

Sentencing Update

Recent Caselaw, New DOJ Policies, Pending Legislation,
Guideline Amendments, Arguments for Below-Guideline
Sentences, Constitutional Challenges to Mandatory Minimums

Amy Baron-Evans
Sentencing Resource Counsel
Federal Public and Community Defenders
abaronevans@gmail.com

Albany, New York
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To Get the Lowest Sentence

- Eliminate or Reduce Mandatory Minimums
- Low-as-Possible Guideline Range
- Below-Guideline Sentence
 - Individualized mitigating factors
 - Policy flaws in the guideline

CASELAW

Alleyne v. United States, 133 S. Ct. 2151 (2013)

Any fact that sets or increases a mandatory minimum is an “element” that must be charged in an indictment and proved to a jury beyond a reasonable doubt; overruling *Harris v. US*, 536 U.S. 545 (2002).

- 924(c), drug type and quantity, receipt of CP, aggravated identity theft – reversed all circuits
- Reversed First, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit law in drug cases

Burrage v. United States, 134 S. Ct. 881 (2014) --
Death or Serious Bodily Injury Results

Banka died after ingesting multiple drugs, including 1 gram of heroin purchased from Burrage

The fact of "death result[ing]" is an **element that must be proved to a jury beyond a reasonable doubt**, citing *Alleyne*.

Must prove that the drug D **drug distributed was not just a contributing cause, but the but-for cause** to trigger increased minimum and maximum under 21 U.S.C. § 841(b)(1)(A)-(C).

"the harm would not have occurred in the absence of—that is, but for—the defendant's conduct"

No evidence Banka would have lived had he not used the heroin from Burrage - reversed.

Habeas should be available.

Rosemond v. United States, 134 S. Ct. 1240 (2014)
– narrows aider and abettor liability

- Must prove D "actively participated in the underlying drug trafficking or violent crime *with advance knowledge* that a *confederate would use or carry a gun during* the crime's commission," or would *possess a gun in furtherance* of the crime.
- Intentionally and actively participating in underlying crime not enough.
- Must also "decide[] to join in the criminal venture, and share in its benefits, with full awareness ... that the plan calls not just for a drug sale, but for an armed one," and "to do what he can to 'make [that scheme] succeed.'"
- "[W]hen an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; *or even if not*, he may at that late point have no realistic opportunity to quit the crime. **And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.**"
- "must be **advance knowledge**," which "means knowledge at a time the accomplice can do something with it—most notably, opt to walk away"

Not Just 924(c)

Vacated convictions for aiding and abetting a robbery (of a pouch of tobacco) where Ds had no advance knowledge co-D would snatch the tobacco.

United States v. Goldtooth, 754 F.3d 763 (9th Cir. 2014), relying on *Rosemond*.

Would apply to aiding and abetting drug trafficking but she was convicted as a principal.

US v. Robinson, 2014 WL 4215538 (M.D. Pa. Aug. 24, 2014)

Even if not charged under 18 U.S.C. § 2, conviction may still have been predicated on an aiding and abetting theory; aiding and abetting is implied in every federal indictment for a substantive offense. See, e.g., *US v. Frorup*, 963 F.2d 41, 42 (3d Cir. 1992); *US v. Armstrong*, 909 F.2d 1238 (9th Cir. 1990).

ACCA, Career Offender, and § 851 Predicates

-*Descamps v. United States*, 133 S. Ct. 2276 (2013) changed the law regarding all kinds of predicates

-*United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) changed the law regarding whether a North Carolina prior is punishable by more than one year

-*United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014); *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011) changed the law regarding whether a Kansas prior is punishable by more than one year

-ACCA

-Career Offender

-§ 851 "felony drug offense"

Best resource -- memos prepared for Clemency,

<http://www.fd.org/navigation/select-topics-in-criminal-defense/sentencing-resources/subsections/clemency>

Successive Motion Problem Under 2255(h)?

- DOJ argued erroneous mandatory minimum sentences constitute “fundamental defect” cognizable under the savings clause, thus may be raised under 28 USC 2241.
- S Ct. granted the petition, vacated the judgment, and remanded.

Persaud v. United States, 134 S. Ct. 1023 (2014).

Jones v. United States, 574 U.S. ___ (2014)

Scalia, Thomas, Ginsburg, dissenting from denial of cert

After jury convicted Ds of distributing small amounts of crack, acquitted of conspiracy, judge found by a preponderance they had engaged in the conspiracy and imposed sentences 4, 5 and 7 times longer than guideline ranges based on offenses of conviction.

Raised as-applied challenge.

But for the judge’s finding of fact, sentences would be “substantively unreasonable” and therefore illegal, *Rita*, 551 U.S. at 372 (Scalia and Thomas, JJ., concurring). “Any fact necessary to prevent a sentence from being substantively unreasonable . . . *may not* be found by a judge” under the Sixth Amendment, citing *Alleyne*, *Apprendi*, *Cunningham*.

“This has gone on long enough...The present petition presents the non-hypothetical case the court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense.”

US v. Kupa, 976 F. Supp. 2d 417 (E.D.N.Y. 2013)
(Gleeson, J.)

Regarding 851s:

“To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one* – not even the prosecutors themselves – thinks are appropriate,” and “insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.”

US v. Young, 960 F. Supp.2d 881 (N.D. Iowa 2013)
(Bennett, J.)

The “statistics” from USSC for 2006, 2008-09 “reveal jaw-dropping, shocking disparity” in the use of § 851s across districts.

New York – 366.15% intra-state discrepancy

N.D. NY – 59.46% of eligible Ds got it
W.D. NY – 21.92% of eligible Ds got it
S.D. NY – 16.24% of eligible Ds got it
E.D. NY – 16.39% of eligible Ds got it

No data where “§ 851 enhancements were used as a plea hammer to induce a defendant to plead—then withdrawn when the defendant did plead.”

If no relief is technically available ...

- *US v. Holloway*. Slip Copy, 2014 WL 3734269 (E.D.N.Y. July 25, 2014), Memorandum Regarding the Vacatur of Two Convictions Under 18 U.S.C. § 924(c)
 - Other examples cited therein
- *US v. Martinez-Blanco*, No. 1:06-cr-00396, available on PACER
 - Joint Motion to Reduce Sentence and Dismiss § 2255 Motion, Order Dismissing Defendant's Motion to Vacate and Set Aside Sentence, Order Amending the Judgment

**New DOJ Charging Policies
May 19, 2010; Aug. 12 & 29, 2013;
Sept. 24, 2014**

DOJ, “Smart on Crime: Reforming the Criminal Justice System for the 21st Century”

- “Today, a vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities.”
- “Many aspects of our criminal justice system may actually exacerbate this problem.”
- Prison “may not be the most sensible method of punishment” for “many non-violent, low-level offenses.”
- “Even for those who do require incarceration, it is important to ensure a sentence length commensurate with the crime committed.”
- So ... new charging policy to ensure that offenders “receive sentences better suited to their individual conduct rather than excessive prison terms more appropriate for violent criminals or drug kingpins.”

“Prosecutors should decline to charge the **quantity** necessary to trigger a mandatory minimum sentence if the defendant meets *each*” of four criteria:

- 1) “relevant conduct” does not involve violence, credible threat of violence, possession of a weapon, trafficking drugs to or with minors, death or serious bodily injury.
- 2) is not an “organizer, leader, manager, or supervisor of others within a criminal organization”
- 3) does not have “significant ties” to “large-scale drug trafficking organizations, gangs, or cartels.”
- 4) does not have a “significant criminal history,” “normally” 3 or more points, but 3 or more points “may not be significant if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent low-level drug activity.” (Aug. 29 memo)

Consider not charging at all.
Consider supporting a variance.

“In some cases, satisfaction of the above criteria meant for low-level, nonviolent drug offenders may indicate that prosecution would not serve a substantial federal interest and that the case should not be brought federally.”

If no MM or GL range exceeds MM, “should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a).”

“Prosecutors should decline to file” **§ 851s** “unless the defendant is involved in conduct that makes the case appropriate for severe sanctions[,] . . . consider[ing]” 6 factors [needn’t meet *each* – totality of the circumstances test]

- 1) Whether D “was an organizer, leader, manager or supervisor of others within a criminal organization”
- 2) Whether “the defendant was involved in the use or threat of violence in connection with the offense” [*not relevant conduct*]
- 3) “The nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses”
- 4) “Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels”
- 5) “Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants”
- 6) “Other case-specific aggravating or mitigating factors.”

Defendant does *not* have to plead guilty

Need only “meet the criteria” outlined above.

For Ds “charged but not yet convicted,” “prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy[.]”

For Ds already convicted by jury or guilty plea but not yet sentenced, prosecutors are “encouraged” to “consider” withdrawing § 851s.

See Holder Memo, Aug. 12, at 2 (Timing and Plea Agreements); Holder Memo, Aug. 29, at 1-2.

Defendant does *not* have to plead guilty

“Charges should not be filed simply to exert leverage to induce a plea.” “In all cases, charges should fairly represent the defendant’s criminal conduct.” Holder Memo, May 19, 2010, at 2.

“Proper charge selection also requires consideration of the end result ... an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea).” U.S. Attorneys Manual, § 9-27.320.

Memo issued 9/24/14: Defendant does *not* have to plead guilty

“Whether a defendant is pleading guilty is *not* one of the factors enumerated” in the August 12, 2013 policy instructing prosecutors that they “should decline to seek” § 851 enhancements.

“Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty.”

“[C]ertain circumstances – such as new information about the defendant, a reassessment of the strength of the government’s case, or recognition of cooperation – may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea.”

“A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate.”

Pending Legislation

Smarter Sentencing Act -- bipartisan

S. 1410 – intro. by Durbin/Lee, 1/30/14 SJC voted 13-5

H.R. 3382 - 10/30/13 intro. by Scott/Labrador

- “clarify” FSA mandatory minimums are retroactive and provide its own mechanism for relief apart from 3582(c)(2) and 1B1.10
- reduce MM from 10 to 5 years under 841(b)(1)(A), and from 5 to 2 years under 841(b)(1)(B)
- reduce MM for one “prior conviction for a felony drug offense” under 841(b)(1)(A) from 20 to 10 years , and for any number of 851 s under (b)(1)(B) from 10 to 5 years
- expand safety valve to include defendants with 2 CH points, but if 2, no prior conviction for violent offenses, firearms offenses, sex offenses, terrorism, racketeering
- Direct the Commission to amend the drug guidelines and safety valve guidelines consistent with the Act

But, so far, would leave untouched

- LIFE mandatory minimum if prosecutor files 851s for two “prior convictions for a felony drug offense” under 841(b)(1)(A)
- MM for “death or serious bodily injury results” under 841(b)(1)(A), (B) or (C)

DOJ and Commission Support SSA

1/23/14 Attorney General Video Message,

<http://www.justice.gov/video/agwa011314.mp4>

8/1/14 Attorney General Speech before NACDL

<http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html>

Statement of Chair, U.S. Sentencing Commission, for Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences” Before the Committee on the Judiciary, United States Senate, **Sept. 18, 2013** [Commn Test] at 2, 7-8,

<http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20131126-Letter-Senate-Judiciary-Committee.pdf>

Commission

Strongly Recommends Reform of MMs

Reports regional and racial disparity in prosecutors' use of 851s and 924(c)s, racial disparity in application of MMs for drugs.

Recommends:

- Drugs
 - Make FSA statutory ranges retroactive
 - Reduce MMs
 - Expand safety valve to Ds with “slightly greater” criminal history
- Apply safety valve to offenses subject to MMs other than drugs
- 851s
 - Narrow scope of “felony drug offense”
 - Reduce its severity
- 924(c)s
 - Eliminate “stacking” of MM for “second or subsequent” in same indictment, apply only to *prior* convictions
 - Reduce severity

Commn Test at 3-4, 7-12

Drugs Minus Two: 2D1.1 & 2D1.11

-- Reduced BOLs under 2D1.1 and 2D1.11 by 2 levels for ALL drugs

-- Retroactive effective Nov. 1, 2014

- But no release until **Nov. 1, 2015**
 - Ask for judicial recommendation for immediate placement in community corrections or home confinement. 18 USC 3521(b), 3624(c). See *Rodriguez v. Smith*, 541 F.3d 1180, 1183 (9th Cir. 2008)
- FAQs on a variety of issues, memo on Public Safety and Post-Sentencing Conduct factors

New 1B1.10(c) – comparable reduction for substantial assistance departure starts from the amended guideline range, *not* a trumping MM

-- When D was subject to MM and the court “had the authority” to sentence below a MM pursuant to a substantial assistance motion, the “amended guideline range” from which the court may grant a “reduction comparably less” is determined without regard to a trumping MM.

-- Overruled *US v. Johnson*, 732 F.3d 109, 115 (2d Cir. 2013)

-- **For crack Ds who got no or partial relief under FSA amendments, can file *now*, can be released *before* 11/1/2015**

-- Also allows reductions or greater reductions for many more under Drugs-2

5G1.3 – Undischarged and Anticipated Terms of Imprisonment

Amends § 5G1.3(b)

- Court “shall” *adjust the sentence downward* for any period of imprisonment already served on an undischarged term of imprisonment
- Court “shall” *impose concurrent sentences with the remainder of the undischarged term* when the undischarged term resulted from another offense that is relevant conduct to the instant offense.
 - **eliminates requirement that the other offense was the basis for an increase in the offense level for the instant offense under Chapter Two or Chapter Three.**

New § 5G1.3(c)

- unless a consecutive sentence is required under § 5G1.3(a), when “a state term of imprisonment is **anticipated** to result from another offense that is relevant conduct to the instant offense,” “the sentence for the instant offense *shall* be imposed to run concurrently to the anticipated term of imprisonment.”
- Applies when the “court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment.”

Felon in Possession

- 2K2.1(c) Cross Reference

If the defendant used or possessed any firearm... **cited in the offense of conviction** in connection with the commission or attempted commission of another offense...

Has to be the *same* gun.

Other amendments 11-1-14

- 2L1.1 – Alien smuggling enhancement
- 2L1.2 – Illegal Re-entry
- 2D1.1 – Marijuana cultivation
- 2A – VAWA
- 5D1.2 – Supervised Release

Challenge “Relevant Conduct” at sentencing, in 3582(c)(2) proceedings

United States v. Getto, 729 F.3d 221, 234 & n.11 (2d Cir. 2013)

- Required to make *two* particularized findings : (1) the scope of the activity *to which the defendant agreed* included the co-conspirator conduct in question, and (2) the co-conspirator conduct was foreseeable to the defendant.
- Court did not make particularized findings, stating only that it had "no quarrel with the [government's] *conspiracy theory* here from what I have read."
- "the *scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy.*"

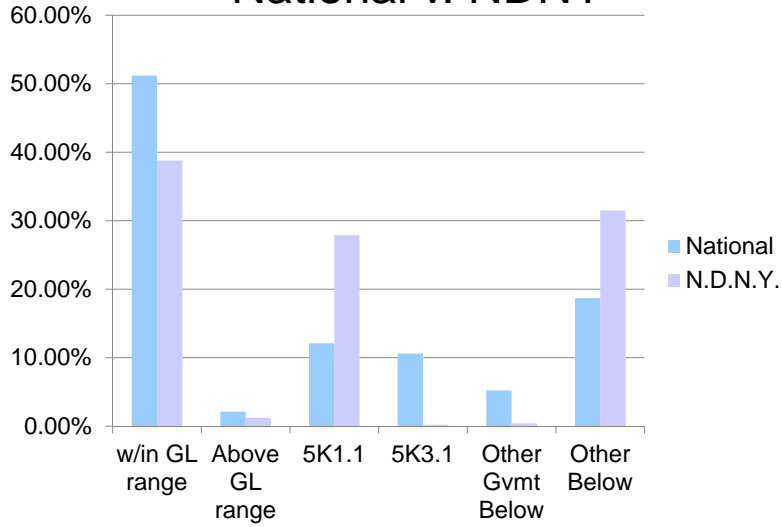
United States v. Davison, 761 F.3d 683 (7th Cir. 2014)

Pinkerton conspiracy is broader than "relevant conduct." Relevant conduct requires not just that amounts sold by others was foreseeable but that the defendant helped or agreed to help his co-conspirators sell those amounts.

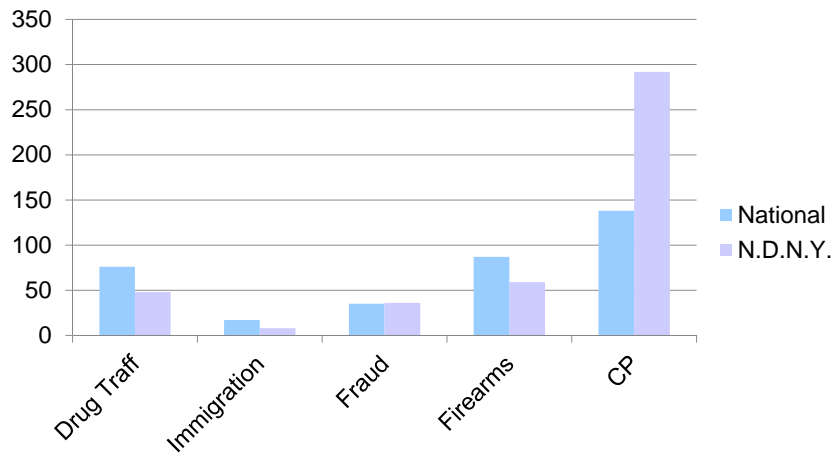
See 1B1.3 Application Note 2 for illustrations of what is and isn't relevant conduct.

Below-Guideline Sentences

FY 2013 -- Position of Sentences -- National v. NDNY



FY 2013 -- Avg. Length of Prison Term - National v. NDNY



The Guidelines Are Not Heartlands

- Within = 47.2%
- Below = 50.5% (29.6% GS, 20.9% NGS)
- Above = 2.2%
 - varies: Drug Trafficking 0.8%, Manslaughter 21.9%, Firearms 4.4%

USSC Quarterly Data Report, 3d Quarter 2014, tbl. 1,
<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-3rd-Quarterly-Report.pdf>

- So far in FY 2014, judges have sentenced below range in **36.6%** of all cases in which no 5K1.1 or 5K3.1.
- Includes **4,242** below-range sentences requested by the prosecutor for reasons other than cooperation or fast-track. (These are on the rise.)
- In several types of cases, the below-range rate is much higher:
 - Crack (18:1 ratio) (FY2013) 40%
 - Methamphetamine (FY 2013) 48%
 - Heroin (FY 2013) 48%
 - Ecstasy (FY 2012) 59%
 - Career offender (FY 2012) 57%
 - Fraud (3d Q 2014) 42%
 - Child Porn - 2G2.2 (3d Q 2014) 68%

Do Not Recommend Proportional Punishment

- 235-293 months
 - PWID 4.5 kg. methamphetamine
 - Second degree murder
 - Aircraft piracy
 - Sell or buy a child for use in production of pornography

- 151-188 months
 - PWID 500 g. methamphetamine
 - PWID 2.8 kg. crack
 - PWID 15 kg. cocaine *and* possess a firearm
 - Rob a bank of \$2 million *and* discharge a firearm
 - Forced sexual act with a child under 16

- 87-108 months
 - PWID 2 kg. cocaine, manager or supervisor
 - Robbery with a dangerous weapon causing bodily injury of \$750,000
 - Voluntary manslaughter
- 46-57 months in CHCII
 - Inciting a prison riot with substantial risk of death
- 27-33 months
 - PWID 40 g. heroin
 - Reckless manslaughter

For many crimes, range has increased hundreds of % points for no reason.

- “Mr. Client’s guideline range is 500% of the average past practice sentence and the original guideline range.”
Sent’g Memo in a Fraud Case, <http://www.fd.org/docs/Select-Topics---sentencing/James-Client---Fraud-Sentencing-Memo----4-12-11.pdf>.
- “Mr. DEFENDANT’s guideline range has increased by 368% from what it would have been under the initial guidelines.”
Meth – Sample Argument, <http://www.fd.org/docs/select-topics/sentencing-resources/sample-sentencing-argument-deconstructing-guidelines-applicable-to-methamphetamine-offenses.pdf?sfvrsn=4>.

Kinds of Below-Range Sentences

1) Variances

- a) Individualized Sentences – *Gall, Pepper*
Mitigating facts about the offense or offender that are relevant to the purposes of sentencing and parsimony
- b) Policy Disagreements – *Kimbrough, Spears*
Guideline recommends punishment that is excessive to satisfy the purposes of sentencing *aside from* any case-specific mitigating facts
- c) Avoidance of unwarranted disparity/unwarranted similarity

2) Departures – USSG 5K2.0 (based on 18 USC 3553(b))

- invention of Comm’n to restrict discretion
- controlled by restrictive policy statements, “heartland” standard
- SCT excised 3553(b) b/c these restrictions made GLs mandatory

As of 2010, some offender characteristics
“may be” relevant as grounds for departure

- Age
- Mental and emotional conditions
- Physical condition including physique
- Military service

If “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines”

Same standard as “not ordinarily relevant” – “present to an exceptional degree”

- Drug or alcohol dependence or abuse now “ordinarily not relevant” rather than “not relevant”

Always Argue for a Variance

- Never argue for a departure unless it is encouraged under the circumstances
 - *E.g.*, loss overstates, criminal history overstates
 - Does the cultural assimilation “departure” really help? Or does it poison the well with all of its requirements?
- Never argue for a departure alone.
- *If* you argue a departure, argue a variance first. Then, “even the Commission says ...”

Don't Use Departure Language When Arguing a Variance

- “Exceptional”
- “Extraordinary”
- “Unusual”
- “Atypical”
- “Heartland”

- Invites departure thinking
 - E.g., this case “doesn’t fall outside the heartland”

- Gall *struck down* “extraordinary circumstances” test

Use 3553(a) Language Every sentence must comply with it

- “Shall” impose a sentence “sufficient, but not greater than necessary” to satisfy the “need” for
 - Just punishment in light of the seriousness of the offense, respect for law
 - General deterrence
 - Incapacitation
 - Rehabilitation in the most effective manner

- “Shall” consider
 - *all* offense and offender circumstances
 - *all* kinds of sentences available *by statute*
 - avoiding *unwarranted* disparities *and* *unwarranted similarities*

Courts Must Consider All Mitigating Factors
May Ignore and Must Reject
Contrary Policy Statements

- 3553(a)(1) is a “broad command to consider . . . the history and characteristics of the defendant”
- Approved variance based on factors the policy statements deemed “not” or “not ordinarily relevant,” ignored policy statements

Gall v. United States, 552 U.S. 38, 50 n.6, 53-60 (2007)

Only Question is Whether the Mitigating Facts are
Relevant to the Purposes of Sentencing

“No question” that Pepper’s

- remaining drug-free for five years
- attending college and achieving high grades
- succeeding at work
- re-establishing a relationship with his father
- marrying and supporting a family

Are “highly relevant” to the need for deterrence, incapacitation, and treatment and training

And “bear directly on the District Court’s *overarching duty* to ‘impose a sentence sufficient, but not greater than necessary’ to serve the purposes of sentencing”

Pepper v. United States, 131 S. Ct. 1229 (2011)

Policy statement prohibiting consideration of these factors was not a reason to uphold 8th Circuit's judgment

- "Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Id.* at 1247.
- Policy statement that conflicted with § 3553(a) may not be elevated above relevant factors. *Id.* at 1249.
- Judge must instead give appropriate weight to relevant factors. *Id.* at 1250.

Courts May Disagree as a Matter of Policy with Guidelines That Lack Empirical Basis and Recommend Punishment Greater Than Necessary

- *Rita v. US*, 551 U.S. 338, 357 (2007)
 - Judge may find the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or "reflects an unsound judgment"
- *Kimbrough v. US*, 552 U.S. 85, 101 (2007)
 - courts may vary "based solely on policy considerations, including disagreements with the Guidelines." (citing *Rita*)
 - not an abuse of discretion to conclude that a guideline that is not the product of "empirical data and national experience . . . yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."
- *Spears v. US*, 555 U.S. 261 (2009)
 - can correct the problem by substituting a different ratio or guideline

Support Arguments With Evidence

- To convince the judge to grant a variance
- To avoid reversal of a variance
- To obtain reversal of denial of a variance

What Kind of Evidence?

- Data showing other judges are not following the guideline
- Facts about the defendant and offense
 - + empirical evidence showing why those facts are relevant to purposes and parsimony
- Facts showing the guideline itself
 - was not developed based on empirical data and national experience
 - recommends a sentence greater than necessary
- Tie the evidence to purposes and parsimony

Get It On the Record

- Objections to PSR
- PSR
- Sentencing Memo
- Letters
- Documentation
- Witnesses if necessary

Evidence-Based Arguments Increase Amount of Explanation Required

Not much explanation required for a GL sentence if it is “clear” the sentence is based on USSC’s “own reasoning” and you did not contest the GL sentence. *Rita*, 551 U.S. at 357.

Judge must consider only *nonfrivolous* arguments, and *must* explain *why* if he rejects them. *Id.* at 351, 357.

If fails to explain how the sentence complies with 3553(a) or fails to address your arguments and evidence, *reverse for procedural error*. *Gall*, 552 U.S. at 51.

Significant Procedural Error

- Fail to calculate the guidelines correctly
- Treat the guidelines as mandatory
- Fail to consider 3553(a) factors
- Fail to address parties' arguments
- Fail to adequately explain
- Comes before review for substantive reasonableness.

Frequent Reversals on D's Appeal for this Kind of Procedural Error

- At least 95 within, 33 above, and 13 below guideline sentences reversed for this kind of procedural error on D's appeal.
- Only 5 within, 14 above, and 3 below guideline sentences reversed as substantively unreasonable on D's appeal
- See http://www.fedoc.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf

Second Circuit

Has reversed **7** within, **1** above, and **4** below-guideline sentences on D's appeal for failure to address a nonfrivolous argument or failure to explain the sentence in terms of 3553(a).

2 reversals for substantive unreasonableness on D's appeal.

Don't count on substantive unreasonableness.

Sentences are substantively unreasonable only if they are "so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice."

US v. Thavaraja, 740 F.3d 253, 259 (2d Cir. 2014).

When reversed for inadequate explanation or failure to adequately address a nonfrivolous argument, the sentence on remand is different

in the majority of cases.

Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (March 2012),
http://www.fd.org/pdf_lib/Procedure_Substance.pdf;
CHAMPION, MAR. 2012, at 36.

Variations Reversed Because Readily Available Evidence Not Presented

DCT failed to explain “how Brown’s age was pertinent to any legitimate sentencing consideration.” *US v. Brown*, 610 F.3d 395 (7th Cir. 2010)

DCT based its disagreement with imprisonment for tax offenders on a “hunch” that prison is not a deterrent. *US v. Bragg*, 582 F.3d 965 (9th Cir. 2009)

DCT did not explain its “conclusory statement” that “the relative length of the sentence does not seem to be ... important in providing deterrence.” *US v. Cutler*, 520 F.3d 136, 163-64 (2d Cir. 2008)

Failure to Vary Reversed Because Defendant *Did* Present Evidence

DCT failed to address D's arguments and evidence regarding his rehabilitation. *L.M. v. United States*, 456 F. App'x 25 (2d Cir. 2011).

DCT failed to address an unrebutted, "well-supported" attack on the career offender guideline, based on "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." *US*, 339 Fed. App'x 650 (7th Cir. 2009).

District court failed to adequately address defendant's arguments and evidence regarding coercion. *US v. Ramirez-Mendoza*, 683 F.3d 771, 775 (7th Cir. 2012).

Best to Object to Procedural Error After It Happens to Avoid Plain Error Review

D failed to preserve objection to DCT's failure to address objections to PSR by not objecting after it happened.

- *US v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012).

Unpub. decisions relying on *Wagner-Dano* to review for plain error where D failed to object to DCT's failure to address arguments or adequately explain after it happened.

- *US v. DiRose*, 2014 U.S. App. LEXIS 19835 (2d Cir. Oct. 17, 2014);
- *US v. Haynesworth*, 568 Fed. Appx. 57 (2d Cir. 2014).

Data Showing What Other Judges Are Doing

- This is the “empirical data and national experience” upon which the Guidelines are supposed to be based. If not, free to vary based on a policy disagreement alone. *Rita*, 551 U.S. at 349, 357; *Kimbrough*, 552 U.S. at 109-10.
- Gives judges comfort in any case.

Table 27A
SENTENCES RELATIVE TO THE GUIDELINE RANGE
BY EACH PRIMARY OFFENSE CATEGORY¹
Fiscal Year 2013

PRIMARY OFFENSE	TOTAL	WITHIN GUIDELINE RANGE		ABOVE GUIDELINE RANGE ²		GOVERNMENT SPONSORED BELOW RANGE		NON-GOVERNMENT SPONSORED BELOW RANGE ³	
		N	%	N	%	N	%	N	%
TOTAL	78,628	40,233	51.2	1,681	2.1	21,974	27.9	14,740	18.7
Murder	89	42	47.2	7	7.9	30	33.7	10	11.2
Manslaughter	63	37	58.7	13	20.6	1	1.6	12	19.0
Kidnapping/Hostage Taking	40	12	30.0	3	7.5	14	35.0	11	27.5
Sexual Abuse	423	238	56.3	32	7.6	73	17.3	80	18.9
Assault	697	409	58.7	45	6.5	112	16.1	131	18.8
Robbery	837	456	54.5	38	4.5	132	15.8	211	25.2
Arson	69	34	49.3	6	8.7	16	23.2	13	18.8
Drugs - Trafficking	22,230	8,624	38.8	242	1.1	8,748	39.4	4,616	20.8
Drugs - Communication Facility	413	209	50.6	8	1.9	110	26.6	86	20.8
Drugs - Simple Possession	1,840	1,720	93.5	110	6.0	3	0.2	7	0.4
Firearms	8,052	4,620	57.4	390	4.8	1,418	17.6	1,624	20.2
Burglary/B&E	37	22	59.5	1	2.7	2	5.4	12	32.4
Auto Theft	87	51	58.6	8	9.2	20	23.0	8	9.2
Larceny	1,314	895	68.1	18	1.4	117	8.9	284	21.6
Fraud	7,543	3,575	47.4	168	2.2	1,844	24.4	1,956	25.9
Embezzlement	338	204	60.4	6	1.8	34	10.1	94	27.8
Forgery/Counterfeiting	728	438	60.2	23	3.2	106	14.6	161	22.1
Bribery	256	96	37.5	3	1.2	86	33.6	71	27.7
Tax	610	214	35.1	2	0.3	122	20.0	272	44.6
Money Laundering	825	280	33.9	11	1.3	312	37.8	222	26.9
Racketeering/Extortion	869	370	42.6	29	3.3	265	30.5	205	23.6
Gambling/Lottery	72	33	45.8	3	4.2	20	27.8	16	22.2
Civil Rights	87	14	24.6	0	0.0	16	28.1	27	47.4
Immigration	24,758	14,073	56.8	357	1.4	7,386	29.8	2,942	11.9
Child Pornography	1,922	648	33.7	32	1.7	354	18.4	888	46.2
Prison Offenses	421	297	70.5	19	4.5	53	12.6	52	12.4
Administration of Justice Offenses	1,390	795	57.2	61	4.4	200	14.4	334	24.0
Environmental/Wildlife	164	106	64.6	1	0.6	32	19.5	25	15.2
National Defense	125	42	33.6	2	1.6	50	40.0	31	24.8
Antitrust	16	2	12.5	0	0.0	9	56.3	5	31.3
Food & Drug	68	49	72.1	1	1.5	5	7.4	13	19.1
Other Miscellaneous Offenses	2,275	1,628	71.6	42	1.8	284	12.5	321	14.1

OFFENSE CATEGORY (SOURCEBOOK OPTION: FOUR CATEGORIES)¹
Fiscal Year: 2012
District: New York North

PRIMARY OFFENSE	TOTAL	WITHIN RANGE		ABOVE RANGE ²		GOV'T SPONSORED BELOW RANGE		NON-GOV'T BELOW RANGE ³	
		N	%	N	%	N	%	N	%
		TOTAL	616	298	48.4	4	0.6	160	26.0
Murder	0	0	--	0	--	0	--	0	--
Manslaughter	0	0	--	0	--	0	--	0	--
Kidnapping/Hostage Taking	1	1	100.0	0	0.0	0	0.0	0	0.0
Sexual Abuse	3	1	33.3	0	0.0	1	33.3	1	33.3
Assault	10	8	80.0	1	10.0	0	0.0	1	10.0
Robbery	3	0	0.0	1	33.3	2	66.7	0	0.0
Arson	1	1	100.0	0	0.0	0	0.0	0	0.0
Drugs - Trafficking	254	73	28.7	1	0.4	122	48.0	58	22.8
Drugs - Communication Facility	1	1	100.0	0	0.0	0	0.0	0	0.0
Drugs - Simple Possession	1	1	100.0	0	0.0	0	0.0	0	0.0
Firearms	42	20	47.6	0	0.0	9	21.4	13	31.0
Burglary/B&E	0	0	--	0	--	0	--	0	--
Auto Theft	0	0	--	0	--	0	--	0	--
Larceny	5	4	80.0	0	0.0	0	0.0	1	20.0
Fraud	53	33	62.3	1	1.9	5	9.4	14	26.4
Embezzlement	4	4	100.0	0	0.0	0	0.0	0	0.0
Forgery/Counterfeiting	6	3	50.0	0	0.0	1	16.7	2	33.3
Bribery	0	0	--	0	--	0	--	0	--
Tax	5	1	20.0	0	0.0	1	20.0	3	60.0
Money Laundering	6	1	16.7	0	0.0	4	66.7	1	16.7
Racketeering/Extortion	20	5	25.0	0	0.0	3	15.0	12	60.0
Gambling/Lottery	0	0	--	0	--	0	--	0	--
Civil Rights	0	0	--	0	--	0	--	0	--
Immigration	139	117	84.2	0	0.0	8	5.8	14	10.1
Child Pornography	33	9	27.3	0	0.0	1	3.0	23	69.7
Prison Offenses	8	3	37.5	0	0.0	0	0.0	5	62.5

SENTENCES RELATIVE TO THE GUIDELINE RANGE FOR DRUG OFFENDERS IN EACH DRUG TYPE (OPTION 2: FOUR CATEGORIES)¹
Fiscal Year: 2012

DRUG TYPE	TOTAL	WITHIN RANGE		ABOVE RANGE ²		GOV'T SPONSORED BELOW RANGE		NON-GOV'T BELOW RANGE ³	
		N	%	N	%	N	%	N	%
		TOTAL	25,349	11,087	43.7	255	1.0	9,130	36.0
Powder Cocaine	6,128	2,684	43.8	59	1.0	2,170	35.4	1,215	19.8
Crack Cocaine	3,509	1,559	44.4	53	1.5	1,112	31.7	785	22.4
Heroin	2,192	915	41.7	27	1.2	718	32.8	532	24.3
Marijuana	6,984	3,689	52.8	60	0.9	2,425	34.7	810	11.6
Methamphetamine	4,935	1,691	34.3	36	0.7	2,147	43.5	1,061	21.5
Other (-)									
Oxycodone/Oxycontin	873	268	30.7	8	0.9	327	37.5	270	30.9
MDMA/Ecstasy	247	69	27.9	2	0.8	98	39.7	78	31.6
Hydrocodone	93	52	55.9	4	4.3	28	30.1	9	9.7
PCP	62	26	41.9	1	1.6	20	32.3	15	24.2
Steroids	47	17	36.2	0	0.0	8	17.0	22	46.8
Gamma-hydroxybutyric acid	4	2	50.0	0	0.0	1	25.0	1	25.0
Other	275	115	41.8	5	1.8	76	27.6	79	28.7

¹ Of the 84,173 cases, 25,711 were sentenced under USSC Chapter Two, Part D (Drugs). Of these, 25,367 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Kent/Manage Drug Establishment), or 2D1.1 (Simple Possession). Of these 25,367 cases, 18 were excluded due to missing information from the submitted documents that prevented the comparison of the sentence and the guideline range. Descriptions of variables used in this table are provided in Appendix A.

² See Tables 21-24B for a list of departure reasons constituting these categories.

**SENTENCES RELATIVE TO THE GUIDELINE RANGE FOR DRUG
OFFENDERS IN EACH DRUG TYPE (OPTION 4: SIX CATEGORIES)¹**

**Fiscal Year: 2012
District: New York North**

DRUG TYPE	TOTAL	WITHIN RANGE		UPWARD DEPARTURES ²		OTHERWISE ABOVE RANGE ³		GOV'T SPONSORED BELOW RANGE		DOWNWARD DEPARTURES ⁴		OTHERWISE BELOW RANGE ⁵	
		N	%	N	%	N	%	N	%	N	%	N	%
		TOTAL	273	75	27.5	1	0.4	0	0.0	127	46.5	10	3.7
Powder Cocaine	54	16	29.6	0	0.0	0	0.0	26	48.1	2	3.7	10	18.5
Crack Cocaine	98	28	28.6	1	1.0	0	0.0	43	43.9	8	8.2	18	18.4
Heroin	20	7	35.0	0	0.0	0	0.0	11	55.0	0	0.0	2	10.0
Marijuana	83	19	22.9	0	0.0	0	0.0	40	48.2	0	0.0	24	28.9
Methamphetamine	3	0	0.0	0	0.0	0	0.0	1	33.3	0	0.0	2	66.7
Other (-)													
Oxycodone/Oxycontin	7	2	28.6	0	0.0	0	0.0	4	57.1	0	0.0	1	14.3
MDMA/Ecstasy	6	2	33.3	0	0.0	0	0.0	2	33.3	0	0.0	2	33.3
Hydrocodone	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
PCP	0	0		0		0		0		0		0	
Steroids	0	0		0		0		0		0		0	
Gamma-hydroxybutyric acid	0	0		0		0		0		0		0	
Other	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0

¹ Of the 622 cases, 276 were sentenced under USSC Chapter Two, Part D (Drugs). Of these, 274 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.4 (Controlling Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Recall/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 271 cases, one was excluded due to missing information from the submitted documents that prevented the comparison of the sentence and the guideline range. Descriptions of variables used in this table are provided in Appendix A.

² See Tables 24-24D for a list of departure reasons comprising these categories.

**Average Extent of Reduction - National
USSC Quick Facts - 2013 except as noted**

Type of case	Average extent of reduction – <u>non-government sponsored</u> <u>departure or variance --</u> <u>would be greater but for</u> <u>MMs</u>
Heroin	36.1%
Crack	34.2%
Powder Cocaine	35.0%
Methamphetamine	31.3%
Marijuana	42.5%
Oxycodone	46.5%
Career offender (FY 2012)	32.7%

USSG 2G2.2

	FY 2013 National	3d Quarter 2014 National	NDNY FY 2012 N= 28
Within – All cases	30.6%	28.6%	21.4%
Above – All cases	1.4%	2.4%	0.0%
Below – All cases Gov't Sponsored – 5K1.1 or 5K3.1	2.8%	3.2%	3.6%
Below – All cases Gov't Sponsored – Other	15.3%	19.1%	0.0%
Below – All cases Non-Gov't Sponsored	49.9%	46.7%	75.0%
Below – All cases other than cooperation or FT	67.0%	68.0%	77.8%

Career Offender – FY 2012

Only **30.2%** of 2,232 within the guideline range

1.1% above the range

27.6% below the range without a government motion

41.1% below the range with a government motion --
includes 301 not based on cooperation or fast-track

57% below the range in all cases not involving cooperation
or fast-track

USSC, Quick Facts – Career Offender (2013)

Evidence Regarding Purposes of Sentencing

Just Punishment Based on Seriousness
of the Offense, 3553(a)(2)(A)

Harm of the Offense
+ Individual Culpability for that
Harm

US v. Cavera, 550 F.3d 180, 192 (2d Cir 2008) (en banc)

"[S]ome Guidelines enhancements ... apply without modulation to a wide range of conduct. ... [T]o take one example," GLs "sharply increase" sentences "where the defendant has a prior conviction for a 'crime of violence,'" but the "definition of the term ... includes a wide spectrum of offenses of varying levels of seriousness, from, on the one hand, murder or rape, to, on the other hand, attempted burglary of a dwelling." (citing 2K2.1, 4B1.2).

"Similarly, many Guidelines ... drastically vary as to the recommended sentence based simply on the amount of money involved," but "there is a wide variety of culpability amongst defendants and, as a result," courts "impose different sentences based on the factors identified in § 3553(a). ... Such district court decisions, if adequately explained, should be reviewed especially deferentially."

Harm

Scientific and medical evidence proves ecstasy is far less harmful than the 500:1 ratio indicates.

- *US v. Kamper*, 748 F.3d 728 (6th Cir. 2014) (district court abused its discretion in refusing to vary on this basis)
 - *US v. McCarthy*, slip op., 2011 WL 1991146 (SDNY 2011) (varying); *US v. Qayyem*, slip op., 2012 WL 92287 (SDNY 2012) (varying)
 - Updated evidence: FPD Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014, at 8-13 (July 15, 2013), available at www.fd.org
- DCT failed to consider minimal amount of force used in sexual abuse case. Life reduced to 180 months on remand.
 - *US v. Cerno*, 529 F.3d 926 (10th Cir. 2008)

Harm

Bipartisan members of Congress, DOJ and the Commission think it would be “just” to cut the punishment for drug offenses by 50-60%:

- SSA would cut 10-year MM by 50%, the 5-year MM by 60%, and direct Comm’n to amend guidelines accordingly.

Relative Harm -- Meth, Crack, MDMA Out of Whack with Heroin

Type of Drug	Number of Users, 2011	Emergency Room Visits, 2011	Emergency Room Visits Per 100,000 Users	Rate of Emergency Room Visits For Users
Heroin	620,000	258,482	41,691	41.7%
Cocaine (crack and powder combined)	3,857,000	505,224	13,099	13.1%
Methamphetamine	1,033,000	102,961	9,967	9.9%
Marijuana	29,739,000	455,668	1,532	1.5%
MDMA/Ecstasy	2,422,000	22,498	928	0.93%

*See U.S. Dep't of Health and Human Servs., Drug Abuse Warning Network, 2011: National Estimates of Drug-Related Emergency Department Visits tbl. 4 (2011), available at <http://www.samhsa.gov/data/DAWN.aspx>; U.S. Dep't of Health and Human Servs., Results from 2011 National Survey on Drug Use and Health, tbl. 1.1A (2011), available at <http://www.samhsa.gov/data/NSDUH.aspx>.

Harm – Fraud GL/Loss

- *Cavera*, 550 F.3d at 192 – invites variance on this basis
- In wire fraud case involving \$3 billion in intended loss, the loss table is “fundamentally flawed” and “valueless.” *United States v. Corsey*, 723 F.3d 366, 377-78 (2d Cir. 2013) (Underhill, D.J., concurring)
- “By making a Guidelines sentence turn on this single factor [loss or gain], the Sentencing Commission ignored [3553(a)] and . . . effectively guaranteed that many such sentences would be irrational on their face.” *US v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012)
- Loss is “a relatively weak indicator of [] moral seriousness . . . or the need for deterrence.” *US v. Emmenegger*, 329 F.Supp.2d 416 (S.D.N.Y. 2004)
- Guidelines fail to “explain[] why it is appropriate to accord such huge weight to such factors,” *US v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006), *aff’d*, 301 Fed. Appx. 93 (2d Cir. 2008)
- “[I]t is difficult for a sentencing judge to place much stock in a guidelines range that does not provide realistic guidance,” *US v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008)
- The “Guidelines were of no help.” *US v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010)

Culpability - Motive, Knowledge, Intent

- **Fraud** – varying from 210-262 months to 60 months based on a variety of factors bearing on culpability and remorse. *US v. Ovid*, 2010 WL 3940724 (E.D.N.Y. 2010)
- Varying from 78-97 months to 24 months where D did not share in monetary gain and behavior was aberrant. *US v. Gupta*, 904 F. Supp. 2d 349 (SDNY 2012)
- **Fake Stash House Robberies** – upholding variance from 235 to 132 months -- agents recruited D to rob a fake stash house of large non-existent drug quantities – “may risk overstating a defendant’s culpability.” *United States v. Briggs*, 397 Fed. App’x 329, 333 (9th Cir. 2010).
** Watch for *en banc* decision in *US v. Kindle* (7th Cir.) – argued April 2013.
- **Stolen or Obliterated Serial Numbers, no mens rea** -- *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011) (reversing for failure to consider lack of mens rea); *United States v. Montague*, No. 09-5542, 2011 WL 4950057 (6th Cir. Oct. 19, 2011) (same)

Culpability - Age

- Young offenders (up to mid-20s) are less culpable than older offenders.
 - *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010)
 - Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Science* 105-09 (2004)
 - Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psych.* 625, 632 (2005)
 - Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report 8* (2005), www.ncjrs.gov/pdffiles1/ojdp/212757.pdf

Prison Can Be Unjustly Punitive

Medical problems BOP will not treat

- U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *The Federal Bureau of Prisons' Efforts to Manage Health Care* (Feb. 2008), <http://www.justice.gov/oig/reports/BOP/a0808/final.pdf>.
 - *U.S. v. Wadena*, 470 F.3d 735 (8th Cir. 2006)
 - *U.S. v. Martin*, 363 F.3d 25 (1st Cir. 2004)
 - *U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000)
 - *U.S. v. Pineyro*, 372 F. Supp. 2d 133 (D. Mass. 2005)
 - *U.S. v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008)

Small, young, elderly inmates subject to abuse, rape, violence in prison

- *No More Math Without Subtraction*, http://www.fd.org/docs/select-topics---sentencing/No_More_Math_Without_Subtraction.pdf

Collateral Consequences Add Retribution on Top of Prison

Loss of profession, reputation, ability to work, family

- *US v. Esso*, 486 F. App'x 200 (2d Cir. 2012)
- *US v. Cole*, 765 F.3d 884 (8th Cir. 2014)
- *US v. Anderson*, 533 F.3d 623 (8th Cir. 2008)
- *US v. Pauley*, 511 F.3d 468 (4th Cir. 2007)
- *US v. Vigil*, 476 F. Supp. 2d 1231 (D.N.M. 2007)
- *US v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004)

- Barrett, Collateral Consequences Resource List, <http://www.fd.org/docs/select-topics---sentencing/Collateral-Consequences-Resource-List-6-1-10.pdf>

General Deterrence -- 3553(a)(2)(B)

Debunk the Myth:

- No amount of imprisonment is necessary for deterrence.
- No difference between probation and imprisonment in deterrent effect.
 - Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) (because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent")
 - Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in *Crime and Justice in America: 1975-2025* (ed. Michael Tonry, 2013)
 - Francis T. Cullen *et al.* *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, *Prison Journal* 91: 48S (2011)
 - Studies Collected in Barrett & Mate, *Using Social Science at Sentencing* (May 2014), available at www.fd.org



NATIONAL INSTITUTE OF JUSTICE

FIVE THINGS

ABOUT DETERRENCE

Deter would-be criminals by using scientific evidence about human behavior and perceptions about the costs, risks and rewards of crime.

1. The certainty of being caught is a vastly more powerful deterrent than the punishment.

Research shows clearly: If criminals think there's only a slim chance they will be caught, the severity of punishment — even draconian punishment — is an ineffective deterrent to crime.

2. Sending an offender to prison isn't a very effective way to deter crime.

Prisons are good for punishing criminals and keeping them off the street, but prison sentences are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.

3. Police deter crime by increasing the perception that criminals will be caught and punished.

The police deter crime when they do things that strengthen a criminal's perception of the certainty of being caught. Strategies that use the police as "sentinels," such as hot spots policing, are particularly effective.

4. Increasing the severity of punishment does little to deter crime.

Laws and policies designed to deter crime are ineffective partly because criminals know little about the sanctions for specific crimes. Seeing a police officer with handcuffs and a radio is more likely to influence a criminal's behavior than passing a new law increasing penalties.

5. There is no proof that the death penalty deters criminals.

According to the National Academy of Sciences, "Research on the deterrent effect of capital punishment is uninformative about whether capital punishment increases, decreases, or has no effect on homicide rates."

Source: Daniel Nagin, "Deterrence in the 21st Century," in *Crime and Justice in America: 1975-2025* (ed. Michael Tonry, University of Chicago Press, 2013).

Drug Offenders

Variations in prison and probation time "have no detectable effect on rates of re-arrest."

"Those assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame."

Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 *Criminology* 357 (2010).

Non-violent drug offenders with little criminal history are deterred by a short prison sentence as well as a long one.

U.S. DOJ, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories*, Executive Summary (Feb. 4, 1994), www.fd.org

Lengthy sentences do not deter drug crime

- Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (2006)
- Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 *J. of Pub. Econ.* 2043, 2043 (2004) (“it is unlikely that the dramatic increase in drug imprisonment was cost-effective”)
- “Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” USSC Fifteen Year Review at 134.
- DEA and FBI reported dealers were immediately replaced. USSC, *Cocaine and Federal Sentencing Policy* 68 (1995)

White Collar and All Offenders

Sentencing Memo in Fraud Case, at 14-15

<http://www.fd.org/docs/Select-Topics---sentencing/James-Client----Fraud-Sentencing-Memo----4-12-11.pdf>

Need for Incapacitation to
Prevent Further Crimes of This
Defendant,
3553(a)(2)(C)

Age

“Recidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50.

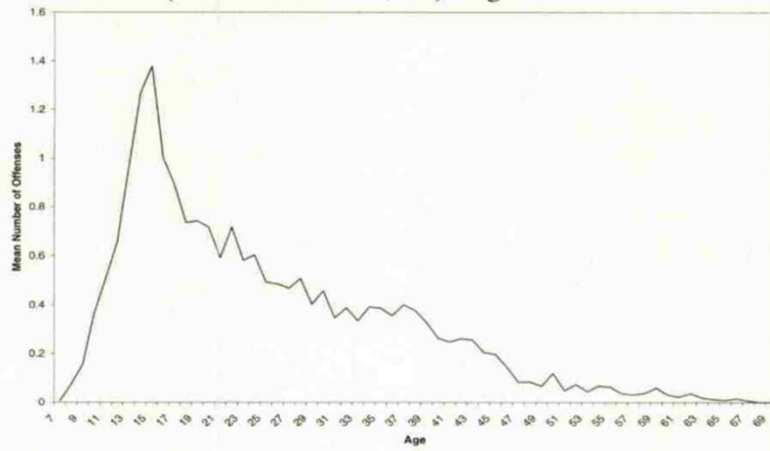
USSC, *Measuring Recidivism* (2004),
http://www.ussc.gov/publicat/Recidivism_General.pdf

(includes less serious SR violations – not all new crimes)

Recidivism Drops Precipitously with Age

Sampson, Robert J. and Laub, John H., *Life-Course Desisters: Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 451 CRIMINOLOGY 555 (2003)

Figure 1 Actual Mean Number of Offenses for Total Crime (Total Events = 9,548): Ages 7 to 70



Young offenders

Reform in a shorter period of time.

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003)

Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993)

Graham, Miller

Other characteristics predicting low risk of recidivism

First Offenders: rate of reconviction for those with 0 points is 3.5%, with 1 point is 5.5%, with 2 or more points is 10.3%

Employment: recidivism rate far less if employed in past year than if unemployed

Education: the more education, the lower the recidivism rate

Family: recidivism lower if ever married even if divorced

Abstinence from drug use: recidivism rate far lower if abstinent for past year than if used drugs

Non-Violent Offenders: fraud, larceny and drug offenders the least likely to recidivate

-US Sent'g Comm'n: *Measuring Recidivism* (2004) ; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 15 (Jan. 4, 2005); *Recidivism and the First Offender* (May 2004)
-Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987* (Aug. 4, 1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf
-Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291 (2001)

Child porn possessors unlikely to be molesters

- **Sample Memorandum in a Child Pornography Case**
 - literature refuting connection between viewing child pornography and likelihood of a contact sex offense against a child
 - <http://www.fed.org/docs/select-topics---sentencing/sample-sentencing-memo-in-child-pornography-case.pdf?sfvrsn=4>
- *US v. Apodaca*, 641 F.3d 1077, 1085-88 (9th Cir. 2011) (Fletcher, J., concurring)

Drug Offenders

Have lower than average rates of recidivism.

- USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“Offenders sentenced in fiscal year 1992 under fraud (16.9%), larceny (19.1%), and drug trafficking (21.2%) are overall the least likely to recidivate”)

“[N]o apparent relationship between the sentencing guideline final offense level and recidivism risk.”

- Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders* (Paper presented at the American Society of Criminology’s annual meeting in Philadelphia Nov. 4, 2009)

Drug Offenders – shorter sentences do not increase risk of recidivism

No statistically significant difference in recidivism rates over five years between offenders released under retroactive 2007 crack amendment and those serving full term.

USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf

Lengthy imprisonment increases recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.

Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Pub. Pol'y* 589, 591-93 (2007)

U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SENTOPT.HTM

Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 *Fed. Sent. Rep.* 22 (1994)

Rehabilitation in the Most
Effective Manner,
3553(a)(2)(D)

Better Ways to Reduce Recidivism

Prison is not rehabilitative. *Tapia v. United States*, 131 S. Ct. 2382 (2011).

“[S]tatistics 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.”

US v. Perella, 273 F. Supp. 2d 162, 164 (D. Mass. 2003) (Gertner, J.) (citing Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 *Hastings L.J.* 1217, 1220 (2002)).

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Drug treatment works and saves money.

- Nat'l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006), http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf
- 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)
- USSC, *Symposium on Alternatives to Incarceration*, at 34 & *Taxman-8* (2008)

Drug treatment in the community works even better.

- Missouri Sent'g Advisory Comm'n, Smart Sentencing, Vol. 1, Issue 4 (July 20, 2009)
- Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 5-6, 18 (2004)
- Steve Aos & Elizabeth K. Drake, Washington State Institute for Public Policy, *Prison, Police, and Programs: Evidence-Based Options that Reduce Crime and Save Money* (Nov. 2013) (findings of meta-analysis available at <http://www.wsipp.wa.gov/BenefitCost>).

Community drug treatment instead of prison

“Where drug addiction of the defendant is causatively intertwined with a violation of the criminal law, every effort should be made to minimize incarceration in favor of a closely supervised, intensive medical treatment regime outside of prison. Outpatient treatment is preferred, permitting the defendant to be more readily integrated into a drug-free productive lifestyle in the community. . . . Every effort should be made to avoid incarceration. According to the experience of this court's probation services and experience of its judges, prison appears to increase the likelihood of: inability to conform to community standards, continued use of drugs to help assuage the pains of failure, ostracism, the risks of complicating psychiatric problems, and the difficulty in obtaining a job.”

United States v. Ilayayev, 800 F. Supp. 2d 417 (E.D.N.Y. 2011)
(Weinstein, J.).

Mental Health Treatment Works

- Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (2007)
- Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), http://www.publicsafety.ohio.gov/links/ocjs_research_briefing7.pdf

Variances to Allow Continued Mental Health Treatment Outside of Prison

- *U.S. v. Duhon*, 541 F.3d 391 (5th Cir. 2008)
- *U.S. v. Polito*, 215 F. App'x 354 (5th Cir. 2007)
- *U.S. v. Crocker*, 2007 WL 2757130 (D. Kan. Sept. 30, 2007)
- *U.S. v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008)

Avoid Unwarranted Disparity/Uniformity, 3553(a)(6)

United States v. Esso, 486 F. App'x 200 (2d Cir. 2012)

- Remanding for resentencing where DCT failed to explain why D received a longer sentence than co-D where D less culpable

United States v. Parris, 573 F. Supp. 2d 744 (E.D.N.Y. 2008)

- Varying from 360 months to 60 months based in part on sentences in other securities fraud cases

United States v. Bradley, 675 F.3d 1021, 1027 (7th Cir. 2012)

- Reversed 169-month upward departure where DCT failed to address cases defendant presented in which conduct was similar but sentences were lower

United States v. Panice, 598 F.3d 426 (7th Cir. 2010)

- reversed where DCT did not consider evidence of sentences in similar cases

Data and Decisions from Other Cases (as above)

- “[D]istrict courts must take account of sentencing practices in other courts,” and “weigh[] [them] against the other § 3553(a) factors and any unwarranted disparity created by the [guideline] itself.” *Kimbrough*, 552 U.S. at 108.
- District court should avoid unwarranted similarities among defendants who are not similarly situated. *Gall*, 552 U.S. at 55.

Unwarranted Disparities Built into the Guidelines

Courts must “take account of . . . any unwarranted disparity created by the [guideline] itself.” *Kimbrough*, 552 U.S. at 108.

Career offender

When career offender GL applies based on drug priors, guideline overstates the risk of recidivism, serves no deterrent or crime prevention purpose, and creates racial disparity. USSC, *Fifteen Year Review* at 133-34.

See also *US v. Newhouse*, 919 F. Supp. 2d 955 (N.D. Iowa 2013)

Rejecting 18:1 powder/crack ratio:

- *United States v. Gardner*, ___ F. Supp. 2d ___, 2014 WL 2106453 (S.D.N.Y. May, 20 2014)
- *United States v. Shull*, 793 F. Supp. 2d 1048 (S.D. Ohio 2011)
- *United States v. Williams*, 788 F. Supp. 2d 847 (N. D. Iowa 2011)
- *United States v. Trammell*, 2012 U.S. Dist. LEXIS 5615 (S.D. Ohio Jan. 18, 2012)
- *United States v. Cousin*, 2012 WL 6015817 (W.D. Pa. Nov. 30, 2012)
- *United States v. Whigham*, 754 F. Supp. 2d 239 (D. Mass. 2010)

Unwarranted Disparity Created by Prosecutors, Agents

Manipulation of the type or quantity of drugs by law enforcement agents

US v. Briggs, 397 F. App'x 329, 332-33 (9th Cir. 2010); *US v. Beltran*, 571 F.3d 1013, 1019 (10th Cir. 2009); *US v. Angelos*, 345 F. Supp. 2d 1227, 1231-32, 1260 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

Targeting minorities for fake stash house robberies

US v. Davis, 766 F.3d 722 (7th Cir. 2014)

Use of guidelines to punish going to trial

US v. Ring, 811 F. Supp. 2d 359 (D.D.C. 2011)

Unfair piling on of consecutive mandatory minimums

US v. Ballard, 599 F. Supp. 2d 539 (S.D.N.Y. 2009); *US v. Angelos*, 345 F. Supp. 2d 1227, 1260 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006)

Disparity Caused by Failure to File Motion Under 5K1.1

- 641 variances for cooperation without §5K1.1 motion.
 - USSC, 2013 Sourcebook, tbls.25, 25A, 25B.
 - *US v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006)
 - *US v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008)
 - *US v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009)
 - *US v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008)
 - *US v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006)
 - *US v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007)

Kinds of Sentences Available By Statute 3553(a)(3)

- Must consider all “kinds of sentences available” by statute, § 3553(a)(3), even if the “kinds of sentence established [by] the guidelines” recommend only prison. *Gall*, 552 U.S. at 59 & n.11
- Probation is a substantial restriction on liberty. *Id.* at 48 & n.4
- Probation authorized for any offense with a statutory maximum below 25 years unless probation expressly precluded. See 18 USC § 3561(a); 18 USC § 3559(a)
- As little as a day in jail + supervised release authorized for others

Congress intended
probation and other alternatives for:

- Drug treatment
- Educational programs
- Vocational training
- Employment skills
- Mental health treatment
- Medical treatment

S. Rep. No. 98-225, at 172-75 (1983)

28 U.S.C. § 994(j)

Guidelines shall “reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a *first offender who has not been convicted of a crime of violence or an otherwise serious offense*”

Prison generally appropriate if “convicted of a crime of violence that results in serious bodily injury.”

What the Commission Did

Deemed all crimes “serious”

Required prison or other confinement for all offenders with a guideline range greater than 0-6 months

See Deconstructing the Commission’s Failure to Provide for Probation and Intermediate Sanctions (<http://www.fd.org/docs/select-topics---sentencing/Deconstructing-the-failure-to-provide-for-probation-and-intermediate-sanctions.pdf>)

Real Sentencing Options

- Community Service – rehabilitative, saves the community money, saves incarceration costs, keeps families together
- Treatment & Job Training - Programs Designed for the Individual
- Fines – can be more punitive than prison
- US Sent’g Comm’n, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SENTOPT.PDF

Policy Disagreement

- Present facts *about* the guideline to show that it
 - was not developed based on empirical data and national experience
 - recommends a sentence greater than necessary to achieve sentencing purposes
- Apart from mitigating case-specific facts, i.e., “even in a mine-run case.”
- If the guideline not based on empirical data and national experience, it is *not* “fair to assume” it achieves sentencing purposes and no possibility of “closer review”

Three points:

- The guideline was not developed by the Commission in its “characteristic institutional role,” i.e., not based on “empirical data and national experience.” *Kimbrough*, 552 U.S. at 109-10.
- The guideline recommends punishment that is greater than necessary to serve the purposes of sentencing under 3553(a)(2) -- apart from any case-specific facts (“even in a mine-run case”).
- Your proposed sentence best serves the purposes of sentencing.

Deconstructing the Guidelines, www.fd.org

Sample Memoranda, Articles, Historical Information, Data

- Career Offender
- Child Pornography
- Drugs – Meth, Oxycodone, Ecstasy
- Firearms
- Fraud
- Immigration
- Mitigating Factors
- Probation
- Relevant Conduct
- Tax

Example

- Sam -- 28 years old – steady work history, drug problem
- Older brother deals powder cocaine
- Sam delivered 2 ounces on one occasion, 1 ounce on another occasion – 84 grams -- isolated incidents, paid \$100 and 1 gram of cocaine
- 5 kilograms allegedly involved in entire conspiracy
- 5 other participants, all involved continuously, shared in profits
- No one used violence or possessed weapons
- One threatened to hurt someone -- turned out to be an informant – for failing to pay for an ounce of cocaine

Criminal History

- 5 points
 - 2 for selling 1 gram of cocaine, 60 days time served, at age 20
 - 1 for driving without a license
 - 2 for committing the instant offense while on probation for the driving offense
- 2 convictions with no points, over 10 years old, at age 18, pled guilty, got probation
 - Simple possession of .5 grams Ecstasy
 - Resisting arrest for that offense

Potential Sentences

- Sam's own conduct – 84 grams cocaine
 - No MM
 - OL 14/CHC III = 21-27 months
- Conspiracy – 5 kg cocaine
 - MM = 10 years
 - OL 30/CHC III = 121-151 months
 - If two 851s = mandatory LIFE

Role

Could get 2-4 points off even if accountable only for own conduct, i.e., 84 grams. USSG 3B1.2, note 3(A)

If 4-level minimal participant reduction, 2 additional points off if:

- Motivated by an intimate or familial relationship or threats or fear
- Received no monetary compensation
- Minimal knowledge of the scope and structure

Charges and Negotiations

- Charged in
 - two counts for delivery of 2 ounces and 1 ounce (totaling 84 grams), 21 USC 841(b)(1)(C)
 - one count for conspiracy to distribute 5 kg., 21 USC 846 & 841(b)(1)(A)
- Threatens to file two 851s based on
 - 8-year-old sale of 1 gram of cocaine
 - Over 10-year-old simple possession of .5 grams Ecstasy

Unless Sam pleads guilty, waives appeal, waives 3582(c)(2) motions, and cooperates against his brother

“should decline to file” 851s

- 1) Not organizer, leader, manager, supervisor
- 2) “the defendant” was not “involved” in a “threat of violence in connection with the offense”
- 3) No “prior history of violent conduct or recent prior convictions for serious offenses”
- 4) No ties to “large-scale drug trafficking organizations, gangs, or cartels”
- 5) Would “create a gross sentencing disparity with ... more culpable co-defendants,” none of whom have two prior convictions for a “felony drug offense”
- 6) Other case-specific mitigating factors – the deliveries were isolated incidents, Sam has a job, a drug problem he is addressing, etc.

“Whether a defendant is pleading guilty is not one of the factors enumerated” in the August 12, 2013 policy instructing prosecutors that they “should decline to seek” an § 851 enhancement.

“should decline to charge quantity”

- 1) D’s “relevant conduct” under 1B1.3(a)(1)(B) does not include co-D’s threat
 - not within the scope of the criminal activity *the defendant* agreed to jointly undertake (i.e., delivery of 3 oz. cocaine), not in furtherance of that activity, and not reasonably foreseeable. 1B1.3, note 2, illustrations (c)(5), (6), (7), (8).
- 2) Not organizer, leader, manager, supervisor
- 3) No ties to “large-scale drug trafficking organizations, gangs, or cartels”
- 4) 5 criminal history points but not “significant” – 2 for “non-violent low-level drug activity,” 1 for driving without a license, 2 for recency

AUSA Complies with Holder Memos

- Sam pleads to a superseding information charging two counts under 21 USC 841(b)(1)(C)
- No agreement on quantity or guideline range
- No cooperation
- PO issues PSR with guideline range of 121-151 months based on 5 kg (level 30)/CHC III

Sentencing Arguments

Litigate Quantity

Sam's "relevant conduct" includes only the 84 grams he delivered

No evidence additional quantities sold by his brother and others were within the scope of the criminal activity *the defendant* agreed to jointly undertake (i.e., delivery of 84 g. cocaine), in furtherance of that activity, or reasonably foreseeable to him.

See USSG 1B1.3, note 2, illustration (c)(5); *United States v. Getto*, 729 F.3d 221, 234 & n.11 (2d Cir. 2013).

Undermine the Guideline

“In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. . . . The Commission did not use this empirical approach in developing the Guidelines for [all] drug-trafficking offenses. Instead, it employed the 1986 Acts’ weight-driven scheme.”

Kimbrough v. United States, 552 U.S. 85, 96 (2007).

Congress Intended the Weight-Driven Scheme to Apply to “Major” and “Serious” Traffickers at the 5 and 10-year MM Levels

But MMs “apply in large numbers to every function in a drug organization” including those like Sam:

- 23% of all drug offenders are couriers, half of them are charged with a MM
- street level dealers -- largest category subject to a MM who get no safety valve or substantial assistance relief

Commn Testimony at 5; 2011 Mand Min Report at 168-69.

Even *worse* under the guidelines -- 93% of drug offenders receive no aggravating role adjustment, USSC, 2013 Sourcebook, tbl. 40, but *all* are subject to guidelines tied to mandatory minimums intended for “major” and “serious” drug traffickers.

“The Commission should ‘de-link’ the drug trafficking Guidelines ranges from the ADAA's weight-driven mandatory minimum sentences and use its resources, knowledge, and expertise to fashion fair sentencing ranges for drug trafficking offenses.” US v. Diaz, 2013 WL 322243 at **1, 18 (E.D.N.Y. 2013) (Gleeson, J.).

“[T]he Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute.” Letter from the Committee on Criminal Law of the Judicial Conference of the United States to the U.S. Sentencing Comm'n (Mar. 16, 2007).

Drugs Minus 2 Not Enough

At the outset, Comm’n added 2 levels *above* MM thresholds to induce defendants to “plead guilty or otherwise cooperate with authorities.” U.S. Sent’g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 148 (1995).

“[S]etting the base offense levels above the mandatory minimum penalties is no longer necessary” Amend. 782, App. C, Reason for Amendment (Nov. 1, 2014).

Drugs Minus 2 Not Enough

- Bipartisan members of Congress, DOJ, and the Commission all support the Smarter Sentencing Act.
- which would direct Commn to amend guidelines to “reflect the intent of Congress that such penalties be decreased in accordance with the amendments made by section 4 of this Act.”
- That is, cut the drug guidelines by 50-60%.

What Other Judges Are Doing – Powder Cocaine Offenses – USSC Interactive Sourcebook

	National % FY 2012	2d Circuit % FY 2012	NDNY % FY2012
Within	43.8%	25.8%	29.6%
Above	1%	0%	0%
Non-gov sponsored below	19.8%	42.8%	22.2%
Gov-sponsored below	35.4%	31.4%	48.1%

Purpose of Sentencing #1: Just Punishment Based on Seriousness of Offense (Retribution)

Enough Retribution Under the Smarter Sentencing Act

Quantity – Powder Cocaine	BOL/Range in CHC I/applicable MM if any	
	11/1/14 (with Drugs-2)	SSA
at least 5 kg. but < 15 kg.	30 97-121 months 10-year MM	24 51-63 months 5-year MM
at least 3.5 kg. but < 5 kg.	28/78-97 months	22/41-51 months
at least 2 kg. but < 3.5 kg.	26/63-78 months	20/33-41 months
at least 500 g. but < 2 kg.	24 51-63 months 5-year MM	17 24-30 months 2-year MM
at least 400 g. but < 500 g.	22/41-51 months	15/18-24 months
at least 300 g. but < 400 g.	20/33-41 months	13/12-18 months
at least 200 g. but < 300 g.	18/27-33 months	11/8-14 months
at least 100 g. but < 200 g.	16//21-27 months	9/4-10 months
at least 50 g. but < 100 g.	14/15-21 months	7/0-6 months

SSA Range in Sam's CHC III

- 5 kg
 - OL 24 in CHC III = 63-78 months
- 84 grams
 - OL 7 in CHC III = 4-10 months

Individual Culpability

Sam was an addict whose motive was to make a gram of cocaine and \$100, do his brother a favor, not greed.

Purpose of Sentencing #2: General Deterrence

Increased sentence lengths do not deter drug crime – see research above

Purpose of Sentencing #3: Incapacitation to Protect Public from Further Crimes of this Defendant

- Sam has minor criminal history, drug-free for a year, successful treatment, working – all predict low risk of recidivism
- Drug offenders have a relatively low risk of recidivism – see research above
- Prison sentences for low-risk drug offenders increase recidivism – see research above

Purpose of Sentencing #4: Treatment and Training in Most Effective Manner

- BOP cannot provide treatment to many who want it. U.S. Government Accountability Office, Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure 20-21 (Sept. 2012), <http://www.gao.gov/assets/650/648123.pdf>
- Community treatment programs for offenders on probation or supervised release offer better options and access to drug treatment than a lengthy prison sentence.
 - Nat'l Center on Addiction and Substance Abuse, *Behind Bars II: Substance Abuse and America's Prison Population*. P. 40, tbl. 5-1
- See research and caselaw above.

Appropriate Sentence

- Starting point based on SSA: 4-10 months, or 63-78 months if judge erroneously finds 5 kg. relevant conduct
- Emphasize mitigating circumstances relevant to the purposes of sentencing:
 - Not a drug dealer, steady work history
 - Became addicted
 - Successfully undergoing treatment, working while on pretrial release
- Probation available if you convinced prosecutor not to charge quantity -- stat max < 25 years under 841(b)(1)(C)

Prosecutor Refuses to Comply with Holder Policy

- Move to strike 851s, quantity allegation
 - DPC, Eighth Amendment
 - before trial and again before sentencing
- Appeal
- Petition for Certiorari
- Habeas

Sam declines to cooperate against his brother.

AUSA charges 5 kg. quantity and files two 851s.

If convicted of the conspiracy count, Mandatory LIFE

Motion to Strike Creates a New Opportunity for the Prosecutor to Comply

Before and after trial:

Aug. 29 Holder Memo:

- If D already convicted and jury found drug quantity – AUSA “generally should not seek relief,” but “nevertheless,” discretion in an “unusual case” in “the interest of justice” such as
 - went to trial to contest a MM that would not be charged under this policy, or
 - to assure consistent treatment of co-Ds in same or closely related cases
- Whether pled guilty or convicted at trial, prosecutors are “encouraged” to “consider” withdrawing 851s before sentencing

Due Process Challenge

- North Carolina v. Pearce (1969)
 - presumption of vindictiveness when judge imposes higher sentence after D successfully appeals conviction
- Blackledge v. Perry (1974)
 - presumption of vindictiveness when prosecutor charges a felony in superior court after the defendant is convicted of a misdemeanor in inferior court
- Bordenkircher v. Hayes (1978)
 - “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort,” and “patently unconstitutional.”
 - *But* no presumption of vindictiveness when prosecutor carries out a threat made during plea negotiations to re-indict on more serious charges if D does not plead guilty to offense charged
 - Assumes level playing field in “give and take” of plea bargaining
 - *But* not LWOP – was eligible for parole after 6 years

Due Process Challenge

Kupa, 976 F. Supp. 2d at 421 & n.12:

Constitutionality of prosecutors' use of 851s "is not a foregone conclusion"

In *Bordenkircher v. Hayes*, the Supreme Court "held that the due process clause ... does not prohibit a prosecutor from carrying out a threat to re-indict a defendant on a more serious charge if he declines an offered plea bargain.... **In that context a jury, which must pass on whether the added charge has been proved beyond a reasonable doubt, acts as a check on the prosecutor's decision to punish the defendant for not pleading guilty ...**

But when the punishment takes the form of filing a prior felony information, there is no such check. The prosecutor unilaterally ratchets up the punishment, with no possibility that either a jury or a judge will act as a brake on that authority....

And ... the filing of a prior felony information is in tension with *Bordenkircher's* admonitions that '[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort,' and ... 'patently unconstitutional.'"

United States v. Goodwin (1982)

- D charged with misdemeanors, advised prosecutor he would go to trial, prosecutor indicted for a felony, convicted
- In pretrial context, no presumption of vindictiveness because supposedly “unlikely” prosecutor “would respond to a defendant’s pretrial demand for a jury trial by bringing charges not in the public interest.” Id. at 384.
- BUT defendant “might prove objectively that the prosecutor’s charging decision was motivated by a desire to punish him for doing something the law plainly allows him to do.” Id. at 384 & n. 19; see also id. at 380 nn. 11-12, 382.

How to Prove it

- Document all negotiations in emails, letters, notes of conversations.
- Prepare chronology.
- LWOP is excessive in light of Sam’s culpability, and does not further any other purpose of sentencing, and
- Since Sam is the non-violent, low-level offender to whom the Holder policy applies, prosecutor seeks this sentence for one reason: as punishment for doing what the law plainly allows him to do – decline to cooperate and plead guilty.
- No check on the prosecutor’s choice to charge 851s – no jury

United States v. Jones, 08–CR–887 (M HP)
(N.D.Cal. Apr. 29, 2010), ECF No. 206

Govt threatened to file 851 to increase 10 year MM to 20 year MM if Jones sought pretrial release, moved for discovery, to suppress evidence, or dismiss indictment, did not plead guilty, or did not cooperate.

Jones failed to comply and moved to strike the 851.

Judge struck the 851 as a violation of due process: prosecutor ignored that the “purpose of [his] discretion is ‘to determine the societal interest in prosecution.’” (citing *Goodwin*, 457 US at 382.

United States v. Ross, 6:03-cv-729-
Orl-22GJK (M.D. Fla. July 11,
2013)

“The prosecutor who handled this case from indictment through sentencing vindictively filed the § 851 enhancement because Petitioner asserted her constitutional right to trial by jury.”

“Attorney General Holder addressed the undersigned and her colleagues at [a recent] conference, stating that it was his objective to have fewer defendants serving [long] sentences in the federal system. The Government’s decision to seek a § 851 enhancement in cases, like this, suggests that his prosecutors disagree.”

Eighth Amendment

As Applied to This Defendant

- Discretionary LWOP for seventh nonviolent felony, passing a worthless check – unconstitutional. *Solem v. Helm* (1983).
- Mandatory LWOP for possessing more than 650 grams of cocaine, first offense – constitutional. *Harmelin v. Mich* (1991).
- Discretionary 25 years to life for shoplifting golf clubs after first degree robbery with a knife and two burglaries 10 months after paroled – constitutional. *Ewing v. Ca* (2003).

Categorically Unconstitutional

- Mandatory death for adult homicide
- Any death for adult nonhomicide, low culpability felony murder, mentally retarded
- Mandatory LWOP for juvenile homicide – *Miller* (2012)
- Any LWOP for any offense in which juvenile did not kill or intend to kill (armed robbery) - *Graham* (2010)

Is LWOP Disproportionate to Culpability As Applied to Sam, or Whole Class of Nonviolent Drug Offenders?

8th Amend. prohibits mismatch between punishment and culpability

Prohibits punishment once diminished relative to the death penalty (i.e., LIFE) from being imposed in a case of twice or more diminished culpability relative to adult homicide.

Compared to adult murderer (death is permissible), juvenile who did not kill or intend to kill has twice diminished culpability because of age and nature of crime (LWOP not permissible). *Graham*.

Likens LWOP to Death Penalty, Thus Requiring Individualized Sentencing

LWOP is “the second most severe penalty permitted by law.”
Graham, 130 S. Ct. at 2027.

But “share[s] some characteristics with death sentences that are shared by no other sentences,” i.e., irrevocable, deprives of liberty without hope of restoration regardless of good behavior and character improvement. *Id.*

Miller goes further: “view[s] this ultimate penalty for juveniles as *akin* to the death penalty.” 132 S. Ct. at 2466.

This “correspondence” makes “relevant” the Eighth Amendment decisions requiring individualized sentencing when the government seeks to impose its “harshest penalties,” i.e., death penalty or LWOP. *Id.* at 2467, 2468.

Finds Mandatory LWOP is the de facto most severe punishment for adults

- Mandatory LWOP is *more* severe than discretionary LWOP. *Miller*.
- Mandatory LWOP is the *de facto* most severe punishment for adults.
 - “Although adults are subject as well to the death penalty in many jurisdictions, *very few offenders actually receive that sentence*. So in practice, the sentencing schemes at issue here result in juvenile homicide offenders receiving *the same nominal punishment as almost all adults*, even though the two classes differ significantly in moral culpability and capacity for change.” *Miller*, 132 at 2468 n.7

OFFENSE	PERMISSIBLE SENTENCE/ IMPERMISSIBLE SENTENCE
Adult Homicide	Discretionary Death permissible/Mandatory death not permissible
Adult Homicide -- mentally retarded, low level felony murder accomplice	Life/Death not permissible
Adult Non-Homicide	?? permissible/Death not permissible
Adult Violent Non-Homicide Offense (Harmelin)	Mandatory LWOP permissible/Death not permissible
Adult – 7th non-violent felony (Solem)	Less than LWOP permissible/ Discretionary LWOP not permissible
Adult non-violent offense (shoplifting) with long serious record (Ewing)	Discretionary 25 years to life permissible/?? impermissible
Juvenile Homicide with Intent to Kill (Miller)	Discretionary LWOP permissible/Mandatory LWOP not permissible
Juvenile non-homicide (Graham – armed robbery)	Less than LWOP permissible/ LWOP not permissible

Graham's culpability was twice diminished – once for age, once because he did not kill or intend to kill

Culpability of nonviolent drug offender like Sam is three times diminished:

1. Once because he did not kill or intend to kill -- Even "other serious violent offenses" like robbery or rape differ from homicide crimes because they do not take life. *Graham*, 130 S. Ct. at 2027.
2. Once because there was no injury, violence, or threat of violence. "[N]onviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem v. Helm*, 463 U.S. 277, 292-93 (1983).
3. Once because he was a low-level accomplice/minimal role. *Enmund*.

Sam's criminal history does not offset the mismatch.

- minor, nonviolent, remote (8 and over 10 years old)
- Unlike *Ewing* -- "long, serious criminal record," numerous "offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior 'strikes' were serious felonies including robbery [with a knife] and residential burglary," and the instant shoplifting attempt only 10 months after paroled for the burglaries and robbery.
- Like *Solem* – While state is justified in punishing a habitual offender more severely than a first offender, Helm's prior felonies were all nonviolent and none a crime against a person. 463 US at 296-97.

Harmelin's view of drug crimes as inherently violent is not correct, no longer accepted

Possession of 650 grams of cocaine is "as serious and violent as the crime of felony murder without specific intent to kill." 501 U.S. at 1002-04 (Kennedy, J., concurring)

1991 -- violent crime rate was high, believed caused by crack

2014

- Drug trafficking is not inherently violent per Attorney General, Bipartisan members of Congress, Commission
- 82% of federal powder cocaine offenders have no weapon involvement. See 2013 Sourcebook, tbl. 39

Sam had no weapon and engaged in no violence.

Miller prohibits LWOP for juveniles on a *mandatory* basis because the risk of disproportionality in individual cases is too high

The "correspondence" between LWOP and the death penalty make "relevant" the line of Eighth Amendment decisions requiring individualized sentencing when the government seeks to impose its "harsh penalties." *Miller*, 132 S. Ct. at 2467, 2468.

Just like the factors in *Miller* (culpability based on age and harm done by the offense), role (culpability) and quantity (harm) in drug cases are fact intensive and case-specific, with profound implications for culpability that would render LWOP disproportionately severe in many cases.

Quantity and Role

Quantity is a poor proxy for role. U.S. Sent'g Comm'n, Mand Min Report at 168 (2011).

In this case

- 5 kg. quantity charged for whole conspiracy v. 84 grams Sam actually delivered
- Role was minor even in the delivery of 84 grams, minimal in the entire 5 kg.

Ask judge to make findings:

- relevant conduct is 84 grams
- minor participant in the two deliveries of that amount
- minimal participant in the entire conspiracy
- Not overriding jury's finding or potential finding of 5 kg. because conspiracy liability is broader than "relevant conduct." See USSG 1B1.3, note 1; *United States v. Getto*, 729 F.3d 221, 234 & n.11 (2d Cir. 2013).

Disproportionate according to the Pope

"All Christians and people of good will are thus called today to struggle not only for abolition of the death penalty, whether it be legal or illegal And this, I connect with life imprisonment. Life imprisonment is a hidden death penalty."

Catholic News Service, October 22, 2014,
<http://www.catholicnews.com/data/stories/cns/1404377.htm>

Disproportionate according to the Attorney General

A proportionate sentence would be one with no mandatory minimum based on quantity and no 851 enhancements.

See Holder Memo (Aug. 13, 2013); Holder Memo (Aug. 29, 2013)

Charging policy meant to ensure drug offenders “receive sentences better suited to their individual conduct rather than excessive prison terms more appropriate for violent criminals or drug kingpins.” *Smart on Crime*.

Disproportionate according to Judges and Policy Analysts

Prosecutors use 851 enhancements to punish defendants for exercising their right to trial or declining to cooperate with sentences “that *no one* – not even the prosecutors themselves – thinks are appropriate.” *Kupa*, 976 F. Supp. 2d at 420.

See also Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 5, 2013); *Young*, 960 F. Supp. 2d at 904.

Disproportionate according to Sentencing Commission

Congress should reduce “both the severity and scope” of 851s because apply too broadly, i.e., to minor offenses, as in this case.

2011 Mand Min Report at 352-53, 368

Pew, America’s New Drug Policy Landscape
(Apr. 2, 2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/>

- 63% of people surveyed in 2014 say the shift away from mandatory sentences for nonviolent drug offenses is a “good thing,” up 17% from 2001
- 32% say it’s a “bad thing,” down 13% since 2001

Is mandatory LWOP justified by any other purpose of sentencing?

Severity does not deter crime.

- National Institute of Justice (July 2014), <https://ncjrs.gov/pdffiles1/nij/247350.pdf>
- Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research (2006)
- Green & Winik, Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders, 48 Criminology 357 (2010)
- U.S. DOJ, An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories, Executive Summary (Feb. 4, 1994), www.fd.org.

Justified by any other purpose of sentencing?

- Incapacitation?
 - Drug offenders have lower than average rates of recidivism. USSC, Measuring Recidivism 13 (2004).
- Rehabilitation?
 - LWOP “foreswears altogether the rehabilitative ideal.” *Miller*, 132 S. Ct. at 2465.

Objective Indicia of Evolving Standards of Decency

Sentences authorized for crimes as or more serious in same jurisdiction (federal)

Sentences authorized for same crime in different jurisdictions (states)

Actual Practice – how often it is actually used

Miller, 132 S. Ct. at 2469, 2471 n.10; *Solem*, 463 U.S. at 292.

All Other Federal Crimes Subject to Mandatory Life Are More Serious

- First degree murder
- Piracy resulting in death
- Unlawful seizure of aircraft resulting in death
- Violation of prohibitions governing atomic weapons resulting in death
- Murder in correctional facility by inmate sentenced to life or by an inmate who escaped from Federal prison
- Causing death in the commission of murder-for hire
- Killing the President, Vice President, or anyone employed in the Exec Office of President or Vice President
- Killing poultry or meat inspectors on account of official duties
- Killing or first degree murder of horse official
- Serious violent felony resulting in death of a child under 14
- Murder of a child under 18 under particular circumstances
- Second or subsequent sex act with child under 12, or by force with child 13-15
- Federal sex offense against a minor with prior conviction of sex offense against minor
- Killing a person to prevent testimony, communication with law enforcement, or with intent to tamper with a witness, victim, informant
- Obstructing justice by using or attempting to use physical force against another, or by tampering with witness, victim, or informant

- Variola virus, resulting in death
- Genocide
- Violation of prohibitions governing missile systems designed to destroy aircraft or radiological dispersal devices, if death results
- Aircraft piracy if death results
- Defined offense aboard aircraft and death results
- Piracy under the law of nations, by a citizen, against US by alien, by assault on commander, by robbery ashore
- Hostage taking resulting in death
- Wrecking a train carrying nuclear waste resulting in death
- Bank robbery if death results
- Kidnapping
- Second or subsequent 924(c) and firearm is machinegun, destructive device, or equipped with silencer
- 18 USC 3559(c) - convicted of "serious violent felony" and previously convicted of 2 or more "serious violent felonies" or one or more "serious violent felonies and one or more serious drug offenses"
- Drug trafficking with 851 and use of the drug was the but for cause of death or serious bodily injury
- Kingpin of continuing criminal enterprise

FAMM: <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>

USSC:

http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Appendix_A.pdf

Rarely Permitted Under State Law

- Only 12 states authorize LWOP for drug-only offenses
- Only 8 of those are *mandatory*, and in one of those the judge has discretion to depart if finds unconstitutionally excessive.
- Appendix -- Michael O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 Mo. L. Rev. 1087 (2014)
- "Federal sentences should be no stricter than state sentences for the same crime." Michael J. Zydney Mannheim, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 74 (2012).

Used Infrequently and Quixotically (Miller, 2471 n.10)

- “widely divergent practices” among districts that are “particularly acute” with respect to filing notices under 851. Commn Test. at 3-4; 2011 Mand Min Report at 255, 267, 352-53.
- *United States v. Young*, 960 F. Supp.2d 881 (N.D. Iowa 2013) (Bennett, J.)
 - analyzes USSC data re who is eligible v. who receives an 851 in different districts and circuits -- “jaw-dropping, shocking disparity” in the use of § 851s across districts
- 851s filed in only 26% of cases in which D was eligible. Human Rights Watch Report at 110

Legislative Inadvertence

Graham overturned the law of 39 jurisdictions and Miller of 29 jurisdictions because the legislation reflected inadvertence rather than deliberate choice.

JLWOP in these jurisdictions “does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration” because they allow juveniles to be transferred to adult court, but do not have separate penalty provisions for those juvenile offenders. *Miller*, 132 S. Ct. at 2473.

Compare Harmelin, 501 U.S. at 1007-08 (“recent enactment calibrated with care, clarity, and much deliberation to address a most serious contemporary problem”); *Ewing* (“deliberate policy decision”).

Legislative Inadvertence

“Congress bypassed much of its usual deliberative legislative process” in enacting mandatory minimums ranging from five years to life in the ADAA of 1986.

US Sent’g Comm’n, 2011 Mand Min Report, at 23-24.

Legislative Inadvertence in setting quantities for “kingpins” under 841(b)(1)(A)

Intended to apply to “kingpins” but

- 48.7% of all drug offenders subject to 10-year MM but only 3.1% were actually organizer/leaders
- “not a strong correlation” between quantity thresholds and actual roles
- “the quantity of drugs involved in an offense was not closely related to the offender’s function in the offense”
- US Sent’g Comm’n, 2011 Mand Min Report at 168-69, 261, 262, Appendix, Fig. D-2.

Legislative Inadvertence in the use of 851s to punish nonviolent drug offenders for declining to plead guilty and cooperate

- Until 1970, prosecutors were required by statute to file an information whenever D had a prior conviction for federal drug trafficking: MM 5 years for first offense, MM 10 years for all subsequent convictions.
- DOJ and DEA told Congress prosecutors reluctant to prosecute because “too severe in relation to the culpability of the user and the dangers of the drug,” manslaughter “draws a lesser penalty than ... smuggl[ing] marijuana”
- Asked Congress to give prosecutors discretion so they could use it only for “professional criminals”
- 1970: Congress not only made 851 discretionary as DOJ requested, but also replaced the minimum with an increase only in the stat max

- 1986 ADAA established the 10, 20 and life MMs if prior convictions for a “felony drug offense”
- Left 851 as is with the understanding that prosecutors would continue to exercise their discretion to file only for “professional criminals”
- 1989 to 2010: DOJ directed prosecutors to use 851s to threaten and punish Ds who were not “professional criminals” for failure to plead guilty or cooperate:
 - 1989 – Thornburgh memo -- “charge the most serious, readily provable offense”
 - 1992 – Memo from DAG – “must file” an 851 information if readily provable
 - 2003 – Ashcroft memo – “strongly encourage” prosecutors to file 851s in every case, but may “forego” in a written plea agreement to give “incentive to plead guilty”

Kupa, 976 F. Supp.2d at 423-30.

International Legal Norms

ACLU, *A Living Death: Life without Parole for Nonviolent Offenses* at 200-06 (2013)

Most European nations have rejected LWOP and those that permit the sentence use it quite sparingly. Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 *FED. SENT. REP.* 39, 40-44 (2010).

In July 2013, the Grand Chamber of the European Court of Human Rights ruled in *Vinter v. United Kingdom* that:

- **In the context of a life sentence**, Article 3 [of the European Convention on Human Rights, barring “inhuman or degrading treatment or punishment”] must be interpreted as **requiring reducibility of the sentence**, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that **continued detention can no longer be justified on legitimate penological grounds**.
- Contracting states **may impose life sentences on adult offenders for “especially serious crimes such as murder,” “particularly [if] such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case.”**

[2013] Eur. Ct. H.R. 645, ¶119.

Sentencing Resources – www.fd.org

- Sentencing by the Statute
 - Important Overview and Information on Sentencing Purposes, Variances, Probation, How to Determine Past Practice Sentence, Deconstruction
- Continuing Struggle for Just, Effective and Constitutional Sentencing After Booker
- No More Math Without Subtraction, [Part IV](#)
 - Empirical Research, Statistics, and Caselaw on numerous mitigating factors
- Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation (Nov. 2011)
- Appellate Decisions After *Gall*
- Hemingway & Hinton, Departures and Variances - Outline of Caselaw on Variances and Departures (2009)
- *Using Social Science at Sentencing* (May 2014)
- Caselaw: Judges Are Free to Disagree with Any Guideline
- Sample Memos, Articles: Deconstructing the Guidelines, <http://www.fd.org/navigation/select-topics-in-criminal-defense/sentencing-resources/subsections/deconstructing-the-guidelines>