Sentencing Appeals (2008-2009)

The post-*Booker* world of federal sentencing appeals has generated exciting and challenging opportunities for defense counsel at both the trial and appellate stages. The Supreme Court's decisions in *Rita*, *Gall* and *Kimbrough* have sparked substantial debate among judges as to their meaning and practical effect. Dissenting opinions and circuit splits are common as courts continue to define the contours of substantive and procedural reasonableness. Here, you will find a summary of selected appellate decisions to help you set up an appellate issue in the district court and on appeal. Circuit splits are noted so that you can be sure to preserve unresolved issues in the event your circuit court of appeals has not yet decided an issue or the Supreme Court decides to grant certiorari on the issue. [1]

I. Practice Tips

A. Successfully challenging a sentence for substantive reasonableness is extremely difficult. If you have drawn a bad judge or bad facts, try to negotiate a plea that limits the judge's discretion, *i.e.* a Rule 11(c)(1)(C) plea, because a sentence toward the statutory maximum may well be upheld as substantively reasonable.

B. If you think you may appeal the sentence, state any and all objections. Don't assume the sentence can be appealed on a specific ground when all that was preserved was a general objection. Think of all the things that may have gone wrong – *e.g.,* bad fact-finding, failure to consider a 3553(a) factor, improper calculation of the guidelines, and state your objection. Otherwise, the sentence might be subject to plain error review. Make sure sentencing letters, memos are made a part of the record and incorporated into your objections.

C. Make a clear and specific record on why your proposed sentence complies with the 3553(a) factors, even if it's a within guideline sentence. The more you can show that your proposal is empirically grounded and consistent with deterrence literature, as well as responsive to the criminogenic needs of your clients, the better your chances of convincing the district court and the better your record for appeal. Check the fd.org website for papers that may help you put together these arguments, including *Sentencing by the Statute*, the various deconstruction papers, *the Federal Public*

[1] This outline was prepared by Denise C. Barrett and Sara E. Noonan, National Federal Defender Sentencing Resource Counsel Project. It is **not** an exhaustive summary of sentencing decisions. Nor does it discuss the numerous decisions applying *Begay* and *Chambers* or challenges to mandatory minimums. Both of those topics are covered by other sessions during the conference. Before deciding how to litigate a particular issue, be sure to research your circuit law and update the cases cited herein. Special thanks to all the Federal Defender bloggers who report on case law developments in their circuits. Their reports are an invaluable way of staying current on the most significant cases emerging in the rapidly evolving area of sentencing appeals.

Defender's Sentencing Resource Manual: Using Statistics and Studies to Redefine the Purposes of Sentencing, *Determining Your Client's Likelihood of Success under Community Supervision and Improving the Odds for a Non-Prison Sentence*, and Sentencing Commission reports.

D. If you are able to convince the judge to impose a below guideline sentence, make sure that the sentence is procedurally grounded and the reason for the sentence adequately explained. Encourage the court to review all the 3553(a) factors and provide specific reasons for why the sentence supports those findings. The court should expressly state any factual findings underlying its decision.

E. To avoid potential problems with *Kimbrough's* "closer review "dicta, consider two lines of attack: (1) deconstruct the guideline to show that it is not the product of empirical study and national experience; and (2) encourage the judge to base the sentence on factors unique to your client or the offense and not solely on a categorical disagreement with the guideline. *See United States v. Simmons*, __F.3d__, 2009 WL 1363544 (5th Cir. May 18, 2009) (noting that Supreme Court did not state "closer review" is needed where district judge's concern "is about the suitability of the sentence under the special conditions of a particular offender").

A. Closely monitor decisions in other circuits so that you can posture your case for certiorari review. The scope of substantive reasonableness review is a subject of intense debate.

II. Review for Procedural Reasonableness

A. A court may commit any number of procedural errors when imposing a sentence.

1. Failing to calculate the guidelines properly. *Gall v. United States*, 128 S.Ct 586, 597 (2007). *See also United States v. Delgado-Martinez*, __F.3d __, 2009 WL 902390, *3 (5th Cir. 2009); *United States v. Klein*, 543 F.3d 206, 215 (5th Cir. 2008) (failure to properly calculate loss); United *States v. Martin*, 291 Fed.Appx. 765, 770-72 (6th Cir. 2008) (failing to properly group counts); *United States v. Kemp*, 530 F.3d 719, 723 (8th Cir. 2008) (failing to calculate the guidelines).

a) A circuit split now exists on whether a court may follow the one book rule when to do so would violate the Ex Post Facto Clause. *Compare United States v. Demaree*, 459 F.3d 791, 794-95 (7th Cir. 2006) (no ex-post facto bar to applying amendment that increased guideline range) *with United States v. Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008) (disagreeing with *Demaree* and concluding that courts should undertake an as applied analysis to determine if using guidelines in effect

at time of sentencing would put defendant at substantial risk for more severe sentence).

b) The government is now taking the position that the Ex Post Facto Clause does not apply to advisory guidelines. Brief in Opposition to the Petition for Certiorari, *Mower v. United States*, 2008 WL 4360885, * 7-8 (Sept. 23, 2008) (No. 07-1539).

c) The issue is pending in the Fourth Circuit on a government appeal. *United States v. Lewis,* 603 F.Supp. 2d 874 (E.D. Va. 2009).

2. Treating the guidelines as mandatory or giving them a presumption of reasonableness. *Gall*, 128 S.Ct. at 597; *Nelson v. United States*, 129 S.Ct. 890, 891-92 (2009) (district court's statement that the guidelines are "presumptively reasonable" and that "unless there's a good reason in the [§ 3553(a)] factors . . . the Guideline sentence is the reasonable sentence" requires summary reversal).

3. Not adequately explaining the reason for the sentence. 18 U.S.C. § 3553(c); *Gall,* 128 S.Ct. at 597. *See, e, g*., *United States v. Persico* 2008 WL 4187967**,** *27 (2d Cir. 2008) (remanding where court failed to give reason for 50 month upward variance); *United States v. Carter*, ___ F.3d ___, 2009 WL 1110786, *4 (4th Cir. 2009) (court failed to provide sufficient reasons for imposing probationary sentence on defendant with guideline range of 36 to 46 months); *United States v. Tisdale*, 245 Fed. Appx. 403, 412 (5th Cir. 2008) ("failure to offer any reason whatsoever for rejecting the defendants' § 3553(a) arguments or any explanation for following the guidelines range constitutes failure to consider the § 3553(a) factors"); *United States v. Gapinski*, 561 F.3d 467, 477-78 (6th Cir. 2009) (sentence reversed where court failed to explain reason for rejecting defendant's argument for lower sentence based on cooperation; court improperly considered possibility of future reduction motion in not considering lesser sentence); *United States v. Oba* , 2009 WL 604936, *1 (9th Cir. 2009) (court failed to adequately explain upward variance where factors were already considered in guidelines and did not address 3553(a) arguments); *United States v. Mendoz*a, 543 F.3d 1186, 1193-94 (10th Cir. 2008) (error, but not reversible because government did not show how more detailed explanation would have resulted in different sentence); *United States v. Narvaez*, 285 Fed. Appx. 720, 725 (11th Cir. 2008) ("district court gave absolutely no reason for imposing the 210-month [guideline] sentence," though the defendant made arguments relating to several 3553(a) factors").

4. Basing the sentence on clearly erroneous facts. *Gall*, 128 S.Ct. at 597; *United States v. Delgado-Martinez***,** __F.3d __, 2009 WL 902390, *1 (5th Cir. 2009); United *States v. Sanchez,* 277 Fed.Appx. 494, 496 (5th Cir. 2008) ("because the record did not support the multiple conspiracy finding, we further concluded that the district court clearly erred in relying on Sanchez's purported participation in a lesser conspiracy to

find that certain consequences of the overarching conspiracy -- the death of some aliens as a result of the dangerous methods used to smuggle them into the country -- were not reasonably foreseeable to her").

5. Failing to consider or mention the statutory factors. *Gall,* 128 S.Ct. at 597**;** *United States v. Waknine*, 543 F.3d 546, 554 (9th Cir. 2008); *United States v. Thomas*, 498 F.3d 336, 341 (6th Cir. 2007) (district judge's statement that he had read the defendant's sentencing memorandum and understood its presentation was insufficient to show that the court had considered the § 3553(a) factors).

6. Believing that a factor could not be considered as a matter of law. *United States v. Cerno*, 529 F.3d 926, 938 (10th Cir. 2008) (amount of force used in offense); *United States v. Simmons*, __F.3d __, 2009 WL 1363544, *5 (5th Cir. May 18, 2009).

7. Basing a sentence on a prior arrest record and unsupported conclusions about that record. *United States v. Berry*, 553 F.3d 273, 284-86 (3d Cir. 2009).

8. Passing over nonfrivolous arguments for leniency. *United States v. Schroeder*, 536 F.3d 746, 756 (7th Cir. 2008); *United States v. Williams*, 553 F.3d 1073, 1084-85 (7th Cir. 2009); *United States v. Peters,* 512 F.3d 787, 788-89 (6th Cir. 2009) (failure to address the defendant's arguments for a "time served" sentence and whether a sentence of "time served" would satisfy the requirement that a sentence be sufficient but not greater than necessary). *See United States v. Barrett*, 552 F.3d 724, 726-27 (8th Cir. 2009); *United States v. Ausburn*, 502 F.3d 313, 329-330 (3d Cir. 2007) (failure to explain why upward variance would not result in unwarranted sentencing disparities); *United States v. Robertson,* 309 Fed. Appx. 918, 923 (6th Cir. 2009) (failure to address non-frivolous argument that the firearms' guideline range was excessive because it double-counted the defendant's prior drug conviction by using the conviction to determine both the base offense level and the criminal history category).

9. Failing to permit a party to speak before imposing sentence. *United States v. Waknine,* 543 F.3d 546, 552-53 (9th Cir. 2008).

10. Failing to ask a defendant if he read the presentence report. *United States v. Mitchell*, 243 F.3d 953, 955 (6th Cir. 2001); *United States v. Rone*, 743 F.2d 1169, 1173-74 (7th Cir. 1984). *But see United States v. Martinez*, Slip Copy, 2009 WL 839093 (11th Cir. Apr. 1, 2009) (no plain error in failing to address defendant to determine if he read PSR and reviewed with counsel; court notes circuit split on the issue); *United States v. Romero,* 491 F.3d 1173, 1179-80 & n. 3 (10th Cir.2007).

11. Conflating the relaxed evidentiary standard in use at a sentencing proceeding with the standard of proof or not resolving disputed factual issues.

a) In resolving disputed factual questions, the guidelines permit a court to consider "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3. A court must resolve disputes in accordance with Fed. R. Crim. 32(i). Rule 32(i)(3)(A) permits a court to "accept any undisputed portion of the presentence report as a finding of fact." If a portion of a PSR or other matter is" disputed," the court must rule on it or determine that a ruling is unnecessary. Rule 32(i)(3)(B).

b) Beware of courts that conflate the relaxed evidentiary standard for the admission of evidence with the required standard of proof (be it proof by a preponderance of evidence or beyond a reasonable doubt). Just because evidence is sufficiently reliable to be put in a PSR or considered at sentencing does not mean it satisfies a party's burden of proof. *United States v. Schroeder*, 536 F.3d 746, 753 (7th Cir. 2008) (presumed accuracy of information that has sufficient indicia of reliably such that court can *consider* it at sentencing does not relieve sentencing court of responsibility to weigh that information and determine if it satisfies government's burden of proof; confusing standard for admissibility of evidence at sentencing with standard of proof is "very serious error"); *United States v. Anton*, 546 F.3d 1355, 1359 (11th Cir. 2008) (court erroneously only accepted "unsupported conclusions" in PSR that recounted hearsay statements of informant and relied on documents seized by government but not produced at hearing*); United States v.Treadway,* 328 F.3d 878, 886 (6th Cir. 2003) ("Notably, both Rule 32(c)(1) and § 6A1.3 of the Sentencing Guidelines indicate that reliance on the PSR is insufficient when the facts are in dispute."). Use these cases to protect your client's due process rights to be sentenced on the basis of reliable information AND under the appropriate standard (keeping in mind that you may also want to argue for a higher standard of proof than a preponderance of evidence).

c) Be careful about what might be necessary to trigger a "dispute" that requires the judge to resolve an issue rather than accept the PSR as a finding of fact under Rule 32(i)(3)(A). Some courts require the defendant to show why the information in the PSR should not be accepted. S*ee United States v. Beckles*, __ F.3d __, 2009 WL 1026365, *8 (11th Cir. April 17, 2009) (court could look to undisputed allegation in PSR in concluding that defendant's firearm possession was a crime of violence because it

involved a sawed-off shotgun; no error in relying on undisputed fact; even if it was error, no prejudice because defendant failed to proffer that firearm was anything other than sawed off shotgun); *United States v. O'Garro*, 280 Fed. Appx. 220, 224 (3d Cir. 2008) (court could rely on double hearsay in PSR, which was based on police reports, to support enhancement for firearm; defendant must show in detail why information is inaccurate) (2-1 decision with Sloviter, J., dissenting). To generate a dispute, the defendant must challenge the historical fact in the PSR, not merely the application of the guideline. *See United States v. Pena-Hermosillo*, 522 F.3d 1108, 1119 (10th Cir. 2008). *But see United States v.Treadway*, 328 F.3d 878, 886 (6th Cir. 2003) (suggesting that objection may be enough to generate a factual dispute).

B. Counsel must object to procedural errors or run the risk of plain error review.

1. *See United States v. Mangual-Garcia,* 505 F.3d 1, 14-15 (1st Cir. 2007) (applying plain-error review to "the contention by both appellants that the district court failed adequately to explain its reasons for imposing the particular sentence within the range"), *cert. denied*, 128 S. Ct. 2081 (2008); *United States v. Verkhoglyad,* 516 F.3d 122, 127-128 (2d Cir. 2008); *United States v. Schade***,** __ F.3d __, 2009 WL 808308 (3d Cir. March 30, 2009); *United States v. Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir. 2008); *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc) (9-6)[2,] *cert. denied*, 129 S.Ct. 68 (2008); *United States v. Perkins,* 526 F.3d 1107, 1111 (8th Cir. 2008); *United States v. Knows His Gun,* 438 F.3d 913, 918 (9th Cir. 2006) (same); *United States v. Lopez-Flores,* 444 F.3d 1218, 1220, 1221 (10th Cir. 2006) (applying plain-error review to a claim that "the district court did not explain its reasoning," because when a challenge goes to "th*e method* by which the district court arrived at [a] sentence," then "the usual reasons for requiring a contemporaneous objection apply"), *cert. denied*, 127 S. Ct. 3043 (2007); *United States v. Palis*, 2008 WL 5401436 (11th Cir. 2008); *In re Sealed Case,* 527 F.3d 188, 191-192 (D.C. Cir. 2008)**.**

2. The question is open in the Fourth, *United States v. Matamoros-Modesta***,** 523 F.3d 260, 263 n.5 (4th Cir. 2008), but at least one panel has applied plain error review to a procedural error. *United States v. Flores-Ansencio,* 2008 WL 4680583 (4th Cir. 2008).

3. The Seventh Circuit does not appear to have ruled on the issue.

[2] The dissenting opinions contain a lengthy analysis of why a unitary standard of reasonableness should apply to appellate review of sentences and why a defendant should not be required to register a separate objection to the procedural reasonableness of the sentence.

4. The Tenth Circuit has suggested that counsel may not be able to "finesse" an objection. *United States v. Hernandez-Lopez*, 2009 WL 921121 (10th Cir. 2009) ("It is likewise unclear whether counsel's statement that "[f]or whatever it's worth, we urge *those* [variance] objections procedurally and substantively," *id.* at 27-28, could fairly cure the problem by identifying the nature of the procedural objections Mr. Hernandez-Lopez now brings on appeal.").

5. In some circuits, you can escape plain error review if the court did not ask at the end of sentencing whether the parties had any objections not previously raised. *United States v. Vonner,* 516 F.3d 382, 387 (6th Cir.2008) (en banc), *cert. denied*, 128 S.Ct. 68 (2008); *United States v. Uscanga-Mora*, 2009 WL 1100458 (10th Cir. April 24, 2009) (finding no plain error, in part, because court asked defense counsel if they had "anything else" to add and whether there was any reason that sentence could not go forward).

6. A general objection that the sentence is greater than necessary or is otherwise substantively unreasonable will not preserve an objection to a procedural error. *See United States v. Mendoza,* 543 F.3d 1186, 1191 (10th Cir.2008) (government's substantive objections at sentencing hearing did not encompass a procedural objection it later raised on appeal).

7. Challenge prior convictions in the district court, including whether a conviction is categorically a qualifying offense, or the issue may well be forfeited and subject to plain error review. *See United States v. Ellis*, __F.3d __, 2009 WL 783262 (5th Cir. 2009) (no plain error despite strong suggestion that prior offense was not a "crime of violence" because "the error said to be plain was never the subject of objection by able counsel"). If you do not object and the offense may have qualified under the modified categorical approach, you may bear the burden of showing that the government would not have been able to prove the nature of the offense with *Shepard* approved documents – a near impossible burden on appeal. *United States v. Zubia-Torres*, 550 F.3d 1202, 1209 (10th Cir. 2008).

C. Use *Shepard* to challenge the adequacy of the government's proof on the fact of the conviction. Some judges have been willing to expand *Shepard's* limits on the kinds of documents that may be considered when looking at prior convictions. See *United State v. Marsh***,** 561 F.3d 81, 87 (1st Cir. 2009) (Merritt, J., dissenting) (opining that court improperly used state police reports in finding facts about prior criminal history that were used to support upward departure). *But see United States v. Felix*, 561 F.3d 1036, 1042-43 (9th Cir. 2009) (*Shepard* not applicable to documents used to prove "fact" of conviction; computer printout from court records provided sufficient evidence).

III. Review for Substantive Reasonableness

A. Whether counsel must object to the substantive reasonableness of a sentence to escape plain error review varies from circuit to circuit.

1. No Objection Necessary. *United States v. Young***,** 553 F.3d 1035, 1053 n. 14 (6th Cir. 2009); *United States v. Castro-Juarez,* 425 F3d 430, 433-4 (7th Cir. 2005); *United States v. Wiley*, 509 F.3d 474, 476 (8th Cir. 2007); *United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009); *United States v. Pinto-Padilla*, 2009 WL 530824, *5 (10th Cir. March 4, 2009); *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).

2. Objection Necessary. *United States v. Carpenter,* 287 Fed. Appx. 131, 133 (2d Cir. 2008) (applying plain error review to procedural and substantive reasonableness claims); *United States v. Peltier,* 505 F.3d 389, 391-392 (5th Cir. 2007).

B. The scope of review for substantive reasonableness is in a state of flux.

1. The Supreme Court explained substantive reasonableness review in *Gall v. United States*, 128 S.Ct. 586 (2008). After reviewing the sentence for procedural reasonableness, "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness ... But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the 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. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id*. at 597.

2. What it means for an appellate court to review a sentence for substantive reasonableness remains elusive and is the subject of sometimes bitter debate among appellate judges. If you are defending a sentence against a government appeal, look to the cases where an appellate court has affirmed a sentence imposed above or below the advisory guideline range. These cases will help you frame an argument that the district court's decision in your case is entitled to substantial deference. If you are attacking a sentence imposed above the advisory guideline range, then look to those cases where courts have reversed a sentence as unreasonable. Cases reversing below guideline sentences will help you show the "double standard" in play – where appellate courts give less deference to below guideline sentences than above guideline sentences. The vigorous debates set forth in these opinions about the appropriate

scope of substantive reasonableness review also provide excellent fodder for certiorari petitions. Some notable opinions include:

a) *United States v. Heath*, 559 F.3d 263, 268 (4th Cir. 2009) (Gregory, J.,dissenting) (dissenting from affirmance of a 240 month sentence imposed for robbery/firearm offenses where guideline range was 100-125 months; noting that review for substantive reasonableness has become "rote" and that district court must do more than recite 3553(a) factors).

b) *United States v. Autrey*, 555 F.3d 864 (9th Cir. 2009) (Tashima, J., dissenting in part) (dissenting from affirmance of five year probationary sentence for child pornography offense where guideline range was 41-51 months; complaining that court should reverse a sentence where it has a "definite and firm conviction" that a mistake has been committed); *United States v. Whitehead,* 532 F.3d 991, 993-94 (9th Cir. 2008) (Bybee, J., dissenting in part) (dissenting from affirmance of five year probationary sentence in offense involving theft of digital access cards with 41-51 month guideline range; complaining that "being deferential does not mean turning a blind eye to an injustice"); *see also United States v. Carter*, 560 F.3d 1107, 1122 (9th Cir. 2009) (Tashima, J., dissenting in part).

c) *United States v. Gardellini*, 545 F3d. 1089, 1097-98 (D.C. Cir. 2009) (Williams, J., dissenting) (dissenting from affirmance of five year probationary term imposed for failing to file tax returns where guideline range was 10-16 months; complaining that district court ignored requirement that sentence should reflect need for general deterrence and that appellate review should not be "mere rubber stamping"); *see also United States v. In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (complaining about magnetic pull of guidelines in case where majority reversed an upward variance).

3. The Second Circuit appears to have the most deferential standard of substantive reasonableness review. *United States v. Cavera*, 550 F.3d 180, 189-90 (2d Cir. 2008) (en banc)*, petition for cert. filed,* 77 USLW 3516 (Feb. 23, 2009) (No. 08-1081) (appellate court will set aside district court's substantive determination on sentence only in exceptional cases where such determination cannot be located within the range of permissible decisions; "court will defer to district court's substantive determination only if it is satisfied that the district court complied with the Sentencing Reform Act's procedural requirements, and this requires that we be confident that the sentence resulted from the district court's considered judgment as to what was necessary to address the various, often conflicting, purposes of sentencing").

4. The Eleventh Circuit appears to apply the most rigorous standard of substantive review**.** *United States v. Pugh,* 515 F.3d 1179, 1191 (11th Cir.2008) (appellate courts are "still required to make the calculus ourselves, and are obliged to remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case") (citation and internal quotation marks omitted).

5. Keep in mind that a rigorous standard of review, which results in reversals of outside the range sentences, may suffer from the same flaws as the "extraordinary circumstance" standard struck down in *Gall*. If court decisions result in reversals of below guideline sentences because of the gravitational pull of the guidelines, then we should argue that the appellate courts are thwarting *Booker*, *Rita,* and *Gall* and making the guidelines de facto mandatory.

C. As-applied challenges to substantive reasonableness review are worth considering. In cases where the sentence would be unreasonable "but for" judge-found facts on guideline factors, remember Judge Scalias's criticism of substantive reasonableness review as a mechanism that could make the guidelines de facto mandatory, in violation of the Sixth Amendment. Look for cases where guideline aggravating factors significantly increase the sentence that would otherwise be imposed. *See Rita v. United States*, 127 S. Ct. 2456, 2475-76 (2007) (Scalia, J., concurring); *United States v. White*, 551 F.3d 381, 389-90 (6th Cir. 2008) (en banc) (Merritt, J., dissenting), *cert. denied*, __S.Ct. __ (U.S. Apr 27, 2009) (No. 08-9523). Cross-references provide particularly fertile ground for these types of challenges.

D. Most courts recognize that district judges are free to disagree with any guideline, not just crack, based solely on policy considerations.

1. Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 128 S. Ct. at 570 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 127 S. Ct. at 2463. The courts' ability to impose a non-guideline sentence based solely on a policy disagreement with the guideline itself applies to all guidelines, not just the crack guidelines.[3] Most courts of appeals, and numerous district courts, have held that judges

[3] For a more detailed discussion of this issue, including its roots in *Cunningham v. California*, 549 U.S. 270 (2007) and *Rita*, 127 S. Ct. at 2465, 2468, as well as how to fashion arguments on why a court should disagree with congressional or sentencing commission policy, *see* Amy Baron-Evans, Jennifer Coffin, and Sara E. Noonan*, Judges Are Free to Disagree With Any Guideline, Not Just Crack, Including Guidelines That Are the Product of Congressional Directives*

are free to disagree with any of the guidelines, including guidelines that emanate from congressional actions. Not all judges, however, are convinced[4] and the government may press the argument that *Kimbrough* does not apply beyond crack cases.

2. May a court disagree with any guideline?

a) Yes. *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009); *United States v. Evans*, 526 F.3d 155, 161 (4th Cir. 2008) (rejecting challenge to upward variance in identity fraud case because, "as the Solicitor General conceded in *Kimbrough*, a sentencing judge may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines") (citations and internal punctuation marks omitted); *United States v. Shah*, 294 Fed. Appx. 951, 955 (5th Cir. 2008) ("Even prior to the decisions in *Gall* and *Kimbrough*, the Supreme Court had already recognized that a district court could impose a sentence that varied from the advisory guideline range based solely on policy considerations, including disagreements with the Guidelines."); *United States v. Williams*, 517 F.3d 801, 809-10 (5th Cir. 2008) ("The Supreme Court reiterated in *Kimbrough* what it had conveyed in *Rita v. United States*, which is that as a general matter, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.") (internal punctuation and citations omitted); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008); *United States v. Tankersley*, 537 F.3d 1100 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3517 (U.S. Mar. 2, 2009) (No. 08-1104); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008).

b) Undecided, but leaning yes. *United States v. Johnson*, 553 F.3d 990, 996 (6th Cir. 2009) (expressing no opinion on whether *Kimbrough* and *Spears* extend beyond the crack-powder cocaine arena , but noting "that this Court has generally heeded the Supreme Court's repeated instructions to afford sentencing judges wide latitude in imposing sentences outside the Guidelines-even in mine-run cases-so long as the

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to the Commission; Amy Baron-Evans*, Sentencing by the Statute* and the various deconstruction papers posted on fd.org.

[4] *See United States v. Vandewege*, No. 07-2250 (6th Cir. 2009) (Gibbons, J., concurring) (stating belief that neither *Kimbrough* nor *Spears* permit district court to reject policy judgment of sentencing commission outside of crack cocaine offenses).

explanation sufficiently articulates the sentence's appropriateness in relation to the 18 U.S.C. § 3553(a) sentencing factors.").

3. May a court disagree with USSG § 2L1.2?

a) Yes. *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (but lack of empirical basis for the guideline doesn't deprive it of presumption of correctness on appeal); *United States v. Herrera-Garduno*, 519 F.3d 526, 530 (5th Cir.2008); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962-63 (E.D. Wis. 2005).

4. May a court disagree with the career offender guideline?

a) Yes. *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Lidell*, 543 F3d 877, 884-85 (7th Cir. 2008) (noting that "section 994(h) only addresses what the Sentencing Commission must do; it doesn't require *sentencing courts* to impose sentences 'at or near' the statutory maximums"); *United States v. Marshall*, 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D.W. Va. 2008); *United States v. Malone*, 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008); *United States v. Hodges*, 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009).

b) No. *United States v. Vazquez*, 558 F.3d 1224, 1227-28 (11th Cir. 2009) (career offender provision encapsulates congressional policy in 28 U.S.C. § 994(h)). The petition for rehearing in *Vazquez*, available at fd.org, discusses why this decision was wrongly decided and why a court is free to disagree with guidelines promulgated as a result of congressional directives.

c) Undecided. *United States v. Friedman*, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009) (dicta indicating that court could disagree with career offender guideline, but suggesting it might be subject to "closer review" because Congress expressly directed the Commission to adopt career offender guideline). The rehearing petition in *Vazquez* will help refute the notion that the career offender provision is somehow worthy of greater deference.

d) Note: The Sixth Circuit ruled in *United States v. Funk*, 534 F.3d 522 (6th Cir. 2008), that a district judge may not categorically disagree with the career offender guideline. The opinion has been vacated and

the appeal dismissed. In its supplemental brief, the Solicitor General stated that it "disagrees with the prior panel's conclusion" and "agrees with Funk that sentencing courts are not precluded from entering a below-range sentence based on policy disagreements with the career offender guideline." Supplemental Brief for the United States at 12-13 (citing *Liddell*, 543 F.3d at 885; *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *Sanchez*, 517 F.3d at 663-665).[5]

5. May a court disagree with the fast-track policy?

a) Yes. *United States v. Seval*, 293 Fed. Appx. 834 (2d Cir. 2008); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

b) No. *United States v. Gomez-Herrera,* 523 F.3d 554, 563 (5th Cir.2008) (agreeing that because Congress authorized "fast-track" programs without revising § 3553(a)(6), any sentencing disparities resulting from "fast-track" programs are "necessarily" warranted); *United States v. Gonzalez-Zotelo*, 566 F.3d 736 (9th Cir. 2009); *United States v. Vega-Castillo***,** 540 F.3d 1235 (11th Cir. 2008) (district court could not consider the disparity caused by nationally disparate "fast-track" sentencing when sentencing defendant), *petition for certiorari filed*, No. 08-8655 (Feb. 10, 2009).

c) Undecided**.** *United States. v. Gil-Hernandez*, 309 Fed. Appx. 566, 567 & n.3 (3d Cir. 2009) (court declined to address the issue because defendant failed to proffer evidence that he was treated differently than similarly situated person in fast-track district).

d) Leaning yes. *United States v. Valadez-Martinez*, 295 Fed. Appx. 832, 835 (7th Cir. 2008) (recognizing that *Kimbrough* "has rekindled debate about whether the absence of a fast-track program can be a factor in the choice of sentence," but declining to reach the issue in this case); s*ee also United States v. Hernandez-Lopez*, 2009 WL 921121, *3 (10th Cir. Apr. 7, 2009) (noting without discussing propriety of district court's statement that it had previously granted variance based on the disparity between sentences in fast track districts).

6. May a court disagree with USSG § 2G1.3 (computer enhancement)?

[5] http://www.fd.org/pdf_lib/Gov%20Funk_01-09.pdf.

a) Yes. *United States v. Vanvliet*, 542 F.3d 259, 271 (1st Cir. 2008) (where district court believed it could not sentence below guidelines based on disagreement with policy to enhance sentence for use of a computer, "[t]he government correctly points out that Vanvliet's sentence must be vacated in light of *Kimbrough*, which held that district courts legitimately may cite their own disagreements with Guidelines policy as justification for imposing a below-Guidelines sentence").

7. May a court disagree with the child pornography guidelines?

a) Yes. Numerous district courts have disagreed with the guidelines for child pornography. *United States v. Beiermann*, 599 F.Supp.2d 1087 (N.D.Iowa 2009); *United States v. Phinney*, 599 F.Supp.2d 1037 (E.D. Wis. 2009); *United States v. Grober,* 595 F.Supp.2d 382 (D.N.J.,2008); *United States v. Doktor*, 2008 WL 5334121 (M.D.Fla. 2008).

b) Several Circuits have assumed that a district court may disagree with a guideline on policy grounds, but is not required to do so. *United States v. Huffstatler*, 561 F.3d 694, 697-98 (7th Cir. 2009); *United States v. Battiest*, 553 F.3d 1132, 1137 (8th Cir. 2009).

8. May a court disagree with policies in §2D1.1 other than the 100:1 policy?

a) Yes. *United States v. Valdez*, 268 Fed. Appx. 293, 297 (5th Cir. 2008) ("the district judge can disagree with the Guidelines policy that purity is indicative of role or that purity is adequately provided for in Valdez's base offense level"); *United States v. Santillanes*, 274 Fed. Appx. 718, 718-19 (10th Cir. 2008) (government conceded error where court refused to address defendant's argument to reject guidelines policy of treating mixed methamphetamine differently from pure methamphetamine); *United States v. Goodman*, 556 F.Supp.2d 1002, 1016 (D. Neb. April 14, 2008) (methamphetamine); *United States v. Thomas*, 595 F.Supp.2d 949 (E.D. Wis. 2009) (powder cocaine); *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008) (disagreeing with over-emphasis on drug quantity, under-emphasis on minimal role).

9. May a court disagree with policies in the firearm guidelines?

a) Yes. *United States v. Cavera*, 550 F.3d 180, 191 (2nd Cir. 2009) (en banc) (firearms trafficking); *United States v. Cook*, 2009 WL 872465, *4-6 (D. Neb. March 30, 2009) (felon in possession); *United States v. Handy*, 570 F.Supp.2d 437, 439 (E.D.N.Y. 2008).

10. May a court disagree with §2B1.1 policies such as its heavy emphasis on loss amount?

a) Yes. *United States v. Evans*, 526 F.3d 155, 161 (4th Cir. 2008); *United States v. Lenagh*, 2009 WL 296999, *3-4, 6 (D. Neb. Feb. 6, 2009); *United States v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008).

11. May a court disagree with the guidelines for murder?

a) Yes. *United States v. Grant*, 2008 WL 2485610 (D. Neb. June 16, 2008).

12. May a court disagree with the guidelines' treatment of offender characteristics?

a) Yes. 18 U.S.C. § 3553(a)(10); *Gall v. United States*, 128 S. Ct. 586, 593, 600-02 (2007); *United States v. Hamilton*, 2009 WL 995576, *3 (2d Cir. April 14, 2009). *United States v. Simmons*, __ F.3d__, 2009 WL 1363544 (5th Cir. May 18, 2009).

13. May a court disagree with the Commission's decision not to make a guideline amendment retroactive?

a) Yes. *United States v. Horn*, 590 F.Supp.2d 976, 984-86 (M.D. Tenn. 2008).

E. How the appellate courts will interpret the meaning of *Kimbrough's* "closer review" language remains unsettled.

1. *Kimbrough* contains dicta suggesting that "closer review" might apply if the sentencing court elects to vary "based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575 (quoting *Rita*, 127 S.Ct. at 2465). But the Court had no occasion to consider the issue because it does not apply to guidelines that "do not exemplify the Commission's exercise of its characteristic institutional role," *i.e.*, were not based on empirical data and national experience. *Kimbrough*, 128 S. Ct. at 574-75. 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 a fact-based departure or variance. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009). Be sure not to concede the "closer review" issue because it runs a grave risk of making the guidelines de facto mandatory, which may be why no court of appeals has attempted to actually apply it. It seems likely that the Court meant for "closer review" to apply, if at all, only when a judge disagrees with a guideline based on a personal unsupported, unreasoned "view." To avoid any issue, make sure the judge states in one way or another that the guideline was not based on empirical data and national experience.

2. The appellate courts remain uncertain about when "closer review" may be warranted.

a) *United States v. Tomko,* 562 F.3d 558, 571 n.9 (3d Cir. 2009) (en banc) (declining to elaborate on what "closer review" language might mean because district judge "made an individualized determination that the Guidelines range recommended an excessive sentence in this instance").

b) *United States v. Simmons,* __ F.3d __, 2009 WL 1363544 *5 (5th Cir. May 18, 2009) (overstating *Kimbrough*'s "closer review" dicta by stating the Supreme Court "required a more intense review when the district court declares a properly calculated sentencing range to be inconsistent with the Guidelines' policy factors even for an ordinary case," but declining to apply it because district judge's disagreement with guidelines on relevance of "age" was individualized).

c) *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc) ("We do not, however, take the Supreme Court's comments concerning the scope and nature of 'closer review' to be the last word on these questions. More will have to be fleshed out as these issues present themselves.").

(1) The court in *Cavera* indicated that variances based upon guidelines that "apply without modulation to a wide range of conduct" will be subject to substantial deference. As the Court put it: "[the firearms guideline], to take one example, sharply increase the recommended sentences for firearms offenses where the defendant has a prior conviction for a 'crime of violence.' U.S.S.G. § 2K2.1 (a). The Guidelines' definition of the term "crime of violence," however, includes a wide spectrum of offenses of varying levels of seriousness, from, on the one hand, murder or rape, to, on the other hand, attempted burglary of a dwelling. *Id.* § 4B1.2 (a) (2). Similarly, many Guidelines such as those covering 'offenses involving taxation,' U.S.S.G. § 2T4.1, "antitrust offenses," *see id.* § 2R1.1, and larceny, embezzlement, fraud, and similar crimes, *see id.* § 2B1.1, drastically vary as to the recommended sentence based simply on the amount of money involved. Here again a district court may find that even after giving weight to the large or small financial impact, there is a wide variety of culpability amongst defendants and, as a result, impose different sentences based on the factors identified in § 3553. *Cf. United States v. Ebbers,* 458 F.3d 110,

129 (2d Cir.2006) (concluding that the sentencing disparity between co-defendants in a securities fraud case was reasonable in light of the "varying degrees of culpability and cooperation between the various defendants"). Such district court decisions, if adequately explained, should be reviewed especially deferentially."

d) *United States v. Lente,* 2009 WL 1143167, *14-15 (10th Cir. April 29, 2009) (Holmes, J., concurring) (finding upward variance to 216 months from 46-57 month guideline range in involuntary manslaughter case unreasonable and discussing at length why district court should have sound reason for varying from a guideline that appears to be the product of "careful Commission study" and empirical evidence); *United States v. Friedman***,** 554 F.3d 1301, 1311 n. 13 (10th Cir. 2009) ("Given our conclusion that the sentence imposed by the district court is not based on a simple disagreement with the policies underlying § 4B1.1, as opposed to something about Friedman's personal characteristics or history, this court need not delve into a difficult antecedent question: how this court should review district court sentences based simply on a policy disagreement with the Guidelines").

F. The appellate presumption of reasonableness may not apply where a guideline is not grounded in empirical evidence.

1. Presumption still applies. *United States v. Mondragon-Santiago***,** 564 F.3d 357 (5th Cir. 2009); *United States v. Battiest*, 553 F.3d 1132, 1136-37 (8th Cir. 2009) (presuming child pornography guideline reasonable).

2. Presumption may not apply. *United States v. Moore*, 518 F.3d 577, 580 (8th Cir. 2008), *revs'd,* 2008 WL 4550138 (U.S. Oct. 14, 2008) ("[T]he Sentencing Commission's long-standing opposition to the 100:1 [crack to powder cocaine] ratio provides some basis for not applying our normal presumption that a sentence within the advisory guidelines range is reasonable.").

G. "The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6) applies to co-defendant disparity and may apply to state/federal disparity.

1. The Solicitor General conceded *in Wittig v. United States* that the Supreme "Court made clear in *Gall* that Section 3553(a)(6) does not merely 'direct[] district courts to avoid unwarranted nationwide disparities,' but also permits consideration of disparity among co-defendants' sentences." Brief in Opposition, *Wittig v. United States*, 2009 WL 698528, *11 (March 16, 2009) (No. 08-779). If you are in a jurisdiction where

courts rely on pre-*Ga*ll case law that holds section 3553(a)(6) applies only to national disparity rather than co-defendant disparity, you should cite to the government's brief in *Wittig*. *See also United States v. Marceau,* 554 F.3d 24, 33-34 (1st Cir. 2008); *United States v. Smart,* 518 F.3d 800, 804 (10th Cir. 2008).

2. Whether a judge may impose a nonguideline sentence based upon state/federal disparity is an open question. The First and Second Circuits have held that a judge may consider local factors and community norms when imposing a sentence. *United States v. Cavera*, 550 F.3d 180, 196 (2d Cir. 2008) (en banc) (judge may increase a firearms sentence to reflect need for deterrence based upon the extensive black market created by New York's gun laws); *see also United States v. Politano*, 522 F.3d 69, 72 (1st Cir. 2008) (affirming above-guideline sentence based in part on an "epidemic of handgun violence in communities within [Massachusetts]"). The rationale of *Cavera* may help bolster an argument that a sentencing judge may consider the lower sentences usually imposed for similar conduct in state court.

H. Pigs do fly: courts have found within or below guideline sentences too high.

1. While rare, appellate courts have reversed sentences as too high. The most striking example, and perhaps the only case where an appellate court found a below guideline sentence too high, is the Third Circuit's decision in *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009). There, the court reversed a six year sentence for trading child pornography with instructions for the court to look at all the § 3553(a) factors, including the parsimony provision. The appellate court was troubled by the district court's failure to consider the reports of three defense experts about the defendant's low likelihood of recidivism and the risk to his well-being if placed in prison.

2. *United States v. Paul***,** 561 F.3d 970 (9th Cir. 2009) (remanding for resentencing a third time by different judge where appellate court found unreasonable a 15- month sentence, near top of guideline range, for theft from local government receiving federal funds because district court failed to credit mitigating evidence; appellate court had previously remanded a 16 month sentence).

IV. Guideline-Sanctioned Departures: To Review or Not Review, Substantive or Procedural?

A. The appellate courts do not agree on how to review a district court's decision on guideline sanctioned departures.

1. Some courts review departure decisions separately. *United States v. Lofink,* 564 F.3d 232 (3d Cir. 2009) (reversing for resentencing where court failed to rule separately on departure motion; court considered argument only in context of 3553(a)); *United States v. Barahona-Montenegro*, __F.3d __, 2009 WL 1323526, *4 (6th Cir. May 14, 2009) (district court did not state whether sentence was based upon variance or departure and did not provide adequate basis for departure); *United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009) (district court did not properly exercise discretion in confusing defendant's request for downward departure with a downward variance).

2. Some courts review the correctness of departure decisions as part of a general review for substantive reasonableness and find that they need not separately review a departure decision. The Seventh and Ninth Circuits have ceased reviewing departures, claiming them "obsolete" or "anachronistic." *United States v. Arnaout,* 431 F.3d 994, 1003 (7th Cir. 2005); *see also United States v. Mohamed,* 459 F.3d 979, 987 (9th Cir. 2006) ("any post- *Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision.") *Id. See* Petition for Certiorari*, Tankersley v. United States*, 2009 WL 559326 (March 2, 2009) (No. 08-1104) (9th circuit case). The Fourth Circuit has suggested that it need not review a departure decision if application of the 3553(a) factors supports the court's sentencing decision. *United States v. Evans*, 526 F.3d 155, 165 (4th Cir. 2008).

3. Other courts review departure rulings as part of their procedural reasonableness analysis on whether the district judge correctly applied the guidelines. *United States v. Wallace,* 461 F.3d 15, 32-33 (1st Cir. 2006); *United States v. Selioutsky,* 409 F.3d 114, 118-19 (2d Cir. 2005); *United States v. Vargas,* 477 F.3d 94, 103 (3d Cir. 2007); *United States v. Moreland,* 437 F.3d 424, 432-33 (4th Cir. 2006); *United States v. Saldana,* 427 F.3d 298, 310-13 (5th Cir. 2005); *United States v. Jackson,* 408 F.3d 301, 304 (6th Cir. 2005); *United States v. Spotted Elk,* 548 F.3d 641, 669-70 (8th Cir. 2008); *United States v. Munoz-Tello,* 531 F.3d 1174, 1186 (10th Cir. 2008); *United States v. Crawford,* 407 F.3d 1174, 1178 (11th Cir. 2005).

4. The U.S. Court of Appeals for the District of Columbia has acknowledged the circuit split but declined to choose sides. *United States v. Olivares,* 473 F.3d 1224, 1229-30 (D.C. Cir. 2006). Its more recent discussion of U.S.S.G § 4A1.3(a)(3)'s prohibition on the use of a defendant's prior arrest record as the basis for an upward departure

suggests, however, that departures are not deemed "obsolete" or "anachronistic" in that circuit. *United States v. Brown,* 516 F.3d 1047, 1053 & n.4 (D.C. Cir. 2008).

V. Review for Plain and Harmless Error

A. Under plain error review, you bear the burden of showing that the defendant's substantial rights were affected by the court's error. This generally involves a showing that the sentence would have been different.

1. If the sentence was within the range (and the error wasn't one in calculating the guidelines), this is an exceedingly difficult showing to make. *United States v. Mondragon-Santiago*, 564 F.3d 357, *6-7 (5th Cir. 2009) (court's failure to adequately explain within range sentence did not affect defendant's substantial rights where defendant could not show that explanation would have changed the sentence).

2. If the sentence was within the range and the error was one in calculating the guideline range, you need to show a "reasonable probability (though not a certainty) that a reduced advisory range would have influenced the district court to impose a more lenient sentence, given that the advisory range remains a 'starting point and the initial benchmark' in a sentencing proceeding." *United States v. Davidson*, 551 F.3d 807, 808 (8th Cir. 2008) (citing *Gall*, 128 S. Ct. at 596-97).

3. If the court incorrectly calculated the guidelines, you can argue that the error infected the court's 3553(a) analysis (because the guideline range is one of the 3553(a) factors and the beginning point of the analysis under *Gall*). *See United States v. Degado-Martinez*, __ F.3d __, 2009 WL 902390 (5th Cir. 2009). If the court indicated it would have imposed the same sentence regardless of its guideline calculations, challenge the adequacy of the court's 3553(a) explanation. *See United States v. Ruiz-Arriaga*, __ F.3d__, 2009 WL 941368 (5th Cir. 2009).

4. If the sentence was outside the range, you may be able to show the error affected the defendant's right to meaningful appellate review. *United States v. Mondragon-Santiago***,** 564 F.3d 357 (5th Cir. 2009) (leaving question open), or that the error "likely would have shifted the court's choice" of sentence, recognizing the broad discretion the court has in imposing a sentence. *See United States v. Mendoza*, 543 F.3d 1186, 1194 (10th Cir. 2008).

5. If the court does not even announce the range, then the error should be reversible. *United States v. Waknine*, 543 F.3d 546, 554 (9th Cir. 2008) (court reversed for plain error even though defendant could not show sentence would have been different had court expressly considered 3553(a) factors; "the district court's total failure to announce its calculated Guidelines range to the parties and to consider expressly the §3553(a) factors is such a serious departure from established procedures

that we will not reject the appeal because of the prejudice prong of plain error review").

6. In looking for prejudice, point to anything in the record that suggests the court was willing to consider a lower sentence. *United States v. Cerno*, 529 F.3d 926, 932 (10th Cir. 2008 (noting district court's statement: "I struggled to find *something* that is mitigating that I could use to reduce the sentence level. I didn't find anything that would justify a reduction in the term.").

7. Think carefully about whether you should also challenge the substantive reasonableness of a sentence. The Tenth Circuit has implied that it will not find that a defendant's substantial rights were affected by a procedural error unless the defendant also challenges the substantive reasonableness of the sentence. *United States v. Romero-Resendez*, 298 Fed. Appx. 790, 793 (10th Cir. 2008).

B. When the error is preserved, the party seeking to uphold the sentence has the burden of showing that it did not affect the sentence imposed.

1. Errors in calculating the guidelines will typically affect the sentence imposed. *See United States. v. Delgado-Martinez*, __F.3d__, 2009 WL 902390, *2 (5th Cir. April 6, 2009).

2. Where a court states that the sentence would have been the same regardless of the error, then the error might be considered harmless, *United States v. Henson*. 550 F.3d 739 (8th Cir. 2008), but then consider challenging the adequacy of the court's alternative explanation. *Id.* (Shepherd, J., dissenting).

3. An appellate court should not review the sentence for substantive reasonableness unless it finds any procedural error harmless. *See e g., United States v. Bain*, 537 F.3d 876, 885 (9th Cir. 2008), *vacated on other grounds*, __S.Ct.__, 2009 WL 1174863 (May 4, 2009) (Benton, J., concurring); *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (reasonableness review depends on court starting with correct guideline calculation).

VI. Waivers and Forfeiture

A. Beware of waiver v. forfeiture. If an issue is waived (intentionally relinquished), it will be not be reviewed even for plain error. Some judges may consider agreement with a PSR calculation as a waiver. *See United States v. Davis*, 2009 WL 430440 (9th Cir. 2009) (Rymer, J., dissenting and part and concurring in judgment) (would have found criminal history error waived and not subject to plain error review where defendant agreed with calculations in PSR).

B. Beware of ambiguous waivers. In United *States v. Kemp*, 530 F.3d 719, 723 (8th Cir. 2008), the defendant preserved his right to appeal a sentence above the guideline range established by the court. The appellate court questioned whether that meant the range with or without upward departures under the guidelines.

C. Remember the multiple ways to deal with waivers on appeal. Think carefully about how you want to proceed with an appeal that involves an appellate waiver. In some offices, attorneys may file an *Anders* brief acknowledging the appellate waiver. Before taking this drastic step, you may wish to consider (a) acknowledging the waiver in your brief, but arguing the substance of the error; or (b) ignore the waiver and wait for the government to invoke (sometimes they don't). Also look to see if the court may have advised the defendant he could appeal despite a waiver in the plea agreement. *United States v. Felix*, 561 F.3d 1036, 1041 (9th Cir. 2009) ("the government waived its waiver argument because the sentencing judge on two occasions told Felix that he could appeal his sentence and the government failed to object").

D. Don't assume 2255 relief will be available.

1. Protect your clients right to relief should the law change by anticipating potential legal developments and taking all steps to preserve error, including petitions for certiorari. In *United States v. Nichols*, 563 F.3d 240 (6th Cir. 2009), the Sixth Circuit held en banc that the petitioner could not show ineffective assistance of counsel when his attorney failed to preserve a "future change in the law" argument (an argument based on the hope that the Supreme Court would strike down existing law while the defendant's case was still pending direct appeal).

a) The petitioner and a co-defendant were sentenced post-*Apprendi*, but pre-*Blakely* and *Booker*. The court affirmed the sentence on appeal. One day before the expiration of time to file for rehearing en banc, *Blakely* came down. Counsel did not ask for rehearing or seek certiorari review. The co-defendant's counsel petitioned for certiorari and eventually won a resentencing after *Booker* was decided. The petitioner filed a pro se motion under 28 U.S.C. § 2255, claiming that counsel had been ineffective for failing to raise an *Apprendi* argument at sentencing or a *Blakely* argument on rehearing or certiorari. The district court denied the motion. The en banc court, overturning a favorable panel decision, concluded that the petitioner could not link the two pieces of the ineffective-assistance standard—deficient performance and prejudice—in time. He could not show prejudice at any point at which he had a right to counsel, and he could not show a right to counsel (and, hence, deficient performance) at any point at which he could show prejudice. The Constitution does not entitle a defendant to the assistance of counsel for a discretionary appeal—like a petition for certiorari. So, the

failure to file for such review cannot amount to constitutionally ineffective assistance.

2. The Fourth Circuit in *United States v. Linder*, 552 F.3d 391 (4th Cir. 2009), *rehearing denied*, 561 F3d. 339 (4th Cir. 2009), denied 2255 relief for a defendant who had entered a plea with an appellate waiver before *Blakely*, was sentenced after *Blakely*, and who had an appeal pending when *Booker* was decided. Even though the court announced that it would impose a 120 month sentence (rather than the 262 month guideline sentence) if the guidelines were advisory, the defendant was denied relief on direct appeal because of the appellate waiver. He was also denied relief in 2255 because the issue had already been litigated on direct appeal.

VII. Conditions of Supervised Release

A. A sentencing judge may impose conditions on supervised release , but only if the conditions are reasonably related to the sentencing factors identified in 18 U.S.C. § 3553(a); the conditions do not deprive the defendant of liberty to a greater degree than is reasonably necessary; and the conditions are consistent with any relevant policy statements by the Sentencing Commission. 18 U.S.C. § 3583(d).

B. Object to any condition that "just doesn't seem right" and especially those that are not standard conditions spelled out in the statute.

1. *See, .e.g., United States v. Ferguson***,** 369 F.3d 847, 853-54 (5th Cir. 2004) (court erred by barring defendant from using tobacco products, aspirin, and over-the-counter medications during his term of supervised release; those products were not reasonably related to defendant's violation for possessing a machine gun, and, given that there was no evidence that those products caused any violent or illegal conduct in defendant, the conditions were not necessary for deterrence, public safety, or medical care); *United States v. Myers*, 426 F.3d 117, 127 (2d Cir. 2005) ("condition of supervised release, which prevented defendant, upon his release from prison, from visiting with his own son until his first pre-release visit with United States Probation Office, had to be vacated, and case had to be remanded for resentencing, based on inadequacy of record on appeal to permit Court of Appeals to determine why condition was imposed or whether defendant, an unwed father whose son was in foster care, possessed constitutionally protected liberty interest in visiting with son").

2. If you fail to object, you run the risk of having the condition reviewed for plain error.

C. Object to the court's failure to give pretrial notice of a nonstandard condition.

1. Whether a defendant must be given advance notice that the court is contemplating imposing a special condition of supervision remains an open question. *See United States v. Weatherton*, __F.3d__, 2009 WL 1162580 (5th Cir. 2009).

D. Look for red flag conditions.

1. Sex offender conditions (including sex offender registration, psychosexual evaluations, treatment, or prohibitions on possession sexually explicit materials) on persons not convicted of sexual offenses.

a) *See United States v. Belman,* 201 Fed.Appx. 517, 518 (9th Cir. 2006) (in false statement, illegal reentry case, reversing condition that defendant submit to plethysmograph and take medication imposed without evidentiary support or findings).

b) *But see United States v. Weatherton*, __F.3d__, 2009 WL 1162580, *2 (5th Cir. 2009) (no plain error in imposing sex offender conditions on defendant convicted of making false claim to FEMA, but later arrested for aggravated rape); *United States v. Dupes,* 513 F.3d 338, 344 (2d Cir.2008) (upholding sex-offender related special conditions as part of sentence for securities fraud where they were reasonably related to defendant's "history and characteristics as a sex offender, his need for treatment, and the public's need for protection from him").

2. Compliance with SORNA conditions for persons convicted of sex offense that do not clearly fall within SORNA's definition of sex offense.[6]

a) *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008) (extensive discussion of whether categorical approach applies to SORNA; concluding that importation of person for immoral purposes (PSR showed a minor) was a "sex offense against a minor" for purposes of requiring registration under SORNA).

b) *United States v. Dodge*, 554 F.3d 1357 (11th Cir. 2009) (holding that defendant convicted of transferring obscene material to a minor should not have been required to register under SORNA because conduct

[6] In cases involving sex offenders, consider filing your brief under seal with redacted public versions to protect the identity of your client so that other inmates and vigilantes do not found out about the client's past. You may also want to warn your client of the risk of keeping the brief in prison with him.

was not by its nature a sex offense against a minor), *rehearing granted, opinion vacated***,** __F.3d__ , 2009 WL 1110549 (11th Cir**.** April 27, 2009).

c) Note: As of June 2009, no state is in compliance with SORNA. The Attorney General issued a blanket extension of time for states to comply by July 26, 2010. For information on state compliance, go to http://www.ojp.usdoj.gov/smart.

3. Employment

a) *United States v. Witting*, 528 F.3d 1280, 1288-89 (10th Cir. 2008) (reversed condition that required defendant from engaging in executive position or negotiating financial arrangements without court approval; his offense conduct did not involve an abuse of his management position; nor did court find that defendant was at risk of engaging in similar conduct in future).

4. Internet/Computer Restrictions

a) *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003) (restriction on use of computer and internet access was overly broad for defendant convicted of child pornography); *see also United States v. Sofsky*, 287 F.2d 122, 126 (2d Cir. 2002) (same).

b) *United States v. Matteson*, 2009 WL 1385937, *2 (10th Cir. May 19, 2009) (random monitoring of computer use for fraud defendant too broad).

5. Delegating to probation the setting of conditions

a) *United States v. Smith*, 561 F.3d 934, 942 (9th Cir. 2009) (government conceded improper delegation to probation office where court required defendant to submit to unspecified number of non-treatment drug tests; court should have specified maximum number of tests defendant would be required to perform). *But see United States v. Cervantes-Rubio,* 275 Fed.Appx. 601, 604-05 (9th Cir. 2008) (such error not reversible under plain error standard).

VIII. Miscellaneous Circuit Splits

A. Consideration of "just punishment"" factors when imposing a sentence upon revocation of supervised release

1. The petition for writ of certiorari in *Lewis v. United States*, 2008 WL 3833279 (Aug. 13, 2008) (No. 07-1295)-- a Sixth Circuit case -- examines a circuit split over whether a district court may consider the just punishment factors in a revocation proceeding. *See also* Brief in Opposition, *Lewis v. United States*, 2008 WL 3155797 (July 31, 2008) (No. 07-1295).

B. Sentencing court's authority to order a federal sentence to run consecutive to a state sentence that has not yet been imposed

1. A petition for certiorari filed in *Jurgens v. United States*, 2008 WL 4441088 (Sept 30, 2008) (No. 08-413) -- a Fifth Circuit case -- identifies a 4-4 split on whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed.

C. Required Jury findings for enhanced stat maxes for conspiracy cases

1. A petition for certiorari filed in *United States v. Seymour*, 519 F.3d 700, (7th Cir.), *cert. denied*, 129 S.Ct. 527 (2008), raises a circuit split on how a jury should determine the amount of drugs attributable to a defendant in a conspiracy. Petition for Writ of Certiorari, *Seymour v. United States*, 2008 WL 2549997 (June 23, 2008) (No. 07-1608). The government acknowledged a split between the Fourth and Seventh Circuit's in its brief in opposition. Brief in Opposition, *Seymour v. United States*, 2008 WL 4409719 (Sept. 26, 2008) (No. 07-1608).

June 9, 2009