UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ANYWHERE

UNITED STATES OF AMERICA	:	
v.	:	**Crim. No.**
JOHN DOE,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF
JOHN DOE'S POSITION ON SENTENCING

TABLE OF CONTENTS

I. Mr. Doe Requests a Sentence Below the Advisory Guideline Range.

John Doe respectfully submits this memorandum in support of his position at sentencing. He will argue that a sentence below the advisory range adequately serves to punish him and, when followed by a term of supervised release, more than sufficiently serves the deterrent and rehabilitative goals of sentencing. Mr. Doe's start in life, his upbringing, and his criminal history, are sadly but likely to be distressingly familiar to this Court. But simply to look at these aspects of Mr. Doe is to characterize John Doe based solely on one aspect of his character, at the expense of completely missing who he is. This oversimplification overlooks the active, involved father who is determined that his eight-year old son be raised by two parents. It misses that, despite his lack of training and his record, he has sought and maintained employment whenever possible. It ignores his appreciation that, if he is ever to overcome the considerable obstacle to employment that his felony record poses, he must further his education, so he attended community college. And it wholly neglects his recent efforts to help at-risk students and to educate staff and faculty at a local school, which resulted in at least one student leaving a gang. John Doe readily admits that in possessing this gun he was wrong and he immediately accepted responsibility for his actions. He recognizes that when threatened at gunpoint, he should have responded by leaving the area, rather than by staying and obtaining a weapon himself. For this John Doe, a sentence in the advisory guideline range is not necessary, nor is it warranted.

A sentence in the advisory guideline range is also neither warranted nor necessary based upon the history of the guideline itself. Mr. Doe's guideline range is driven most significantly by an amendment promulgated in 1991, an amendment that made his prior convictions the driving force of the advisory range. This amendment was enacted in direct contravention of research indicating that these convictions were not a significant factor in sentencing judges' determinations of sentence length. Moreover, prosecutions for this offense have been disproportionately aimed at and felt by the African-American and Hispanic communities, imprisoning those who possess weapons (like Mr. Doe, for self-defense), while ignoring the sources of the guns that flood cities such as Newark, sources such as corrupt gun dealers. These facts alone militate strongly

against the imposition of a guideline sentence.

A sentence below the advisory range is feasible, and this memorandum will demonstrate that it is also appropriate. In this memorandum, Mr. Doe will follow the same framework that guides this Court in imposing sentence, namely, 18 U.S.C. § 3553(a). An evaluation of Mr. Doe's circumstances under the § 3553(a) factors will demonstrate that a sentence below the range is "sufficient, but not greater than necessary to serve the purposes of sentencing."[1]

II. John Doe is Working to Break the Cycle His Parents Started in Powerful Ways.

John Doe has a history that is sadly familiar to this Court, but it is a history that he is working in important ways to overcome. When Mr. Doe was born, his mother was still a child herself – just fourteen years old. She then had two more children, before she turned seventeen. Mr. Doe's mother was a drug addict, and could not care for her children; indeed, she could barely care for herself. Mr. Doe's father, also a child, was of no help. Instead, he, his siblings, and his mother lived with his grandmother, who did her best to care for all of them. But Mrs. Doe had lived a hard life. Before she relocated to New Jersey, she had worked in the fields of her homestate; years of backbreaking labor had left her arthritic and limping, but she rose to the challenge of raising her grandchildren. That challenge became ever more difficult as crime, drugs and gangs inundated the streets of P, including the neighborhood where she lived.

Mr. Doe, however, did not have to look beyond the walls of his own home to witness drug use first-hand. He saw his mother using drugs openly at home, making no effort to hide her addiction or her needs from her young children. To Mr. Doe, "normal" life was an absent father, an addicted mother who got high in front of him, crime on every corner, and a grandmother who loved and nurtured him but who could not shield him from these most dangerous and adult aspects of life. The young John Doe absorbed it and he grew up very fast. With his grandmother as the only person who was stable

---

[1]As an initial matter, although it does not impact his criminal history score, Mr. Doe maintains his objection to the computation in the PSR. *See* March 30, 2011 Objection Letter, *attached to final PSR*.

and upon whom he could reliably count, Mr. Doe quickly "learn[ed] how to fend for himself at a very young age." Exhibit A (Z. Letter). Not a path anyone would wish for a child, it was the only path Mr. Doe saw open to him. Perhaps had someone intervened to show Mr. Doe a different way to live or offered him a different direction, he would not be before this Court. But that did not happen.

While Mr. Doe cannot change what has happened in his life, he has come to understand that he can make a difference in other children's lives. Realizing that, on February 24, 2010, he participated in the Stop the Killings Movement Play at P. High School and L. Middle School. *See* Exhibit B (P. School Letter). The goal of the play and follow-up interaction with the students and staff was to provide information on how to live a life without violence for those who live in crime-ridden and gang-infested neighborhoods. Mr. Doe offered his own experience, talking about living in precisely those types of areas, and in prison, where gangs are prevalent, discussing what he had seen his friends endure when they chose to join gangs, as well as how to remain on the fringes, as he had done. Mr. Doe served as a role model by offering his life as a learning example for others. As S. states,

> Due to [Mr. Doe's] testimony and braveness in sharing we had a student reach out to us and are in the process of changing their life. If you are able to help one person and change one life, then our job is done as a role model and adult. We thank him for sharing his experience with us and hope he prospers in his future endeavors.

Exhibit B.

Not only did Mr. Doe make an impression on at least one student, as well as the staff and faculty, participating in the play left an indelible impression on Mr. Doe. In talking about why he chose to take part in the play, he stated, "maybe if someone had did that for me, I would have thought more" before traveling down the path he ultimately took. Indeed, in discussing his future plans, Mr. Doe now would like to counsel troubled youth, building on the play, to help at-risk teens stay away from crime and from making the same mistakes that he has made.

He has already begun working to ensure that his older son does not go down the same path. Mr. Doe well remembers growing up without having his father around, and

he was determined that even though he and B. were no longer together, he would be an active, involved part of his son's life. He maintains a good relationship with Ms. B, understanding that it is in M's best interest to have parents who work together to raise him in an amicable environment. He and Ms. B worked out a schedule so that one of them always had M; he was never left on his own and he certainly was never left to "fend for himself," as was Mr. Doe. Most recently, when Ms. B had a more rigid work schedule, Mr. Doe took his son to and from school, keeping M at his house to do his homework until Ms. B finished work. If there was time after homework, Mr. Doe would take M to the park; sometimes, they would also watch wrestling or basketball, two of M's favorites. M also spent some weekends with Mr. Doe, as well as summer days. When he could, Mr. Doe saved up to take M to the circus during the summer, a rare treat, but he wanted M to have the kind of childhood memories that he never had. Understanding what was important, he also attended parent activities at M's school as well, including Thursday father-and-son activities and parent-teacher conferences.

Mr. Doe looks forward to doing the same kinds of activities with D, his five-month old son. D was born prematurely, but, thankfully, he is doing well; he lives with C. Sadly, Mr. Doe has yet to hold D, who was born while Mr. Doe was in custody on this charge. Mr. Doe appreciates that he "should have walked away" when he was threatened at gunpoint by a neighborhood gangmember who had already killed another of Mr. Doe's friends, rather than panicking, getting drunk, and getting a gun. He is thankful that this arrest – his last – did not result in anyone getting hurt; he was working to refocus his life when this happened, and he fully appreciates that his half-measures were insufficient. While he was doing what he needed to do with his children, he admits that "I should have just eliminated myself from the situation" by staying away from the area entirely, "knowing I had a baby on the way," and that had he done that, there would have been no opportunity for his poor judgment and bad decisions to snowball to the point where he is before this Court.

In sum, Mr. Doe understands that he must redouble his efforts when he is released; he must rebuild his relationship with M, establish a relationship with D, and work to right himself so that he can achieve his goal of working with troubled youth – all

of which will be that much more difficult with this conviction and prison sentence. But Mr. Doe has worked to overcome his past in important ways, including in ways that will affect the future, such as raising his son to help him avoid the path he took and facilitating the student's departure from the gang. Lacking any formal certification and saddled with a felony record, stable, legitimate employment has eluded Mr. Doe, but he has worked steadily whenever he was able.[2] These efforts, undertaken despite the utter absence of any resources and lack of any support structure upon which to draw, represent not just a fundamental break from the way he grew up but also significant accomplishment for Mr. Doe. They also demonstrate to this Court that he will successfully work to overcome this setback, as well.

---

[2]Mr. Doe's criminal history was undoubtedly a serious obstacle to his ability to obtain steady work. One sociologist conducted an audit study to "measure the impact of a criminal record and race in shaping employment opportunities." *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION vii (2007). The results were clear and troubling:

> The results of the study provide clear evidence for the significant effect of a criminal record, with employers using the information as a screening mechanism, weeding out ex-offenders at the very start of the hiring process. As a result, ex-offenders are one-half to one-third as likely to receive initial consideration from employers as equivalent applicants without criminal records. Mere contact with the criminal justice system–in the absence of any transformative or selective effects–severely limits subsequent job prospects. The mark of a criminal record indeed represents a powerful barrier to employment.

Id. at 144-45.

III. A § 3553(a) Inquiry Properly Focused on the Mandate to Impose a Minimally Sufficient Sentence Without Special Deference to the Guidelines Supports a Sentence Below the Range.

In addition to the nature and circumstances of the offense and Mr. Doe's history and characteristics, the Court must consider the "need for the sentence imposed" to serve the punitive, deterrent, protective and rehabilitative purposes of sentencing, the types of sentences available, the need to avoid unwarranted disparity and, of course, the advisory guidelines range. While the advisory guideline calculation remains an important consideration, it is "not the only consideration" in determining the appropriate sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). To the contrary, the guidelines "'reflect a rough approximation of sentences that *might* achieve § 3553(a)'s objectives.'" *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)) (emphasis added). A sentencing court "may not presume that the Guidelines range is reasonable." *Gall*, 552 U.S. at 50 (citing *Rita*, 551 U.S. at 351). Rather, the sentencing court must make an "individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50. Above all, a court's final determination of a sentence must reflect "§ 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in 3553(a)(2)," namely, retribution, deterrence, incapacitation, and rehabilitation. *See Kimbrough*, 552 U.S. at 111.

In making these individual assessments, sentencing courts are free to disagree with the guidelines' recommended sentence in any particular case, and may impose a different sentence based on a contrary view of what is appropriate under § 3553(a). This includes the freedom to disagree with "policy decisions" of Congress or the Sentencing Commission that are contained in the guidelines. *See Pepper v. United States*, 131 S. Ct. 1229, 1241 (Mar. 2, 2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views . . . . That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."); *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (confirming *Kimbrough's* holding that courts may vary from particular guideline

because of policy disagreement with that guideline) (*per curiam*).

This is a case in which this Court *should* reject the advice of the guidelines, because they are a poor guide to the minimally sufficient sentence for Mr. Doe in particular, and because the flaws in their development and, in particular, in the amendment that drives Mr. Doe's guideline range, make them a poor guide generally. As will be demonstrated, the firearms guideline was amended dramatically in 1991; as relevant to Mr. Doe, the base offense level was doubled, from 12 to 24. The applicability of this increased base offense level turned on the existence of certain types of prior convictions, even though the research indicated that the existence of such priors was not strongly correlated with the length of sentence.[3]

In the wake of these dramatically increased ranges, evidence of dissatisfaction and problems is mounting. For example, the rate of below-range sentences has increased fairly steadily over the years, particularly since *Booker*, to the point where in FY 2011, more than 20% of sentences in firearms cases were below-range for reasons other than government-sponsored motions. In addition, and particularly troubling, data published by the Sentencing Commission and other evidence indicate that the brunt of the gun prosecutions and accompanying increasingly severe sentences are being felt disproportionately and unjustly by African-Americans and Hispanics. In these circumstances, for reasons pertaining to Mr. Doe in particular and to the flaws in the firearms guideline generally, a sentence within the mechanically calculated range would be far greater than necessary to serve the purposes of sentencing.

[3]The guideline was amended in a number of other ways, but this memorandum focuses on the amendment and findings that pertain to Mr. Doe's circumstances.

A. The flawed development of the firearms guideline and evidence indicating increasing downward departure and variance rates render the advisory range a poor guide to the minimally sufficient sentence. A below-range sentence is thus merited.

The firearms guideline is problematic in Mr. Doe's case because the guideline does *not* reflect an exercise of the Commission's unique role and expertise. As this section will demonstrate, the range applicable to the conduct underlying Mr. Doe's offense has increased dramatically, to the point where it is unrecognizable in relation to the ranges that applied at the beginning of the guidelines era. More significantly, the reasoning underlying these changes is seriously flawed, rendering the advisory range a poor guide to the minimally sufficient sentence. In *Rita*, the Supreme Court gave two reasons that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that "might achieve § 3553(a)'s objectives." First, the original Commission used an "empirical approach" which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." Second, the Commission can review and revise the guidelines based on judicial feedback through sentencing decisions, and consultation with other frontline actors, civil liberties groups, and experts. *Id*. at 348-50. Where revision is *not* based on judicial feedback or other empirical research, however, the rationale for viewing the range as a rough approximation of sentences that might achieve the statutory sentencing objectives is absent. That is the case with respect to the firearms guideline as it applies to Mr. Doe, which renders the range a poor guide to the minimally sufficient sentence.

1. The range applicable to Mr. Doe's offense conduct and criminal history has increased from 15 to 21 months at the outset of the guidelines era to 77 to 96 today.

The original version of § 2K2.1 set a base offense level of 9. *See* U.S.S.G. § 2K2.1 (1987 ed.). Under this version, with Criminal History Category VI, Mr. Doe's range would have been 15 to 21 months. This initial version was soon amended, however, to increase the relevant base offense level to 12. *See* U.S.S.G. § 2K2.1(a)(2) (1989 ed.). Under this version, after the two-level deduction for acceptance, Mr. Doe's range would still have been only 24 to 30 months. In 1991, the firearms guideline was significantly

amended in a number of ways. As relevant to Mr. Doe, the offense level doubled, from 12 to 24, applicable when the defendant had at least two prior convictions of either a crime of violence or a controlled substance offense. *See* U.S.S.G. § 2K2.1(a)(2) (1991 ed.). With the two-level downward adjustment for acceptance of responsibility, Mr. Doe's range would have been 84 to 105. In 1992, the Commission promulgated the provision permitting a third point for acceptance of responsibility; with that adjustment, Mr. Doe's range would be, as it is now, 77 to 96 months.

2. The dramatic increase to the offense level in 1991 did not reflect an exercise of the Commission's characteristic institutional role.

The most dramatic increase to the firearms guideline, as applicable to Mr. Doe, occurred in 1991, following a detailed examination of the guideline by the Sentencing Commission's Firearms and Explosive Materials Working Group ("the Working Group"). As this section will demonstrate, however, the guideline was revised in a manner (as applicable to Mr. Doe's case) that did *not* reflect the Working Group's findings. In fact, it was revised in a manner that *contradicted* some of those findings.

The Commission directed the Working Group to "thoroughly examine" the firearms and explosives guidelines and to make appropriate revisions. In December, 1990, the Working Group issued its report.[4] *See* U.S. SENTENCING COMMISSION, FIREARMS AND EXPLOSIVE MATERIALS WORKING GROUP REPORT (Dec. 11, 1990) ("FIREARMS REPORT") [Exhibit C]. After reviewing sentencing data, case files, reported decisions, and feedback "from the field and from the Bureau of Alcohol, Tobacco, and Firearms (ATF)," the Working Group recommended the consolidation of several firearms guidelines into one, § 2K2.1. One of the reasons specifically stated for this consolidation was to "reduce the number of departures and consequent disparity by relying more heavily on specific offense characteristics." *Id*. at 10-11.

Given this emphasis on "specific offense characteristics," the Working Group

[4]Page references to the FIREARMS REPORT refer to the numbers in the lower right-hand corner of each page. Due to volume, only those portions that are relevant to this case are attached. Mr. Doe will provide a full copy upon request.

sought to discern which offense characteristics correlated with the sentence length, presumably with the goal of revising the guidelines accordingly. *See id*. at 18-19. The review determined that the offense characteristics impacting sentence length included "actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection purposes, drug-related conduct, N.F.A. firearms, destructive devices." *Id*. at 18-19 (footnotes omitted). Significantly, the existence of prior convictions was *not* among this list. In fact, the Working Group explicitly concluded that sentence length "does *not* seem strongly correlated with the existence of prior firearms or drug-related offenses or convictions for crimes of violence."[5] *Id*. at 140 (emphasis added).

From that point, based on what it considered to be a high rate of sentences at the upper end and above the range in firearms case, the Working Group concluded that some increase in the ranges was warranted. While this might have been a rational decision as a general matter, the route chosen by the Working Group and, ultimately, the Commission, was *not* rational, at least as applied to cases like Mr. Doe's. In direct contravention of the Working Group's conclusion that sentence length was *not* strongly correlated with the existence of qualifying priors, the amendment turned this finding on its head and the existence of qualifying priors became the main driving factor in a significantly higher base offense level. Specifically, the guideline was amended to provide that a defendant with two prior qualifying convictions was subject to a base offense level of 24. That was twice the base offense level provided for in the 1989 and 1990 versions (which applied to defendants with one prior qualifying conviction), and

---

[5]The Working Group noted that criminal history category "appears to be a significant factor in determining the offense level and length of sentence imposed." *Id*. at 138. Indeed, longer sentences (i.e., in the middle, at the top, or above the guideline range) were imposed on defendants in the two highest *criminal history categories*. The average *offense level* for defendants in these higher criminal history categories "was equivalent to the average for all Defendants." *Id*. at 139. It stands to reason, of course, that defendants with higher criminal history categories would receive longer sentences. The Commission, however, found no correlation between *certain types of prior convictions* (i.e., drug convictions, crimes of violence) and the length of sentence. *See id*. at 140. It thus made no sense to raise the base offense levels based on such convictions, but that is what the Commission did.

nearly triple the base offense level of 9 provided for in the 1987 and 1988 versions (which did not turn on the existence of any prior convictions). The decision to base this higher offense level on the existence of certain prior convictions was therefore utterly disconnected from evidence reviewed and analyzed, and the conclusions drawn, by the Working Group. This disconnect alone undercuts the reliability of the base offense level as a guide to the appropriate sentence.

Further undercutting the reliability of the amendment as a guide was the *degree* of the change wrought by the amendment. While the sentences resulting from the early versions of the guidelines were, the Working Group concluded, disproportionately imposed at the high end of, or above, the ranges, the Working Group pointed to no evidence that indicated the need to increase the ranges so dramatically. Specifically, the FIREARMS REPORT noted that § 922 cases "not sentenced under the guidelines have received sentences ranging from 32 months to 62 months, with an approximate average annual total of 42 months." FIREARMS REPORT at 16. The 1989 data file showed an average sentence of 43 months for firearms cases overall, *see id*. at 17, an average of 14 months under § 2K2.1(a)(2), and sentences under § 2K2.1(a)(2) that ranged from probation to 48 months, *see id*. at 134. *See also id*. at 40 ("Sentencing practice before the guidelines demonstrated a tendency to sentence prohibited person to an average 40-60 months imprisonment, while under the guidelines, sentences have averaged 14 months imprisonment.") The Working Group also reported that defendants in criminal history categories V and VI "averaged thirty-eight (38) month sentences – more than twice the average of all cases." *Id*. at 139. Nothing about pre- or post-guidelines data indicated that judges thought that the average firearms sentence should jump so severely.

In short, the data suggested that modest adjustments to the guidelines could have been made to ensure that sentence length was more evenly distributed throughout ranges that corresponded with pre-guidelines sentence practice and with feedback since the inception of the guidelines. Instead, the Sentencing Commission dramatically increased the base offense level for § 2K2.1(a)(2)(and, again, based on an offense characteristic its own review deemed not strongly correlated to sentence length). This

dramatic change, not surprisingly, produced dramatic increases in sentence length. Specifically, the average sentence for firearms possession doubled between 1988 and 1995. *See* U. S. Sentencing Commission, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 67 (Nov. 2004). Again, because the result represents a drastic over-correction to the problem as identified, the guideline range is an unreliable basis for the minimally sufficient sentence.

But the nature and degree of this change to the base offense level are not the only factors that undercut the base offense level's reliability; other flaws in the development of the guideline also erode the use of the base offense level as a proxy for sentencing. In addition to proceeding in a way that contradicted the Working Group's findings, the Commission was selective in its attention to other findings. For example, the Working Group determined that sentence length was correlated with a defendant's purpose in possessing the firearm, including specifically whether the gun was possessed for protection. *See* FIREARMS REPORT at 141 ("Where some personal or protection use was intended, average sentence and sentence within the guideline range was low."). Despite this finding, the Working Group proposed no such adjustment for situations in which the defendant had the firearm for protection; instead, the Working Group proposed a downward adjustment in the offense level where the defendant had the firearm for sporting or collection purposes. *See id*. at 225.

Beyond the selective use of its own findings, there is also no question that considerations other than the statutory purposes of sentencing or empirical research findings impacted the Working Group. For example, the Working Group took into account the reported reluctance of prosecutors to pursue cases that would not result in significant sentences of imprisonment. *See id*. at 41 & n. 59 ("Others note the frustration of crime control objectives as many United States Attorneys are reluctant to prosecute even serious felon offenders in light of the relatively low penalties under the guidelines.") (citing letter from ATF reporting difficulty in having certain individuals prosecuted due to "the insufficient sentences provided for by the guidelines"). In addition to being merely anecdotal, the purported reluctance of prosecutors to enforce

certain laws because the sentences imposed will not be severe enough is simply *not* a legitimate reason to increase the severity of sentences. *Congress* sets the penalty ranges for offenses; the Commission was charged with fashioning guidelines *within* those ranges based on the *statutory purposes of sentencing*, not based on the desire of prosecutors to pursue only those cases in which long sentences are likely. And yet the end result was that the base offense level was *doubled*, with the corresponding result that the sentences demanded were dramatically increased, as were prosecutions.

To summarize, the Working Group failed in significant ways to propose revisions that were tailored to its research and findings, which at most indicated a need for modest increases. It failed to propose revisions that accounted for mitigating circumstances. And it failed to frame the revisions with the overall purposes of sentencing in mind. Each of these, individually and collectively, renders the guideline unreliable as a guide to the minimally sufficient sentence. But the Working Group was not done yet.

3. In the end, the base offense level was doubled to bring § 922(g) sentences more in line with ACCA sentences.

What the Working Group did instead was propose revisions that had little, if anything, to do with the research and findings it reported. In the end, it shaped the firearms guideline in the image of a separate guideline and statute that are aimed at repeat violent offenders. *Id*. at 28-32. Astonishingly, the Working Group was explicit about its utter abandonment of its mandate and its adoption of this aim:

> The proposed guideline would ensure that felons with a demonstrated propensity for engaging in violent or particularly harmful offenses are punished more severely. *Congress has established this objective* by increasing the relative statutory maximum penalties to be applied not only to prohibited persons, e.g. felons convicted under 922(g)(1) (ten-year statutory maximum), but also to felons with violent and drug-related prior convictions, see 18 U.S.C. 924(e) (mandatory minimum of fifteen years for person convicted of 18 U.S.C. § (22)(g) who has three previous convictions for violent felonies or serious drug offenses).

Id. at 28-29 (emphasis added; footnotes omitted). Thus, the Sentencing Commission's eventual adoption of the increased base offense level was not designed to establish

ranges for § 922(g) offenders that were "sufficient, but not greater than necessary" to achieve the purposes of sentencing identified in 18 U.S.C. § 3553(a)(2). The amendment was designed instead to achieve consistency with a statute used primarily to prosecute individuals with a persistent history of repeated violent conduct.

This is a far cry from the empirical process that was envisioned at the outset of the guidelines era. Rather than basing the guideline on past practice or on independent study and then making adjustments based on the feedback of judges and practitioners, the Commission acted, in the words of Justice Scalia, like a "junior-varsity Congress." *See Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). This is not only an abdication of its intended role, but a violation of its statutory mandate to "independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. § 994(m). Acts of Congress, moreover, , do not absolve the Commission of fulfilling this role. For instance, in the context of the later Adam Walsh Act, the Criminal Law Committee of the Judicial Conference urged the Commission, when deciding whether to amend the guidelines in response to a mandatory minimum, to make an assessment based on its own expert opinion and independent of any potentially applicable mandatory minimum. *See* Comments of the Criminal Law Committee of the Judicial Conference (March 16, 2007).[6] If the resulting guideline, alone or in combination with specific offense characteristics, is lower than the mandatory minimum, the Committee noted, § 5G1.1(b) would operate. *See id.* The Criminal Law Committee suggested that the Commission could consider in its independent evaluation any information in published reports or hearing records upon which Congress may have relied. *Id*. In other words, the Criminal Law Committee encouraged the Commission not to respond mechanically to congressional policies, but to evaluate, assess, and analyze.

In the case of § 922(g), the Commission did not follow its Congressionally mandated path to independently evaluate and develop a sentencing range consistent with the sentencing goals as set forth in § 3553. Instead, it implemented an amendment

[6]Available at (http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.)

that was designed to serve not the purposes of sentencing as a whole, but explicitly and solely to more closely approach the sentences produced by the ACCA. In so doing, it promulgated a guideline provision devoid of the legitimacy presumably conferred by inclusion in the guidelines.

4. The rates of downward departures and variances strongly indicate that the current ranges are greater than necessary to serve the purposes of sentencing.

That the version of § 2K2.1 produced by this deeply flawed amendment process is not a reliable guide to the minimally sufficient sentence is evinced by the ever-increasing rates of downward departures and variances under the current and recent versions. The Working Group relied heavily on this measure to justify increased ranges. At that time, of course, the Working Group was concerned about what it deemed a high number of upper-range and above-the-range sentences. The *same measure*, *i.e.*, departure and variance rates, now suggests that the Commission vastly over-corrected the problem, producing ranges that judges, in increasing numbers, feel necessary to temper. By this measure, the Commission has utterly failed to achieve one of the stated aims of the Working Group, that of "reduc[ing] the number of departures and consequent disparity by relying more heavily on specific offense characteristics." FIREARMS REPORT at 11.

Specifically, the Working Group cited an 8.4% departure rate as evidence that the ranges produced by the early versions of the firearms guidelines were "generally insufficient." But that rate has been exceeded, and by far, after the amendment, with no study, much less action from the Commission. From 1997 through 2002, the downward departure rate in § 2K2.1 cases equaled or topped 10%. *See* Exhibit D (Data drawn from tables showing, in pre-*Booker* reports, "Offenders Receiving Departures in Each Primary Sentencing Guideline" and, in post-*Booker* reports, "Sentences Relative to the Guideline Range by Each Primary Sentencing Guideline," from Fiscal Year 1997 through Fiscal Year 2010, available at ussc.gov). As this graph demonstrates, in the years before the PROTECT Act, the rate climbed fairly steadily, from approximately 10% in 1997, 1998 and 1999 to approximately 12% in 2000 and 2001, to more than 13% in the portion of fiscal year 2002 that occurred before the PROTECT Act. *See id.* Since *Booker*, the

departure and variance rates have only continued to increase. In 2006, the first full year after *Booker*, approximately 14% of § 2K2.1 sentences were imposed below the range for reasons other than government-sponsored motions. In 2009, approximately 21.5% of such sentences were imposed below the range, again for reasons other than government-sponsored motions, in 2010, the percentage was 22.2%, and in 2011, the percentage was 22%. *See id*. This bears emphasis – more than *one-fifth* of sentences are now below-range.[7]

If an 8% upward departure rate indicates a "general insufficiency" of the ranges, then a 21.4% below-range rate must indicate the gross excessiveness of the ranges. These numbers are powerful evidence that the Commission has failed to achieve one of the stated aims of the 1990-1991 effort to improve the firearms guidelines. Rather than reducing departures and disparity, the 1991 and subsequent changes have significantly increased downward departures and variances. This evidence also compels the conclusion that the ranges resulting from the current and recent versions of the firearms guideline are far greater than necessary to meet the purposes of sentencing in many, many cases.

And yet, when faced with departures and variances that overwhelm the sentencing imbalance that prompted the Commission, for defendants like Mr. Doe, to double the base offense level, the Commission has done nothing. That utter failure to act provides yet another basis for this Court to step in and temper the Commission's excess. Given the numerous flaws in the development of the guideline, which have been compounded by the Commission's inaction in the face of undeniable judicial comment in the form of below-range sentences, the guideline cannot be deemed to represent a reliable guide to the minimally sufficient sentence. This Court can and should disregard it and impose a below-range sentence.

---

[7]If *government-sponsored* departures are taken into account, the rate of below-range sentences increases even more dramatically. For example, in 2011, 14% of firearms sentences were imposed below the range based on government-sponsored motions, meaning that 36% of firearms sentences overall were below the range.

B. Consideration of the punitive, deterrent, protective, and rehabilitative purposes of sentencing, in light of the overriding mandate to impose a sentence minimally sufficient to serve those purposes, warrants a sentence below the advisory range.

The sentencing statute directs the Court to impose a sentence that is minimally sufficient to comply with the purposes of sentencing listed in paragraph § 3553(a)(2), frequently referred to in shortcut form as punishment, deterrence, incapacitation and rehabilitation.[8] The sentence suggested by the guidelines in this case is far greater than necessary to meet these needs. That range has been inflated by the 1991 and other amendments to the firearms guidelines, amendments which have sometimes contradicted, sometimes ignored the Commission's own research and findings. The fact that many judges deem the ranges excessive is demonstrated by the steadily increasing rates of downward departures and variances. And the evidence is stark that African-Americans and Hispanics are disproportionately bearing the brunt of the stepped-up enforcement of certain firearms laws and the draconian sentences. Alone and together, these forces operate in Mr. Doe's case to suggest a sentence out of all proportion to the instant offense and to his criminal history in general.

A sentence below the advisory range, along with the many collateral consequences of a serious felony conviction, would constitute severe punishment. Conditions of supervision and the threat of imprisonment should Mr. Doe violate those conditions will serve as deterrence. And since prison may not be used to further rehabilitation, that purpose does not militate in favor of a sentence in the mechanically

---

[8]The statute requires the Court to consider the need for the sentence:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a).

calculated range; in fact, the criminogenic effects of incarceration militate *against* incarceration for that length of time.

1. The punitive purpose of sentencing warrants a sentence below the mechanically calculated range.

Section 3553(a)(2)(A) requires the Court to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." As the plain language indicates, this provision requires the Court to consider these purposes in relation to the *instant offense*. In this case, the advisory range cannot be viewed as an empirically based, equitably applied determination of the sentence minimally necessary to serve these purposes in relation to the instant offense. It is, instead, one outgrowth of the excessively punitive policies that have characterized criminal sentencing over the past several decades and that have disproportionately impacted poor men of color, men just like Mr. Doe. By their excessive punitiveness and by their inequitable impact, these policies have undermined, rather than promoted, respect for the law.

a. Federal gun prosecutions disproportionately target African-Americans.

As already noted, the sentencing statute provides that the sentence must be no greater than necessary to serve the punitive purpose of sentencing. In reference to this purpose, then, the relevant question is what length of sentence is minimally necessary to serve this purpose? For several decades now, the response to this question has been "the longer, the better." Hence, the explosion in incarceration rates. Incarceration rates in the United States are "now almost five times higher than the historical norm prevailing throughout most of the twentieth century, and they are three to five times higher than in other Western democracies." Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, HARV. LAW & POLICY REV. 307 (Summer 2009) (footnotes and citations omitted).

The trend in prosecutions and sentences for firearms offenses on the federal level reflects this increasing reliance on incarceration. In 1996, approximately 2500 defendants were sentenced for firearms offenses; in 2010, the number topped 8200. And this increased enforcement effort has been felt disproportionately by African-

American defendants. Whereas whites made up approximately 48% of firearms defendants in 1992, they made up only 29% of the same group in 2010. *See* Exhibit E (data drawn from tables published by U.S. Sentencing Commission showing "Average Length of Imprisonment by Primary Offense Criminal History Categories"). African-Americans, meanwhile, went from constituting 38.8% to 50% of firearms defendants in the same time period. *See id*.

This trend is not surprising because law enforcement's efforts have been focused on "communities in which African Americans are disproportionately concentrated." *Id*. at 315 (footnote omitted). "Project Safe Neighborhoods," an anti-gun program that began in 1991, operated in every one of the thirty cities with the largest African-American populations. *See* Bonita R. Gardner, SEPARATE AND UNEQUAL: FEDERAL TOUGH-ON-GUNS PROGRAM TARGETS MINORITY COMMUNITIES FOR SELECTIVE ENFORCEMENT, 12 MICH. J. RACE & L. 305, 316 (Spring 2007) (hereinafter "SEPARATE AND UNEQUAL"). Even in smaller cities, the focus remained on those with significant populations of African-Americans. "Of the fifty-four cities with populations exceeding 100,000 where African Americans make up thirty percent or more of the population, Project Safe Neighborhoods focuses on at least forty-four of those communities." *Id*.

> According to statistics presented in the Eastern District of Michigan, almost ninety percent of those prosecuted under Project Safe Neighborhoods are African American. In the Southern District of New York where Project Exile was implemented, there was testimony showing that more than eighty percent of defendants prosecuted under the project were African American. In the Southern District of Ohio, statistics have shown that of seventy-seven cases known and reviewed under Project Disarm (Cincinnati's Project Safe Neighborhood's initiative), seventy of the defendants were African American, more than ninety percent of all prosecutions under the program. And under Project Exile in Richmond, Virginia, the defendant and prosecution stipulated in an Eastern District case that "as many as 90 percent of the defendants prosecuted under Project Exile are African American."

Id. at 317.

And it isn't just that the vast majority of those targeted for prosecution under

these laws are African-American. It isn't that they are receiving federal felony sentences, rather than state felony sentences. It is that they are receiving *longer* felony sentences. *See id.* at 308 ("Those caught with a gun in one of those communities will be met with the full weight of federal law and find themselves facing sentences that are almost uniformly longer than those imposed under comparable state law. The person caught with a gun in other communities, if prosecuted at all, will certainly not end up in federal court to face its harsher penalties."). While these men receive "the full weight of federal law," the sources of illegal guns are rarely, if ever, prosecuted.

b. Corrupt gun dealers who flood the streets with illegal guns virtually escape prosecution.

There is no shortage of information pointing to the sources of the guns traced to crimes ("crime guns"). For example, numerous studies and investigations reveal that a small number of gun stores are responsible for a large number of crime guns. *See, e.g.*, AMERICANS FOR GUN SAFETY FOUNDATION, SELLING CRIME: HIGH CRIME GUN STORES FUEL CRIMINALS 1 (January 2004) ("A small number of the nation's 80,000 gun dealers are flooding American's streets with crime guns - yet Washington rarely investigates, shuts down or prosecutes most of these high-crime dealers.");[9] Alcohol, Tobacco and Firearms, *Commerce in Firearms in the United States* 23-24 (2000) (finding that 1.2% of current firearms dealers account for "well over 50 percent of the traces to current retail dealers" in 1998);[10] David S. Fallis, *Virginia gun dealers: Small number supply most guns tied to crimes*, WASH. POST, Oct, 25, 2010 (hereinafter "*Virginia gun dealers*") (following year-long investigation, reporting that "60 percent of the 6,800 guns sold in Virginia [since 1998] and later seized by police can be traced to just 40 dealers").[11] One former ATF agent said, "[A] bad gun dealer is like a bad cop. He can

---

[9]Available at http://www.agsfoundation.com/data/product/file/98/AGSF_Selling_Crime_Report.pdf (last visited May 7, 2011).

[10]Available at http://permanent.access.gpo.gov/lps4006/020400report.pdf (Last visited May 7, 2011).

[11]Available at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/24/AR2010102402

really hurt us because he can really pump the guns out." *See id*. The numbers of guns traced to certain stores bear this out, and put Mr. Doe's conduct in perspective. *See id*. (noting 1,400 crime guns traced to one dealer, 72 traced to another, 230 to another). *See* Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* x-xi (June 2000) (noting that corrupt licensees were associated with largest number of diverted guns, followed by gun shows, straw purchasers, unlicensed sellers, and firearms theft; also nothing that "mean number of trafficked guns involved in any case in which [a Federal firearms licensee] figured was over 350").[12] Gun shows are another major source of crime guns. *See* AMERICANS FOR GUN SAFETY FOUNDATION, NO QUESTIONS ASKED: BACKGROUND CHECKS, GUN SHOWS AND CRIME (April 2001) (citing ATF study indicating that "from 1996 to 1998, gun shows were the nation's second leading source of guns recovered in illegal gun trafficking investigations, accounting for 26,000 illegal firearms").[13]

That gun stores and corrupt dealers are a large part of the problem is no secret to law enforcement. ATF's written testimony to the Commission in support of an amendment to the number-of-firearms table made clear that a large part of the problem of firearms trafficking emanated from licensed (or purportedly licensed) gun dealers:

> In 1997, an ATF investigation of a dealer who lied on his license application and failed to maintain records was initiated in the San Francisco Field Division[.] More than 100 of the 446 guns the defendant bought and sold during the short time he was in business were later seized by police investigating violent crimes. The defendant was sentenced to 2 years for lying on his license application and failing to

---

221.html (last visited May 7, 2011).

[12]Available at http://www.bradycampaign.org/xshare/pdf/facts/2000-atf-following.pdf (last visited May 7, 2011).

[13]Available at http://www.agsfoundation.com/data/product/file/95/AGSF_No_Questions_Report.pdf (last visited May 7, 2011).

> maintain records. Similarly, in a 1999 case, a defendant pled guilty to engaging in the business of dealing in firearms without a license. To date, approximately 25 of the over 200 firearms he sold have been recovered in crimes including robberies, aggravated assaults, narcotics offenses, and firearms offenses. Several of the firearms have been recovered in the hands of juveniles. Subsequently, the defendant was sentenced to 4 ½ years in prison.

See U.S. SENTENCING COMMISSION, Public Hearing, March 19, 2001, Written Testimony of John P. Malone 3-4, Assistant Director, Firearms Arson and Explosives, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (March 9, 2001).[14]

Despite all of this evidence that gun stores and shows are a significant source of crime guns, neither law enforcement agencies nor legislators have made the investigation and prosecution of these targets a priority. A Washington Post investigation reported that federal prosecutions of gun dealers are rare, "averaging about 15 a year nationally." *Virginia gun dealers* at 3. Perhaps more telling is the fact that lawmakers seem to go out of their way to *protect* gun dealers. "Gun tracing is such a politically sensitive issue that Congress in 2003 banned the release of any federal data connecting dealers to guns seized in crimes. Lawmakers also prohibited the use of such tracing information in lawsuits against dealers. Current and former federal agents say that targeting suspect dealers is time-consuming and politically sensitive and that cases are difficult to prove." *Id*. at 2. Indeed, when New York City initiated an effort to investigate straw purchasing in Virginia, which it believed was a significant source of the illegal flow of guns to the city, officials in Virginia actively and forcefully intervened. *See* Tim Craig, *Va. Tells NYC to Stop Gun Stings*, WASH. POST, May 10, 2007.[15]

c. Instead, federal gun prosecutions focus almost exclusively on end-users.

---

[14]Available at http://www.src-project.org/wp-content/pdfs/testimony/ussc_testimony_written_20010319/0007542.pdf (last visited May 10, 2011).

[15]Available at http://www.washingtonpost.com/wp-dyn/content/article/2007/05/09/AR2007050902573.html (last visited May 7, 2011).

Due in clear part to the political difficulties inherent in targeting gun stores, law enforcement has instead focused its resources and efforts against men like Mr. Doe, who merely possessed the gun, albeit unlawfully by reason of his record. As a result, the government focuses overwhelmingly on prosecuting only two of the existing gun laws, 18 U.S.C. § 922(g) and 18 U.S.C. § 924(c), both of which "are directed at the 'end-users' of the firearm, as opposed to the gun dealer, seller or intermediary who supplied the firearm." *See* SEPARATE AND UNEQUAL at 312. Consequently, initiatives like "Project Safe Neighborhoods," which claimed to be an anti-gun law enforcement effort to "'reduc[e] illegal gun possession and abuse by not stopping at merely prosecuting the gun-toting criminals'" but also by "'cutting off the supply of illegal guns at the source by targeting those who put these illegal guns out on the streets and into the hands of criminals[,]'" *id*. at 313 (quoting Attorney General John Ashcroft, Prepared Remarks for the Project Safe Neighborhoods National Conference, Kansas City, Mo. (June 16, 2004),[16] fell woefully short of its goal to "cut[] off the supply of illegal guns at the source" because resources were, instead, focused almost exclusively on the end-users.

The exceedingly myopic focus of federal prosecutions, despite the wealth of federal statutes available in the government's quiver to target guns as part of its efforts to reduce gun violence, becomes immediately apparent upon even a scant review of prosecution statistics:

> For fiscal year 2003, only 4.2 percent of cases were brought for lying on Firearm Purchase Form, 1.88 percent for Stolen Firearms, 1.5 percent for Trafficking, 0.7 percent for Obliterated Serial Numbers, 0.3 percent for Corrupt Firearms Dealers, and 0.2 percent for Supplying Firearms to Minor or Near a School.

SEPARATE AND UNEQUAL at 313. At first glance, those statistics may not seem utterly inexplicable; the government could still be aiming to staunch the flow of illegal guns and produce at least some of these statistics. Some of these statutes could overlap in whom

[16]Available at http://www.atf.gov/press/releases/2004/06/062204-speech-doj-ag-ashcroft-psn-conference.html

they target, for instance; or it could be that the government were choosing one statute over another in prosecuting those who flood the streets with illegal guns, namely, corrupt dealers. But looking beneath the surface calls this explanation into doubt and demonstrates that, in fact, the government is wholly ignoring the *source* of the illegal guns that litter the streets:

> Criminal cases against corrupt gun dealers declined by eleven percent between 2000 and 2004, and from 2000-2003, only 120 cases were brought under the three federal statutes that deal with corrupt gun stores. During these four years, dealer prosecutions accounted for less than one percent (.32 percent) of all federal gun prosecutions.
>
> Gun trafficking laws are rarely enforced even in those states known for being the source of guns used in crime. In fiscal years 2000-2002, federal prosecutors filed only 26 cases against gun traffickers in Georgia, although that state was known in 2001 to be the leading supplier of guns to criminals in Alabama, Connecticut, Florida, and Massachusetts, and was among the top five crime gun suppliers to New Jersey, South Carolina, Tennessee, New York, North Carolina, Virginia, Michigan, Pennsylvania, Washington, D.C., and Maryland.
>
> In North Carolina, from 2000-2002, there were only 23 federal prosecutions for illegal gun trafficking, though this state too is known to be a leading supplier of crime guns. As of 2003, it was the second largest supplier of guns used in crime in New York, and the fifth largest supplier of handguns used in crime across the country. In 2000, 3,308 crime guns were traced to sources in North Carolina, including 1,421 crime guns used in other states. Of an estimated 22,000 firearms stolen in North Carolina from 2000-2002, there were only 16 federal prosecutions for stealing firearms.

Id. at 313-14 (all footnotes omitted). As these statistics demonstrate, far from representing a comprehensive effort to reduce illegal gun possession and abuse by targeting both the end-users *and* the sources of the guns, federal prosecution has focused nearly exclusively on the end-users. *See id*. at 308 ("[P]roject Safe Neighborhoods has been touted as a comprehensive, efficient and successful operation. In reality, the program is a narrowly-applied, reactive effort aimed at low-level

criminals. It is an easily satisfied numbers operation.")

This enforcement and prosecutorial focus is, therefore, not driven solely by determinations regarding the seriousness of the conduct (the unlawful possession of a gun) but also by considerations of political expediency. And one extremely troubling, inequitable result is that this focus has disproportionately impacted African-Americans. The numbers speak for themselves. *See* Exhibit E (showing steady increase in percentage of firearms defendants who are African-American, up from 38.8% in 1992 to 50% in 2010). This focus on low-level end-users is analogous to the inequities inherent in the "war on drugs," in which low-level end-users continue to be prosecuted and subjected to draconian sentences, while the flow from the major sources has never been effectively stanched. The difference, however, is that the gun dealers operate openly on American streets and are known to law enforcement; they simply operate with near impunity.

d. The impact of these prosecutions is far-reaching yet confined to a narrow segment of the population, undermining respect for the law.

The punitiveness and the disproportionate impact of these policies extend far beyond the actual terms of imprisonment. That impact, too, is felt disproportionately by men like Mr. Doe. Mr. Doe's record will trail him throughout his life and will serve as a serious obstacle to forging a steady, financially viable life. *See generally* BRUCE WESTERN, PUNISHMENT & INEQUALITY IN AMERICA ch. 5 (The Labor Market After Prison) (2006) (hereinafter PUNISHMENT & INEQUALITY) (discussing negative effects of prison record on wages, wage growth, job options, and life path). As the author of PUNISHMENT & INEQUALITY writes:

> Incarceration reduces not just the level of wages, it also slows wage growth over the life course and restricts the kinds of jobs that former inmates might find. Incarceration redirects the life path from the usual trajectory of steady jobs with career ladders that normally propels wage growth for young men. Men tangled in the justice system become permanent labor market outsiders, finding only temporary or unreliable jobs that offer little economic stability.

Id. at 109.

The extent to which the increased reliance on incarceration has disproportionately impacted poor people of color suggests that forces other than the seriousness of various offenses are at work in, *inter alia*, the setting of penalties for those offenses. *See id.* at 55 ("Studies of criminal sentencing that control for legally relevant factors like the seriousness of the crime and the defendant's criminal history have found the highest chances of incarceration among socially disadvantaged – either minorities or those living in high unemployment areas."). *See also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2010) (hereinafter JIM CROW) ("The stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history. And while the size of the system might suggest that it would touch the lives of most Americans, the primary targets of its control can be defined largely by race.").

Indeed, one commentator takes issue with the term "mass incarceration" precisely because the surge in incarceration has *not* been experienced by the "masses," but by a much smaller segment of the population:

> First, the prevalence of penal confinement in the United States, while extreme by international standards, can hardly be said to concern the masses. Indeed, a rate of 0.75 percent compares quite favorably with the incidence of such woes as latent tuberculosis infection (estimated at 4.2%) and severe alcohol dependency (3.81 percent), ailments which no one would seriously contend have reached mass proportion in the United States. Next, the expansion and intensification of the activities of the police, courts, and prison over the past quarter-century have been anything but broad and indiscriminate. They have been *finely targeted*, first by class, second by that disguised brand of ethnicity called race, and third by place. This cumulative targeting has led to the *hyper*incarceration of one particular category, *lower-class African American men trapped in the crumbling ghetto*, while leaving the rest of society – including, most remarkably, middle- and upper-class African Americans – practically untouched. Third, and more important still, this *triple selectivity is a constitutive property of the phenomenon*: had the penal state been rolled out indiscriminately by policies resulting in the capture of vast numbers of whites and well-to-do citizens, capsizing their families and decimating their neighborhoods as it has for inner-city African Americans, its growth would have been speedily derailed and eventually stopped by political

> counteraction. "Mass" incarceration is socially tolerable and therefore workable as public policy only *so long as it does not reach the masses*: it is a figure of speech, which hides the multiple filters that operate to point the penal dagger.

Loïc Wacquant, *Class, race & hyperincarceration in revanchist America*, DAEDALUS 74, 78 (Summer 2010) (emphases in original; footnotes omitted).[17]

Moreover, the fact that the government *could* prioritize the prosecution of gun stores, thereby shutting down a major source of the supply of crime guns, but makes a choice not to, and instead targets primarily poor individuals of color found to be in possession of one firearm and driven by the desire to protect himself (like Mr. Doe), suggests that forces other than the pure seriousness of the offense are at work. The fact that the government makes this choice *despite* knowing that corrupt gun dealers can, and do, flood the streets with illegal guns renders this suggestion a forceful one.

This, in turn, undermines rather than promotes respect for the law, because it undermines the fundamental principles that all are equal in the eyes of the law and that the law is colorblind. And it compels the conclusion that the punishment – including the prison sentence suggested by the advisory range and the lifelong collateral consequences – is not tethered to the seriousness of the offense. For this reason, the punitive purpose of sentencing warrants a sentence below the advisory range.

e. The punitive purpose of sentence can be achieved with a below-range sentence.

For Mr. Doe, the punitive purpose of sentencing can be achieved with a below-range sentence. That is because the punitive effect of any sentence is not viewed in a vacuum by simple, bland reference to an offense; rather, that effect is, and must be, measured against Mr. Doe and his individual case. For him, even a below-guideline

---

[17]Wacquant also points out that the percentage of African-Americans and Latinos in prison has increased over the past four decades even as "the criminal population has both shrunk and become *whiter* during that period." *Hyperincarceration* at 79 (emphasis in original). He continues: "[T]he share of African Americans among individuals arrested by the police for the four most serious violent offenses (murder, rape, robbery, and aggravated assault) dropped from 51 percent in 1973 to 43 percent in 1996, and it continued to decline steadily for each of those four crimes until at least 2006." *Id*. (footnotes omitted).

sentence represents significant punishment because it would be the longest prison term he has served, and by far. Before this offense, the longest sentence he ever served was approximately three years. *See, e.g.*, PSR ¶¶37, 39. A six-year sentence (72 months) for instance, would be 200% longer than that longest sentence; a five-year sentence (60 months) would be a 167% increase. Even a below-range sentence will, therefore, be more than sufficiently deterrent for Mr. Doe individually, as well as sending a message to others.

Not only would a below-range sentence be sufficiently punitive for Mr. Doe when measured against what he has experienced in the past with respect to his criminal history, it will be sufficiently punitive because it incorporates ten months in local custody. Mr. Doe has already been punished beyond what most federal inmates experience, having been subject to a very difficult pre-trial detention. As this Court may be aware, -- County Jail is over-run by gangs and federal detainees are not segregated from state detainees, making life difficult for even those who may have previously experienced living under the stress of constant supervision. Mr. Doe has had to work to avoid become embroiled with the chaos and conflict that characterize -- County Jail. Further, -- County Jail is experiencing a shortage of officers, and has addressed that shortage by rolling lockdowns. During his tenure at the facility, Mr. Doe has been subjected to continual periods of up to 45 days during which, in addition to the usual indignities attendant a prison stay, he had only intermittent and irregular phone access and was not allowed to recreate or to shower for days. *Cf. United States v. Sutton*, 2007 WL 3170128, at *14-15 (D.N.J. 2007) (rehabilitative purpose of sentence "forbids a sentence that degrades and dehumanizes the offender who serves it, that in effect provides correctional *mistreatment*[;]" overly punitive nature of this type of detention must be factored into ultimate sentence) (Hayden, J.). While the federal facility will be a vast improvement, he will still be unable to make even the most basic decisions for himself, under the constant monitoring of the guards, and continually trying to achieve the balance necessary to live safely in a large prison facility. Therefore, while a sentence below the advisory range can achieve this goal of sentence on its own, coming on top of almost a year in the difficult conditions of – County Jail, it is more than sufficiently

punitive.

Finally, were this Court to have any concerns that a below-range sentence would not adequately punish Mr. Doe, the ensuing years of supervised release should assuage those concerns. During that time, he will be strictly monitored by Probation. Any failure to comply with the conditions that this Court sets will result in a violation and the threat of further prison; the repercussions will be swift and severe. Thus, a sentence below the advisory range adequately achieves the goal of punishing Mr. Doe. Coupling a period of imprisonment with the years of supervised release that will follow is adequate to meet the punitive purpose of sentencing without resort to the mechanically determined, seriously flawed guideline range.

2. The deterrent and protective purposes warrant a sentence below the advisory range.

The sentencing statute also requires the Court to consider the "need for the sentence imposed . . . to afford adequate deterrence to criminal conduct" and the need to "protect the public from further crimes of the defendant." 18 U.S.C. §§ 3553(a)(2)(B) & (C). While many believe that the higher the sentence, the greater the effect in deterring others, the empirical research shows no relationship between sentence length and deterrence. The general research finding is that "deterrence works," in the sense that there is less crime with a criminal justice system than there would be without one. But the most pertinent question for this Court is whether a term of imprisonment of 6½-8 years or longer is minimally necessary to serve this purpose of sentencing. And, in Mr. Doe's particular circumstances, the answer is a resounding "no."

After more than two decades of extraordinary growth in the use of incarceration as a sanction for criminal conduct, players from across the criminal justice spectrum are beginning to question its efficacy on a number of fronts, including its efficacy as a deterrent. In a speech at an event sponsored by the Vera Institute of Justice, Attorney General Eric Holder noted that the still-growing rates of incarceration are having little effect on crime rates.

> [W]hile prison building and prison spending continue to increase, public safety is not improving. Since 2003, spending on incarceration has continued to rise, but crime

> rates have flattened. Indeed, crime rates appear to have reached a plateau, and no longer respond to increases in incarceration.

See Remarks as prepared for delivery by Attorney General Eric Holder at the Vera Institute of Justice's Third Annual Justice Address (event held July 9, 2009).[18] *See also* PUNISHMENT & INEQUALITY ch. 7 (Did the Prison Boom Cause the Crime Drop?) (reviewing and evaluating research regarding effects of incarceration on crime rates and concluding that evidence "suggests that mass imprisonment helped reduce crime and violence in the United States in the late 1990s, but the contribution was not large").

The government can point to nothing - no study, no empirical evidence - in support of the position that 6½-8 years or more of prison is any more effective in terms of specific or general deterrence than a sentence of 4 or 5 years. In contrast, there is evidence demonstrating that prison may heighten the risk of recidivism. *See e.g.*, THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 7 (2005) ("The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.") (footnote and citation omitted). *See also generally* JUSTICE STRATEGIES, CHILDREN ON THE OUTSIDE: VOICING THE PAIN AND HUMAN COSTS OF PARENTAL INCARCERATION (2011) (discussing effects of parental incarceration on children's emotional and economic well-being).[19]

In contrast to an argument about the *length* of the sentence, it is, rather, the *certainty* of sentence, not the severity of sentence, that imparts the deterrent effect. Mr. Doe had been working to stop the cycle that his mother and father started with him by

---

[18]Available at http://www.vera.org/download?file=2864/AG-Eric-Holder-Justice-Address-Transcript.pdf (last vistited Feb. 19, 2011).

[19]Available at http://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf (last visited May 7, 2011).

ensuring that his son had two active, involved, and present parents; he also went beyond his immediate family to try to provide some guidance to local troubled youth through a school program. In addition, he diligently sought employment, despite his lack of formal training and with the added obstacle of a felony record, again breaking the cycle, as well as teaching his son the value of employment. A sentence that accounts for these efforts, and incorporates a layer of supervision, is plainly sufficiently deterrent. Further, this Court has the threat of prison to hold over Mr. Doe if he were ever tempted to commit any further criminal activity; that *certain* punishment constitutes the most effective deterrent that exists because Mr. Doe is now made aware specifically that punishment, specifically, further federal prison, will follow any further missteps. Because sufficient deterrence can be achieved with a below-range sentence, Mr. Doe requests that the Court grant his request and impose a sentence without regard to the advisory range.

3. The rehabilitative purpose of sentencing warrants a sentence below the advisory range.

Section 3553(a)(2)(D) requires the Court to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." This purpose militates strongly in favor of a sentence below the advisory range. As a preliminary matter, Congress has explicitly directed that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). In other words, locking someone up neither achieves nor is a substitute for rehabilitation or achieving the goals set forth in § 3553(a)(2)(D). Thus, imprisoning Mr. Doe for the term demanded by the guidelines cannot be justified on the basis of offering him any rehabilitation, education, or vocational training.

Nonetheless, some specific goals in this vein can be furthered during prison for some clients, and Mr. Doe falls into that category. Specifically, Mr. Doe will be able to attend therapy; it is his goal to work with at-risk and troubled youth. By participating in therapy, he can not only explore any particular issues that he may have, he may be permitted to observe how counselors work with clients, experience that may be valuable

as he works toward his goal upon release.[20] Mr. Doe may also learn other skills, skills he is unaware that appeal to him or for which he may learn he is particularly suited because he was never been exposed to them growing up. These goals can aptly be furthered in sentence below the range because that will still afford him years in which to learn. In those years, he can also learn how to resist the temptation to use drugs when he is around others who are using; although not an addict, he can learn about addiction, including its genetic component, and why it is important that, as he stated, he "eliminate" himself from those situations.

Finally, and most importantly, is the effect the requested sentence would have on M and D. Even with a sentence at the bottom of the range, Mr. Doe would be released when M is a teenager, and when D has just entered school. To be sure, Mr. Doe will have a great deal of explaining to do to his children, to account for his absence during many critical years of their childhoods and to rebuild his relationships with them once he is home. But he will be home at a time when M, a teenager, will be vulnerable to the pressure of the young men around him and in need of a father to keep him off the street and in school. If Mr. Doe is to have a chance to break the cycle that his parents started once and for all – parenting at a young age, dropping out of school, drug use, criminal convictions – he will need to be home with his children. With the sooner return that a shorter sentence will bring, Mr. Doe may also be able to ameliorate some of the vicious effects that a father's absence can wreak:

> Children of incarcerated parents, whether it is their mother or father who is imprisoned, will likely experience emotional, physical, mental and behavioral problems. In one study, the sons of incarcerated fathers exhibited aggressive, delinquent and criminal behavior shortly after their father's incarceration. In addition to behavioral problems, many of these children's school performance declined rapidly upon incarceration of their fathers. This reaction to their fathers' incarceration is likely because fathers normally assume disciplinarian duties. . . . Regardless of the sex of the child,

[20]While Mr. Doe has expressed an interest in taking courses to help him toward that goal while he is in prison, in counsel's experience, that opportunity is available only in certain prisons and at a prohibitively expensive cost.

> research shows that the children of an incarcerated father are at risk of continuing the cycle of criminality.

Tiffany J. Jones, *Neglected By The System: A Call For Equal Treatment For Incarcerated Fathers And Their Children – Will Father Absenteeism Perpetuate The Cycle Of Criminality?*, 39 Cal. W. L. Rev. 87, 99 (Fall 2002).

Correspondingly, a below-range sentence leaves open the possibility that his children, while still at an impressionable age, will see their father free and striving to build a better life and to prove that rehabilitation and redemption are possible. A higher sentence, on the other hand, would mean that M would be leaving high school and M would be on his way to middle school before they see their father free again. The effect of their father's incarceration during the rest of their childhood, while profoundly visited upon M and D, will unfortunately not be limited to them:

> Commentators have remarked that "society ultimately bears the burden of familial incarceration because inmates separated from their families have a higher rate of recidivism, their children have a greater likelihood of becoming criminals themselves, and families often become increasingly unstable." Many of these children experience behavioral and educational problems and do not receive the attention they need to discourage them from committing delinquent acts. Society then falls victim to these children's crimes and bears the financial and social costs of supporting them.

Id. Thus, a sentence below the range is appropriate for Mr. Doe because it achieves the goals of sentencing. It is also appropriate from a societal standpoint and from the perspective of minimizing the detriment to his children and breaking the cycle of crime and negativity that plague his family.

4. A below-range sentence is in keeping with the kinds of sentences available.

The sentencing statute requires the Court to consider "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). None of the statutes of conviction sets a mandatory minimum term of imprisonment. The Court is, therefore, free to impose a sentence that involves no prison at all, making the requested sentence well within keeping with the kinds of sentences available.

5. A below-range sentence does not run afoul of the goal of avoiding unwarranted disparity because it is a *warranted* disparity.

The Court must also consider the need to avoid unwarranted disparities among similar offenders. 18 U.S.C. § 3553(a)(6). However, this preference is not to avoid all disparities at all costs. Rather, it is to avoid *unwarranted* disparities; disparity remains an ameliorative tool to adjust the guidelines because "[f]air sentencing is individualized sentencing." *Fifteen Years of Guidelines Sentencing*, at 113 (Nov. 2004).[21] As this memorandum has demonstrated, the ranges produced by the mechanical operation of the guideline itself are dramatically higher than those produced at the inception of the guidelines era. In response to the increased severity, courts have been granting downward departures and variances in ever-greater numbers. And the enforcement of the firearms laws has, for reasons utterly unrelated to the seriousness of the offenses, disproportionately impacted African-Americans.

[21]Moreover, considering the severe and substantial flaws in the applicable guideline, the disproportionate impact on poor men of color, Mr. Doe' experiences at the county jail and Mr. Doe's circumstances and history, disparity is also warranted on these bases.

IV. Mr. Doe Requests Waiver of the Applicable Fine.

Mr. Doe respectfully requests waiver of the applicable fine. He has spent the last ten months in -- County Jail. Before that, he was in custody after his arrest on 6/28/09 until the time of his sentencing, with the exception of six months. He simply has no resources with which to pay a fine; any fine would, as a practical matter, fall to his family.

V. Mr. Doe Respectfully Requests a Sentence Below the Guideline Range.

John Doe respectfully asks this Court to impose a sentence below the advisory guideline range, a sentence that adequately serves the punitive, deterrent, and rehabilitative goals of sentencing. This sentence also accounts for his particular circumstances, while minimizing the negative impact on his children and helping to end the cycle that his parents started and that he taken significant and meaningful strides towards breaking. Mr. Doe looks forward to returning to his children and to rebuilding his life, and he wants to obtain additional skills and training while in prison to help him lead a productive life upon his release and to facilitate his return to society. Finally, he is committed to this being his last involvement with the criminal justice system, and he intends to work academically, vocationally, and personally to ensure that he does not return to prison.

Your Honor's thoughtful consideration of the matter is greatly appreciated.