Rita, Gall and *Kimbrough*: A Chance for Real Sentencing Improvements

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In a series of cases beginning in 1999, the Supreme Court examined the historical roots of the right to jury trial in both the original Constitution and the Bill of Rights. *See* U.S. Const. Art. III, § 2, cl. 3, U.S. Const. Amend. 6. The Court concluded that the right to jury trial is both an individual right and a structural allocation of power to the people, and held that, in order to give it meaningful content, any fact that exposes a defendant to greater potential punishment must be found by a jury beyond a reasonable doubt. *Jones v. United* States, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). A majority of the Court in *Booker* applied this reasoning to hold that judicial factfinding under the mandatory United States Sentencing Guidelines violated the Sixth Amendment. A different majority (with Justice Ginsburg in both) created a remedy, directing judges to impose a sentence that complies with 18 U.S.C. § 3553(a) and to treat the guidelines as merely advisory within that statutory framework, and instructing courts of appeals to review all sentences for reasonableness.

In its most recent cases, *Rita v. United States*, 127 S. Ct. 2456 (2007), *Kimbrough v. United States*, 128 S. Ct. 558 (2007) and *Gall v. United States*, 128 S. Ct. 586 (2007), and also in *Cunningham v. California*, 127 S. Ct. 856 (2007), the Court gave substantive and procedural content to the remedy, making clear that Section 3553(a) is the controlling sentencing law and rejecting the devices that were used after *Booker* to maintain a *de facto* mandatory guideline system.

Part I of this paper gives an overview of how these decisions clarify that Section 3553(a) really is the controlling law and the guidelines merely advisory. Part II outlines the procedural nuts and bolts and arguments for improved procedural safeguards. Part III describes the as-applied Sixth Amendment challenge invited by Justice Scalia. The most important part of this paper is Part IV, which describes the Court's invitation to use empirical and policy critiques of the guidelines as sword and shield. The influence of a particular guideline on an individual sentence will now depend on whether or not it is based on sound policy in light of empirical evidence, and any improvements to individual guidelines will be driven by challenges showing that they are not.

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I. Section 3553(a) Really Is The Controlling Sentencing Law.

A. Guidelines Only One of Several Factors; Parsimony and Purposes Control

The "Guidelines are only one of the factors to consider when imposing sentence." *Gall*, 128 S. Ct. at 602. The Guidelines, "formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence." *Kimbrough*, 128 S. Ct. at 564. "The statute, as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *Kimbrough*, at 570.

B. No More Mindless Uniformity

After *Booker*, the government successfully convinced most courts of appeals to replicate mandatory guidelines by claiming that uniformity was the primary or only goal of the Sentencing Reform Act. This was not accurate. The Commission was directed, among other things, to "avoid[] unwarranted disparities among defendants with similar records who have been convicted of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences." 28 U.S.C. §§ 991(b)(1)(B). Judges were directed to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18

U.S.C. § 3553(a)(6). No one was directed to pursue mindless uniformity, but that is what the Commission did, and the courts of appeals enforced it before and after *Booker*.[1]

In *Gall* and *Kimbrough*, the Court rejected mindless uniformity. Echoing the statutes, the Court recognized that a "deferential abuse-of-discretion standard could successfully *balance* the need to reduce *unjustifiable* disparities across the Nation and consider every convicted person as an *individual*." *Id*. at 598 n.8 (internal quotation marks and citations omitted) (emphasis supplied). Moreover, simply by "correctly calculat[ing] and review[ing] the guideline range," a judge "necessarily [gives] significant weight and consideration to the need to avoid unwarranted disparities." *Gall*, 128 S. Ct. at 599. In a decisive rejection of mindless uniformity, the Court recognized that unwarranted uniformity is every bit as objectionable as unwarranted disparity: "[I]t is perfectly clear that the District Judge . . . also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated." *Id*. at 600 (emphasis in original).

In *Kimbrough*, the Court demoted the government's (ironic) argument that abandoning the 100:1 powder to crack ratio would result in disparities ("cliffs" and differences among judges) to its proper place in the statutory framework: "To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself." *Kimbrough*, 128 S. Ct. at 574. *See also id.* at 575 (approving district court's consideration of the fact that the 100-1 ratio "itself created an unwarranted disparity within the meaning of § 3553(a)"). The Court also suggested that the Sentencing Commission could help to avoid unwarranted disparities through "ongoing revision of the Guidelines in response to sentencing practices." *Id.* at 573-74. Finally, mindless uniformity cannot co-exist with the *Booker* remedy: "These measures will not eliminate variations between district courts, but our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted." *Id*. at 574.

C. Guideline-Centric "Departure" Concepts Prohibited or Ignored

In *Gall*, the Court not only used the terms "departure" and "variance" interchangeably, *Gall*, 128 S. Ct. at 594, 597, but made no mention whatsoever of the "heartland" concept or the guidelines' restrictions on consideration of individual characteristics. This was so even though the case was all about a below-guideline sentence based on offender characteristics that the guidelines ignore or deem "not ordinarily relevant," including age and immaturity, voluntary withdrawal from the conspiracy, and self rehabilitation through education, employment, and discontinuing the use of drugs. *Id.* at 598-602. This strongly indicates that the "heartland" concept and the guidelines' restrictive policy statements are no longer relevant, as some courts of appeals

[1] *See Gall v. United States*, Brief for Federal Public and Community Defenders et al. as Amici Curiae 1-15, http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf.

have held.[2] Indeed, Section 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in every case, and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

It is no longer permissible, in imposing or reviewing a non-guideline sentence, to use percentages or proportional mathematical calculations based on the distance "from" the guideline range, or to require "extraordinary" circumstances. *Gall*, 128 S. Ct. 594, 595.

D. Probation Is Punishment and Is an Option In Any Case In Which It Is Not Prohibited By Statute, Despite Contrary Guideline Limits.

The *Gall* Court disapproved of the Eighth Circuit's characterization of Gall's probationary sentence as a 100% downward variance in part because it gave no weight to the substantial restriction of liberty involved in even standard conditions of probation. *Gall*, 128 S. Ct. at 595-96 & n.4. Further, in some cases, like *Gall*, "'a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.'" *Id.* at 599 (quoting district court opinion).

Finally, while some courts of appeals had reversed probationary sentences when the guideline range was outside Zone A, relying on § 3553(a)(4) ("kinds of sentence . . *established [by] the guidelines*"), the Court rejected the Eighth Circuit's conclusion that probation "lies outside the range of choice dictated by the facts of this case" because "§ 3553(a)(3) ["kinds of sentences *available*"] directs the judge to consider sentences other than imprisonment." *Id*. at 602 & n.11.

E. The District Courts' Vital Role in Improving the Guidelines

In *Rita*, Justice Breyer described the intended evolution of the Guidelines, saying that the Commission's work is "ongoing," that it "will" collect statements of reasons when district courts impose non-guideline sentences, that it "may" obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others, and that it "can revise the Guidelines accordingly." *Id*. at 2464. This evolutionary ideal has not been realized thus far.[3] It can be realized only if the

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[2] *United States v. Arnaout*, 431 F.3d 994 (7thCir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9th Cir. 2006); *see also United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006) ("Our circuit still uses 'departure' terminology in certain circumstances, but not with the same vitality and force that it had pre-Booker.").

[3] *See Gall* Brief, *supra* note 1; Amy Baron-Evans and Jennifer Coffin, *The Need For Adversarial Testing of the Sentencing Commission's Rules*, forthcoming in The Champion.

district courts disagree with the guidelines when warranted by policy considerations, and communicate those disagreements to the Sentencing Commission though their sentencing decisions. *See Rita*, 127 S. Ct. at 2465, 2468; *Kimbrough*, 128 S. Ct. at 570. *See* Part IV, *infra*.

II. Procedures

The sentencing procedures set forth in *Gall* and *Kimbrough* are an improvement over those in use in the lower courts before these decisions. However, although Justice Breyer did not write either decision, his influence is in evidence, providing small openings, as he did in *Booker* and *Rita*, for the promotion of mandatory "guidelines creep."[4] The Commission is already "training" judges, clerks and probation officers as to the purported meaning of these cases with selectively chosen statements to promote another round of mandatory guidelines creep.

It is important for defense counsel to emphasize the overall import of the Court's procedural framework, which accords wide leeway to the sentencing judge to impose a non-guideline sentence on a variety of grounds. Moreover, any procedural respect the guidelines might otherwise have is not justified unless the guideline at issue is in fact based on empirical evidence of pre-Guidelines sentencing practice or empirical evidence developed since then. The most frequently applied guidelines do not meet that test. *See* Part IV, *infra*.

A. Sentencing Procedure

The sentencing judge "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 128 S. Ct. at 596. As a "matter of administration and to secure nationwide consistency," the guideline range "should be the starting point and the initial benchmark." *Id*. This is not particularly surprising or significant because the guideline range is the only § 3553(a) factor expressed as a number of months. Defense counsel's sentencing memorandum, however, should ordinarily begin with a more compelling presentation, for example, the history and characteristics of the defendant or the nature and circumstances of the offense.

Because the "Guidelines are not the only consideration," the judge, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate," "should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id*. The judge must independently evaluate the appropriate sentence in light of the Section 3553(a) purposes and factors, and must consider arguments that the guidelines should not apply on general policy grounds, case-specific grounds (including guideline-sanctioned departures), or "regardless." *Rita*, 127 S. Ct. at 2463, 2465, 2467-68. In doing so, the judge "may not presume that the Guidelines range is reasonable." *Gall*, 128 S. Ct. at 596-97; *see also Rita*, 127 S. Ct. at

[4] This phrase was coined in Sands & Kalar, *An Object All Sublime — Let the Punishment Fit the Crime: Federal Sentencing After Gall and Kimbrough*, The Champion (March 2008).

2465 (same). The judge "must make an individualized assessment based on the facts presented," and "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 128 S. Ct. at 597.

If the judge decides on an outside-guideline sentence, she "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597. The judge "must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications" because the guidelines "are the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," but "[n]otably, not all of the Guidelines are tied to this empirical evidence." *Id.* at 594 & n.2.

The judge need not discuss arguments for or against a guideline sentence that are not raised: "[I]t [is] not incumbent on the District Court Judge to raise every conceivably relevant issue on his own initiative." *Id.* at 599. If the judge rejects nonfrivolous arguments for a non-guideline sentence, he must explain why. *Rita*, 127 S. Ct. at 2468.

B. Appellate Procedure

The court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Gall*, 128 S. Ct. at 597.

If the sentence is "procedurally sound," the court of appeals "then consider[s] the substantive reasonableness of the sentence." *Id*. at 597. The court of appeals must review "all sentences-whether inside, just outside, or significantly outside the Guidelines range," and regardless of the "uniqueness of the individual case," under a "deferential abuse-of-discretion standard." *Gall*, 128 S. Ct. at 591, 598. The court of appeals may not simply mouth "abuse of discretion," while in fact applying a *de novo* standard, as the Eighth Circuit did in *Gall*. *Id*. at 600, 602.

The court of appeals may not substitute its judgment for that of the sentencing judge: "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* at 597. This is because "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case," "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record," "has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court," and has "an institutional advantage over appellate courts in making these sorts of

determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Id*. at 597-98 (internal quotation marks and citations omitted).

"If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness." *Gall*, 128 S. Ct. at 597; *see also Rita*, 127 S. Ct. at 2462. After *Rita*, courts of appeals may decline to apply a presumption of reasonableness to all within-guideline sentences, *see United States v. Rutkoske*, 506 F.3d 170, 180 n.5 (2d Cir. 2007); *United States v. Ausburn*, 502 F.3d 313, 326 n.23 (3d Cir. 2007), or to sentences within a particular guideline. *See* Part IV, *infra*. The presumption is "not binding," *id*. at 2463, and has no "independent legal effect." *Id*. at 2465. "It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case." *Id*. at 2462. It does not grant "greater factfinding leeway" to the Commission than to the sentencing judge. *Id*. at 2463. It "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id*.

"But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 128 S. Ct. at 597. *See also Rita*, 127 S. Ct. at 2467 (appeals court may not adopt a presumption of unreasonableness).

C. The District Court Has the Last Word on the "Extent" of Variance.

Undeniably, there is double talk in *Gall* on the central question of proportionality review,[5] but three things are clear. First, the appeals courts must apply a "deferential

[5] The ambiguity seems to be the result of Justice Thomas' repudiation of the *Booker* remedy altogether. Five justices in *Rita* were prepared to reject any substantive review at all or any substantive review tied to the guidelines. Justices Stevens and Ginsburg said that appeals courts must always defer to the district court's sentencing determination, *Rita*, 127 S. Ct. at 2472, 2474 (Stevens, J., concurring), and favored substantive review only to correct complete arbitrariness: "After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable." *Id*. at 2473. Justices Scalia and Thomas said that there could be no substantive component to reasonableness review at all, that district courts must be completely free to sentence anywhere within the statutory range, *id.* at 2476, 2482 (Scalia, J., concurring), and sought common ground with Justice Stevens by casting the Yankees/Red Sox example as an impermissible reason, which would be procedurally unreasonable in their view. *Id*. at 2483 n.6. Similar to the other four, Justice Souter said that "[o]nly if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them." *Id*. at 2488 (Souter, J., dissenting). When Justice Thomas dissented from the *Booker* remedy, it left a seven-member majority, with four for no or minimal substantive review, and three for guideline-centric review, and hence the double talk.

abuse-of-discretion standard" to "all sentences-whether inside, just outside, or significantly outside the Guidelines range," and regardless of the "uniqueness of the individual case." *Gall*, 128 S. Ct. at 591, 598. Second, the appeals court "must give due deference to the district court's decision that the § 3553(a) factors justify the extent of the variance." *Id*. at 597. Third, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id*.

However, there are other statements that will sow confusion and be used to promote mandatory guidelines creep, in particular, "We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.* at 597. However, while the appeals court "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range," and "may consider the extent of the deviation," it "must give due deference to the district court's decision that the § 3553(a) factors justify the extent of the variance." *Gall*, 128 S. Ct. at 597.

Further, "applying a heightened standard of review to sentences outside the Guidelines range . . . is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range." *Id*. at 596. A "rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in" *Booker*. *Id*. at 594. An "appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," or the use of percentages to determine the strength of the justifications required "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id*. at 595.

D. No Hierarchy of Review for Different Kinds of Non-Guideline Sentences

The Commission is using *dicta* from *Kimbrough* (without identifying it as *dicta*) to suggest that so-called "outside-the-heartland" "departures" are favored and judicial disagreement with the guideline based on the purposes of sentencing is disfavored. The theory behind the *dicta* is that District Courts are most familiar with the individual offense and offender, and the Commission at least has the capacity to formulate guidelines based on empirical data and national experience.[6] *Kimbrough*, 128 S. Ct. at 574. "In light of these discrete institutional strengths, a district court's decision to vary from the advisory Guidelines *may* attract greatest respect when the sentencing judge finds a particular case 'outside the 'heartland' to which the Commission intends individual Guidelines to apply,'" but "while the Guidelines are no longer binding, closer review *may* be in order when the sentencing judge varies from the Guidelines based *solely* on the

[6] *But see* Amy Baron-Evans and Jennifer Coffin, *The Need for Adversarial Testing of the Sentencing Commission's Rules*, forthcoming in The Champion (because the Commission's rulemaking procedures and practices lack transparency, reasoning and accountability, adversarial testing in court is a necessary and superior method of testing the Commission's rules).

judge's *view* that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Id*. at 574-75 (emphasis supplied).

Note that even on its own terms, this is descriptive of what "may" happen, not prescriptive as to what must happen, and it would never apply if the judge articulated reasons based on evidence and/or experience showing that the guideline failed properly to reflect § 3553(a) considerations.

In any event, the Court immediately clarified that this is pure *dicta*: "The crack cocaine Guidelines, however, present no occasion for elaborate discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic role." *Kimbrough*, at 575.

Indeed, "discussion of this matter," even briefly, sticks out like a sore thumb. It is in conflict with everything else the Court has said, *i.e.*, courts must impose a sentence that is sufficient but not greater than necessary to satisfy sentencing purposes, must treat the guidelines as just one among several statutory factors, must be permitted to disagree with the guidelines based solely on policy considerations, and the courts of appeals may not grant greater factfinding leeway to the Commission than to the district courts. *Kimbrough*, 128 S. Ct. at 564, 570; *Gall*, 128 S. Ct. at 602; *Rita*, 127 S. Ct. at 2463, 2465, 2468; *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007). The notion that so-called "outside-the-heartland" departures (the meaning of which remains unknown) are entitled to special deference was repudiated in *Gall*, which held that "all sentences-whether inside, just outside, or significantly outside the Guidelines range," and regardless of the "uniqueness of the individual case," must be reviewed under a "deferential abuse-of-discretion standard." *Gall*, 128 S. Ct. at 591, 598.

So where does this *dicta* come from and why is it here? Justice Ginsburg cites pages 38-39 of the transcript of oral argument in *Gall*, where Justice Breyer said he wants to "interpret that word 'reasonable' so that we *get back* to a situation where judges do depart when they have something unusual and maybe occasionally when they think the guideline wasn't considered properly."[7] This citation and the immediate clarification that it is *dicta* indicate that this was an idea Justice Breyer had, but that it has no force. Indeed, it is mandatory guidelines speak.

Justice Scalia immediately set the record straight, stating in concurrence that he joined "the opinion only because I do not take this to be an unannounced abandonment of the following clear statements in our recent opinions." *Kimbrough*, 128 S. Ct. at 576 (Scalia, J., concurring). After reviewing those clear statements, he said:

> These statements mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due

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[7] *Gall v. United States*, No. 06-7949, Transcript of Oral Argument 39 (Oct. 2, 2007), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-7949.pdf.

> consideration) the advice of the Guidelines [as the majority just said at p. 570]. If there is any thumb on the scales; if the Guidelines must be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the "advisory" Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.

Id. (emphasis in original).

Thus, there are a variety of grounds for imposing a non-guideline sentence, with the only hierarchy of "respect" being that the controlling statute, 18 U.S.C. § 3553(a), trumps any contrary provision of the guidelines. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

If the court of appeals in your circuit nonetheless begins once again to hold that district courts are not free to make their own application of the § 3553(a) factors and to reject the advice of the guidelines after due consideration, file petitions for certiorari arguing that judicial factfinding in your case and in your circuit violates the Sixth Amendment.

E. What Will the Remedy Be if the Courts of Appeals Again Enforce a *De Facto* Mandatory Guideline System?

At least three, and maybe five, justices seem prepared to reject the *Booker* remedy in a case involving judicial factfinding if the courts of appeals again enforce a *de facto* mandatory guideline system.

In *Rita*, Justices Stevens and Ginsburg said they were "not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*," but "[o]ur decision today makes clear . . . that the rebuttability of the presumption is real," and "that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . or outside that range." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring). "Given the clarity of our holding," these two justices "trust that those judges who had treated the Guidelines as virtually mandatory during the post- *Booker* interregnum will now recognize that the Guidelines are truly advisory." *Id*.

Justice Scalia gives "*stare decisis* effect to the statutory holding of *Rita*," but believes that "any appellate review for substantive reasonableness will necessarily result in a sentencing scheme constitutionally indistinguishable from the mandatory Guidelines struck down in" *Booker*. *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring). In repeatedly inviting as-applied Sixth Amendment challenges, *see* Part III, *infra*, Justice Scalia is apparently setting the stage to prove Justice Breyer's remedy a failure.

Justice Souter wrote separately in *Gall* to state that he sees the "objectionable points" of *Booker* and *Rita* "hexing our judgments today." *Gall*, 128 S. Ct. at 603 (Souter, J., concurring). He believes that the best resolution would be for Congress to "reestablish[] a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion." *Id*. By the phrase, "not identical to the original in all points of detail," Justice Souter apparently contemplates simplification and improvement of the current guidelines, but whether this would occur in the hands of Congress is unclear. It does not appear that Justice Souter believes that the Court itself could not require jury findings, given that he joined Justice Stevens' dissent in *Booker* arguing that that the Court should do so. *Booker*, 543 U.S. at 271-303.

Justice Thomas has now rejected the *Booker* remedy because it is far broader than necessary to correct constitutional error in that it applies even when there was no judicial factfinding (as in *Gall* and *Kimbrough*), the Sixth Amendment violation is "more suitably remedied by requiring any such facts [that raise the sentence beyond the level justified by the jury verdict or the defendant's admission] to be submitted to the jury," and the Court has "assume[d] the legislative role of devising a new sentencing scheme" with decisions "grounded in policy considerations rather than law." *Kimbrough*, 128 S. Ct. at 577-78 (Thomas, J., dissenting); *see also Gall*, 128 S. Ct. at 603 (Thomas, J., dissenting). Some have read this to mean that Justice Thomas has reversed himself on the Sixth Amendment holding, but that is not correct. In Justice Thomas' view, mandatory application of the guidelines did not violate the Sixth Amendment in *Gall* or *Kimbrough* because there was no judicial factfinding in those cases.

F. Procedural Safeguards

Standard of Proof. The requirement of proof beyond a reasonable doubt under the Fifth Amendment Due Process Clause protects against factual error whenever a potential loss of liberty is at stake. *In re Winship*, 397 U.S. 358, 363-64, 368 (1970). As *Winship* itself involved judicial factfinding in a juvenile delinquency proceeding, this is so regardless of the identity of the factfinder and whether or not the finding results in "conviction" of a "crime." Facts to which the reasonable doubt standard applies are not just those that go to guilt or innocence, but those that increase punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975).

The Supreme Court reaffirmed these principles in *Apprendi*: "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.' This was a primary lesson of *Mullaney*."[8] *Apprendi*, 530 U.S. at 484. *See also Jones*, 526 U.S. at 240-43 & n.6;

[8] The Court distinguished *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) as involving a finding that resulted in a mandatory minimum sentence but that did not expose the defendant to additional punishment, within a range in which judicial discretion was otherwise entirely unfettered. *See Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 242.

Cunningham, 127 S. Ct. at 863-64 (referring to independent right to proof beyond a reasonable doubt and tracing origins of recent Sixth Amendment jurisprudence to doctrinal discussions of *Winship* and *Mullaney* in *Jones*).

Though the Supreme Court has considered the Fifth Amendment right to proof beyond a reasonable doubt in tandem with the Sixth Amendment jury trial right in recent cases, *Apprendi*, 530 U.S. at 478, it remains clear that the Fifth Amendment due process right remains distinct, *id.* at 476-77, and applies equally to judicial factfinding. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (despite the absence of jury factfinding, judge's use of the reasonable doubt standard assured that accuracy was not seriously diminished). Thus, *Booker*'s resolution of the Sixth Amendment issue, which concerned the reservation of control in the people against governmental power, did not address what standard of proof a *judge* must use under the Fifth Amendment to find facts that expose a defendant to additional loss of liberty. *Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

Factfinding under the advisory guidelines has a determinate, numerical impact on the guideline range, which in turn drives the length of the ultimate sentence and exposes the defendant to additional loss of liberty within the meaning of *Winship*, *Mullaney*, and *Apprendi*. The judge must "calculate" the guideline range "correctly," *Gall*, 128 S. Ct. at 596, *i.e.*, she must find the aggravating facts and assign them the required number of points. The judge must then use this "calculation" as the "starting point and the initial benchmark," *id.*, and must justify any "deviation" from it with a "justification [that] is sufficiently compelling to support the degree of the variance." *Id*. at 597. This fact finding necessarily drives sentence length because the guideline range is the only § 3553(a) factor with a number affixed to it and is the benchmark from which both sentencing and appellate review proceed. *Gall*, 128 S. Ct. at 595. Guideline factfinding thus exposes the defendant to loss of liberty, and is therefore required to be conducted based on proof beyond a reasonable doubt under *Winship*, *Mullaney*, and *Apprendi*.

Thorough Adversarial Testing. The sentencing court must "subject[] the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465. The phrase "federal sentencing procedure" appears to include both the rules of procedure and the requirements of the Due Process Clause, as the citation for this proposition is "Rules 32(f), (h), (i)(C) and (i)(D)" and "*Burns v. United States*, 501 U.S. 129, 136 (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing)."

The narrow holding of *Burns* was that an earlier version of Rule 32 that did not include subsection (h) must be read to require advance notice of a district court's intention to impose an upward departure in order to avoid the serious constitutional question whether the Due Process Clause requires notice. *Burns* also tells us what the components of "thorough adversarial testing" are: notice, a meaningful opportunity to be heard, the right to confront adverse witnesses and evidence, and the right to a full, formal, adversarial-style hearing. *See id.* at 137-38.

By comparison, the Guidelines' advice to find facts by a "preponderance" of the "probabl[y] accurate" "information," including hearsay, USSG § 6A1.3, p.s., is clearly deficient. Moreover, the Commission is not empowered to advise that the preponderance standard "is appropriate to meet due process concerns" because only courts are empowered by our Constitution to announce minimum constitutional standards, and the Commission is not a court. *See Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989). The original Commission recognized that it was not appropriate for it to "specify across-the-board procedural rules" because of the diversity of settings in which procedural issues can arise *and* because it doubted its power to do so. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 48 (1987).[9] It contemplated that procedural issues would be developed by judges through caselaw, against the background of the "Commission's objective of ensuring . . . as much care and accuracy as is practically feasible." *Id*.

Notice of Upward Variance, Probation Officer's Recommendation. The "thorough adversarial testing" passage from *Rita* would also seem to decide the issue of whether notice of an upward variance under Section 3553(a) is required.[10] *See Irizarry v. United States*, 128 S. Ct. 828 (2008) (granting certiorari to resolve this question). It also would seem to require the Probation Officer's recommendation to be disclosed to the defendant.

III. As-Applied Sixth Amendment Challenges

In his concurrence in *Gall*, Justice Scalia repeated his invitation, first made in *Rita*, 127 S. Ct. at 2479 (Scalia, J., concurring), to bring as-applied Sixth Amendment challenges. *Gall*, 128 S. Ct. at 602-03 (Scalia, J., concurring); *see also Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring) (agreeing that such a challenge may be brought).

Noting that "the Court has not foreclosed as-applied constitutional challenges," Justice Scalia states that the "door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 128 S. Ct. at 602-03 (Scalia, J., concurring).

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[9] The Supplementary Report is available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

[10] There is a circuit split on the issue. *See United States v.* Vega-Santiago. 2007 WL451813 (1st Cir. 2008) (notice not required); *United States. v. Vampire Nation,* 451 F.3d 189 (3d Cir. 2006) (same); *United States v. Mejia-Huerta,* 480 F.3d 713 (5th Cir. 2007) (same); *United States v. Walker,* 447 F.3d 999 (7th Cir. 2006) (same); *United States v. Long Soldier,* 431 F.3d 1120 (8th Cir. 2005) (same); *United States v. Irizarry,* 458 F.3d 1208 (11th Cir. 2006) (same); United States *v. Anati,* 457 F.3d 233 (2d Cir. 2006) (notice required); *United States v. Davenport,* 445 F.3d 366 (4th Cir. 2006) (same); *United States v. Cousins,* 469 F.3d 572 (6th Cir. 2006) (same); *United States v. Evans -Martinez,* 448 F.3d 1163 (9th Cir. 2006) (same); *United States v. Atencio,* 476 F.3d 1099 (l0th Cir. 2007) (same).

The best cases for this argument are those in which a judicial finding of fact has a very large impact on the sentence, especially if the facts found are crimes of which the jury acquitted or that were never charged. As stated by the Appellant in an acquitted crimes case that will be argued before the en banc Sixth Circuit on June 4, 2008: "Unless this Court can say that it would uphold Mr. White's 264-month sentence as reasonable absent the district court's reliance on acquitted crimes for 167 months of that sentence, the sentence violated the Sixth Amendment." *See* Brief of Appellant, *United States v. White* at 12, No. 05-6596, http://www.fd.org/pdf_lib/White_Appellant_Brief.pdf.

For other ideas on the as-applied challenge, *see What is Lovely (and Not So Lovely) About Rita* at 26-27 (September 12, 2007), *http*://www.fd.org/pdf_lib/Rita_Memo_9.12.07.pdf.

IV. Lack of Empirical Basis as Sword and Shield

In *Rita*, *Gall* and *Kimbrough*, at each point at which the guidelines are denied or given some form of procedural or substantive respect, it depends on whether the Commission actually exercised its capacity to develop guidelines based on empirical data. We are invited to demonstrate that the Commission failed to do so with respect to the guideline at issue, using it as both sword and shield.

A. A Sword in Favor of a Non-Guideline Sentence

District court judges must now consider and respond to nonfrivolous arguments that the guideline sentence itself reflects an unsound judgment because it fails properly to reflect § 3553(a) considerations, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). District courts are no longer required, or permitted, to simply defer to Commission policies. *Id*. Courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Id*. at 2463.

Why would Justice Breyer invite litigants and courts to test the Guidelines? Perhaps it is because the Guidelines cannot evolve unless the Commission hears and incorporates feedback from sentencing judges. *See Rita*, 127 S. Ct. at 2464 (Commission "*can* revise the Guidelines accordingly") (emphasis supplied); *Kimbrough*, 128 S. Ct. at 573-74 (Commission "*will* help to 'avoid excessive sentencing disparities'" through "ongoing revision of the Guidelines in response to sentencing practices.") (emphasis supplied). That dialogue and evolution did not occur when the guidelines were mandatory,[11] as Justice Breyer has recognized.[12] In any event, he needed a majority, and

[11] *See Gall v. United States*, Brief for Federal Public and Community Defenders et al. as Amici Curiae 1-15 (reviewing history), http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf.

the Court had already held 6-3 in *Cunningham v. California*, 127 S. Ct. 856 (2007) that a system that does not permit judges to sentence outside a recommended range based on "general objectives of sentencing" alone without a "factfinding anchor" violates the Sixth Amendment. *Id*. at 862-70. Thereafter, even the "Government acknowledge[d] that . . . 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'"[13] *Kimbrough*, 128 S. Ct. at 570.

Gall is an example of the Guidelines not treating defendant characteristics in the proper way, *i.e.*, as required by 18 U.S.C. § 3553(a). There, the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on characteristics of the defendant which are required to be considered under § 3553(a)(1) and must be taken into account in order to avoid unwarranted disparities and unwarranted similarities under § 3553(a)(6), but which the Guidelines ignore or deem not ordinarily relevant, including age and immaturity, voluntary withdrawal from a conspiracy, and self rehabilitation through education, employment, and discontinuing the use of drugs. *Gall*, 128 S. Ct. at 598-602.

Kimbrough was an "unremarkable" "mine-run" case in which the guideline itself reflects unsound judgment in that it fails properly to reflect § 3553(a) considerations. 128 S. Ct. at 575. There, the Court upheld a below-guideline sentence in an ordinary crack trafficking case because the crack guidelines (like all of the drug guidelines) were not based on past practice at their inception, and reflect unsound judgment in light of the purposes of sentencing and the need to avoid unwarranted disparities. The Court said: "In the main," the Commission used an "empirical approach based on data about past practices, including 10,000 presentence investigation reports," but it "did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses." *Id*. at 567. When a guideline is not the product of "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." *Id*. at 575.

After *Kimbrough*, the courts of appeals "must re-examine [their] case law" holding that "courts were not authorized to find that the guidelines themselves, or that the statutes on which they are based, are unreasonable." *United States v. Marshall*, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008).

Of course, the facts of the case must fit whatever it is that you contend is wrong with the guideline. For example, an argument that the career offender guideline over-states the risk of recidivism when the predicates are drug offenses does not work for a client whose only predicates are crimes of violence, though there may be other arguments to reject the career offender guideline in the case. As the Court said in *Kimbrough*, "the

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[12] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999).

[13] *See also* Tr. of Oral Argument at 50, *Rita v. United States* (U.S. argued Feb. 20, 2007); Tr. of Oral Argument at 32-33, *Claiborne v. United States* (U.S. argued Feb. 20, 2007).

District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)." 128 S. Ct. at 576. The Court did not mean that the district court properly relied on something "unique" about Mr. Kimbrough or his offense because it made quite clear that this was an "unremarkable" "mine-run" case. What it meant was that the facts of the case fit what is wrong with the crack cocaine guidelines. Thus, you are not seeking a "categorical" rejection of a guideline in all possible cases, but a rejection of the guideline in this case because the facts fit the policy problems of the guideline.

This challenge must be raised and developed by counsel. While the court *could* raise it *sua sponte*, this is unlikely and there is no recourse on appeal if it does not. *See United States v. Marshall*, slip op., 2008 WL 55989 at *8 (7th Cir. Jan. 4, 2008) (judge was not required to reject the career offender guideline *sua sponte*).

B. A Shield Against Undue Influence at Sentencing

The reason the judge must seriously consider the extent of any departure from the guideline range and give sufficient justifications for an unusually harsh or lenient sentence is that the guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 128 S. Ct. at 594. But the Court immediately qualified this general assumption: "Notably, not all of the Guidelines are tied to this empirical evidence. For example, 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," the effect of which "is addressed in *Kimbrough*." *Id.* at 594 n.2.

In *Kimbrough*, the Court said that district courts must treat the guidelines as the "starting point and initial benchmark" because the Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience.'" *Kimbrough*, 128 S. Ct. at 574 (internal citations omitted). However, this does not pertain to guidelines, like the crack guidelines, that "do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.' Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses 'greater than necessary' in light of the purposes of sentencing set forth in § 3553(a)." *Id.* at 575 (internal quotation marks omitted).

C. A Shield Against Undue Influence on Appeal

The courts of appeals may, but are not required, to apply a presumption of reasonableness to a within-guideline sentence. *Rita*, 127 S. Ct. at 2462; *Gall*, 128 S. Ct. at 597. After *Rita*, courts of appeals can still decline to apply a presumption of

reasonableness to all within-guideline sentences, *United States v. Rutkoske*, 506 F.3d 170, 180 n.5 (2d Cir. 2007); *United States v. Ausburn*, 502 F.3d 313, 326 n.23 (3d Cir. 2007), or to a sentence within a particular guideline. In *Rita*, the basis for the non-binding- with-no-independent-legal-effect presumption was that it was "fair to assume" that the guidelines "reflect a rough approximation" of sentences that "might achieve 3553(a) objectives" because the original Commission (instead of basing the Guidelines on the purposes of sentencing as Congress directed, *see* 28 U.S.C. § 991(b)(1)(A)) used an "empirical approach" based on "past practice," and the Guidelines "*can*" evolve in response to non-guideline sentencing decisions and consultation with the criminal justice community. *Rita*, at 2464-65 (emphasis supplied). Thus, the court of appeals should not apply a presumption of reasonableness to a sentence within a particular guideline range when the Commission did not use this empirical approach to create the guideline or amend it in response to empirical evidence or feedback from judges and other participants in the criminal justice system.

If the government argues that the "closer review" *dicta* in *Kimbrough*, 128 S. Ct. at 574-75, should be taken as an instruction from the Supreme Court rather than the *dicta* that it is, *see* Part II.D, *supra*, it simply does not apply when the guideline at issue in the case "do[es] not exemplify the Commission's exercise of its characteristic role." *Kimbrough*, at 575. Put another way, if a judge relies on *evidence* from the Commission itself or another reliable source showing "that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case," the judge is not "var[ying] from the Guidelines based *solely* on the judge's *view*." *Id*. at 575 (emphasis supplied).

D. What to Look For and Where to Look

When a guideline is not the product of "empirical data and national experience," *i.e.*, the Commission did not exercise its capacity for expertise, judges have wide leeway to reject the guideline itself as reflecting unsound judgment even in a "mine-run case." *Kimbrough*, 128 S. Ct. at 575. This is true if the guideline (1) was not based on past practice/empirical data at its inception; (2) was created or amended after the initial set of guidelines with no empirical basis; (3) was created or amended contrary to the Commission's own data or other available data or policy analyses; (4) has not been amended in the face of later data that shows it to be unsound; and/or (5) was created or amended for no stated reason.

Sentencing Resource Counsel and the Defender Guideline Committee are in the process of developing an online reference manual (entitled *Deconstructing The Guidelines* which will be linked from www.fd.org) that will critically examine the history and empirical basis (or lack thereof) of the most frequently encountered guidelines and policy statements. It will also provide a guide to doing it yourself, in case the provision at issue in your case is too rarely used to be included or has not yet been completed. Check the online manual frequently, as this will be an ongoing process.

Meanwhile, always begin by checking the Reasons for Amendment in Appendix C of the Guidelines Manual corresponding to the amendments listed in the Historical

Note at the end of each guideline. Is there any indication that empirical evidence supported the guideline or subsequent amendments? Often, you will find no reason, which itself demonstrates that the amendment was not based on empirical evidence.[14] Often, the Commission will cite a new law enacted by Congress. Such citations must be critically evaluated as explained in Part G, *infra*. Review the law cited to determine whether or not it contains a congressional directive, and if so, what it actually says. Analyze the law's legislative history. Where a guideline has been amended, follow these steps for each amendment.

Look for affirmative evidence that the guideline is not based on empirical evidence, does not advance sentencing purposes, and does not avoid unwarranted disparities or unwarranted similarities. Much of this evidence has already been assembled in *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf, which addresses, to a greater or lesser extent, restrictions and prohibitions on individual characteristics and offense circumstances, relevant conduct, drug offenses, immigration offenses, economic crimes, firearms offenses, sex crimes, the career offender guideline, the Guidelines' failure to properly account for first offender status, various other problems with the criminal history rules, and the unnecessary use of imprisonment.

Check for relevant materials on www.fd.org, on the Sentencing Resource page, http://www.fd.org/odstb_SentencingResource3.htm, the Crack Cocaine page, http://www.fd.org/odstb_CrackCocaine.htm, and the Defender Recommendations to the Commission, http://www.fd.org/pub_SentenceLetters.htm. Many resources are also cited in Parts E, F and G, *infra*.

E. Which Guidelines and Policy Statements Were Not Based on Past Practice?

Congress directed the Commission to consider all four statutory purposes set forth in Section 3553(a)(2) in developing the guidelines.[15] The original Commissioners, however, "considered" only "just deserts" and "crime control," then expressly abandoned those two purposes when they could not agree on which should predominate.[16] They solved their "philosophical dilemma" by adopting an "empirical approach that uses data estimating the existing sentencing system as a starting point."[17] At the instance of Justice

[14] A typical example is the reason for prohibiting consideration of lack of guidance as a youth and similar factors indicating a disadvantaged background: "This amendment provides that the factors specified are not appropriate grounds for departure." USSG, App. C, amend. 466 (Nov. 1, 1992).

[15] *See* 28 U.S.C. § 991(b); S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984).

[16] U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

[17] *Id*.

Breyer, the Court now accepts that this makes the Guidelines a "rough approximation" of the statutory purposes set forth in Section 3553(a)(2), *see Rita*, 127 S. Ct. at 2464; *Gall*, 128 S. Ct. at 594, but recognizes that "not all of the Guidelines are tied to this empirical evidence." *Id*. at 594 n.2.

In fact, "the Commission, either on its own initiative or in response to congressional actions, established guideline ranges that were significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including white collar offenses, drug trafficking, immigration offenses, robbery of an individual, murder, aggravated assault, and rape. 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* at 47 (2004) (hereinafter "Fifteen Year Report"), citing U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987).[18]

Further, in estimating past practice sentencing levels, the Commission did not include probationary sentences. *See* Supplementary Report at 24. This was no small omission, since nearly 40% of all defendants were sentenced to straight probation in 1984. *See* Fifteen Year Report at 43. As of 2002, only 14% of all defendants were sentenced to straight probation under the restrictive mandatory Guidelines. *Id*. Only 7.7% received straight probation in 2007, after *Booker*. *See* U.S. Sentencing Commission, 2007 Sourcebook, Figure D. Straight probation should be used more freely after *Gall*. *See* Part I.D, *supra*.

The use of uncharged and acquitted separate offenses to calculate the guideline range also was not based on past practice and is inconsistent with national experience. *See United States v. White*, Appellant's Supplemental Brief at 22-25 (discussing evidence with respect to acquitted crimes, most of which is equally applicable to uncharged crimes), http://www.fd.org/pdf_lib/White_Appellant_Brief.pdf.

The Commission "deviated from average past practice" when it deemed offender characteristics other than criminal history to be not ordinarily relevant, as one of its "'trade-offs' among Commissioners with different viewpoints." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988). This was also contrary to congressional will. *See* Part G, *infra*.

As Justice Breyer stated in 1987, "once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad" and the "resulting compromises do not seem too terribly severe," but the guidelines would "evolve" based on information from actual practice under the guidelines. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

[18] The Supplementary Report is available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

F. Have the Guidelines Evolved Based on Empirical Evidence and National Experience Since Then?

Since then, the Commission has amended the guidelines in a "one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules." *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). How to show this?

1. Commission Studies

The Commission has published studies based on empirical evidence identifying problems with the guidelines that have not yet been addressed. In addition to the reports on crack cocaine sentencing,[19] the Commission's *Fifteen Year Report* identifies serious problems with the career offender guideline, the relevant conduct rules, the drug guidelines generally, and various forms of disparity that have increased under the Guidelines, most notably racial disparity and hidden disparities caused by the government's practices as permitted and encouraged by the Guidelines.[20] The Commission has published three reports on recidivism, identifying numerous factors that predict reduced recidivism that are prohibited or discouraged from consideration by the Guidelines and factors that do not predict recidivism which are included in the Guidelines.[21] Judges have relied on these extra-guideline findings to impose non-guideline sentences that better comply with § 3553(a),[22] and are clearly free to do so after *Kimbrough*.

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[19] The "modest" two-level reduction in the crack guidelines is "'only . . . a partial remedy' for the problems generated by the crack/powder disparity." *Kimbrough*, 128 S. Ct. at 569. "The amended Guidelines *still* produce sentencing ranges keyed to the [now discredited] mandatory minimums in the 1986 Act." *Id*. at 569 n.10 (emphasis supplied). The pre-amendment guidelines "produced sentencing ranges that slightly *exceeded* those statutory minimums," while the amended ranges "include" them. *Id*. at 569 n.10 (emphasis in original).

[20] 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* 47-55, 76, 82, 91, 94, 102-06, 111-15, 117, 122, 131-35, 140-42 (2004).

[21] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "*Measuring Recidivism*"); U.S. Sentencing Comm'n, *Recidivism and the First Offender* (May 2004); U.S. Sentencing Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005).

[22] *See United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (relying on *Fifteen Year Report*'s discussion of career offender guideline to impose non-guideline sentence); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (relying on *Fifteen Year Report* to point out

2. Other Empirical/Policy Research

There are many areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include studies on brain development by the National Institutes of Health and others, as cited by the district court in *Gall*,[23] research showing the efficacy and cost savings of drug treatment, education and job training over lengthy incarceration in reducing crime,[24] reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value,[25] research on the adverse impact of

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disparities arising from government's unilateral power to reward cooperation, contrasting restrictions on aberrant conduct guideline with recidivism reports); *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Ali*, Crim. No. 1:05-5, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006) (imposing non-guideline sentence, citing recidivism reports).

[23] Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows "that the region of the brain that inhibits risky behavior is not fully formed until age 25").

[24]Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, Health Services Res., 41(1), 192-213 (2006) (for every $1 spent on drug treatment, $7 is saved in general social savings, primarily in reduced offending and also in medical care); Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 Law & Contemp. Probs. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, January 2007 (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

[25] U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (Feb. 1994), available at *http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf*; The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at *http://www.sentencingproject.org/pdfs/incarceration-crime.pdf*; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999); Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/Aug. 1994).

incarceration on children and families,[26] analyses of the suitability of members of immigrant populations for intermediate sanctions,[27] reports on the efficacy of victim mediation as an alternative to incarceration,[28] and studies demonstrating that contrary to myth, recidivism rates for sex offenders are lower than in the general criminal population, and that community treatment for sex offenders is effective.[29]

Other resources can be found in the Defender Sentencing Resource Manual, http://www.fd.org/pdf_lib/SentencingResourceManualMay2007.pdf, on the Sentencing Project's website, http://www.sentencingproject.org, in the Defenders' written comments to the Commission, http://www.fd.org/pub_SentenceLetters.htm, and in the written and

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[26] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children* (Dec. 2001), presented at U.S. Dep't of Health and Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (2002) (discussing impact of parental incarceration on children and benefits of alternatives to incarceration); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001) (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) ("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."); Patricia M. Wald, *"What About the Kids?': Parenting Issues in Sentencing*, 8 Fed. Sent. Rep. 137 (1995) (discussing growing body of research showing that children fare better in their parents' care than in foster care or elsewhere).

[27] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338, 353 (2005).

[28] Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001) (explaining ancient concept of "restorative justice" as alternative to incarceration, citing numerous studies examining its effectiveness in criminal context); *see also*, *e.g.*, James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998) (collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had significantly lower recidivism rates), *available at* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

[29] U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration); F.S. Berlin, *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcomes*, 12 Am. J. of Forensic Psych. 3 (1991) (documenting effectiveness of community treatment for sex offenders).

oral testimony of witnesses who testified at Commission hearings, http://www.ussc.gov/HEARINGS.HTM.

3. Statistics Showing the Guideline is Not Being Followed

A guideline is not based on empirical evidence or national experience when judges increasingly impose non-guideline sentences in the face of this guideline. In March 2006, the Commission published a report on the impact of *Booker* which identifies some of the kinds of cases in which below-guideline sentences had increased in the first year or so after *Booker*, including all drug trafficking cases, career offender cases, first offender cases, and some sex offense cases. *See* U.S. Sentencing Commission, *Report on the Impact of United States v. Booker on Federal Sentencing* at 119, 128, 132, 137-140, (March 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

The Annual Sourcebooks and Quarterly Updates list reasons given for departures and variances, but they are not listed by offense guideline. The frequency of departures/variances is given by primary offense type and by Chapter Two guideline, but without reasons.

4. Judicial Decisions

Many district court decisions and some appellate decisions identify and explain issues the Commission has not addressed. For example, after *Booker*, district courts have issued many decisions showing that the career offender guideline fails to distinguish between serious and non-serious offenses.[30] In *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006), the judge pointed out that the definition of career offender predicates covers misdemeanor convictions, contrary to 28 U.S.C. § 994(h), from states with misdemeanors punishable by more than one year. In *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008), the judge described how the child pornography guideline was not based on empirical evidence. In at least three cases, judges have declined to follow the "bad math" embodied in the new marijuana equivalency table for crack in multi-drug cases. *See United States v. Molina*, slip op., 2008 WL 544703 (E.D.N.Y., Feb. 28, 2008) *United States v. Horta*, __ F.Supp.2d __, 2008 WL 445893 (D. Me. 2008); *United States v. Watkins*, __ F. Supp. 2d __, 2008 WL 152901 (D. Tenn. 2008). In *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007), the judge identified a "structural problem" in the relevant conduct rule as demonstrated by two different probation officers "calculating" ranges of 37-46 months and 151-188 months for two identically-situated defendants in the same case. In *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), the judge explained how calculations under the fraud guideline based on unintended loss and various overlapping

[30] *See, e.g., United States v. Person*, 377 F. Supp. 2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005); *United States v. Serrano*, Crim. No. 04-424, 2005 WL 1214314, at **7-9 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, Crim. No. 04-222, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005).

adjustments resulted in a "patently absurd" life sentence. *United States v. Gener*, Crim. No. 04-424-17, 2005 WL 2838984 *5 (S.D.N.Y. Oct. 26, 2005) illustrated the problem with including juvenile adjudications with a sentence of 60 days or more in the criminal history score where the juvenile offense is trivial and the length of confinement results not from the gravity of the offense but family circumstances and special needs.

Judicial decisions evaluate offenses and offenders in light of sentencing purposes in ways that the Guidelines simply do not, for example, discussing the statistical likelihood of recidivism of persons of the defendant's age, educational level and work history, the deterrent value and societal cost of lengthy prison sentences for the type of offense, the community's view of the seriousness of the offense, the efficacy of substance abuse or other mental health treatment. *See, e.g.*, *United States v. Brennan*, 468 F. Supp. 2d 400, 404-08 (E.D.N.Y. 2007); *United States v. Holden*, No. 06-20345, 2007 WL 1712754 (E.D. Mich. June 13, 2007); *United States v. Nellum*, Crim. No. 2:04-30, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Perella*, 273 F. Supp. 2d 162 (D. Mass. 2003). On the issue of addiction and treatment, which the Guidelines do not recognize, Judge Gertner has written:

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

Perella, 273 F. Supp. 2d at 164.

G. What Effect Do Congressional Actions Have on the Analysis?

After *Gall* and *Kimbrough*, the fact that a guideline (or amendment to a guideline) was spawned by congressional action is a red flag for lack of empirical basis, raising the question whether the guideline reflects unsound judgment. *See Gall*, 128 S. Ct. at 594 n.2 ("For example, 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."); *Kimbrough*, 128 S. Ct. at 575 ("The crack cocaine Guidelines . . . do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.'"); *id*. at 569 n.10 ("The

amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act.").

The Court recognizes that Congress makes mistakes, and that when the Commission blindly follows or exacerbates a congressional mistake with guidelines that are not based on empirical evidence or experience, and that are contrary to sentencing purposes and/or create unwarranted disparities or unwarranted similarities, the courts are free to reject such guidelines. *Kimbrough*, 128 S. Ct. at 567-68, 569 n.2, 571-72, 574-75; *Gall*, 128 S. Ct. at 594 & n.2.

Congress created the Sentencing Commission as an independent expert body and placed it in the Judicial Branch. The Supreme Court upheld the promulgation of the Guidelines by the Commission against Separation of Powers challenge, "not without difficulty," based in part on a prediction that the Commission would not be enlisted in the work of the political branches, but instead would bring "judicial experience and expertise" to the "neutral endeavor" of sentencing, "the Judicial Branch's own business." *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989). Justice Scalia disagreed, stating that it was "not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress." *Id*. at 427 (Scalia, J., dissenting).

From the start, the Commission based the guidelines in very large measure on the actions and influences of Congress and the Department of Justice, rather than independent expertise, beginning with the Anti-Drug Abuse Act of 1986.[31] The Commission has acknowledged that the goals of sentencing reform have not been fully achieved because, "[i]n some cases, the results of research and collaboration have been overridden or ignored . . . through enactment of mandatory minimums or specific directives to the Commission."[32] *See* Fifteen Year Report at vii. The term "directives" may convey the impression of express instructions to amend the guidelines in particular ways, but many of the guidelines were created or amended as a reflexive response to a new or increased mandatory minimum, an increased statutory maximum, an instruction to study some aspect of sentencing or to change penalties if appropriate, or behind-the-scenes discussions not in the public record at all. In some instances, the Commission exceeded an express congressional directive, or took other action that appears to contravene congressional intent.

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[31] For an informative account of how the Department and its allies in Congress have pressured the Commission to create sentencing rules that are not based on empirical evidence or experience, *see* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005). For an early account of the Commission's work as "overtly political and inexpert," *see* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989).

[32] *See also* Fifteen Year Report at 49 (linking drug trafficking guidelines to Anti-Drug Abuse Act, "had the effect of increasing prison terms far above what had been typical in past practice"); *id*. at 73 ("frequent mandatory minimum legislation and specific directives to the Commission to amend the [sex offense] guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.").

1. Congressional Actions That Are Not Express Directives

In *Kimbrough*, the government acknowledged that in general, courts may vary from the guidelines based on policy considerations alone, including disagreements with the guidelines, but argued that the 100-1 powder to crack ratio was an exception because it was a "specific policy determination" by Congress which the Commission and sentencing courts were required to follow. *Id*. at 570. The Court rejected this characterization because the Anti-Drug Abuse Act "mandates only maximum and minimum sentences," but "says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence." *Id*. at 571. If it were otherwise, the Commission could not have exercised its own policy judgment to use a different method than the statute for calculating the weight of LSD. *Id*. at 571-72 (discussing *Neal v. United States*, 516 U.S. 284 (1996)). Neither "logical incoherence" with a statute, nor a directive to study and recommend unspecified amendments, constitutes a congressional command. *Id.* at 571-73.

Judges are free to disagree with guidelines that were created or increased in response to an increase in a statutory maximum, a new or increased mandatory minimum, or a directive to study or raise sentences if "appropriate." The Criminal Law Committee of the Judicial Conference has 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, and if the resulting guideline, alone or in combination with specific offense characteristics, is lower than the mandatory minimum, § 5G1.1(b) can operate. *See* Comments of the Criminal Law Committee of the Judicial Conference (March 16, 2007), http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf. 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*. This recommendation was made in connection with proposed amendments responding to the Adam Walsh Act, which has no legislative history whatsoever.

2. Express Congressional Directives

In response to the government's argument that the Anti-Drug Abuse Act "implicitly" required the Commission to write guidelines corresponding to the mandatory minimums and extrapolating below, between and above those two levels, the Court said that "[d]rawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms." *Kimbrough*, 128 S. Ct. at 571. As an example, it referred to 28 U.S.C. § 994(h), the statute upon which the (in many ways broader, *see* sub-part 3, *infra*) career offender guideline is based.

Does this mean that a guideline which follows to the letter a congressional directive stated in "express terms" is immune from scrutiny as a potentially unsound judgment? That question was not before the Court, but the answer must be "No." Even

the government recognizes as much. *See* Brief of the United States at 29, *Kimbrough v. United States* ("As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under *Booker* and subject to the general principles of sentencing in section 3553(a)."); Letter stating the government's position on the career offender guideline, docketed March 17, 2008 in *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) ("position of the United States" is that "*Kimbrough*'s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.") (emphasis in original), available on the Sentencing Resource Page of www.fd.org.

Congress has the exclusive right and responsibility to legislate statutory minimums and maximums,[33] and those outer limits trump any inconsistent guideline range, as is obvious, and as USSG § 5G1.1 says. But when Congress uses the Commission as a conduit for a specific sentence or sentencing increase, the resulting guideline is but one factor to be considered under § 3553(a), and is subject to the same critical analysis as other guidelines, as the courts have found in both career offender and child pornography cases. *See United States v. Martin*, __ F.3d __, 2008 WL 748104 (1st Cir. Mar. 21, 2008) (courts have broad discretion to sentence below career offender guideline under *Gall* and *Kimbrough*); *United States v. Sanchez*, __ F.3d __, 2008 WL 553517 ** 9-11 (2d Cir. Feb. 29, 2008) (Section 994(h) is a directive to the Commission, not the courts); *United States v. Marshall*, slip op., 2008 WL 55989 **7-8 (7th Cir. Jan. 4, 2008) ("We must reexamine our case law" holding "that courts are not authorized to find that the guidelines themselves, or the statutes upon which they are based, are unreasonable . . . in light of the Supreme Court's recent decision in *Kimbrough*."); *United States v. Malone*, 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (imposing below guideline sentence based on Commission's reports finding career offender guideline unsound); *United States v. Baird*, slip op., 2008 WL 151258 *7 (D. Neb. 2008) ("Because . . . the Guidelines for child [pornography] offenses, like the drug-trafficking Guidelines, were not developed under the empirical approach, but . . . in response to statutory directives. . . . the court affords them less deference than it would to empirically-grounded guidelines.").

If it were otherwise, the Separation of Powers problem that most troubled the Court in *Mistretta* would arise:

[33] See *United States* v. *Evans*, 333 U.S. 483, 486 (1948) (observing that "as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions"); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (stating that "the authority to define and fix the punishment for crime is legislative," while the "right . . . to impose the punishment provided by law, is judicial"); *United States* v. *Wiltberger*, 18 U.S. (1 Wheat) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *United States* v. *Hudson*, 11 U.S. (1 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

> We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. . . . The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Mistretta v. United States, 488 U.S. 361, 407 (1989).

3. Guidelines that Contravene Statutes

Where a guideline, policy statement or commentary is inconsistent with a specific statutory provision, the statute controls. *See United States v. LaBonte*, 520 U.S. 751, 757-58 (1997) (amendment of career offender guideline to define "offense statutory maximum" not to include an increased maximum under 21 U.S.C. § 851 was in conflict with the plain meaning of "maximum term authorized" in 28 U.S.C. § 994(h) and "must bow to the specific directives of Congress"); *Neal v. United States*, 516 U.S. 284, 292-95 (1996) (Commission could use a constructive weight method for LSD in the guidelines instead of the actual weight method used in 21 U.S.C. § 841 as construed in *Chapman*, but the statute controls at the mandatory minimum levels and the Commission has no authority to override it); *Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993) (guidelines, policy statements and commentary must yield to the plain meaning of a statute).

Appendix C of the Guideline Manual sets forth the Reason for Amendment for each guideline amendment. While the Reason for Amendment may say that it was promulgated pursuant to a statute, closer inspection may reveal that the amendment conflicts with the statute. For example, USSG § 3B1.4 increases the offense level by two levels for use of a minor in committing a crime, regardless of the defendant's age, but the statute pursuant to which this guideline was promulgated stated that the defendant must be at least 21 year of age. The Sixth Circuit held that because the guideline was "in conflict with a clear congressional directive," it could not be applied to a defendant under the age of 21. *See United States v. Butler*, 207 F.3d 839, 849-52 (6th Cir. 2000).

Another example is the career offender guideline, which implements 28 U.S.C. § 994(h), but which defines the predicates far more broadly than Congress required in that statute. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker at 48-51 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf. Some lower courts (but not all) held early on that the Commission was free to do this according to its broader promulgation and amendment authority. Those cases pre-dated *LaBonte* and *Stinson*. Further, they did not examine whether the Commission had actually carried out or achieved congressional directives under its broader authority. This will be discussed in greater detail in the Career Offender section of *Deconstructing The Guidelines*, coming soon.

Another example is Chapter 5's policy statements deeming various offender characteristics to be never or not ordinarily relevant. Congress directed the Commission to consider the relevance of a variety of offender characteristics, 28 U.S.C. § 994(d), and to reflect the "general inappropriateness of considering" education, vocational skills, employment record, family ties and community ties "in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). The purpose of 28 U.S.C. § 994(e) was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," but "each of these factors," in both § 994(d) and (e), "may play other roles in the sentencing decision." S. Rep. No. 98-225, at 175 (1983). The purpose of 28 U.S.C. § 994(e) was not to prohibit or discourage consideration of these factors to mitigate punishment, as the Commission has done. Moreover, these factors must be considered under Section 3553(a)(1).

An interesting example which unfairly affects many sentences are the application notes to USSG § 1B1.3 which require the guideline range to be calculated based on uncharged and acquitted crimes. This is contrary to the plain language of the Sentencing Reform Act, was not intended by Congress according to the legislative history, and has never been reviewed by Congress because it is buried in application notes which are not required to be submitted to Congress for review, as explained in *United States v. White*, Appellant's Supplemental Brief at 15-21, http://www.fd.org/pdf_lib/White_Appellant_Brief.pdf. The *White* case will be argued on June 4, 2008 before the en banc Sixth Circuit.