Judges are free to disagree with any guideline, not just crack

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I. Judges are free to conclude that a guideline not based on empirical data or national experience is greater than necessary to satisfy § 3553(a).

Judges are now invited to consider arguments that the applicable guidelines fail properly to reflect § 3553(a) considerations, reflect an unsound judgment, do not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 551 U.S. 338, 351, 357 (2007). Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (internal quotation marks and citations omitted).

Whether a judge may draw any useful advice from a guideline depends first on whether the Commission, in promulgating or amending it, acted in "the exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109. As described in *Rita*, the exercise of this role has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and consultation with participants in and experts on the criminal justice system. *Rita*, 551 U.S. at 348-50. Where a guideline was not developed based on this "empirical data and national experience," it is not an abuse of discretion to conclude that it "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10. *See also Spears v. United States*, 129 S. Ct. 840, 843-44 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.").

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*, 129 S. Ct. at 843; *Kimbrough*, 552 U.S. at 109-10. There is *dictum* in *Kimbrough* noting that "closer review" *might* apply if a judge were to disagree based on his or her personal, unsupported, unreasoned "view." *Ibid*. This "closer review" *dictum*, if it ever applies, does not apply when the Commission did not do what an "exercise of its characteristic institutional role" required-develop the guideline in question based on "empirical data and national experience." *Kimbrough*, 552 U.S. at 109-10.

Take Note! Be sure to make a record showing how the particular guideline was not based on empirical data and national experience, and be sure the judge makes clear in her statement of reasons that the guideline is not based on empirical data and national experience. To assist with this, see the cases below (and others that research uncovers), as well as the papers, briefs and other materials deconstructing the child pornography, career offender, illegal re-entry, uncharged and acquitted conduct, fraud, firearms and

probation guidelines, and policy statements regarding mitigating factors, at http://www.fd.org/odstb_SentencingResource3.htm#DECONS. Contact us if you need help.

II. Judges have disagreed with numerous guidelines, including guidelines based on explicit congressional directives to the Commission, and the courts of appeals have approved.

The district courts have disagreed with a wide range of guidelines, including guidelines based on congressional directives, such as the career offender guideline and the child pornography guideline. The courts of appeals, with one exception resulting in a circuit split discussed in Part III, have approved.[1] The courts of appeals generally hold that judges may disagree with flawed guidelines, but are not required to do so.[2] However, there are two cases in which the courts of appeals have reversed a within

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[1] *See, e.g., United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (§ 2L1.2); *United States v. Tomko*, 562 F.3d 558, 570 (3d Cir. 2009) ("*Kimbrough* . . . involved the district court's authority to vary from the Guidelines based on *policy* disagreement with them"); *United States v. Carr*, 557 F.3d 93, 106 (2d Cir. 2009) ("the sentencing court has discretion to deviate from the Guidelines-recommended range based on the court's disagreement with the policy judgments evinced in a particular guideline"); *United States v. Johnson*, 553 F.3d 990, 996 (6th Cir. 2009) ("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 explanation sufficiently articulates the sentence's appropriateness in relation to the 18 U.S.C. § 3553(a) sentencing factors"); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc) (acquitted conduct and all guidelines); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc) (all guidelines); *United States v. Branch*, 537 F.3d 582, 594 (6th Cir. 2008) ("*Kimbrough* . . . provided that district courts may deviate from sentences under the advisory guidelines on the basis of policy disagreements with its provisions"); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008) (all guidelines); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008) (fast track); *United States v. Gardellini*, 545 F.3d 1089, 1092 (D.C. Cir. 2008) (*Kimbrough* "held that district courts are free in certain circumstances to sentence outside the Guidelines based on policy disagreements with the Sentencing Commission – and that appeals courts must defer to those district court policy assessments"); *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008) (computer enhancement under § 2G1.3); *United States v. Jones*, 531 F.3d 163, 180 (2d Cir. 2008) (all guidelines); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track and all guidelines); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008) ("district courts must be allowed to consider whether other § 3553(a) policies outweigh the Guidelines in a given case"); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008) ("defendants certainly may attack the effect of the Sentencing Guidelines by arguing that they reflect overbroad or mistaken policy priorities."); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender).

[2] *See, e.g., United States v. Cisneros*, slip. op., 2009 WL 423923 (5th Cir. Feb. 20, 2009); *United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009); *United States v. Perez-Chavez*, 303 Fed. Appx. 460, 461 (9th Cir. 2009); *United States v. Castro-Valenzuela*, 304 Fed. Appx. 986, 991 (3rd Cir. 2008).

guideline sentence as substantively unreasonable when the guideline itself failed properly to reflect § 3553(a) considerations.[3] The following is only a partial list of cases in which district courts have disagreed with unsound guidelines, and courts of appeals have recognized their authority to do so.

- **Child pornography guideline (mostly based on congressional directives, but not entirely)**. *United States v. Dorvee*, 616 F.3d 174, 184, 188 (2d Cir. 2010) (after careful review, concluding that § 2G2.2 is beset with "irrationality" to such a degree that "unless applied with great care, [it] can lead to unreasonable sentences that are inconsistent with what § 3553 requires," and advising generally: "District judges are encouraged to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2-ones that can range from non-custodial sentences to the statutory maximum-bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."); *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009) (stating its "view that the sentencing guidelines at issue [§ 2G2.2] are in our judgment harsher than necessary," that "first-offender sentences of this duration are usually reserved for crimes of violence and the like," and that if "sitting as the district court, we would have used our *Kimbrough* power to impose a somewhat lower sentence"); *United States v. Huffstatler*, 571 F.3d 620, 623 (7th Cir. 2009) ("As the Sentencing Commission itself has stated, '[m]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses.'"); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (concluding that § 2G2.2 was not developed pursuant to Commission's characteristic role); *United States v. Henderson*, __ F.3d __, 2011 WL 1613411 (9th Cir. 2011) (same); *United States v. Apodaca*, 641 F.3d 1077 (9th Cir. 2011) (guidelines "for child pornography . . . were not based on empirical data and expertise," "provide a large number of sentence enhancements, which apply in nearly every case and cause routine offenses to generate sentence recommendations approaching (or exceeding) statutory maximums," and "[c]oncentrating offenders at the top of the sentencing spectrum in this manner [is] 'fundamentally incompatible with § 3553(a).'"); *id*. at 1085-88 (Fletcher, J., concurring) (reviewing literature casting doubt on existence of connection between consumption of child pornography and likelihood of a contact sexual offense against a child); *United States v. Regan*, 627 F.3d 1348, 1354 (10th Cir. 2010) (finding this position to be "quite forceful" but defendant did not raise it below); *United States v. Beiermann*, 599 F.Supp.2d 1087, 1104-05

[3] *See United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (reversing guideline sentence under § 2G2.2 as substantively unreasonable); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (reversing as substantively unreasonable a within-guideline sentence in an illegal reentry case where the 16-level enhancement under § 2L1.2(b)(1)(A) overstated the seriousness of the defendant's offense and failed to avoid unwarranted disparity; it was not reasonable for the defendant's record of harmlessness to others for the past 25 years to subject him to the same severe enhancement applied to a recent violent offender and criminal history).

(N.D. Iowa Feb. 24, 2009) (categorically rejecting child pornography guideline because it "does not reflect empirical analysis, but congressional mandates that interfere with and undermine the work of the Sentencing Commission;" and it "impermissibly and illogically skews sentences for even 'average' defendants to the upper end of the statutory range, regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability"); *see also United States v. Stark*, slip op., 2011 WL 555437 (D. Neb. 2011); *United States v. McElheney*, 630 F. Supp. 2d 886 (E.D. Tenn. 2009); *United States v. Burns*, slip op., 2009 WL 3617448 (N.D. Ill. 2009); *United States v. Riley*, 655 F. Supp. 2d 1298 (S.D. Fla. 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), *aff'd*, *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Stern*, 590 F. Supp. 2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F. Supp. 2d 997 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M. D. Fla. Dec. 19, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. June 20, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008; *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Stabell*, 2009 WL 775100 (E.D. Wis. March 19, 2009); *United States v. Gellatly*, 2009 WL 35166, *3-5 (D. Neb. Jan. 5, 2009); *United States v. Noxon*, 2008 WL 4758583, *2 (D. Kan. Oct. 28, 2008); *United States v. Stults*, 2008 WL 4277676, *4-7 (D. Neb. Sept. 12, 2008); *United States v. Grinbergs*, 2008 WL 4191145, *5-8 (D. Neb. Sept. 8, 2008); *United States v. Goldberg*, 2008 WL 4542957, *6 (N.D. Ill. April 30, 2008); *United States v. Sudyka*, 2008 WL 1766765, *5-6, 8-9 (D. Neb. April 14, 2008).

- **Career Offender guidelines (required by a congressional directive to the Commission and expanded upon by the Commission).** *See Vazquez v. United States*, No. 09-5370, 78 U.S.L.W. 3416 (Jan. 19, 2010) (granting certiorari, vacating the judgment, and remanding for further consideration in light of Solicitor General's position that district court may lawfully conclude that career offender guideline yields a sentencing "greater than necessary" to serve the objectives of sentencing); Brief of the United States, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009); *United States v. Vazquez*, __F. Supp. 2d __, 2011 WL 2565526 (June 28, 2011); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. Steward*, 339 Fed. Appx. 650, 653-54 (7th Cir. 2009) (district court abused its discretion in failing to consider defendant's argument based on "Sentencing Commission's own report, questioning the efficacy of using drug trafficking convictions, especially for retail-level traffickers, to qualify a defendant for career offender status"); *United States v. McLean*, 331 Fed. Appx. 151, 152 (3d Cir. June 22, 2009) (remanding so that district court could consider Commission's findings on

career offender guideline); *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); *cf. United States v. Friedman*, 554 F.3d 1301, 1311-1312 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guideline but concluding that district court's sentence was not based on that disagreement); *United States v. Whigham*, 754 F. Supp. 2d 239, 247-48 (D. Mass. 2010); *United States v. Woody*, slip op., 2010 WL 2884918, *7 (D. Neb. 2010); *United States v. Hicks*, slip op., 2010 WL 605294 (E. D.Wis. 2010); *United States v. Malone*, slip op., slip op., 2008 WL 6155217 (E.D. Mich. Feb. 22, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Hodges*, slip op., 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009).

- **Fast Track Disparity (departure authorized by congressional directive but no congressional prohibition on variance to correct for disparity).** *United States v. Lopez-Macias*, __ F.3d __, 2011 WL 5310622 (10th Cir. 2011); *United States v. Jiminez-Perez*, __F.3d__, 2011 WL 4916585 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008). *See United States v. Sandoval Ramirez*, __ F.3d __, 2011 WL 2864417 (7th Cir. 2011) for strict requirements in Seventh Circuit.

  See Part III for circuit split; Fifth, Ninth and Eleventh hold that district courts may not vary based on fast track disparity.

- **Drug offenses**:

  - **MDMA (Ecstasy).** *See, e.g., United States v. McCarthy*, No. 1:09-cr-01136, Memorandum and Order (S.D.N.Y. May 19, 2011) (concluding that guidelines recommend punishment for MDMA offenses that is greater than justified, and that MDMA should not be punished more severely than powder cocaine, based on testimony of four expert witnesses, Commission reports, and data concerning health risks)

  - **Methamphetamine**. *United States v. Valdez*, 268 Fed. Appx. 293, 297 (5th Cir. 2008) (affirming an upward variance based on purity of crystal methamphetamine in which defendant trafficked because "[a]s a general matter, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines. Thus, like the holding in *Kimbrough v. United States* that a district court can disagree with the 100-to-1 crack-to-cocaine sentencing ratio, 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)

(remanding for resentencing because government conceded that it was error for court to refuse to address defendant's argument that it should reject the guidelines' policy of treating mixed methamphetamine differently from pure methamphetamine); *United States v. Santillanes*, No. 07-619, Transcript of Sentencing Hr'g (D.N.M. Sept. 19, 2009) (concluding based on unrebutted evidence that punishment for certain methamphetamine offenses was unsupported by any empirical data or study and created unwarranted disparity); *United States v. Goodman*, 556 F.Supp.2d 1002, 1016 (D. Neb. April 14, 2008) (finding in conspiracy to manufacture methamphetamine case that "[a] variance is appropriate in view of the fact that the Guidelines at issue were developed pursuant to statutory directive and not based on empirical evidence."); *United States v. Nincehelser*, 2009 WL 872441, *4-5, 7 (D. Neb. March 30, 2009) (same); *United States v. Hubel*, 2008 WL 5434383, *7 (D. Neb. Dec. 30, 2008) (same); *United States v. Castellanos*, 2008 WL 5423858, *7 (D. Neb. Dec. 29, 2008) (same); *United States v. Rocha*, 2008 WL 2949242, *6 (D. Neb. July 30, 2008) (same for conspiracy to distribute and possess with intent to distribute methamphetamine mixture); *United States v. McCormick*, 2008 WL 268441, *10 (D. Neb. Jan. 29, 2008) (same for possession of precursor chemicals because those guidelines, "were, like the drug-trafficking Guidelines, determined with reference to statutory directives and not grounded in empirical data").

- **Powder cocaine.** *United States v. Thomas*, 595 F.Supp.2d 949 (E.D. Wis. 2009) (imposing below-guideline sentence for attempted distribution of powder cocaine because the Sentencing Commission "departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes," and "sentences in drug cases have since increased far above pre-guideline practice"); *United States v. Urbina*, 2009 WL 565485, *3 (E.D. Wis. March 5, 2009) (following *Thomas* in conspiracy to distribute powder cocaine case); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (two fundamental problems with drug guidelines are "over-emphasis on quantity" and "under-emphasis on role," creating "false uniformity"; "apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or the 1996 Task Force and others, recommended.").

- **Crack.** The cases are legion. Here are a few adopting a 1:1 ratio. United States v. Shull, __ F. Supp. 2d __, 2011 2559426 (S.D. Ohio June 29, 2011); *United States v. Williams*, __F.Supp.2d__, 2011 WL 1336666 (N. D. Iowa April 7, 2011); *United States v. Whigham*, 754 F. Supp. 2d 239 (D.Mass.2010); *United States v. Williams*, 2010 U.S. Dist. LEXIS 30810 (S.D. Ill. Mar. 30, 2010); *United States v. Greer*, 2010 U.S. Dist. LEXIS

30887 (E.D. Tex. Mar. 30, 2010); *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009); *United States v. Lewis*, 623 F. Supp. 2d 42, 46 (D.D.C. 2009); *United States v. Medina*, 2009 U.S. Dist. LEXIS 82900 (S.D. Cal. Sept. 11, 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 70722, 2009 WL 2485842 (W.D. Pa. Aug. 12, 2009); *United States v. Luck*, 2009 U.S. Dist. LEXIS 71237, 2009 WL 2462192 (W.D. Va. Aug. 10, 2009); *United States v. Carter*, 2009 U.S. Dist. LEXIS 73094 (W.D. Va. Aug. 18, 2009); *Henderson v. United States*, 2009 U.S. Dist. LEXIS 83208 (E.D. La. Sept. 10, 2009)

- **Firearms offenses.**

  - **Firearms trafficking**. *United States v. Cavera*, 550 F.3d 180, 191 (2nd Cir. 2009) (en banc) (affirming above-guideline sentence in firearms trafficking case based on court's finding that the guideline sentence did not provide adequate deterrence because "a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses," and "district courts may rely on categorical factors to increase or decrease sentences"); *id.* at 199 (Raggi, J., concurring) (agreeing with the majority that "we cannot prohibit non-Guidelines sentences based on a sentencing judge's disagreement with Commission policy determinations").

  - **Felon in possession**. *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011) (reversing for procedural error within-guideline sentence because district court failed to address the defendant's challenge to the stolen gun enhancement, or to explain why it rejected that argument); *United States v. Handy*, 570 F.Supp.2d 437, 439 (E.D.N.Y. 2008) (refusing to apply enhancement for possessing a stolen firearm with no *mens rea* where defendant did not know that the firearm was stolen because it "is irrational" and "is to punish by lottery"); *United States v. Cook*, 2009 WL 872465, *4-6 (D. Neb. March 30, 2009) (rejecting felon in possession and career offender guidelines because they "were promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission's unique area of expertise, [so] the court affords them less deference than it would to empirically-grounded Guidelines"); *United States v. Bennett*, 2008 WL 2276940, *4, 7 (D. Neb. May 30, 2008).

- **Illegal Re-entry.** *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (reversing as substantively unreasonable a within-guideline sentence in an illegal reentry case where the 16-level enhancement under § 2L1.2(b)(1)(A) overstated the seriousness of the defendant's offense and failed to avoid unwarranted disparity); *United States v. Mondragon-Santiago*, __ F.3d __, 2009 WL 782894, *9 (5th Cir. March 26, 2009) (acknowledging in illegal reentry case

that "[i]n appropriate cases, district courts certainly may disagree with the Guidelines for policy reasons and may adjust a sentence accordingly"); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962-63 (E.D. Wis. 2005) (rejecting §2L1.2's 16-level enhancement because "[t]he Commission did no study to determine if such sentences were necessary – or desirable from any penal theory, . . . [n]o research supports such a drastic upheaval, . . . [and] the Commission passed it with relatively little discussion," it overlaps with Chapter Four and thus double counts criminal history, and it creates unwarranted disparities with defendants in fast track districts); *United States v. Macias-Prado*, 2008 WL 2337088, *3 (E.D. Wis. June 6, 2008).

- **Uncharged Conduct/Acquitted Conduct.** *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) ("If the district court judge concludes that the sentence produced in part by these 'relevant conduct' enhancements 'fails properly to reflect § 3553(a) considerations,' the judge may impose a lower sentence, including, if reasonable, a lower sentence that effectively negates the acquitted-conduct enhancement.").

- **Fraud.**
  - **Health care fraud.** *United States v. Lenagh*, 2009 WL 296999, *3-4, 6 (D. Neb. Feb. 6, 2009) (imposing below guideline sentence for conspiracy to commit health care fraud "because the fraud offense Guidelines were promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission's unique area of expertise, [so] the court affords them less deference than it would to empirically-grounded Guidelines. Also the Guidelines calculation is driven by the amount of loss. Although, as a general rule, the amount of loss or damage is one measure of the seriousness of an offense, and should surely determine the amount of restitution, it is not always a reliable proxy for the culpability of an individual defendant.").

  - **Securities fraud.** *United States v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008) (disagreeing with §2B1.1's heavy focus on loss amount and its "one-size-fits-all approach for its number of victims, [and] officer/director and manager/supervisor enhancements").

  - **Tax fraud.** *United States v. Gardellini*, 545 F.3d 1089, 1092 (DC Cir. 2008) (affirming below guideline sentence in tax fraud case based on district court's application of § 3553(a) factors and finding that the guideline sentence would over-punish the defendant).

  - **Identity fraud.** *United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010); *United States v. Evans*, 526 F.3d 155, 161 (4th Cir. 2008) (rejecting challenge to above-guideline sentence 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).

- **Murder.** *United States v. Grant*, 2008 WL 2485610 (D. Neb. June 16, 2008) (imposing below guideline sentence for second degree murder conviction because "[t]he Guidelines that establish the base offense levels for murder are among those that were not based on empirical data and national experience, . . . [so] they are a less reliable appraisal of a fair sentence and the court affords them less deference than it would to empirically-grounded Guidelines").

- **Policy Statements Discouraging or Prohibiting Consideration of Offender Characteristics**, such as age, lack of criminal history, employment record, community ties, and charitable work. *See* 18 U.S.C. § 3553(a)(1); *Gall v. United States*, 128 S. Ct. 586, 593, 600-02 (2007) (upholding below-guideline sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy, or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self-rehabilitation through education, employment, and discontinuing the use of drugs, without mentioning Commission's contrary policy statements); *Pepper v. United* States, 131 S. Ct. 1229 (2011) (district court may "impose a non-Guidelines sentence based on a disagreement with the Commission's views," particularly "where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted"; § 3553(a)(5), instructing courts to consider "pertinent" policy statements, is only one of seven factors courts must consider, and may not be "elevate[d] above all others"; district court must "consider and give appropriate weight to . . . the extensive evidence of Pepper's postsentencing rehabilitation."); *see also United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009) (district court erred in declining to take account of defendant's age and poor health based on policy statements); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009) (abandoning prior precedent requiring courts to follow policy statements in light of *Gall* and *Kimbrough*); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009) (district court erred in failing to consider defendant's significant health problems under § 3553(a) despite policy statement requiring "extraordinary" impairment); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (district court erred in declining to consider defendant's advanced age, prior military service, health issues, employment history, and lack of criminal history in reliance on policy statements because "standards governing departures do not bind a district court when employing its discretion" under § 3553(a)); *United States v. Hamilton*, 323 Fed. Appx. 27, 31 (2d Cir. 2009) ("district court . . . had discretion to consider the policy argument disagreeing with the Guidelines' refusal to consider age and its correlation with recidivism" and "abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines."); *United States v. Blackie*, 548 F.3d 395, 399 (6th Cir. Mich. 2008) ("[A] policy statement does not automatically limit or confine the scope of a sentencing judge's considerations."); *United States*

v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (where government pointed to policy statement disapproving consideration of family circumstances to "blunt" the evidence presented, such policy statements "are not decisive as to what may constitute a permissible ground for a variant sentence in a given case.").

III. Fast Track.

Contrary to the First, Second, Third, Sixth, Seventh, Eighth, and Tenth Circuits, *see United States v. Lopez-Macias*, __ F.3d __, 2011 WL 5310622 (10th Cir. 2011); *United States v. Jiminez-Perez*, __F.3d__, 2011 WL 4916585 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008), the Fifth, Ninth and Eleventh Circuits have held that judges may not disagree with the disparity created by the absence of a fast track program in the district because Congress directed the Commission to create a departure for fast track. *See United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008).

The Eleventh Circuit denied rehearing en banc in *Vega-Castillo*, but Judge Carnes concurred separately to say that the issue is "potentially meritorious," and that he may vote for reconsideration in a case "where there is no apparent reason why the defendant would not have been offered the benefits of an early disposition program if he had been in a district with that kind of program." Vega-Castillo had 11-13 criminal history points, including a conviction for selling crack and two for violent crimes, and he did not offer to waive his right to appeal or to file a § 2255. According to the government (which was not necessarily correct), he would not likely have received a fast track departure in a district with a fast track program, so he was not similarly situated to defendants who receive such departures. *See* 548 F.3d 980 (11th Cir. 2008) (Carnes, J., concurring in the denial of rehearing en banc).

Federal Defenders in the Fifth Circuit have filed several petitions for certiorari, the Solicitor General was ordered to respond, the Defenders replied, and the Court denied certiorari. This does not mean that the Court will never grant certiorari, so continue to raise this issue and file petitions for certiorari.

A. Judges must be permitted to disagree with the guidelines to ensure that the guidelines are not treated as mandatory or presumptive.

The courts' ability to impose a non-guideline sentence based solely on a policy disagreement with the guideline itself, in the absence of any special facts, applies to all guidelines, not just the crack guidelines. The principle first appeared in *Cunningham v. California*, 549 U.S. 270 (2007), where the Court recognized that judges' authority to sentence outside the guideline range based solely on general policy objectives, without any factfinding anchor, is necessary to avoid a Sixth Amendment violation. *Id*. at 279-

81. Then, in *Rita*, the Court held that because the guidelines may not be presumed reasonable at sentencing, sentencing judges are permitted to find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations," that the guidelines "reflect an unsound judgment," or that the guidelines "do not generally treat certain defendant characteristics in the proper way." 552 U.S. at 351, 357. Then, in *Kimbrough*, the Court reiterated that a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," and thus, "courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines." *Id.* at 101 (internal quotation marks and citations omitted). Because "the cocaine Guidelines, like all other Guidelines, are advisory only," the appeals court's conclusion that the sentencing judge was barred from disagreeing with the crack guidelines in a "mine-run case" was error because it rendered the guidelines "effectively mandatory." *Id*. at 91, 110.

As the Fifth Circuit has repeatedly said, *Kimbrough* merely applied the broad principle it had already conveyed in *Rita* – that a judge may vary from the guidelines based on policy considerations, including disagreements with the guideline -- to the crack guideline,[4] but "*Kimbrough* does not limit the relevance of a district court's policy disagreement with the Guidelines to situations such as the cocaine disparity and whatever might be considered similar."[5]

B. Sentencing *courts* are not bound by guidelines based on congressional directives to the *Commission*.

In *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009), *cert. granted, judgment vacated*, 130 S. Ct. 1135 (Jan. 19, 2010), the Eleventh Circuit distinguished between the crack guidelines, which "were the result of implied congressional policy" in 21 U.S.C. § 841(b), and the career offender guideline, which "was the result of 'direct congressional expression'" in 28 U.S.C. § 994(h), a judgment that was vacated by the Supreme Court.

Similarly, the Fifth, Ninth, and Eleventh Circuits have held that courts in non-fast track districts may not vary downward to correct for the disparity created by the lower

[4] *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008) ("In *Kimbrough*, the Court reiterated what it had conveyed in *Rita*; a sentencing court may vary from the Guidelines based solely on policy considerations, including disagreements with the Guidelines, if the court feels that the guidelines sentence fails properly to reflect § 3553(a) considerations."); *United States v. 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. Shah*, 294 Fed. Appx. 951, 955 (5th Cir. 2008) (noting that "[e]ven 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").

[5] *United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009).

sentences available to similarly situated defendants in fast track districts, because the PROTECT Act contained a direct congressional directive to the Commission to promulgate a departure provision for early disposition programs authorized by the Attorney General. *See United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740-41 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 561 (5th Cir. 2008).

The distinction between "direct" and "implied" congressional policy is a distinction without a difference. The only relevant distinction is whether a direct congressional directive was to the Commission or to sentencing courts. Neither § 994(h) nor the PROTECT Act is a directive to sentencing courts. In *Kimbrough*, the government argued:

> [1] [W]here Congress has made a specific policy determination concerning a particular offense (or offense or offender characteristic) that legally binds sentencing courts, and [2] the Commission (as it must) incorporates that policy judgment into the Guidelines in order to maintain a rational and logical sentencing structure, [3] that specific determination restricts the general freedom that sentencing courts have to apply the factors set forth in 18 U.S.C. 3553(a).

Kimbrough, Brief of the United States, 2007 WL 2461473, *16.

The Supreme Court rejected this argument. It rejected the first premise because 21 U.S.C. § 841 legally binds *sentencing courts* only at the statutory minimums and maximums and "says nothing" about appropriate sentences within these brackets. *Kimbrough*, 128 S. Ct. at 571. The Court could have stopped there, but also rejected the second premise, because Congress did not direct *the Commission* to incorporate the ratio into the sentencing guidelines. *Id*. In explaining this latter conclusion, the Court contrasted 21 U.S.C. § 841(b) with 28 U.S.C. § 994(h), which "specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id*. In doing so, the Court did <u>not</u> suggest that § 994(h) was a directive to the courts or that it otherwise limits a court's sentencing discretion under § 3553(a), but rather cited it as an example of an express direction to the Commission to show that Congress knows how to direct the Commission when it wishes to do so. *Id. See also United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008) ("Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts, and . . . there is no statutory provision instructing the court to sentence a career offender at or near the statutory maximum"); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009) (§ 994(h) "tells the Sentencing Commission, not the courts, what to do"). The Court concluded that § 841 "does not require the Commission-or, after *Booker*, sentencing courts-to adhere to the 100-to-1 ratio for crack cocaine quantities other than those that trigger the statutory minimum sentences." *Kimbrough*, 552 U.S. at 105.

Accordingly, the Solicitor General states that the "current position of the United States" is that "<u>Kimbrough</u>'s reference to Section 994(h) as an example of Congress

directing 'the Sentencing Commission' to adopt a Guideline reflecting a particular policy, 552 U.S. at 103, did not suggest that Congress had bound sentencing courts through Section 994. The court of appeals' reliance on Kimbrough's reference to Section 994(h) therefore depends on the additional, unstated, premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts. That premise is incorrect." Brief of the United States on Petition for a Writ of Certiorari, *United States v. Vazquez*, No. 09-5370.[6]

Likewise, "the PROTECT Act's authorization for the selective deployment of fast-track programs bears scant resemblance to a congressional directive instituting statutory minimum and maximum sentences. Although the latter directive necessarily cabins a sentencing court's discretion, the former authorization says nothing about the court's capacity to craft a variant sentence within the maximum and minimum limits." *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008). The First Circuit "respectfully disagree[d] with the conclusion reached by the [Fifth Circuit] *Gomez-Herrera* panel":

> While the *Kimbrough* Court acknowledged that a sentencing court can be constrained by express congressional directives, such as statutory mandatory maximum and minimum prison terms, 128 S. Ct. at 571-72, the PROTECT Act –as the Fifth Circuit would have to concede – contains no such express imperative. The Act, by its terms, neither forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court's discretion to deviate from the guidelines based on fast-track disparity. The statute simply authorizes the Sentencing Commission to issue a policy statement and, in the wake of *Kimbrough*, such a directive, whether or not suggestive, is "not decisive as to what may constitute a permissible ground for a variant sentence."

Id. at 229 (quoting *Kimbrough*, 128 S. Ct. at 571-72). Reading into the PROTECT Act an implicit restriction on a district court's sentencing discretion requires "heavy reliance on inference and implication about congressional intent-a practice that runs directly contrary to the Court's newly glossed approach . . . In refusing to read a bar on policy disagreements into either Congress's original formulation of the 100-to-1 crack/powder ratio in the Anti-Drug Abuse Act or its later rejection of the Sentencing Commission's attempted softening of the ratio, *Kimbrough* made pellucid that when Congress exercises its power to bar district courts from using a particular sentencing rationale, it does so by the use of unequivocal terminology." *Id.* at 229-30 (citing *Kimbrough*, 126 S. Ct. at 570-74). It thus "opened the door for sentencing courts to deviate from the guidelines in individual cases notwithstanding Congress's competing policy pronouncements." *Id.* at 230 (citing *Martin*, 520 F.3d. at 96).

In sum, sentencing courts must follow express directive *to the courts*, such as

[6] http://www.fd.org/pdf_lib/Govt_Response_to_Cert_Petition%2009-5370%20Vazquez%20US%20Resp%20Br.pdf.

statutory minimum and maximum terms, but are free to disagree with *guidelines* that are based on congressional directives *to the Commission*, such as the career offender guideline and the fast track policy statement.

The Supreme Court has warned against courts of appeals "seiz[ing] upon" and misreading isolated language in *Kimbrough* (such as the Eleventh Circuit's misreading of *Kimbrough*'s reference to § 994(h)) "in order to stand by the course they had adopted pre-*Kimbrough*." *Spears v. United States*, 129 S. Ct. 840, 845 (2009). In *Spears*, the Court summarily rejected a standard adopted by the First, Third and Eighth Circuits prohibiting the categorical replacement of the 100:1 powder/crack ratio with a different ratio because it would lead district courts to "believ[e] that they are not entitled to vary based on 'categorical' policy disagreements with the Guidelines" and thus to unacceptably "treat the Guidelines' policy . . . as mandatory" or "mask[] their categorical policy disagreements as 'individualized determinations.'" *Id*. at 844. Less than a week later, the Court forcefully reiterated that the "Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson v. United States*, 129 S. Ct. 890, 892 (2009) (emphasis in original). Avoiding such a presumption at sentencing was the very point of *Rita*'s authorization of judicial disagreements with the guidelines. *Rita*, 551 U.S. at 351.

C. If guidelines based on congressional directives are mandatory, most of the guidelines would be mandatory and the guidelines would violate both the Sixth Amendment and Separation of Powers.

If it were correct that guidelines based on congressional directives to the Commission are mandatory on the courts, judges could not disagree with almost any guideline, and the guidelines would then have to be struck down not only on Sixth Amendment grounds, but Separation of Powers grounds.[7] The vast majority of the guidelines are based in one way or another on congressional directives to the Commission.[8] But the Court has repeatedly emphasized that *all* of the guidelines are advisory. *See Kimbrough*, 552 U.S. at 90; *Gall*, 552 U.S. at 46; *Rita*, 551 U.S. at 351. In *Gall*, the Court held that the judge had committed no procedural error in considering as grounds for a non-guideline sentence that Gall had obtained a college degree, started a

[7] The Separation of Powers argument is set forth in Appellant's Brief Regarding Number of Images Enhancement, http://www.fd.org/pdf_lib/mistretta%20redacted.pdf, and 2G2.2 Reply to Government at 20-23, http://www.fd.org/pdf_lib/2G2.2%20Reply%20to%20Govt.pdf.

[8] At least 75 distinct guidelines and policy statements have been promulgated or amended, some repeatedly, in response to congressional directives. These are USSG §§2A1.2, 2A1.3, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2A6.2, 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2C1.8, 2D1.1, 2D1.2, 2D1.10, 2D1.11, 2D1.12, 2D2.3, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G3.1, 2H3.1, 2H4.1, 2H4.2, 2J1.2, 2K1.4, 2K2.1, 2K2.24, 2L1.1, 2L1.2, 2L2.1, 2M5.1, 2M5.2, 2P1.2, 2R1.1, 2T4.1, 2X7.1, 3A1.1, 3A1.2, 3A1.4, 3B1.3, 3B1.4, 3B1.5, 3C1.4, 3E1.1, 4A1.1, 4A1.3, 4B1.5, 5C1.2, 5D1.2, 5E1.1, 5H1.4, 5H1.6, 5H1.6, 5H1.7, 5H1.8, 5K2.0, 5K2.10, 5K2.12, 5K2.13, 5K2.15, 5K2.17, 5K2.20, 5K2.22, 5K3.1, 8B1.1, 8B2.1. *See* Congressional Directives to Sentencing Commission 1988-2008, www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf.

business, and had strong family ties, though the Commission deems those factors "not ordinarily relevant" in reliance on its (mis)interpretation of a congressional directive.[9] In *Rita*, where the Court first established the courts' authority to disagree with the federal sentencing guidelines, the guideline range was based on USSG §2M5.2, *Rita*, 551 U.S. at 343, which had been increased pursuant to an express congressional directive. *See* USSG, App. C, Amend. 633 (Nov. 1, 2001); Pub. L. No. 104-201, § 1423(a). Clearly, there is no category of mandatory guidelines based on directives to the Commission.

D. Additional Issues Regarding Fast Track Disparity

A representative of the Solicitor General's Office said at a sentencing conference a couple of years ago that the Solicitor General disagrees with the rationale of the Fifth, Ninth and Eleventh Circuits that judicial disagreement with fast track disparity is prohibited by statute because there is no such statute. The Solicitor General, however, agrees with the secondary rationales of these courts that judges may not vary to correct for fast track disparity because (1) to do so would interfere with prosecutorial discretion, and (2) in any event, these defendants are not similarly situated.

1. Prosecutorial discretion

Here is what the First Circuit said regarding the prosecutorial discretion rationale:

> In a last-ditch effort to persuade us to bar consideration of fast-track disparity, the government thunders that upholding variant sentences premised in whole or in part on this ground will be tantamount to "a judicial attempt to exercise prosecutorial discretion"-an action that supposedly would impinge upon Executive Branch authority and, thus, violate separation-of-powers principles.
>
> This tirade elevates hope over reason. While the decision to institute a fast-track program in a particular judicial district is the Attorney General's, the ultimate authority to grant a fast-track departure lies with the sentencing court. *See* USSG § 5K3.1. The appellant is not requesting that this court direct prosecutors to institute a fast-track program in the District of Puerto Rico or to offer him a fast-track plea. Rather, the appellant asks that we gauge the impact of disparate sentencing practices in crafting his sentence. Because this is an unquestionably judicial function, we discern no separation of powers concerns here.

Rodriguez, 527 F.3d at 230.

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[9] *See* USSG §§5H1.2, 5H1.5; USSG, Chapter 5, Part H, Intro. Comment. ("28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, . . . employment record, and family ties . . . in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment").

2. Similarly situated

a. First Circuit

To set up the best case to show that your client is situated similarly to defendants in fast track districts, consider *offering* to do everything that a fast track agreement would require, though this varies by district. Judge Carnes suggested that a defendant's failure to make such an offer meant that he was not similarly situated, though "[o]f course, a defendant cannot be required to file an appeal waiver covering the fast track program disparity issue as a condition of appealing that very issue." *See* 548 F.3d 980 (11th Cir. 2008) (Carnes, J., concurring in the denial of rehearing en banc). However, here is what the First Circuit said about the "not similarly situated" rationale:

> Finally, the government argues that even if fast-track disparity ordinarily can be considered in sentencing, the appellant is outside the universe of defendants who might be advantaged by such a proposition. This is so, the government asseverates, inasmuch as the appellant is not similarly situated to other defendants charged with immigration crimes; after all, he filed pretrial motions and did not waive his right to appeal. But the government is trying to have it both ways. Lacking the benefit of the bargain inherent in fast-track programs, a defendant cannot be expected to renounce his right to mount a defense. *Cf. United States v. Tierney*, 760 F.2d 382, 388 (1st Cir.1985) ("Having one's cake and eating it, too, is not in fashion in this circuit.").
>
> The government also claims that the appellant's prior felony convictions might disqualify him from the fast-track program in some districts. *See, e.g., United States v. Duran*, 399 F.Supp.2d 543, 547 (S.D.N.Y.2005). But this goes to the substance of the appellant's argument-a matter that the district court did not reach. In all events, the criteria for fast-track programs vary from district to district, and the government has not suggested that the appellant would be categorically foreclosed from receiving fast-track benefits.

Id. at 230-31 & n.4.

b. Seventh Circuit

In *United States v. Sandoval Ramirez*, __ F.3d __, 2011 WL 2864417 (7th Cir. 2011), the Seventh Circuit recently adopted strict requirements to show that the defendant is similarly situated:

> What evidentiary showing must a defendant charged with being found in the United States after previously having been deported, 8 U.S.C. § 1326(a), make before a district court is obliged to consider his request for a lower sentence to

> account for the absence of a fast-track program in that judicial district? The question has been percolating since we decided United States v. Reyes-Hernandez, 624 F.3d 405, 417, 420 (7th Cir. 2010), which permits sentencing courts to compensate for fast-track disparities but emphasizes that no district judge is required to evaluate this mitigating argument until the defendant demonstrates that he would have been eligible to participate in a fast-track program and, in fact, would have "pursued the option" had it been available. . . .
>
> We hold that a district court need not address a fast-track argument unless the defendant has shown that he is similarly situated to persons who actually would receive a benefit in a fast-track district. That means that the defendant must [1] promptly plead guilty, [2] agree to the factual basis proffered by the government, and [3] execute an enforceable waiver of specific rights before or during the plea colloquy. It also means that the defendant [4] must establish that he would receive a fast-track sentence in at least one district offering the program and [5] submit a thorough account of the likely imprisonment range in the districts where he is eligible, [6] as well a candid assessment of the number of programs for which he would not qualify. Until the defendant meets these preconditions, his "disparity" argument is illusory and may be passed over in silence.

One of the appellants attached to his sentencing memorandum "a waiver of his rights to file pretrial motions, appeal his sentence, and mount a collateral attack on his conviction so long as he received 'a sentence commensurate with the sentences received by defendants in 'fast-track' jurisdictions.'"

The Seventh Circuit requires an unconditional waiver, apparently even if he conditions the waiver on the sentence he would get in a particular district:

> [T]hat meaningless condition amounts to an unenforceable waiver; the sentencing benefits afforded defendants in fast-track districts vary widely, so even if the district court had given Ocampo a break to account for a perceived fast-track disparity, Ocampo still could argue that his conditional appeal waiver did not become operative because the sentence he received wasn't 'commensurate' with sentences in fast-track districts. And then there is always the question whether a unilateral waiver that was not made as part of a plea agreement or discussed during the plea colloquy, see FED. R. CRIM. P. 11(b)(1)(N), can ever be binding, cf. United States v. Sura, 511 F.3d 654, 661-63 (7th Cir. 2007) (holding that sentencing court plainly erred by neglecting to inform defendant during plea colloquy that his plea agreement included appeal waiver). So Ocampo's offer to relinquish his rights rings hollow. Not only that, but a defendant in a fast-track district must give up those rights immediately when he enters his guilty plea, not a couple months down the road at sentencing, like Ocampo. A defendant who wants to claim parity with an eligible defendant in a fast-track district must be prepared to accept the detriments that come with that status.

A petition for rehearing en banc will be filed. Preserve the issue, especially the unconscionable unconditional waiver.

This creates a circuit split:

The First Circuit, in response to the government's argument that a defendant was "not similarly situated [because] he filed pretrial motions and did not waive his right to appeal," said: "But the government is trying to have it both ways. Lacking the benefit of the bargain inherent in fast-track programs, a defendant cannot be expected to renounce his right to mount a defense. Cf. United States v. Tierney, 760 F.2d 382, 388 (1st Cir.1985) ('Having one's cake and eating it, too, is not in fashion in this circuit.')." United States v. Rodriguez, 527 F.3d 221, 230-31 (1st Cir. 2008).

In concurring with a denial of rehearing en banc in the 11th Circuit, Judge Carnes said: "Of course, a defendant cannot be required to file an appeal waiver covering the fast track program disparity issue as a condition of appealing that very issue. However, it might well be reasonable to require the defendant to offer to file an appeal waiver covering every issue except fast track disparity in order to align himself as closely as possible with those defendants in other districts who have received the departure." See United States v. Vega-Castillo, 548 F.3d 980 (11th Cir. 2008) (Carnes, J., concurring in the denial of rehearing en banc).

To figure out whether and where your client would be eligible and what the sentence would be:

The 2003 Ashcroft memo is still the source of what the defendant has to do: agree to factual basis, waive pretrial motions, waive appeal, waive 2255 except for IAC.

The requirements other than that vary by district.

This 12/28/09 is the most up to date list of districts with fast track programs: http://www.fd.org/pdf_lib/Fast%20Track%20Ogden%20memo%2012.28.09.pdf.

To prove that a client would have been eligible for a fast-track reduction if he'd been arrested in a fast-track district and to show what sentence he would have received in each fast-track district, look to the District-By-District Memorandum cited in the opinion and published at Fast-Track Dispositions District-by-District Relating to Illegal Reentry Cases, reprinted in 21 FED. SENT'G REP. 339 (2009). That memorandum provides the most complete information about the parameters of each district's fast track program. You can also look to a few other primary sources published in that same issue of the Federal Sentencing Reporter, specifically, the fast-track eligibility memoranda for the Central District of California, 21 Fed. Sent'g Rep. 349, and for the District of New Mexico, 21 Fed. Sent'g Rep. 360. The District-By-District Memorandum and the other primary sources: (1) enable you to show the particular sentence a defendant would have received in most (but not all) of the current fast-track districts; and (2) demonstrate that most fast-track districts do not prevent defendants with prior convictions for crimes of

violence, defendants in high criminal history categories, or defendants with prior convictions for illegal reentry from receiving fast-track reductions. A helpful summary of the parameters of each district's fast-track program can be found in an article published in the same issue of the Federal Sentencing Reporter. See Alison Siegler, Disparities and Discretion in Fast-Track Sentencing, 21 Fed. Sent'g Rep 299, 304-306 (explaining the specific sentence a defendant facing 77-96 months under the guidelines would be facing in each fast-track district based on the primary sources, and demonstrating that most fast-track districts do not exclude defendants with prior COVs and in high CHCs from receiving fast-track reductions).

It should also be noted that the Seventh Circuit exhorts the government to stipulate to a defendant's eligibility, presumably based on the information available in the District-By-District Memorandum.