nat’l Research Council, *The Growth of Incarceration*, *supra* at 146 (“Drug policy research has . . . shown consistently that arrested dealers are quickly replaced by new recruits.”); U.S. Sent’g Comm’n, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

since 2000 despite the increased penalties.⁸² Nor was a guideline sentence of 235 months necessary to protect the public from further crimes of Client A, 18 U.S.C. § 3553(a)(2)(C). According to the Commission, drug offenders have lower than average rates of recidivism.⁸³ Young offenders like Client A, (*e.g.*, in their 20s), are less culpable than the average offender because their brain has not completely developed,⁸⁴ and reform in a shorter period of time.⁸⁵

In *United States v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa 2013), Judge Bennett explained at length how the methamphetamine guideline is greater than necessary to serve sentencing purposes, and adopted a policy of varying downward by one-third in methamphetamine cases,⁸⁶ in addition to any downward variance based on a defendant's individualized circumstances. *Id.* at 1031.

Fourth, a sentencing court may now consider previously prohibited individualized mitigating circumstances. If sentenced today based on the circumstances present at Client A's original sentencing, Client A's culpability would be mitigated her youth, *see Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012), and by the drug addiction that fueled both her current and prior offenses, *see United States v. Hendrickson*, 25 F. Supp. 3d 1166 (N.D. Iowa 2014), and for which she needed treatment, *see* 18 U.S.C. § 3553(a)(2)(D).

⁸² *See* Office of National Drug Control Policy, *What America's Users Spend on Illegal Drugs*, fig. FW.8 (2012).

⁸³ *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) ("Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, § 2D1.1 (21.2%) are overall the least likely to recidivate.").

⁸⁴ *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Science* 105-09 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psych.* 625, 632 (2005); Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* 8 (2005), www.ncjrs.gov/pdffiles1/ojdp/212757.pdf.

⁸⁵ *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 *Crime & Delinq.* 396 (1993); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010).

⁸⁶ Judge Bennett is not alone. For example, Judge Gleeson in the Eastern District of New York has stated: "Until the Commission does the job right, which should take considerable time, it should lower the ranges in drug trafficking cases by a third In the meantime, the current ranges will be given very little weight by this Court." *United States v. Diaz*, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

Given all of the above, a sentencing judge today may well conclude that Client A's starting point guideline range should be *at most* the same as that for crack under the FSA and the current Manual. If the judge thus varied to the 2014 amended crack guideline range, her base offense level would be 26, with a corresponding guideline range of **92-115** months (including three levels off for acceptance). Or, a judge may follow the lead of other judges, supported by evidence that the average non-government sponsored reduction in fiscal year 2013 was 31%, *see* U.S. Sent'g Comm'n, *Quick Facts – Methamphetamine Offenses* (2013), and vary downward by one-third. Using this methodology, the judge would first vary downward to **125** months (188 months minus 63 months), then vary further after taking into consideration mitigating factors relevant to sentencing purposes under 18 U.S.C. § 3553(a).

Client A has already served more time than the sentence a judge would likely impose today.

APPENDIX 1

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - ...
- (5) any pertinent policy statement--
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g) is in effect on the date the defendant is sentenced[;]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

APPENDIX 2

The following is a non-exhaustive list of decisions in which judges have recognized the flaws in a guideline or guideline policy.

Crack / USSG § 2D1.1 (adopting 1:1 powder-to-crack ratio)

United States v. Williams, 788 F. Supp. 2d 847 (N.D. Iowa 2011)
United States v. Shull, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011)
United States v. Trammell, 2012 U.S. Dist. LEXIS 5615 (S.D. Ohio Jan. 18, 2012)
United States v. Cousin, 2012 WL 6015817 (W.D. Pa. Nov. 30, 2012)
United States v. Whigham, 754 F. Supp. 2d 239, 247 (D. Mass. 2010)

Methamphetamine / USSG § 2D1.1

United States v. Hayes, 948 F. Supp. 2d 1009 (N.D. Iowa 2013)

Heroin / USSG § 2D1.1

United States v. Diaz, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013)
United States v. Cabrera, 567 F. Supp. 2d 271 (D. Mass. 2008)

MDMA/Ecstasy / USSG § 2D1.1

United States v. McCarthy, 2011 WL 1991146 (S.D.N.Y. May 19, 2011)
United States v. Qayyem, 2012 WL 92287 (S.D.N.Y. Jan. 11, 2012)

Drug addiction and culpability/ USSG § 5H1.4

United States v. Hendrickson, 25 F. Supp. 3d 1166 (N.D. Iowa 2014)

Fraud / USSG § 2B1.1

United States v. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006)
United States v. Parris, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008)
United States v. Watt, 707 F. Supp. 2d 149 (D. Mass. 2010)
United States v. Gupta, 904 F. Supp. 2d 349, 352 (S.D.N.Y. 2012)
United States v. Faulkenberry, 759 F. Supp. 2d 915, 928 (S.D. Ohio 2010)
United States v. Corsey, 723 F.3d 366, 377-78 (2d Cir. 2013) (intended loss)

Child pornography / USSG § 2G2.2

United States v. Marshall, 870 F. Supp. 2d 489 (N.D. Ohio 2012)
United States v. Kelly, 868 F. Supp. 2d 1202 (D.N.M. 2012)

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United States v. Dorvee, 616 F.3d 174, 184, 188 (2d Cir. 2010)
United States v. Grober, 595 F. Supp. 2d 382 (D.N.J. 2008), *aff'd* 624 F.3d 592 (3d Cir. 2010)
United States v. Strayer, 2010 WL 2560466 (D. Neb. June 24, 2010)
United States v. Cruikshank, 667 F. Supp. 2d 697 (S.D. W.Va. 2009)
United States v. Phinney, 599 F. Supp. 2d 1037 (E.D. Wis. 2009)
United States v. Beiermann, 599 F. Supp. 2d 1087 (N.D. Iowa 2009)

Career offender / USSG § 4B1.1⁸⁷

United States v. Newhouse, 919 F. Supp. 2d 955 (N.D. Iowa 2013)
United States v. Williams, 435 F.3d 1350 (11th Cir. 2007)
United States v. Naylor, 359 F. Supp. 2d 521 (W.D. Va. 2005)
United States v. Hodges, 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009)
United States v. Colon, 2007 WL 4246470 (D. Vt. Nov. 29, 2007)
United States v. Moreland, 2008 WL 904652 (S.D. W. Va. Apr. 3, 2008)

Acquitted conduct / USSG § 1B1.3

United States v. Wendelsdorf, 423 F. Supp. 2d 927 (N.D. Iowa 2006)

Fast-track disparity / USSG § 5K3.1

United States v. Lopez-Macias, 661 F.3d 485 (10th Cir. 2011)
United States v. Jimenez-Perez, 659 F.3d 704 (8th Cir. 2011)
United States v. Camacho-Arellano, 614 F.3d 244 (6th Cir. 2010)
United States v. Reyes-Hernandez, 624 F.3d 405 (7th Cir. 2010)
United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009)
United States v. Rodriguez, 527 F.3d 221, 228 (1st Cir. 2008)

⁸⁷ For more detailed guidance in career offender cases, see How a Person Previously Sentenced as a “Career Offender” Would Likely Receive a Lower Sentence Today.