

GROUNDHOG DAY What's New in White Collar Sentencing?

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October 1, 2010

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GROUNDHOG DAY What's New in White Collar Sentencing?

A whole lot!

- Section 3553(a) now rules
- Guidelines merely advisory

Courts Must Consider All Mitigating Factors, and Ignore Contrary Policy Statements

- *Rita v. United States*, 551 U.S. 338, 357 (2007)
 - Judge may conclude policy statements “fail to treat the defendant’s characteristics in the proper way”
- *Gall v. United States*, 552 U.S. 38, 50 n.6, 56-60 (2007)
 - 3553(a)(1) is a “broad command to consider . . . the history and characteristics of the defendant”
 - Approved variance based on factors the policy statements deem “not” or “not ordinarily relevant” for departure

Courts Must Consider All Kinds of Available Sentences, May Ignore Zones

- 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 authorized for any offense with a statutory maximum below 25 years unless probation expressly precluded. See 18 USC § 3561(a); 18 USC § 3559(a).

Courts May Reject Guidelines That Lack Empirical Basis and That Recommend Punishment Greater Than Necessary

- *Rita*, 551 U.S. at 351, 357
 - Judge may find the “Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” or “reflects an unsound judgment”
- *Kimbrough v. United States*, 552 U.S. 85, 101 (2007)
 - “courts may vary [from Guideline ranges] 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.”

Guidelines One Dimensional – UP!

- Constructed solely of aggravating factors said to reflect “harm”
 - Loss + Enhancements
- Fail to reflect differences in degree of intent, motive, capacity, small effect for role
 - “wide variety of culpability” among Ds with same amount of \$\$ US v. Cavera, 550 F.3d 180, 192 (2d Cir. 2008) (en banc)

But Seriousness of Offense = Harm + Culpability

1. Nature and Seriousness of Harm
2. Offender’s Degree of *Blameworthiness*, e.g.,
 - Mens rea
 - Motive
 - Role
 - Mental illness
 - Other diminished capacity

Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005)

Guidelines do not address, or affirmatively reject, other § 3553(a) purposes and factors

- No attempt to reflect “need” for deterrence, incapacitation, rehabilitation
- Mitigating factors required to be considered under § 3553(a)(1) are prohibited or discouraged as grounds for “departure”
- “Kinds” of sentences permitted by statute other than prison, § 3553(a)(3), generally not recommended

GUIDELINES = MATH WITHOUT SUBTRACTION.

Avoid Guideline-Centric Analysis, Refocus to § 3553(a)

- Describe all mitigating facts about offense and offender. 3553(a)(1)
- Explain why the sentence you seek, based on those facts, is SBNGN to satisfy sentencing purposes, 3553(a)(2)
- Explain why probation, home detention, or split sentence is appropriate, 3553(a)(3)
- Calculate guideline range, low as possible, 3553(a)(4)
- Attack “correct” guideline range if appropriate
- Use avoidance of unwarranted disparity to your advantage, 3553(a)(6).

Important Overview And Information

Baron-Evans & Coffin, Sentencing by the Statute, www.fd.org, Sentencing Resource page.

Calculating Loss

- actual vs. intended (one or the other)
- reasonably foreseeable and within scope of D’s agreement
- “credits” and other ways to mitigate loss
- estimating loss
- gain as an alternative measure
- lessons from securities cases on causation — Rutkoske, 506 F.3d 170 (2d Cir. 2007); Olis, 429 F.3d 540 (5th Cir. 2005)

How to Attack the “Correct” Guideline Range

Rationale

Two reasons it may be “fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve §3553(a)’s objectives.” *Rita*, 551 U.S. at 350.

1. Original Comm’n used “empirical approach” to develop initial guidelines, beginning “with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past.”
2. Guidelines *can* “evolve” in response to judicial decisions, sentencing data, criminological research, and consultation with experts and *all* stakeholders (not just DOJ).

Rita, 551 U.S. at 349-50.

But ...

- “Notably, not all of the Guidelines are tied to this empirical evidence.” *Gall*, 552 U.S. at 46 n.2.
- When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it “yields a sentence ‘greater than necessary’ to achieve §3553(a)’s purposes, even in a mine-run case.” *Kimbrough*, 552 U.S. at 109-10.

Guidelines are not actually based on past practice.

- Did not include probationary sentences in estimating average past sentence length, or in making probation available
 - 38% of all sentences in 1984 were probation; now about 7%
- Prohibited or deemed “not ordinarily relevant” offender characteristics always considered in the past
- Required increases for acquitted and uncharged crimes (“relevant conduct”) at same rate as if charged and convicted

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“Significantly More Severe” than Past Practice

Initial guidelines “significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts.”

- White collar offenses
- Drug trafficking
- Crimes of violence

USSC, *Fifteen Years of Guidelines Sentencing* at 47 (2004),
http://www.ussc.gov/15_year/15year.htm.

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Comm’r Breyer explains ...

- Deviations from past practice were result of “‘trade-offs’ among Commissioners with different viewpoints.”
- Some complain white collar guidelines “too harsh,” but
 - “once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad” and the “resulting compromises do not seem too terribly severe.”
- Guidelines will “evolve” based on information from actual practice – i.e., departures.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-20, 23 (1988).

“Evolved” in a One-Way Upward Ratchet

Amended in a “one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules.”

Why?

- Judicial departures choked off by Comm’n and appeals courts
- DOJ and allies in Congress controlled amendment process
 - congressional directives, threats, pressure

Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

White Collar Guidelines Driven By Politics, Not Expertise.

- 1989 increases “overtly political and inexpert.”
 - Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27Am. Crim. L. Rev. 289 (1989).
- 2003 increases due to intense pressure from DOJ and Congress.
 - Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373 (2004).

Past Practice v. Today’s White Collar Guidelines

	Past Practice*	2009 Guidelines
Fraud Sophisticated, \$1 million	18-24 months/ 18% probation	46-57 months +
Embezzlement Sophisticated, \$1 million	27-33 months/ 3% probation	41-51 months +
Bribery \$100,000	4-10 months/ 29% probation	51-63 months
Tax Evasion \$100,000	10-16 months/ 22% probation	33-41 months

Source of “past practice” from previous slide

- USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), Table 1(a), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.
- See also *id.*, Table 1(b).
- For how to use Supplementary Report, see *Sentencing by the Statute* at pp. 36-45, www.fd.org, Sentencing Resource page.

Loss not a good measure of offense seriousness

- Amount of loss is often “a kind of accident” and thus “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).
- The “Sentencing Guidelines . . . in an effort to appear ‘objective,’ tend to place great weight on putatively measurable quantities, such as . . . the amount of financial loss in fraud cases, without, however, explaining 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).

Relevant Conduct Makes It Worse

- John Steer, former Commissioner and co-author of “Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines,” says in Sept. 08 Champion interview:
 - uncharged conduct “is the aspect of the guideline that I find most difficult to defend.”
 - acquitted conduct should not be used to calculate range.
- Deconstructing Relevant Conduct, www.fd.org/pdf_lib/relevant%20conduct2.pdf

Factor Creep Piles It On

- Cumulative and overlapping increases – added in response to congressional directives with no empirical evidence.
- Comm'n recognizes problem of "factor creep." See USSC, Fifteen Year Review at 137, http://www.usssc.gov/15_year/15year.htm
- "This precision is false." Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180 (Jan./Feb. 1999)
- So, judge should vary or depart.
 - *US v. Lauersen*, 362 F.3d 160 (2d Cir. 2004)
 - With 6 additional SOCs, "the calculations under the guidelines have so run amok that they are patently absurd on their face." *US v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006)

Mythical Deterrence Rationale

- Original Commission -- "the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these [economic] crimes, particularly when compared with the status quo where probation, not prison, is the norm." USSG, ch. 1, intro., pt. 4(d) (1987).
- Abandoned "short" but "definite"
- All empirical research shows longer sentences do not deter. Baron-Evans & Coffin, *Sentencing by the Statute* at 7-10.
- White collar offenders – no difference in deterrent effect of prison v. probation. See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995)

Judges say ...

- "Although, as a general rule, the amount of loss or damage is one measure of the seriousness of an offense . . . it is not always a reliable proxy for the culpability of an individual defendant."
 - *United States v. Lenagh*, 2009 WL 296999, *3-4, 6 (D. Neb. Feb. 6, 2009).
- Heavy focus on loss and "one-size-fits-all approach for its number of victims, [and] officer/director and manager/supervisor enhancements" provide no sensible guidance.
 - *United States v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008).

- The "Guidelines were of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment."
 - *United States v. Watts*, ___ F. Supp. 2d ___, 2010 WL 1676439 (D. Mass. 2010).

Judges nearly unanimous ...

- "Since *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in corporate fraud cases] and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives."

Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008).

Jurors say ...

- Mail Fraud
 - GL range -- 37-46 months
 - Juror average – 7 months
- Perjury
 - GL range -- 21-27 months
 - Juror average – 2 months

Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harvard Law & Policy Review 173 (2010).

So Attack the Guideline

- Map out past practice sentence, initial guideline sentence, current guideline range, and amendments in between
- Reason for Amendment? No Reason, or Reason is Not Empirical, such as followed or exceeded a Congressional Directive
- USSC Studies and Admissions Showing Problems with the Guideline Never Addressed, e.g.,
 - Offender Characteristics Predict Reduced Recidivism but are prohibited or discouraged
 - Fraud “Factor Creep”
- Criminological Studies showing
 - Long Sentences Do Not Deter
 - Long Sentences Increase Recidivism, Interfere with Rehabilitation
- Law Review Articles Criticizing the Guideline
- Statistics Showing the Guideline is Not Being Followed in this Type of Case
- Judicial Decisions Criticizing the Guideline

Example

- James Client, owner of securities firm managing pension funds and health benefit savings accounts
- Embezzled \$19 million client funds

Sent. Memo.,
http://www.fd.org/pdf_lib/sentencing%20memo%20fraud%20example.pdf

Guideline Range

- | | |
|----|--|
| 7 | base offense level |
| 20 | loss \$7 - 20 million |
| 6 | more than 250 victims |
| 2 | violation of judicial/administrative order or fraudulent action in bankruptcy proceeding |
| 2 | sophisticated means |
| 1 | convicted under 18 U.S.C. § 1957 (2S1.1(b)(2)(A)) |
| 2 | abuse of position of trust |
| -3 | acceptance of responsibility |

TOTAL OFFENSE LEVEL 37
GUIDELINE RANGE 210 - 262 months

700% Increase Since 1987

- Past Practice Sentence
 - 30-37 months for highest \$\$ sophisticated embezzlement
 - 18-24 months for highest \$\$ sophisticated fraud
- 1987 -- 30-37 months
- 1989 -- 57-71 months
- 2001 -- 121-151 months
- 2008 -- 210-262 months

Based on No Empirical Research

App. C, Amend. 154 (Nov. 1, 1989)

- “to provide additional deterrence and better reflect the seriousness of the conduct”
 - But see Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27Am. Crim. L. Rev. 289 (1989)
 - “gratuitously” increased in response to DOJ argument that statutes were “oblique signals” from Congress when statutes “said no such thing”
 - “overtly political and inept”
 - abandoned statutory mandates by failing to rely on own data, failing to measure the effectiveness or efficiency of guideline sentences, and failing to provide analysis of prison impact
- Contrary to all evidence re deterrence.

App. C, Amend. 617 (Nov. 1, 2001)

- Increased for moderate and high loss amounts.
- Removed more than minimal planning but folded it into increased penalties for moderate and high loss and kept 2 levels for sophisticated means.
- Why? “[C]omments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that the offenses sentenced under the guidelines consolidated by this amendment *under-punish* individuals involved with moderate and high loss amounts, *relative to penalty levels for offenses of similar seriousness sentenced under other guidelines.*”

What did they really say?

- Dep. AG Holder notes fraud punished more leniently than drugs. See 2000 Economic Crimes Symposium, <http://www.ussc.gov/2000sympo/bWelcome.PDF>.
- Judge Gilbert speaking for CLC: drug crimes are “punished too harshly,” high loss fraud “too leniently,” “apples and oranges.” <http://www.ussc.gov/2000sympo/ePlenaryIII.PDF>, at 56.
- AAG Robinson speaking for DOJ: “sentences for economic crimes should not be set, in our view, to match sentences for drug crimes.” *Id.* at 59.
- Prof. Cohen: “drug offenses are broke so they need to be fixed,” but no “evidence that fraud is broke,” and “deterrence isn’t supported.” *Id.* at 65-66, 69.

USSC Uses to Implement Upward Ratchet

- Drug Guidelines Based on Ill-Informed Mandatory Minimums
 - Too high because not based on empirical research, but congressional hysteria
- Increase Fraud Guidelines Based on Drug Guidelines

- In 2001, DOJ opposed lowering sentences for some low-level fraud offenders.
- In 2003, DOJ applied intense pressure to Comm’n to raise such sentences, then enlisted Congress, *invoking drug guidelines*.

Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373 (2004).

Additional Enhancements Mostly Directed by Congress Without Empirical Support

- USSC is required to follow specific congressional directives (see last slide for how to find and use directives)
- But *courts* are free to disagree with the resulting guideline based on policy considerations or individual circumstances

See Baron-Evans & Coffin, *Judges Are Free to Disagree With Any Guideline*, http://www.fd.org/pdf_lib/Free%20to%20Disagree%20with%20Any%20Guideline.pdf.

Show Similar Cases

- Chart in James Client Memo shows many cases in which substantial variances were given.

E.g.,

- 360 reduced to 60 months, US v. Parris, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008)
- 85 years reduced to 42 months, US. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006)

- Would create unwarranted disparity to sentence *within* the guidelines.

Use the Guidelines as a Sword

- find other *more* serious offenses where the range would be the same as (or less than) in your case – e.g., arson, kidnapping voluntary manslaughter. See James Client memo at 22
- show the judge that without certain enhancements the range in your case would be as low as that for *far less* serious offenses – i.e., the enhancement(s) have an out-sized effect on the sentence

Provide the Evidence!

- Supreme Court invited arguments that the guideline sentence --
 - *Itself* fails properly to reflect § 3553(a) considerations
 - Reflects an unsound judgment
- But judge need not consider “frivolous” arguments.
- Judge must consider *nonfrivolous* arguments and *must* explain acceptance or rejection of them

Rita, 551 U.S. at 351, 357.

- If fails to explain, reverse for procedural unreasonableness.

Gall, 552 U.S. at 51.

Don't be remembered as the defense attorney responsible for “closer review”!

- *Dicta*: *Maybe* “closer review” if “based *solely* on the judge’s view,” but *not* if guideline “not based on empirical evidence or national experience.” *Kimbrough*, 552 U.S. at 109-10.
- Disagreement with a guideline not developed in Comm’n’s “characteristic institutional role” gets as much “respect” on appeal as any other departure or variance. *Spears v. US*, 129 S. Ct. 840 (2009)
- *But see United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc) (Sotomayor, dissenting and concurring) –
 - *whenever* “a district court implements a policy decision applicable to a wide class of offenders that is *at odds with the Sentencing Commission.*”
 - court of appeals can dissect and substitute its own analysis

Individualized Circumstances: Departures or Variances?

Policy statements re “departures” = dictates without explanation, make no sense.

Judges say these factors *are* “ordinarily relevant.” USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13, available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

Variances make sense. See 3553(a).

Some courts say departures are obsolete. See *US v. Miranda*, 505 F.3d 785, 792 (7th Cir. 2007).

Some judges prefer departures if they fit.

“Symbolic” Movement on Offender Characteristics Effective Nov. 1, 2010

- Age, mental and emotional conditions, physical condition, and military service (chap. 5H)
 - Formerly “not ordinarily relevant” unless “present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the guidelines”
 - Now “may be relevant” if “present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines”

More Symbolism

- Drug dependence or abuse formerly “not relevant” now “not ordinarily relevant”
- “In certain cases, a downward departure may be appropriate to accomplish a specific [substance abuse or mental health] treatment purpose. See § 5C1.1, Application Note 6.”
- § 5C1.1, note 6 – Ds in Zone C can move to Zone B to accomplish treatment objective.

Making Matters Worse ...

New Introductory Commentary, Chapter 5, Part H

- should not give offender characteristics “excessive weight”
- “most appropriate use” is “not as a reason to sentence outside the applicable guideline range,” but to determine sentence within guideline range

What To Do?

- Always argue as variance, use “departure” policy statements *only* if they clearly apply
- Argue as variance, ignore departures.
- If departure clearly applies, argue as variance, note that “even the Sentencing Commission says ...”

Use These Resources

- Hemingway & Hinton, Departures and Variances, http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf
 - Outline of Caselaw on All Kinds of Variances and Departures
- Baron-Evans & Coffin, No More Math Without Subtraction, forthcoming soon on www.fd.org
 - Part IV -- Empirical Research, Statistics, and Caselaw on numerous mitigating factors

Cooperation without Gov't Motion

223 variances in which judge stated cooperation without a § 5K1.1 motion as the reason. USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbls.25, 25A, 25B.

- *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009)
- *United States v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008)
- *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008)
- *United States v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007)
- *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006)
- *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006); *see also*

Medical Condition

- *U.S. v. Alemanas*, 553 F.3d 27 (1st Cir. 2009)
- *U.S. v. Kempf*, 2009 WL 667413 (4th Cir. March 13, 2009)
- *U.S. v. McFarlin*, 535 F.3d 808 (8th Cir. 2008)
- *U.S. v. Spigner*, 416 F.3d 708 (8th Cir. 2005)
- *U.S. v. Garcia-Salas*, 2007 WL 4553913 (10th Cir. Dec. 27, 2007)
- *Rodriguez-Quezada v. U.S.*, 2008 WL 4302518 (S.D.N.Y. Sept. 15, 2008)
- *U.S. v. Carmona-Rodriguez*, 2005 WL 840464 (S.D.N.Y. April 11, 2005)
- *U.S. v. Truesdale*, 286 Fed. Appx. 9 (4th Cir. 2008)

BOP Med Care Inadequate

- *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)

Need for 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)

Collateral Consequences

US v. Anderson, 533 F.3d 623 (8th Cir. 2008) (“suffered atypical punishment such as the loss of his reputation and his company”)

US v. Pauley, 511 F.3d 468 (4th Cir. 2007) (“lost his teaching certificate and state pension as a result of his conduct,” consideration of which “is consistent with § 3553(a)’s directive that the sentence reflect the need for ‘just punishment’ and ‘adequate deterrence.’”)

US v. Vigil, 476 F.Supp.2d 1231 (D. N.M. 2007) (“suffered incalculable damage to his personal and professional reputation as a result of tremendous media coverage of his case and the case against his co-conspirators” and “was forced to resign his position as State Treasurer”)

More – Barrett, Collateral Consequences Resource List, http://www.fd.org/pdf_lib/Collateral%20Consequences%20Resource%20List.6.1.10.pdf.

Aberrant Behavior

- *U.S. v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (“isolated mistake” in otherwise long and entirely upstanding life)
- *U.S. v. Hadash*, 408 F.3d 1080, 1084 (8th Cir. 2005) (“law abiding citizen, who [did] an incredibly dumb thing”)
- *U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (prompted by economic pressures of unemployment by first offender who had throughout his 15-year marriage worked at lots of jobs to educate his six children)
- *U.S. v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (deconstructing and rejecting aberrant conduct policy statement)
- Lots more – See Hemingway & Hinton at 32-34.

First Time Non-Violent Offender

- USSC must “insure that the guidelines 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.” 28 USC 994(j).

Low Risk of Recidivism USSC, *Measuring Recidivism* (2004),

http://www.ussc.gov/publicat/Recidivism_General.pdf

- **First Offenders:** rate of reconviction (3.5%) is less than those with 1 point (5.5%) or 2 or more points (10.3%).
- **Age:** “Recidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50.
- **Employment:** Lower recidivism if stable employment in recent past.
- **Education:** Recidivism decreases with increasing educational level.
- **Family:** Recidivism rates lower for defendants who are or were ever married, even if divorced.
- **Abstinence from drug use:** Recidivism lower for those without illicit drug use in the year prior to the offense.
- **Non-Violent Offenders:** Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate.

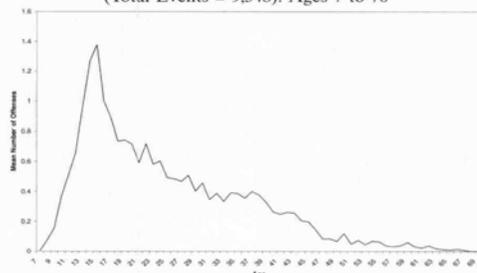
Low Risk of Recidivism BOP Research

- Family, education, job, etc.
- Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 54 (Aug. 4, 1994), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf.

Recidivism Drops Precipitously with Age

Sampson, Robert J. and John H. Laub, *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



Drug/Alcohol Treatment Reduces Recidivism

- Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007).
- Susan L. Ettner *et al.*, *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006)
- Doug McVay *et al.*, *Justice Policy Institute Policy Report, Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004).

Mental Health Treatment Reduces Recidivism

- 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), available at http://www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf.

Lengthy Incarceration Increases Recidivism

- 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), available at <http://www.ussc.gov/SIMPLE/sentopt.htm>
- Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994)

Avoid Unwarranted Disparity and Unwarranted Uniformity

- Avoid *unwarranted* disparity and *unwarranted uniformity*. 3553(a)(6).
 - Compared to other Ds in same case
 - Compared to other similar cases – see Chart in James Client memo; see Chart in *US v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008)
 - Compared to other Ds without same circumstances / characteristics
 - High rate of below guideline sentences for this general type of crime – 35% for 2B1.1 (non-gov't and gov't-sponsored)

Plea Bargaining Considerations

- Remind the AUSA of DOJ's most recent guidance – May 19, 2010 Holder memo <http://lawprofessors.typepad.com/files/holdermemo.pdf>
- Factors in deciding if a straight-up plea is too much
 - statutory minimums and maximums
 - number and different types of counts
 - factual basis
- When a plea agreement isn't worth it
 - limits on the sentence you can seek
 - appeal and collateral challenge waivers

Danger ahead

- Nov. 2011 guidelines amendments
 - Congressional directive in Patient Protection and Affordable Care Act -- § 10606
 - "aggregate dollar amount of fraudulent bills" submitted to government health care program is "prima facie evidence of the amount of the intended loss by the defendant"
 - "loss plus" -- extra 2-, 3-, and 4-level increases based on loss of \$1mm-\$7mm, \$7mm-\$20mm, over \$20mm if health care offense related to government health care program

Danger ahead – cont.

- Dodd-Frank Wall Street Reform and Consumer Protection Act
 - securities fraud – review and “if appropriate” amend guidelines for securities fraud to reflect intent of Congress that penalties appropriately account for the potential and actual harm to the public and the financial markets
 - special emphasis on the gross receipts/jeopardizing and officer/director enhancements
 - financial institution fraud – similar directive

Resources

- David Debold, Practice Under the Federal Sentencing Guidelines (2-volume treatise co-published by ABA Criminal Justice Section)
- Sentencing Resource page, www.fd.org
- Fraud Sentencing Memo, James Client
 - Updated version --
http://www.fd.org/pdf_lib/sentencing%20memo%20fraud%20example.pdf
- Sentencing by the Statute,
http://www.fd.org/pdf_lib/Sentencing_By_the_Statute.pdf

How to Determine Past Practice Sentence

- See Sentencing by the Statute at pp. 36-45, www.fd.org, Sentencing Resource page.
- Caution
 - Does not *always* work in your favor, usually does.
 - Be careful to look at both Tables 1(a) and 1(b) in the Supplementary Report. Table 1(b) shows some extra aggravating factors.

Where to get the history of a guideline

Historical Note at the end of each guideline cites first effective date and amendment numbers

- Appendix C of the Manual containing amendments and “reasons” for them
- USSC Public Comment, Written Hearing Testimony, Hearing Transcripts, Reports.
 - Some posted on www.uscc.gov
 - Other materials posted on www.src-project.org

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How to Find and Analyze Congressional Directives

http://www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf

- Search Table by Guideline Number (e.g., “2B1.1”)
- Did Congress specifically instruct USSC to increase guidelines?
 - If so, did USSC follow the directive to the letter? If so, indicates lack of empirical basis.
 - Or exceed it? (often exceed)
- Or did Congress instruct to study and amend “if appropriate”?
 - If so, was any study done? (not that we can tell)
 - Empirical basis given? (NOT)

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