

Sentencing: Where We've Been, Where We're Going

Advanced Defender Conference
New Orleans
May 31, 2017

Where We Almost Were: Sentencing Reform

- Smarter Sentencing Act
- SAFE Justice Act
- Sentencing Reform and Corrections Act (SRCA)

SRCA

Sentencing Reform and Corrections Act (SRCA)

- Introduced in Senate by Grassley, Durbin, Cornyn, Whitehouse, Lee, Schumer, Graham, Leahy, Booker, Tim Scott and placed on leg calendar October 2015; 36 sponsors
- Introduced in House by Goodlatte, Conyers, SJL and others in October 2015, placed on leg calendar December 2016; 79 sponsors
- January 2017 -- Grassley, Ryan said would be reintroduced early, still hope
- 851 – narrow definition of felony drug offense, but add serious violent felony; reduce enhanced MMs under 841(b)(1)(A) from 20 to 15 years for one prior, from life to 25 years for two or more, others as is
- Expand safety valve
 - Up to 4 points but no 3-point prior and no 2-point prior for COV
 - Court can waive point requirements but not if prior serious drug offense or serious violent felony
 - Info disclosed may not be used to enhance sentence unless relates to COV
 - Applies to maritime drug offenses
- Reduce 10-year MM to 5-year MM if no prior serious drug offense or serious violent felony and other conditions
- 924(c) - eliminate stacking without intervening conviction
- FSA retroactive
- Early release on back-end with earned credits for some

Holder Charging and Sentencing Policies

- Decline to charge
 - drug quantity triggering MM if non-violent, not OLMS, not significant ties to cartel, not have “significant” CH (e.g., remote in time, aberrational, itself non-violent low-level drug activity)
 - 851s under similar circumstances, or “gross sentencing disparity,” any other mitigating circumstances
- Pleading guilty and cooperating *not* a condition
- Not every case is a federal case
- Should “generally continue to advocate for a sentence within the guideline range,” but given the advisory nature of the guidelines, make “individualized assessment of facts and circumstances of each particular case”
- Reduced prison population by 14% - 2013 to 2016
- Reduced federal drug cases by 19% - 2010 to 2016

Sentencing Regression

- Kate's Law, HR 361, S 45, introduced Jan/Feb 2017, all R sponsors:
 - 5-year MM for any alien who
 - has been denied admission, excluded, deported or removed
 - thereafter enters, attempts to enter, or is found at any time in the US
 - and before removal or departure, was convicted of aggravated felony or at least twice of illegal reentry
 - Cost increase for each year's cohort of new defendants: \$1.4 billion
- Back the Blue Act, HR 2437, S 1134, introduced 5/16/17, all R sponsors:
 - Federalize any killing, attempt or conspiracy to kill, or assault of a "federally funded" LEO
 - MM 10 years, MM 30 years or death
 - new federal death penalty aggravator for killing LEO, prosecutor, judge, first responder
 - even stricter limits on habeas in cases involving killing of federally funded LEO
- DEA hiring prosecutors to bring drug trafficking, money laundering and asset forfeiture cases by regulation to circumvent congressional appropriations process

Pryor, J. Proposes Mandatory Guidelines DOJ's Wroblewski Promoting



Swearing to tell the truth



Set the Stage to Revive the War on Drugs

- Focus on “violent crime” – by which he meant *drug trafficking and immigration* – because “crime rates rising,” citing 10% increase in murder rate
- Marijuana “only slightly less awful” than heroin
- Immigration is “violent” because cartels rape and kill
- Use “all available tools” -- drug mandatory minimums, 924(c)s, prosecute state cases federally, asset forfeiture
- Federal prosecution of anyone who assaults a LEO, end oversight of troubled police departments, “unfairly maligned”
- Further guidance “forthcoming,” including an “updated memo on charging for all criminal cases.”

Rising Crime Rate = Fake News

- Murder rate:
 - 10.2 per 100,000 in 1980
 - 4.4 per 100,000 in 2014
 - 4.9 per 100,000 in 2015 – increase concentrated in a few cities with history of police abuses; still half of 1991 rate
- Violent and property crime dropped by 50% from 1991 to 2015
- Overall crime rate fell fourteenth year in a row
- Studies show undocumented immigrants commit less crime than US citizens

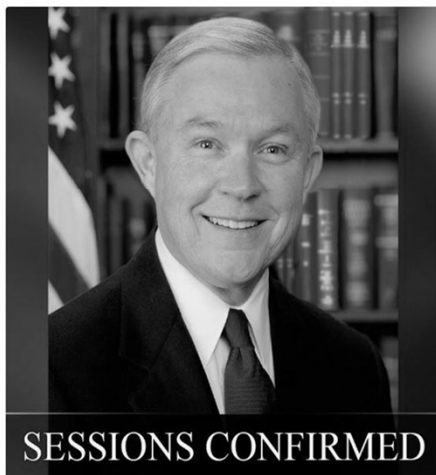


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Following

Law & Order, welcome back...🇺🇸

#GOODNEWS #AmericaFirst #MAGA



RETWEETS
35

LIKES
125



Sessions Policy May 10, 2017

- Charge MSRP offense = “those that carry the most substantial guidelines sentence, including mandatory minimum sentences.”
 - But: “There will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted. In that case, prosecutors should carefully consider whether an exception may be justified.”
- Sentencing: “must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences” = seek the highest guideline range
 - “should in all cases seek a reasonable sentence under the factors in 18 U.S.C. § 3553. In most cases, recommending a sentence within the advisory guideline range will be appropriate.”

Sparked Renewed Interest in Sentencing Reform

- Justice Safety Valve Act, introduced 5/16/17
 - S 1127 – Rand Paul (R-KY), Leahy (D-VT), Merkley (D-OR)
 - HR 2435 - Scott (D-VA), Massie (R-KY), Jayapal (D-WA), Cohen (D-TN), Crowley (D-NY)
- Sec. 3553 would provide: "Notwithstanding any provision of law other than this subsection, the court may impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of subsection (a)."
- Rand Paul op-ed
 - Sessions' “reversal of a policy that was working will accentuate the injustice in our criminal justice system, especially racial injustice.”
 - “A third of African-American males are still prevented from voting, primarily because of the War on Drugs.”
 - Arrest rates are “so lop-sided because it is easier to round up, arrest, and convict poor kids in urban areas than it is to convict rich kids in suburban areas.”

Mens Rea Reform Act

- Would require proof BRD of knowledge, intent or willfulness for every element
- Intended to apply to all kinds of defendants and all elements, including drug type and quantity

What Can We Do?

Negotiating Tips

- 1) Holder's May 19, 2010 policy and Sessions policy both say recommend sentence within guideline range in "most" but not all cases and refer to 3553(a)
 - Only difference: "Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file."
- 2) Sessions refers to "circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the [MSRP] charging policy is not warranted," and rescinds Holder's August 12, 2013 (drug quantity) and September 24, 2014 (851 enhancement) policies specifying circumstances.
 - Argue Holder's specific "circumstances" (non-violent, no leadership role, no significant ties to cartels, not a "significant" criminal history, i.e., non-violent, low-level), and any other circumstances like unwarranted disparity, mitigating circumstances
 - Biggest difference: everything requires supervisory approval

Negotiating Tips

- 3) Did not rescind Holder's May 19, 2010 memo – every decision based on "individualized assessment," not every case should be brought federally
- 4) Did not rescind any previous DOJ policy that is not "inconsistent" with his policy

Ashcroft policy:

 - 851 notice "only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity" – like Holder policy
 - 924(c)s (no Holder policy):
 - first 924(c) "shall be charged and pursued" in "all but exceptional cases"
 - in cases involving three or more "in which the predicate offenses are crimes of violence," "shall in all but exceptional cases charge and pursue the first two such violations"
- 5) "But it is important to note that unlike previous charging memoranda, I have given our prosecutors discretion to avoid sentences that would result in injustice." AG Sessions Speech, New York, May 12, 2017.

Fight Back With Constitutional Challenges

Due Process

- Outdated caselaw (Bordenkircher (1978)) assumed level playing field, pre-dated DOJ coercion policy beginning 1989
- You can “prove objectively” that rather than “bringing charges ... in the public interest,” prosecutor punished defendant “because he has done what the law plainly allows him to do” *i.e.*, used quantity, 924(c), 851s, any other mandatory minimum to threaten or punish for refusing to plead guilty under prosecutor’s terms. United States v. Goodwin (1982).

Outdated Eighth Amendment Law re Severe Term of Years Sentences, Shaky Foundation

- Only 3 justices joined controlling opinions in Harmelin (1991) upholding life for possession of 600 grams cocaine, and Ewing (2003), upholding 25 years for theft of golf clubs
 - Kennedy in both pluralities – equated drug selling with felony murder
 - 4 justices would have ruled unconstitutionally disproportionate in both cases, including Breyer & Ginsburg in Ewing
 - Scalia agreed 25 years for theft of golf clubs was disproportionate
 - But Scalia plus Rehnquist in Harmelin, and Scalia plus Thomas in Ewing, believed no proportionality principle for term-of-years sentences

Eighth Amendment

Miller and Graham opened the door to challenges to term-of-years sentences for adults

- Mismatch between punishment and crime:
 - LWOP is the de facto most severe punishment for adults (Miller)
 - Reserved for murderers and rapists (per Roberts in Graham)
 - Non-violent drug offenders are several steps down
- Any term of years can be disproportionate – look at life expectancy reduced by effect of incarceration, infirmity (Breyer, dissenting in Ewing)
- Compare to state sentences for same crime, sentences for more serious federal crimes
- Advances in knowledge/hard data regarding harms, recidivism risk declines with age, deterrence is a myth
- Widespread bipartisan evolution in “standards of decency”

- *Ewing*, at 35-36, 39 (Breyer, Ginsburg, Stevens, Souter dissenting)
 - 25-year sentence is disproportionate
 - “long enough to consume the productive remainder” of Ewing’s life
 - Ewing, “seriously ill when sentenced at age 38,” “will likely die in prison”
- Support in recent caselaw
 - “In view of Jenkins’ age, this sentence effectively meant that [he] would be incarcerated and subject to intense government control for the remainder of his life.” *US v. Jenkins*, __F.3d__, 2017 WL 1371399 *3 n.2 (2d Cir. Apr. 17, 2017).
 - “That he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public. Likewise, in considering ‘the need for the sentence imposed ... to afford adequate deterrence,’ § 3553(a)(2)(B), the District Court could not reasonably ignore the deterrent effect of Dean’s 30-year mandatory minimum.” *Dean v. US*, 137 S. Ct. 1170, 1176 (2017).
 - “Sentencing judges need to consider the phenomenon of aging out of risky occupations.” *US v. Presley*, 790 F.3d 699 (7th Cir. 2015)
 - Recidivism rates are inversely related to age at release. *US v. Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014) (Gorsuch, J.).

Dean v. United States, 137 S. Ct. 1170 (Apr. 3, 2017)

unanimous

- 30 years plus one day “more than sufficient,” but believed not permitted to consider 30-year 924(c) sentence in varying from GL range for robberies. Varied from 84-105 months to 40 months on another basis, imposed 400 months. Eighth Circuit affirmed based on circuit precedent.
- Reversed. Judge has discretion under 3553(a), 3582(a) and 3584(b) to consider 924(c) sentence in determining both the length of a prison term for each individual offense and an aggregate prison term for multiple counts, and nothing in 924(c) says otherwise.
- That D will be released after his 50th birthday because of the 924(c) sentence bears on whether “still more” incarceration is needed to protect the public.
- The court “could not reasonably ignore” the deterrent effect of the 30-year mandatory minimum.

Sessions v. Dimaya, argued Jan. 17, 2017

- Whether 18 U.S.C. 16(b)’s residual clause, as incorporated into the INA’s provisions governing alien removal, is unconstitutionally vague.
- Ninth Circuits held that it is.
- 924(c)(3)(B) -- same residual clause
- But won’t necessarily decide whether it’s V4V
 - Both parties urged don’t decide it
 - Govt argued a looser vagueness standard – “no intelligible standard” -- is allowed for an immigration statute
 - Unlikely to buy it -- immigration consequences are grave, and cannot have one standard for 16(b) in criminal cases and another for 16(b) in immigration cases

Is 924(c)'s residual clause void for vagueness?

- **Yes:** US v. Cardena, 842 F.3d 959 (7th Cir. 2016); cf. Baptiste v. Attorney General, 841 F.3d 601 (3d Cir. 2016) (16(b)'s residual clause is V4V); Golicov v. Lynch, 837 F.3d 1065 (10th Cir. 2016) (same)
- **Confused:** US v. Taylor, 814 F.3d 340 (6th Cir. 2016) (924(c) residual clause not V4V); Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016) (16(b) residual clause *is* V4V)
- **No:** US v. Hill, 832 F.3d 135 (2d Cir. 2016); US v. Prickett, 839 F.3d 697 (8th Cir. 2016); cf. United States v. Gonzalez–Longoria, 831 F.3d 670 (5th Cir. 2016) (*en banc*) (16(b)'s residual clause is not V4V)

Variances

Policy Disagreements/Mitigating Circumstances, Characteristics

- Because “the Guidelines are now advisory[,] ... courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” Kimbrough v. United States, 552 U.S. 85, 101-02 (2007).
- “[C]ourts are entitled to vary from the . . . guidelines in a mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the Guidelines’ sentencing range.” Spears v. United States, 555 U.S. 261, 267 (2009).
- Applies to *all* guidelines, e.g.: “A district court's sentencing discretion is no more burdened when a defendant is characterized as a career offender under § 4B1.1 than it would be in other sentencing decisions.” United States v. Clay, 787 F.3d 328, 331-32 (5th Cir. 2015).
- Examples of Policy Disagreement Cases – in your materials
- Individual Circumstances and Characteristics – tie to the purposes of sentencing

Just Punishment in Light of Seriousness of Offense

Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?* 4 Harv. L. & Pol’y Rev. 173 (2010) – guidelines do not reflect community view of the gravity of the offense – polled juries after verdict in gun, drug, child porn, fraud cases

United States v. Collins, 828 F.3d 386 (6th Cir. 2016) - D convicted at trial of receiving and distributing, and possessing, child pornography

- Upheld downward variance from 262-327 months to mandatory minimum of 60 months
- Judge polled the jury after the verdict as to the appropriate sentence.
- Responses ranged from 0 to 60 months, with a mean of 14.5 months and a median of 8 months. All but one juror recommended a sentence less than half the mandatory minimum.

What Would Client Have to Do to Get the Same or Lower Sentence?

- 235-293 months: commit second degree murder
- 188-235 months: sell or buy a child under 12 for use in pornography, commit aircraft piracy
- 151-188 months: rob a bank of any amount over \$5 million, discharge a firearm, and cause bodily injury
- 121-151 months: forced sexual act with a child under 16
- 87-108 months: voluntary manslaughter

Deterrence

- Articles, studies, reports unanimously show:
 - (1) Incarcerating your client will not deter others from committing crimes (general deterrence)
 - (2) Your client's risk of reoffending is either unaffected or increased by imprisonment, compared to probation (specific deterrence)
 - (3) No amount of imprisonment is necessary for deterrence



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).

It's unanimous! Long prison terms do not deter any better than short prison terms or probation.

- Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (Jeremy Travis et al. eds., 2014)
- Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Justice* 199, 202 (2013)
- 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)
- Brennan Center for Justice, *What Caused the Crime Decline* 4, 15, 25 (2015)
- Francis T. Cullen et al. *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, *Prison Journal* 91: 48S (2011)
- Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 28 (2006)
- Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 447-48 (2007)

Incapacitation

“Sentencing judges need to consider ... aging out.”

US v. Presley, 790 F.3d 699 (7th Cir. 2015)

- Career offender sentenced to 37 years at age 34
- “Criminals, especially ones engaged in dangerous activities ... weight future consequences less heavily than a normal, sensible, law-abiding person would.” “The length of a sentence therefore has less of a deterrent effect on such a person than the likelihood that he'll be caught, convicted, and imprisoned.”
- Defendants engaged in activities such as drug trafficking, gun possession and violent crime, are especially likely to “ag[e] out of risky occupations.” “Violent crime is far less common among persons over 40, let alone over 60, than among younger persons.”
- “The sentencing judge in this case did not refer to any of this literature, and in any event gave no reason to think that imposing a 37-year sentence on Presley would have a greater deterrent effect on current or prospective heroin dealers than a 20-year or perhaps even a **10-year sentence . . . Sentencing judges need to consider the phenomenon of aging out of risky occupations.**”

Aging Out

- *United States v. Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014) (Gorsuch, J.) (recidivism rates are inversely related to age at release)
- *Dean v. United States*, 137 S. Ct. 1170 (2017)
 - That D will be released after his 50th birthday bears on whether “still more” incarceration is needed to protect the public.
- Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 3, 12 (1994), https://www.bop.gov/resources/research_projects/published_reports/recidivism/oreprrecid87.pdf.

Punishment Is Unjust In Light of Age At Release

- “As a 44–year–old impecunious white male with a high school education, Jenkins's life expectancy was 76.5 years at the time of his sentencing. ... [W]e do know that, as a statistical matter, the life expectancy of an incarcerated person drops significantly for each year of incarceration. ... Thus Jenkins's life expectancy is likely significantly less than 76.5 years.” *US v. Jenkins*, __F.3d__, 2017 WL 1371399 *3 n.2 (2d Cir. Apr. 17, 2017)

Inspector General Report on Aging Inmates

- Inmates' physiological age averages 10-15 years older than chronological age
 - Due to incarceration stresses + pre-incarceration conditions
- BOP not providing proper or timely medical care or housing for inmates 50+
 - Lacks staffing, training, physical infrastructure (low bunks, elevators, wheelchair accessible cells, walkways)
 - Does not provide appropriate programming
- Costs 8% more to incarcerate inmates 50+
- Inmates 50+ engage in fewer and less serious misconduct – not violent or aggressive
- 15% rate of rearrest after release for 50+, mostly for drugs
 - Compared to 41% rate of rearrest for all

U.S. Dep't of Justice, Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (May 2015), available at <https://oig.justice.gov/reports/2015/e1505.pdf>.

For 50+, Punishment is More Severe, Recidivism Risk Less

- 45-year-old defendant should be sentenced to at most 5 years
- 50-year-old defendant should not go to prison at all
 - More punitive for older, sick b/c not properly cared for and no programming
 - Virtually no risk of re-arrest
 - IG says ideal candidate for compassionate release

If client is young

- 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)
- Young offenders (e.g., in their 20s) are less culpable than the average offender because of brain development.
 - 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.
- *Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010); *Roper v. Simmons*, 543 U.S. 551, 567, 569-70 (2005)

Disparity: Longstanding Police Practices Targeting Racial Minorities: The Primary Cause of Racial Disparity in CH, Ineligibility for SV, CO Guideline

- From 1992 through 2014, black defendants comprised 32.7 percent of defendants convicted of the eight major instant offenses for career offenders, but were 61.6 percent of those defendants sentenced as career offenders.
- “Operation Pipeline” – War on Drugs – 1984 – thousands of state and local police trained in its methods, i.e., racial profiling to stop and search – institutionalized
- Recent studies in cities across the country
 - Black pedestrians and drivers are stopped and searched or frisked significantly more often than whites
 - Blacks who are searched or frisked are found with contraband significantly less often than whites who are searched or frisked
- Black defendants come to federal court with priors they would not have if they were white.

See *Beckles*, FPD Amicus Brief at 18-26, <http://www.src-project.org/wp-content/uploads/2016/09/15-8544tsacFederalPublicAndCommunityDefendersAndTheNationalAssociationOfFederalDefenders.pdf>

Disadvantage Makes the Punishment Unjust, Contributes to Disparity

“[T]he only ‘career’ he ever had seems to have been selling drugs” and “earn[ing] an extraordinary sentence for a relatively mundane offense.” *United States v. Precely*, 628 F.3d 72, 83-84 (2d Cir. 2010) (Lynch, J., concurring).

“Had the defendants been raised by cohesive, adequate families, most of the difficulties they encountered would probably never have come to pass. Well-resourced, attentive parents would have had the knowledge, ability, and insight to protect their children from many of the difficulties that befell these defendants in their youth, to obtain assistance to deal with their psychological and physical problems, to obtain crucial opportunities for education, work, and personal growth, and to act as useful role models. Those with learning disabilities would likely have been provided available resources to overcome their impairments at public expense. That the defendants were born into circumstances without such support is at the center of this tragedy.” *United States v. Bannister*, 786 F. Supp.2d 617, 688-89 (E.D. N.Y. 2011).

Use Data

- Judge is doing nothing radical
- Judge should avoid unwarranted disparities

Data – Career Offender

	La M (2016)	La W (2016)	National (2015)
Within Guideline Range	0 %	16.7 %	25.0 %
Below-Guideline Variances Not Sponsored by Government	33.3 %	33.3 %	28.8 %
Government-Sponsored Below-Guideline Variances	33.3 %	0 %	20.6 %
5K1.1 Departures	33.3 %	50.0 %	23.7 %
<ul style="list-style-type: none"> • District and Circuit Data – available from Paul J. Hofer, pjhofer@gmail.com • National Data – U.S. Sent’g Comm’n, Quick Facts – Career Offender, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY15.pdf 			

Data – Drug Trafficking Career Offender

	All Career Offenders National (2015)	Drug Trafficking Offender (2014)
Within Guideline Range	25.0 %	22.6%
Below Range - Not Sponsored by Government	28.8 %	27.6%
Below Range Government-Sponsored	44.3%	49.4%
Extent of Reduction Below Range	41.9% below	42.6% below

National Data – U.S. Sent’g Comm’n, *Quick Facts – Career Offender*, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY15.pdf.pdf

Drug Trafficking Career Offender Data – Average Sentences of Drug Trafficking Offenders (Career Offender and Non-Career Offender) – FY 2005-2014, https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/average-sentences-of-drug-offenders-and-robbery-offenders-career-offender-and-non-career-offender-fy-2005-2014.pdf

Why Go to All This Trouble?

- “Unless a party contests the Guidelines sentence generally under § 3553(a) – ... the judge normally need say no more.” “Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.” *Rita v. U.S.*, 551 U.S. 338, 357 (2007)
- Reversals on defendant’s appeal for inadequate explanation or failing to adequately address a nonfrivolous argument:
 - 58.1% of within range sentences less severe on remand.
 - 73.7% of outside range (above and below) less severe on remand.

See *Where Procedure Meets Substance*, http://fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/where-procedure-meets-substance-making-the-most-of-the-need-for-adequate-explanation.pdf
- Useful now and in the future. Judge can’t “unsee” it.