

**FEDERAL PUBLIC DEFENDER OFFICE  
DISTRICT OF MASSACHUSETTS  
51 SLEEPER STREET, 5TH FLOOR  
BOSTON, MASSACHUSETTS 02210**

TELEPHONE: 617-223-8061  
FAX: 617-223-8080

December 3, 2012

Honorable Patti B. Saris  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

Dear Judge Saris:

As we discussed at the National Sentencing Policy Institute in October, we have some suggestions regarding how the Commission's report on sentencing after *Booker v. United States*, 543 U.S. 220 (2005) might present the issues in a complete and balanced way. This letter is not meant to reiterate every issue that we have raised in our previous letters and testimony, but to provide specific suggestions.

We urge the Commission to include the following information in its report for the reasons that follow:

- Complete statistics and information regarding regional differences, including whether variation in sentence lengths has grown; the kinds of cases, rates of government-sponsored departures and variances, extents of variances and departures, average guideline minimums, sentences imposed; and the interaction between prosecutorial and judicial sentencing practices
- A complete account of current data and research regarding racial disparity in sentencing, including appropriate cautions regarding the Commission's findings, the evidence that the primary cause of racial disparity is not judges, but prosecutorial charging and plea bargaining practices, and the evidence that judges have reduced racial disparity
- Current data through FY 2012 regarding judicial departures and variances
- Current data through FY 2012 regarding departures and variances sought or agreed to by prosecutors
- The role of unwarranted severity in causing disparities in the sentencing practices of both judges and prosecutors
- A fair account of the views of appellate judges and the appellate caselaw

## **I. The Report Should Include Complete Statistics and Information Regarding Regional Differences.**

Rather than focusing solely on rates of non-government sponsored below-guideline sentences,<sup>1</sup> the Commission should examine whether variation in sentence length has grown, should include the kinds of cases, rates of government-sponsored departures and variances, extents of variances and departures, average guideline minimums, and sentences imposed in different districts, and should attempt to shed light on the interaction between prosecutorial and judicial sentencing practices.<sup>2</sup>

### **A. Sentence Length as a Neutral and Relevant Measure of Whether Differences Among Districts Have Grown**

One way to present a more complete picture is to look at the bottom line: whether variation among districts in sentence length has grown over time. Sentence length reflects the influence of *both* judges and prosecutors on guideline ranges, and rates and extents of variances/departures, as well as the mix of cases, changes in guidelines and statutes, and other factors that affect the rates and extents of below-range sentences. Moreover, the Commission cannot accurately compare non-government sponsored rates (or government-sponsored rates) before and after 2003 because until 2003, the Commission reported a large number of government-sponsored departures in the same category as non-government sponsored departures.<sup>3</sup> Comparing variation in sentence length over time avoids these problems and presents a more accurate picture of whether differences among districts really have increased.

---

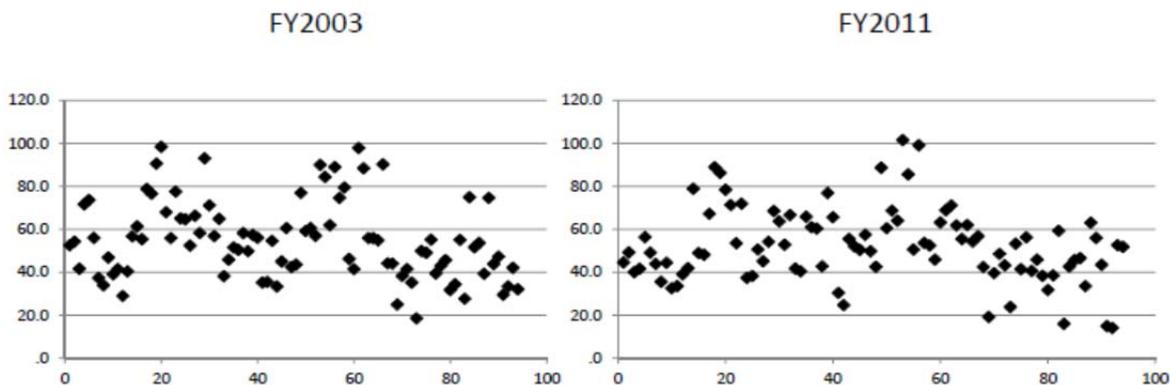
<sup>1</sup> In its October 2011 testimony, the Commission said that there had been “growing disparities among circuits and districts.” In support of this claim, it listed, from highest to lowest, rates of non-government sponsored below-range sentences for each district in fiscal year 2010, and set forth the difference between the highest and lowest rates of non-government sponsored below-range sentences by district for certain types of offenses during a 33-month period after *Gall*. See Statement of Judge Patti B. Saris, Chair, U.S. Sent’g Comm’n, *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After Booker: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 55-60 (2011) at 25, 28, 31, 33, 36, 38, 41, 43, 46, 48, 50, 53; Appendix D [hereinafter “Commission Testimony”].

<sup>2</sup> Analyzing sources of regional disparity “cannot be resolved through simple examination of the reported rates” because “the potential sources are so many, varied, and interacting.” U.S. Sentencing Comm’n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 93, 111 (2004).

<sup>3</sup> See U.S. Sent’g Comm’n, *Downward Departures from the Federal Sentencing Guidelines* 60 (2003) (reporting that after subtracting government-initiated downward departures, the 2001 rate of “other” downward departures was reduced from 18.1% to 10.9%); U.S. Sent’g Comm’n, *2002 Sourcebook of Federal Sentencing Statistics* tbl.26 (reporting only two categories of downward departures: “substantial assistance departure[s]” and “other downward departure[s]”); U.S. Sentencing Comm’n, *2004 Sourcebook of Federal Sentencing Statistics* tbl.26A (2004) (reporting three categories: “substantial assistance departure[s],” “gov’t initiated downward departures,” and “other downward departures”).

A straightforward comparison of inter-district variation in sentence lengths in 2003 with inter-district variation in sentence lengths in 2011 shows that it has grown very little. The chart below plots mean sentences by district in 2003 and 2011 using SENTOT0, with mean sentence in months on the vertical axis and district number on the horizontal axis.

**Variation by District in Average Sentence Length (Probation = 0)**



Researchers using multivariate methods have also concluded that variation in sentence length among districts has not grown since *Booker*, and has even decreased. Ulmer, Light and Kramer found that the percentage of sentence length variation explained by differences among districts was 6.6% before the PROTECT Act, 5.8% after the PROTECT Act, 5.2% after *Booker*, and 6.3% after *Gall* through 2009.<sup>4</sup> Lynch and Omori, analyzing drug cases from 1993 through 2009, found that the proportion of variation in sentence length due to differences among districts was 14.1% before *Koon*, 12% after *Koon*, 13.6% after the PROTECT Act, 13.9% after *Booker*, and 13.1% after *Kimbrough*.<sup>5</sup>

**B. Guideline Severity, Rates, Sentences Imposed**

More complete information would help shed light on the reasons for different rates of non-government sponsored below-range sentences among districts and their ultimate impact. For example, the relatively low rates of non-government sponsored below-range sentences in the Middle District of Georgia (5.3%), the Western District of Texas (12.3%), and the Southern District of Texas (15.7%) have been held up for comparison to districts with higher rates of non-government sponsored below-range sentences, in particular the Southern District of New York (49%), the District of Massachusetts (30.8%), and the District of Minnesota (44.5%). The reason for these differences is illuminated by the relative severity of guideline ranges. In 2011, the

<sup>4</sup> See Jeffery Ulmer et al., *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUSTICE Q. 799, 816 (2011).

<sup>5</sup> See Lynch & Omari, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court* at 46, tbl.3, *Criminology, Law and Society*, University of California, Irvine, Paper presented at Conference on Empirical Legal Studies, Stanford Law School (Nov. 2012).

average guideline minimums in the Middle District of Georgia, the Western District of Texas, and the Southern District of Texas were only 44 months, 35 months, and 34 months respectively. The average guideline minimums in the Southern District of New York, the District of Massachusetts, and the District of Minnesota were twice as high, at 72 months, 71 months, and 83 months respectively. And despite the higher rates of below-range sentences in the latter districts, the average sentence lengths – 55 months, 59 months, and 72 months respectively – well exceeded the national average of 49 months. It seems that in some districts, judges are correcting for overly-harsh guideline ranges, and in others there is less need to do so.

### **C. Rates and Kinds of Government-Sponsored Below-Range Sentences**

The Commission has cited the growth in the difference between high and low rates of non-government sponsored below-guideline sentences by circuit from 2006 to 2010 as evidence of “increased inconsistencies” as a result of *Booker*.<sup>6</sup> Yet the growth in the difference between the high and low rates of government sponsored below-guideline sentences by circuit has nearly tripled that of the non-government sponsored rate: the difference between the high and low rates of government-sponsored below-guideline sentences by circuit grew by 20.7 percentage points from 2006 to the third quarter of 2012, while the difference in non-government sponsored rates by circuit grew by only 8.1 percentage points.<sup>7</sup> And the difference between the highest and lowest rates of government-sponsored below guideline sentences by district has been consistently greater than the difference between the highest and lowest non-government sponsored rates.<sup>8</sup> In short, government-sponsored below-range sentences have consistently contributed more to regional variation and to the growth in that variation than judicial below-range sentences.

It would also help to clarify that some districts have low non-government sponsored rates of below-guideline sentences and others have high rates in certain kinds of cases because of the interaction with government-sponsored below-guideline sentences. For example, in 2011, Arizona had a 3.9% rate of non-government sponsored below-range sentences in immigration cases, while the Southern District of New York had a 59.7% rate. This is explained by the fact that Arizona had a very high rate of government-sponsored sponsored below-guideline sentences

---

<sup>6</sup> U.S. Sent’g Comm’n, *Mandatory Minimum Penalties in the Criminal Justice System* 347 (2011).

<sup>7</sup> See U.S. Sent’g Comm’n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 26 (government sponsored rate of 16.4% for the First Circuit and 31.4% for the Ninth Circuit; non-government-sponsored rate of 7.3% for the Fifth Circuit and 24.1% for the Second Circuit); U.S. Sent’g Comm’n, *2012 Preliminary Quarterly Data Report, Third Quarter*, tbl. 2 (government sponsored rate of 14.3% for the Fifth Circuit and 50% for the Ninth Circuit; non-government-sponsored rate of 10.8% for the Ninth Circuit and 35.7% for the Second Circuit).

<sup>8</sup> For example, in 2011, the difference between the highest and lowest rates of government-sponsored below guideline sentences by district was 12.5 percentage points higher than the difference between the highest and lowest non-government sponsored rates. See U.S. Sent’g Comm’n, *2011 Sourcebook of Federal Sentencing Statistics*, tbl.26.

in immigration cases (60.4%) because it has a fast track program, while the Southern District of New York had a very low rate of government-sponsored below-guideline sentences in immigration cases (1.5%) because it has no fast track program. The end result is that average sentence length was 17 months in Arizona and 22 months in the Southern District of New York. Providing information like this would put the statistics in better perspective.<sup>9</sup>

#### **D. Prosecutorial Practices and Problematic Guideline Applications in Certain Districts**

A full and accurate assessment of differences among districts requires an in-depth examination of charging and plea bargaining practices and anomalies in guideline application in each district. A few examples would help shed light on the issues. For example, the career offender, firearms, and immigration guidelines apply differently in different districts depending on peculiarities of state and circuit law with respect to prior convictions. And in some districts more than others, prosecutors bring minor drug cases that would otherwise be prosecuted in state court when the career offender guideline applies. This is especially problematic – and creates unwarranted geographical disparity – when the career offender guideline would not apply in most other districts. *See, e.g., United States v. Curet*, 670 F.3d 296 (1st Cir. 2012) (defendant who pled guilty to selling 12 grams of crack was a career offender as a result of a “guilty filed,” which is not a conviction under Massachusetts law, for resisting arrest, which is not a felony under Massachusetts law or the law of most states but is punishable by up to 2 1/2 years).

As a result of peculiarities of Massachusetts law, First Circuit law, and prosecutors’ practices in the District of Massachusetts, career offender cases comprised 11.2% of all cases in the district in 2011, the third highest career offender caseload in the country. The within-guideline rate in career offender cases was only 11.7%, with 45% non-government sponsored departures/variances and 41.7% government sponsored departures/variances.<sup>10</sup> The two districts with higher career offender caseloads were the Western District of Pennsylvania and the District of Maryland, with career offender cases comprising 11.8% and 11.4% of their caseloads respectively. Like Massachusetts and unlike most other states, Pennsylvania and Maryland have misdemeanors that are punishable by more than one year. In the Western District of Pennsylvania, the within-guideline rate was 13%, with 63% non-government sponsored departures/variances and 0% government sponsored departures/variances. In the District of Maryland, the within-guideline rate was 23.6%, with 49.4% non-government sponsored departures/variances and 0% government sponsored departures/variances.<sup>11</sup> It appears that judges in these districts are alleviating unwarranted geographic disparity, as well as the inappropriate severity of the career offender guideline in many cases.

---

<sup>9</sup> *Cf.* Commission Testimony at 26 (stating that there was a difference of 65.6 percentage points between two unnamed districts in non-government sponsored rates in immigration cases).

<sup>10</sup> USSC 2011 Monitoring Dataset.

<sup>11</sup> *Id.*

## **II. The Report Should Include a Complete Account of Current Data and Research Regarding Racial Disparity in Sentencing.**

The Commission's research on racial disparity has recently focused on only one potential source of disparity: judicial discretion. The Commission's multivariate analyses of judicial sentencing decisions attempts to measure average differences among racial groups after controlling for some legally relevant factors, such as the presumptive sentence, departure/variance status, and other factors. This method fails to capture disparity arising from prosecutorial discretion before the case ever gets to a judge for sentencing, and fails to measure structural disparity built into the rules that determine the presumptive sentence. This method also conceals the benefits to minority defendants of expanded judicial discretion to sentence outside the range.

The Commission should include the substantial evidence, including its own research, that unjustified racial disparities continue to result from prosecutors' decisions, as well as many of the statutory and guideline rules themselves. It also should acknowledge that judges reduce racial disparity when they use their discretion to offset disparities stemming from prosecutorial discretion, unsound rules, or a combination of the two. Without a full assessment of all sources of and remedies for disparity, the consequences of legislation that would constrain judicial discretion and give prosecutors greater control over sentencing outcomes will not be understood.

### **A. The Commission should present more complete data bearing on the effect of judicial discretion at the sentencing stage.**

One straightforward way to identify the effect of increased judicial discretion is to compare the average sentences recommended or required for different groups by the applicable guidelines and statutes—*i.e.*, the presumptive sentence—with the average sentences actually imposed after the exercise of judicial discretion. In fiscal year 2011, the gap between black and white males in the mean guideline minimum was 31.4 months, but the gap in the mean sentence imposed was 29.3 months.<sup>12</sup> That is, the racial gap is smaller after the exercise of judicial discretion than before it – the opposite effect than suggested by the Commission's multivariate analysis. We urge the Commission to include this data.

Further, while the Commission previously reported “growing” demographic disparities, the Commission's measure of a difference in sentence length between black and white males after *Gall* and *Kimbrough* has decreased as the period lengthens, from 23.3% as reported in its 2010 report, to 20% as reported in its October 2011 testimony, to 19.5% as stated by Mr. Blackwell in October 2012. This decrease should be noted in the report. As we explain below, the Commission should also report the fluctuations that have occurred in shorter time periods not defined by dates of Supreme Court decisions, in order to provide context for evaluating whether any changes after those decisions are greater than might be expected from other sources.

---

<sup>12</sup> For this analysis, SENTOT0 was used for average sentence length, and GLMIN was used for guideline minimum. Both the guideline minimum and average sentence length were capped at 470 months.

**B. The Commission should give clear and appropriate cautions.**

Many factors that legitimately affect sentences and that might explain the differences in sentences imposed on different groups are not included among the control variables in the Commission's multivariate studies. We were happy to hear Mr. Blackwell acknowledge in Memphis that the Commission's study does not take account of all relevant factors. The Commission acknowledged that unmeasured factors likely affected its results in U.S. Sent'g Comm'n, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* 4, 9-10 (2010). In two submissions to Congress, however, the Commission not only omitted this information but strongly suggested that its study controlled for all relevant factors. See Commission Testimony at 53 ("The principal benefit of this tool is that it accounts, or controls, for the effect of each factor in the analysis. Each factor is separately assessed and the extent to which each factor influences the outcome is measured."); U.S. Sent'g Comm'n, *Mandatory Minimum Penalties in the Criminal Justice System* 347 (2011) ("[A] recent Commission analysis found that, after controlling for relevant factors, Black male offenders received longer sentences than White male offenders, and that those differences in sentence length have increased steadily since *Booker*."). We hope that the Commission will correct this impression in its *Booker* report.

The Commission should also clearly state appropriate cautions about causation. While Commissioners and staff have denied that the Commission is suggesting that the "race effects" it finds are unfair or are caused by judges, this point has been undercut by the fact that the Commission is calling for legislation that would constrain judicial discretion. The fact that data is missing on many factors that may differ among groups that judges legitimately consider in sentencing is one reason to question any attribution of unfairness to judicial decision making, as the Commission cautioned in its 2010 report.

In addition, previous Commission reports discussed year-to-year fluctuations in the regression coefficient for race as evidence that these coefficients vary due to a variety of factors having nothing to do with discrimination by judges. But the Commission's recent work ignores these fluctuations. Moreover, by creating time periods defined by legislation (the PROTECT Act) and Supreme Court decisions, the Commission invites readers to assume that differences among these time periods are *due to* the legal changes defining the periods. Commission research examining neutrally-defined time periods found race effects in some years but not in other years, and only for drug offenses in some years and non-drug offenses in other years. See U.S. Sentencing Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 121-127 (2004). These fluctuations, observed during periods of relative legal stability, led the Commission to caution that "[o]ffense-to-offense and year to year fluctuations in racial and ethnic effects are difficult to reconcile with theories of enduring stereotypes . . . or overt discrimination" on the part of judges. *Id.* at 125. The Commission gave the same warning in its first *Booker* report. See U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 108 & n.320 (2006).

Cautions such as this remain valid, and are even more important today, because the Commission has suggested that changes in the coefficient associated with race can be attributed

to the legal changes it has used to define its time periods. For example, the Commission finds race effects for males but not females. Further, there have been fluctuations in shorter time periods since *Booker*, thus suggesting that many factors other than legal changes affect the coefficient for race. Hispanic males reportedly received sentences 6.8% longer than white males during the twenty-one-month period after *Gall* through 2009, but this dropped to statistical insignificance during the thirty-three-month period through 2010 reported in the Commission's 2011 testimony. Likewise, the reported aggregate black male/white male difference decreases as the study period grows longer, from 23.3% as reported in 2010, to 20% as reported in October 2011, to 19.5% as reported by Mr. Blackwell in October 2012. The Commission should use shorter, neutrally-defined time periods, and more sophisticated statistical models that measure long term trends and random fluctuations, to help prevent the false inference that the differences among the time periods were caused by the legal changes used to define the time periods. Short of that, the Commission should caution that studying shorter time periods and different offense types would likely show different results.

Most important, the Commission should acknowledge the growing body of research that questions its conclusions and applies different methods to study disparity arising from a wider range of sources. The Penn State study, released shortly after the Commission's study, reached different results using the same data and the same presumptive sentence model but a methodology that differed from the Commission's in other respects. Assuming that plausible arguments can be made on either side as to who made the right choices,<sup>13</sup> this only proves the point that "findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution." Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines*, 1986-90, AT 106 (1993); see also *Fifteen Year Review* at 127 (noting the same regarding the Commission's own fluctuating results); U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 108 (2006) (same).

Other researchers, using entirely different models, have questioned the Commission's apparent inference of causation and provided strong evidence that racial disparity in sentencing outcomes is not caused by increased judicial discretion at all. See Part C.2 and 3, *infra*. This is further reason to caution against inferring causation.

---

<sup>13</sup> For example, according to Rehavi and Starr, either the Commission's approach of combining the incarceration decision with the sentence length decision or Ulmer et al's approach of separating them is appropriate, but there were problems with both in the way they were implemented. See Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of United States v. Booker* 30 n.109 & 46 n.145 (U. Mich. L. & Econ. Research Paper No. 12-021, 2012), available at <http://ssrn.com/abstract=2170148>.

**C. The Commission Should Present Data and Research That Shed Light on Whether Constraining Judicial Discretion and Enlarging Prosecutorial Power Would Increase Racial Disparity.**

More recent studies using different methodologies than the Commission or Penn State conclude that racial disparity after *Booker* is not caused by judicial discretion, but primarily by prosecutors' use of mandatory minimums, and that increased judicial discretion appears to have lessened racial disparity. In the interest of a fully informed understanding of the tradeoff between judicial discretion and prosecutorial power resulting from any legislative fix, we urge the Commission to present the findings of Professors Fischman and Schanzenbach and those of Professors Starr and Rehavi. We also urge the Commission to include its own research bearing on whether it would be wise to transfer more sentencing power to prosecutors.<sup>14</sup>

**1. The Commission's data show that racial disparity results from the exercise of prosecutorial discretion when it is unchecked by the balancing influence of judges.**

The Commission's data show that black offenders are more likely to be charged with more severe mandatory minimums than similarly situated white offenders. Among drug trafficking defendants in 2010 who received either a § 924(c) conviction or a weapon enhancement under § 2D1.1, 36% of black defendants, but only 26% of white defendants, received the harsher § 924(c) enhancement. See Paul J. Hofer, *Review of U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System*, 24 Fed Sent Rep 193, 198 (2012). The Commission previously reported that among offenders who possessed or used a gun during a drug offense in 1995, black offenders were 48% of those who qualified for a mandatory minimum of five or more years under 18 U.S.C. § 924(c), but 56% of those charged with a mandatory minimum and 64% of those who actually received it. Data from 2000 showed the same pattern. See U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 90-91, 131 (2004).

The recent mandatory minimum report found the same kind of disparity under 21 U.S.C. § 851, which requires the government to file an information: 29.9% of eligible black drug offenders received an increased mandatory minimum under § 851, while only 25% of eligible white offenders, 19.9% of eligible Hispanic offenders, and 24.8% of offenders of "other" races received the increase. U.S. Sent'g Comm'n, *Mandatory Minimum Penalties in the Criminal Justice System* 257-58 (2011). The Commission also reported that "stacked" § 924(c) counts, which result in sentences that are "excessively severe and disproportionate to the offense committed," are charged against black defendants at a higher rate than defendants of other races and that this creates "perceptions of unfairness and unwarranted disparity." *Id.* at 359-60, 363-

---

<sup>14</sup> As the Commission and many others have recognized, discretion is hydraulic: reducing judicial discretion has the effect of giving prosecutors greater control over sentencing outcomes. See, e.g., U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 92 (2004); Rehavi & Starr, at 6-8 (reviewing the literature).

64. Further, black offenders receive government-sponsored substantial assistance departures less often than defendants of other races. *Id.* at 159-60, 179, 214-15, 221, 291.

This data regarding racial disparity in prosecutors' use of mandatory minimums and substantial assistance motions has direct implications for the likelihood that a legislative "fix" that would constrain judicial discretion at the cost of enlarging prosecutorial control over sentencing outcomes would increase racial disparity. The Commission should include these findings in its report on sentencing after *Booker*, just as it included discussion of its multivariate study of judicial discretion in its report on mandatory minimums. *Id.* at 347.

**2. Fischman and Schanzenbach's research shows that racial disparity narrows in periods of deferential review, that the primary cause of racial disparity after *Rita, Gall* and *Kimbrough* is mandatory minimums that impede judicial discretion, and that judicial discretion does not contribute to, and may in fact mitigate, racial disparities.**

Innovative research by econometricians has recently employed sophisticated models that are able to examine a wider scope of decision making than the models employed by the Commission or Penn State. Professors Fischmann and Schanzenbach focus on the effect of the standard of review and the effect of prosecutors' use of mandatory minimums on racial disparity. Like the Commission and Penn State, they examined data only at the sentencing stage, but unlike the Commission and Penn State, they did not use the presumptive sentence, departures/variances, or the presence of mandatory minimums as control variables. Instead, they examined these factors as outcome variables that could themselves be affected by the response of prosecutors and/or judges to changes in the law, *i.e.*, *Koon*, the PROTECT Act, *Booker*, *Rita/Gall/Kimbrough*. Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 *J. Empirical Legal Stud.* 730-31, 737-43 (2012).

The results shed a very different light on the effects of judicial and prosecutorial decision making. They found that the "disparity in departure rates and prison sentences [for black offenders] relative to whites narrows in periods of deferential review, but black offenders are sentenced more often at the statutory minimum even as their offense levels do not change. In other words, when judges are freer to depart, they do so proportionally more often for blacks than whites, resulting in lower prison sentences. However, judges appear to be constrained more frequently by mandatory minimums when sentencing black defendants." *Id.* at 746; *see also id.* at 743-44.

After *Rita, Gall* and *Kimbrough*, departures substantially increased for both white and black offenders. *Id.* at 757. However, the percentage of black offenders sentenced at the mandatory minimum also increased. *Id.* at 752. Prison sentences declined for white offenders, but for black offenders, prison sentences declined only in cases unlikely to involve a binding mandatory minimum and therefore stayed relatively flat overall. *Id.* at 757, 761. In cases not likely to involve a binding mandatory minimum, sentences fell by the same proportion for whites and blacks. *Id.* at 761.

The departure results showed that judges prefer more lenient prison sentences for black offenders, but this did not translate into lower prison sentences overall because lower sentences were impeded by trumping mandatory minimums more often for black offenders than for white offenders. *Id.* at 757, 761. Thus, while the “disparity between white and black offenders in prison sentences increase[d]” after *Rita, Gall* and *Kimbrough*, “this is largely a consequence of the mandatory minimums.” *Id.* at 752. They found “no evidence that the increase in racial disparities after *RGK* is due to the biased exercise of judicial discretion.” *Id.* at 730. They concluded that “judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing.” *Id.* at 761. Thus, “[p]olicymakers interested in redressing racial disparity today should pay much closer attention to the effects of mandatory minimums and their effect on prosecutorial and judicial discretion.” *Id.*

**3. Rehavi and Starr’s research shows that prosecutors’ charging and plea bargaining decisions in the use of mandatory minimums is the primary driver of racial disparity in sentencing, and that there is no evidence that *Booker* increased racial disparity in the exercise of judicial discretion.**

Professors Rehavi and Starr used data from multiple sources to study the criminal justice process from arrest through sentencing. *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of United States v. Booker* 18-19 (U. Mich. L. & Econ. Research Paper No. 12-021, 2012), available at <http://ssrn.com/abstract=2170148>. They rejected use of the presumptive sentence as a control variable because that approach assumes that the presumptive sentence does not itself reflect unwarranted disparity in prosecutors’ charging and plea bargaining decisions and their substantial control over the facts that eventually get to the judge; that approach could lead to misguided policy changes because disparities found at the sentencing stage cannot safely be attributed to judicial discretion without examining disparity at the earlier stages that produced the presumptive sentence. *Id.* at 10-16. They also questioned whether changes in disparity can be attributed to changes in the law regarding judicial discretion without testing long term trends and other changes that have occurred over time. *Id.* at 3, 20, 30-31.

Rehavi and Starr used the arrest offense rather than the presumptive sentence as the key case-severity control variable, and assessed disparities introduced throughout the post-arrest process. *Id.* at 16-17. They found a 10% black-white disparity in non-drug cases, which rose to 14% when drug cases were added. *Id.* They also found that black men were twice as likely as white men to be charged with a mandatory minimum offense. When they controlled for the charged mandatory minimum, half of the otherwise-unexplained racial disparity in average sentence disappeared. When they controlled for the mandatory minimum of conviction, all of the otherwise-unexplained racial disparity disappeared. *Id.* at 19. In other words, disparity in the charging of mandatory minimums caused all of the racial disparity in average sentence length—a finding consistent with Fischman and Schanzenbach, but contrary to studies that examine only sentencing decisions using the presumptive sentence as the primary control.<sup>15</sup>

---

<sup>15</sup> Rehavi and Starr combined the incarceration decision and the sentence length decision as the Commission did, but counted non-prison sentences as 0 months, rather than .01 months as the

Rehavi and Starr used a regression discontinuity design to isolate the effect of *Booker* on racial disparity attributable to judges. *Id.* at 32-40. Again, like Fischman and Schanzenbach, they found “no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it.” *Id.* at 40. And notably, in light of the Commission’s proposal to restrict judicial discretion to consider certain offender characteristics, they found that there was no socioeconomic disparity in sentencing after *Booker*. *Id.* at 22, 50.

Rehavi and Starr concluded that it is “myopic” to focus on judicial sentencing alone because “racial disparities in recent years have been mostly driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums.” *Id.* at 48. They warned that using the Commission’s contrary results as the basis to constrain judicial discretion would be counterproductive, first, because it would not reduce disparities but increase them, and, second, because increased rigidity would also increase severity, primarily for black men. *Id.* at 49.

#### **4. Evidence showing that judges have reduced racial disparity that is built into the rules**

None of these studies takes account of racial disparity that is built into the statutes and guidelines themselves, including not just crack, but the career offender guideline, the criminal history score, and various mandatory minimums, particularly 18 U.S.C. § 924(c) and 21 U.S.C. §§ 841 and 851. Judges can and do exercise their discretion to reduce unwarranted racial disparity caused by guidelines that have a disproportionate impact on black offenders without clearly serving any purpose of sentencing. For example, in fiscal year 2010, by imposing below-guideline sentences they would not (and could not) have imposed under the mandatory guidelines, judges spared more than 860 African American defendants sentenced under the crack or career offender guidelines over 3300 years of unnecessary incarceration.<sup>16</sup> We hope that the Commission will include some analysis of how judges have reduced racial disparity built into certain rules.

It has not been our experience that judges exercise discretion in a biased manner against black men. It has been our experience that prosecutors’ use of harsh rules appears to have a racially disparate impact, and that judges, when given the opportunity, mitigate that harshness in an evenhanded way. There is mounting empirical evidence that this is in fact the case. Thus,

---

Commission did, and also excluded immigration offenses as Ulmer et al did. *Id.* at 30 n.109, 45. They also tested the incarceration decision separately, and found “no significant disparity in the incarceration decision after controlling for arrest offense.” *Id.* at 30 n.109.

<sup>16</sup> This estimate was made using the Monitoring Datasets for fiscal years 2003 and 2010. It is based on the increase in the rate of non-government sponsored below-guideline sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 and the average extent of these reductions. Fiscal year 2003 was used as the comparison year because it preceded the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which affected how cases were handled in anticipation of *Booker*.

giving prosecutors *more* control over sentencing outcomes – through a stricter standard of review and various other devices the Commission has proposed to make the guidelines more binding – is no solution to racial disparity and in fact would be harmful to racial minorities. While we understand that the Commission has committed itself to proposing this legislation, we believe it should present all of the relevant evidence.

### **III. The Report Should Present Current Data Regarding Both Judicial and Prosecutorial Departures and Variances.**

The Commission’s first *Booker* report, released in March 2006, was based on data extracted as of February 22, 2006. It has now been two months since fiscal year 2012 ended. We urge the Commission to provide the most current picture of the sentencing data in this *Booker* report, including data through 2012.

That data demonstrates that the “increasing” trend previously cited by the Commission has reversed itself. The non-government sponsored rate of below-guideline sentences has decreased in a sustained manner, from 17.8% in 2010 to 17.4% in 2011 to 16.7% during the first three quarters of 2012.<sup>17</sup> And the extent of non-government sponsored below-range sentences has decreased significantly or remained the same in every category from 2011 to 2012.<sup>18</sup>

At the same time, contrary to the Commission’s recent statement that the rate and extent of government-sponsored below-range sentences have remained “about the same” since *Booker*, the government-sponsored rate has grown more than the non-government sponsored rate, despite the fact that it was so much higher to begin with. The government-sponsored rate has grown by 4.1% (from 23.8% in 2005 post-*Booker* to 27.9% in the first three quarters of 2012), while the non-government sponsored rate has grown by 3.8% (from 12.9% to 16.7%).<sup>19</sup> Further, while the extent of substantial assistance departures has decreased by .1%, the extents of fast track departures and government-sponsored variances have increased by 3.8% and 1.7% respectively.<sup>20</sup>

---

<sup>17</sup> U.S. Sent’g Comm’n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbl. 1; U.S. Sent’g Comm’n, 2011 Sourcebook of Federal Sentencing Statistics, tbl.N; U.S. Sent’g Comm’n, 2010 Sourcebook of Federal Sentencing Statistics, tbl.N.

<sup>18</sup> *Compare* U.S. Sent’g Comm’n, 2011 Sourcebook of Federal Sentencing Statistics, tbls. 31A-31D (degree of decrease for non-government sponsored below-range sentences: 33.3%, 46.4%, 35.1%, 58.5%) *with* U.S. Sent’g Comm’n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbls. 10-13 (degree of decrease for non-government sponsored below-range sentences: 32.7%, 39.3%, 35.1%, 33.5%).

<sup>19</sup> U.S. Sent’g Comm’n, 2005 Sourcebook of Federal Sentencing Statistics, Section III, tbl. 26; U.S. Sent’g Comm’n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbl. 1.

<sup>20</sup> *Compare* U.S. Sent’g Comm’n, 2011 Sourcebook of Federal Sentencing Statistics, tbls. 30-31 (degree of decrease for government-sponsored below-range sentences: 50%, 30%, 36.4%) *with* U.S. Sent’g Comm’n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbls. 7-9 (degree of decrease for government-sponsored below-range sentences: 48.9%, 33.8%, 38.1%).

In addition, the nature of government-sponsored below-guideline sentences has shifted. The rate of substantial assistance departures has dropped from 14.7% to 11.5%, while the rates of fast track departures and government-sponsored variances have each nearly doubled (fast track departures from 6.2% to 11.5% and variances from 2.9% to 4.9%).<sup>21</sup> In child pornography cases, the rate of government-sponsored variances is now 17.9%.<sup>22</sup> Further, the government agrees to or does not oppose more than half of sentences classified as non-government sponsored below range.<sup>23</sup> Taken together, the government moves for or does not object to a below-guideline sentence in at least 36.3% of all cases, while judges impose below-range sentences without a government motion and over the government's objection in at most 8.4% of cases. Put another way, the government moves for 62.6% of all below-guideline sentences and does not object to at least another 18.7% of such sentences.

It is important that the Commission include information regarding prosecutorial practices in its *Booker* report for several reasons. Where more than a quarter of defendants are found or plead guilty to a charge carrying a mandatory minimum sentence and nearly 97% of defendants plead guilty, it is obvious that prosecutors have an enormous influence over sentencing outcomes. After *Booker*, prosecutors still control the applicable guideline, as well as the minimum and maximum sentence, through their charging and plea bargaining decisions, and they are largely in control of the severity of the guideline range by deciding which aggravating facts to convey to the judge. In addition, prosecutors seek below-guideline sentences – and at a significantly increasing rate – including variances under § 3553(a).

While *Booker* brought needed balance between judges and prosecutors in their influence on sentencing outcomes,<sup>24</sup> the Commission proposes a series of legislative changes that would constrain judicial discretion and consequently increase prosecutorial power over sentencing outcomes. Some members of Congress, apparently based on the Commission's presentation last October, voiced support for a mandatory guidelines system which would place the mandatory range, and thus the final sentence, solely in the hands of prosecutors. These proposals cannot be fairly evaluated without knowing the consequences of greater prosecutorial control over sentencing outcomes. If prosecutors introduce unwarranted disparity – and there is substantial

---

<sup>21</sup> U.S. Sent'g Comm'n, 2005 Sourcebook of Federal Sentencing Statistics, Section III, tbl. 26; U.S. Sent'g Comm'n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbl. 1.

<sup>22</sup> *Id.*, tbl. 5.

<sup>23</sup> U.S. Sent'g Comm'n, 2012 Preliminary Quarterly Data Report, Third Quarter, tbls. 1, 6. See Paul J. Hofer, How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?, 22 Fed. Sent. Rep. 89, 92 (Dec. 2009) (explaining the 2009 data); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 1160 U. Pa. L. Rev. 1631, 1679 n.262 (2012) (explaining the 2011 data).

<sup>24</sup> As the Commission has observed, “in a tightly structured sentencing system like the [mandatory] federal sentencing guidelines,” the “[d]isparate effects of charging and plea bargaining [were] a special concern . . . because the ability of judges to compensate for disparities in presentence decisions [was] reduced.” U.S. Sentencing Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 92 (2004).

evidence that they do – then undoing the current balance between prosecutors and judges would be counterproductive. Without this information, Congress could be misled to adopt a solution to the wrong problem that would make matters much worse.

Further, the chief problem facing the federal criminal justice system is that sentences are too severe in many cases to serve any legitimate purpose of sentencing. The Bureau of Prisons population is consuming the Department of Justice’s budget. As the Commission saw firsthand at FCI Memphis, too many people who no longer need to be there – primarily African American men – will be languishing in prison for another five, ten or twenty years. The fact that prosecutors – whose interest is in retribution for the seriousness of the offense and protecting the public from further crimes of defendants – frequently seek or agree to sentences below the guideline range strongly supports the need for lower sentences.

Finally, we believe that sentences outside the guideline range are often necessary to comply with the purposes of sentencing. But if they are a problem, one would expect the Commission to be at least as concerned about those initiated by prosecutors as those initiated by judges. Not only are there far fewer judge-initiated variances and departures, but judges are neutral, are charged with imposing sentences that meet the purposes of sentencing, state their reasons in open court, and are subject to appellate review. Prosecutors are adversarial parties whose decisions are not made in public, are not required to take into account the purposes of sentencing, and are not subject to judicial review.

For these reasons and as shown above in Parts I and II, the post-*Booker* sentencing system cannot be fairly assessed without assessing prosecutorial practices. In its mandatory minimum report, the Commission counterbalanced its criticism of inconsistent use of mandatory minimums by prosecutors with criticism of judicial discretion under the guidelines. *See U.S. Sent’g Comm’n, Mandatory Minimum Penalties in the Criminal Justice System* 346-47 (2011). Likewise, a balanced picture of the advisory guidelines system must include an assessment of prosecutorial practices.

#### **IV. The Report Should Acknowledge the Role of Unnecessary Severity in Causing Disparity in the Advisory Guideline System.**

As the Commission noted in its mandatory minimum report, mandatory minimums that apply too broadly, are set too high, or both, lead to inconsistencies in application of mandatory minimums by prosecutors. *U.S. Sent’g Comm’n, Mandatory Minimum Penalties in the Criminal Justice System* 345 (2011). At the same time, the Commission asserted that the Supreme Court’s decisions have “increased inconsistencies” in sentencing under the guidelines. *Id.* at 346. But the root of inconsistencies under the advisory guidelines system is the same as under mandatory minimums: guidelines that apply too broadly, are overly severe, or both, lead to differences within and among districts in the sentencing practices of both judges and prosecutors.

The data noted in Part III, showing a decreasing trend in judicial below-guideline sentences, suggests that when the Commission fixes unsound guidelines, judges follow them more often. For instance, from 2010 to 2011, the within-guideline rate in crack cases increased

by 5.9 percentage points and the non-government sponsored rate of departures/variances dropped by 6.5 percentage points,<sup>25</sup> and we suspect this trend has continued in 2012.

## **V. The Report Should Give a Fair Account of the Views of Appellate Judges and the Appellate Caselaw.**

In its October 2011 testimony, as well as in New Orleans and Memphis, the Commission suggested or stated that appellate judges are generally frustrated by the standard of review. We do not believe that this is an accurate summary of what appellate judges have said or of the appellate caselaw. We therefore urge the Commission to provide a fair account of the views expressed by appellate judges and of the appellate caselaw.<sup>26</sup>

Appellate judges testifying at the Commission's regional hearings recognized that the current standard is necessary if the guidelines are to remain constitutional, declined to support statutory change when asked, recognized that sentencing judges are best situated to decide sentences and most often get it right, and urged the Commission to facilitate appellate review by justifying its guidelines. *See* Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sent'g Comm'n at 53-58 (Feb. 16, 2012) (discussing testimony of appellate judges at regional hearings). In its October 2011 testimony, however, the Commission relied on snippets of testimony taken out of their full context and isolated complaints in two dissenting opinions. *See* Commission Testimony at 15-17.

Appellate judges at the hearing in February 2012 advised the Commission not to seek a stricter standard of review. *See* Transcript of Public Hearing Before the U.S. Sent'g Comm'n at 170-71 (Feb 16, 2012) (Judge Lynch) (“[I]n going from the district court to the court of appeals, my sense of the desirability of more appellate review of sentences has drooped . . . because now I see it also from that perspective, and I see that we don’t have the same degree of information, the same feel for the case. I think appellate judges are very reluctant to get pushed into this.”); *id.* at 171 (Judge Davis) (“I really agree with Judge Lynch, and . . . we really have settled into a comfort level I think in the Fourth Circuit. It ain’t broke. . . . And I think the court is really quite comfortable with where we are.”); Letter from Hon. Myron H. Bright, U.S. Circuit Judge, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n (Jan. 10, 2012) (criticizing the Commission’s proposals for stricter appellate review as likely unconstitutional, and recognizing sentencing judges’ greater competence in sentencing and ability to compensate for unreasonableness of some guidelines).

Appellate judges speaking in New Orleans expressed no frustration with the appellate standard of review. They did not say that they think sentences are unreasonable, but are unable to reverse them. In fact, Judge Riley and Judge Owen encouraged “bullet proofing” sentences in

---

<sup>25</sup> U.S. Sent’g. Comm’n, *Interactive Sourcebook*.

<sup>26</sup> We have previously explained why the Commission’s proposed changes to the standards of review would likely be held unconstitutional. *See* Statement of Henry Bemporad, Federal Public Defender for the Western District of Texas, Before the U.S. Sent’g Comm’n (Feb. 16, 2012).

the district court to cut down on appellate review. When pressed, Judge Riley and Judge Owen said that Congress could codify what *Rita* said regarding a rebuttable presumption of reasonableness, but Judge Riley warned that going further may not pass muster. Judge Motz said that codifying a presumption of reasonableness would be unwise and saw no need for or benefit from congressional intervention. Judge Chin declined to comment.

Of course, the proper and constitutional standard of review is not up to a vote of appellate judges. If it were, we believe, based on testimony and comments over the last four years, that the majority of appellate judges would oppose a stricter standard. That belief also is supported by appellate decisions.

Numerous courts of appeals have recognized that the district courts are best situated to determine sentences.<sup>27</sup> At the same time, the courts of appeals are fully equipped to reverse sentences that are procedurally or substantively unreasonable.<sup>28</sup> In some cases, dissenting judges

---

<sup>27</sup> See, e.g., *United States v. Poynter*, 495 F.3d 349, 351 (6th Cir. 2007) (“Unlike the trial court,” the court of appeals “[does] not see” or hear the evidence, and “most appellate judges have little experience sentencing individuals.”); *United States v. Aleo*, 681 F.3d 290, 300 (6th Cir. 2012) (noting that “the sentencing court observed the defendant and the witnesses firsthand, and . . . has a wide variety of sentencing cases to compare each case to, unlike an appellate court,” and “[o]ur role is not to usurp the sentencing judge’s position as the best interpreter of the facts”); *United States v. Begin*, 696 F.3d 405, 414 (3d Cir. 2012) (“[T]he sentencing judge, not the court of appeals, is in a superior position to find the facts and judge their import under § 3553(a) in the individual case.”); *United States v. Abu Ali*, 528 F.3d 210, 265-66 (4th Cir. 2008) (“[T]he sentencing judge is in a superior position to find facts and conduct the individualized assessment that is such an integral part of the sentencing process.”) (internal citation and quotation marks omitted); *United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (“[W]e are to afford significant deference to a district court’s sentencing decision. . . . [W]e may not reverse just because we think a different sentence is appropriate. . . . ‘The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.’”) (quoting *Gall*, 552 U.S. at 51) (internal citation omitted); *United States v. Friedman*, 554 F.3d 1301, 1312 (10th Cir. 2009) (“[D]istrict courts enjoy a strong institutional advantage in arriving at sentencing decisions, and [t]hose decisions are therefore entitled to substantial deference.”) (internal citation omitted); *United States v. Pugh*, 515 F.3d 1179, 1192 (11th Cir. 2008) (“We . . . recognize the wide discretion afforded to district courts in sentencing, especially since the district court is in a superior position to find facts and judge their import.”) (internal quotation marks omitted); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) (“[R]esponsibility for sentencing is placed largely in the precincts of the district courts.”); *United States v. Gardellini*, 545 F.3d 1089, 1095 (D.C. Cir. 2008) (“The District Court’s conclusion rests on precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized.”).

<sup>28</sup> See, e.g., *Poynter*, 495 F.3d at 353 (reversing upward variance to statutory maximum as substantively unreasonable); *Aleo*, 681 F.3d at 300-02 (reversing upward variance to statutory maximum as substantively unreasonable); *Begin*, 696 F.3d 405, 414 (3d Cir. 2012) (reversing upward departure as procedurally unreasonable); *Abu Ali*, 528 F.3d at 269 (reversing downward variance as substantively unreasonable); *Ressam*, 679 F.3d at 1087 (reversing downward variance as substantively unreasonable); *Friedman*, 554 F.3d at 1312 (reversing downward variance as substantively unreasonable); *Pugh*, 515 F.3d at 1194 (reversing downward variance as substantively unreasonable); *United States v. Miller*, 601 F.3d 734 (7th Cir. 2010) (reversing upward variance as substantively unreasonable); *United States v.*

have expressed the view that the court affirmed a sentence using a standard *more* deferential than *Gall* requires, both for sentences viewed as too short,<sup>29</sup> and for sentences viewed as too long.<sup>30</sup> In other cases, dissenting judges have expressed the view that the court reversed a sentence using a standard *less* deferential than *Gall* requires.<sup>31</sup> These are not complaints about the standard of review itself, but reasonable disagreements about the way it was applied in a particular case. Such disagreements have existed, and would exist, under any standard of review.

We have compiled a list of all appellate reversals in certain categories since *Gall* and *Kimbrough* through September 27, 2012.<sup>32</sup> Seventeen sentences were reversed as substantively unreasonable on the defendant's appeal (5 within-guideline sentences, 10 above-guideline sentences, and 2 below-guideline sentences), and twenty-one below-range sentences were reversed as substantively unreasonable on the government's appeal. One hundred twenty-one sentences were reversed for a failure to adequately explain the sentence or to adequately address non-frivolous arguments on the defendant's appeal (81 within-guideline sentences, 29 above-guideline sentences, and 11 below-guideline sentences), and seventeen below-guideline sentences were reversed for the same kind of procedural error on the government's appeal.

This demonstrates that courts of appeals are fully capable of reversing outlier sentences for substantive unreasonableness, and are fully equipped to review and reverse for procedural error. And, contrary to the view that reversal for procedural error has no effect on remand – a misperception stated in the Commission's October 2011 testimony, *see* Commission Testimony at 16, reversals for procedural error have resulted in a different sentence 57% of the time. *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for*

---

*Cutler*, 520 F.3d 136 (2d Cir. 2008) (reversing downward variance as substantively unreasonable); *United States v. Akhigbe*, 642 F.3d 1078, 1087-88 (D.C. Cir. 2011) (reversing upward variance as procedurally unreasonable).

<sup>29</sup> *See United States v. Tomko*, 562 F.3d 558, 578 (3d Cir. 2009) (*en banc*) (Fisher, J., dissenting); *United States v. Feemster*, 572 F.3d 455, 470-71 (8th Cir. 2009) (*en banc*) (Beam, J., dissenting); *United States v. Edwards*, 622 F.3d 1215, 1216 (9th Cir. 2010) (*en banc*) (Gould, J., dissenting).

<sup>30</sup> *See United States v. Heath*, 559 F.3d 263, 268-70 (4th Cir. 2009) (Gregory, J., dissenting); *United States v. Overmyer*, 663 F.3d 862, 867 (6th Cir. 2011) (Merritt, J., dissenting); *United States v. Docampo*, 573 F.3d 1091, 1104 (11th Cir. 2009) (Barkett, J., concurring in part and dissenting in part).

<sup>31</sup> *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 272-73 (4th Cir. 2008) (Motz, J., dissenting); *United States v. Irely*, 612 F.3d 1160, 1271-72 (11th Cir. 2010) (Edmondson, J., dissenting); *United States v. Amezcua-Vasquez*, 586 F.3d 1176, 1178-80 (9th Cir. 2009) (O'Scannlain, J., dissenting from the denial of rehearing *en banc*); *United States v. Hunt*, 521 F.3d 636, 653 (6th Cir. 2008) (Martin, J., dissenting).

<sup>32</sup> *See* Appellate Decisions After *Gall* (Sept. 27, 2012), [http://www.fd.org/docs/select-topics---sentencing/app\\_ct\\_decisions\\_list.pdf](http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf). It does not include reversals where the district court erred in calculating the guideline range, or treated the guidelines as mandatory or presumptively reasonable, or did not address an argument because circuit precedent at the time of sentencing precluded it from doing so.

*Adequate Explanation* at 18 (Dec. 2011), [http://www.fd.org/docs/select-topics---sentencing/Procedure\\_Substance.pdf](http://www.fd.org/docs/select-topics---sentencing/Procedure_Substance.pdf).

Thank you for the opportunity to provide these suggestions.

Very truly yours,

/s/ Miriam Conrad

Miriam Conrad, Federal Public Defender  
Vice-Chair, Federal Defender Sentencing  
Guidelines Committee  
on Behalf of the Federal Defender Sentencing  
Guidelines Committee and Legislative Expert Panel

cc: William B. Carr, Jr., Vice Chair  
Ketanji Brown Jackson, Vice Chair  
Hon. Ricardo H. Hinojosa, Commissioner  
Dabney Friedrich, Commissioner  
Hon. Beryl A. Howell, Commissioner  
Isaac Fulwood, Jr., Commissioner *Ex Officio*  
Jonathan J. Wroblewski, Commissioner *Ex Officio*  
Judith M. Sheon, Staff Director  
Kenneth Cohen, General Counsel