

# Determining Your Client's Likelihood of Success under Community Supervision and Improving the Odds for a Non-Prison Sentence<sup>1</sup>

Whether your client goes directly to prison or is a candidate for an alternative sentence may depend upon how well you can convince the judge that he or she presents a low likelihood of committing another crime or violating release conditions. This paper discusses some of the ways you can determine your client's likelihood of success under community supervision, identify those areas where your client needs additional support to improve the likelihood of success, and persuade a judge that prison is a greater than necessary punishment for your client.

## I. Assessing the Risk of Recidivism

### The Risk Prediction Index (RPI)

The Federal Judicial Center developed the Risk Prediction Index (RPI) after several years of study and testing in eleven districts. Pat Lombard and Laural Hooper, *RPIFAQ's Bulletin* (1998). U.S. Probation officers may use a computerized version of the RPI during their initial assessment of newly released offenders to "estimate the likelihood that an offender will be arrested or have supervision revoked during his or her term of supervision." U.S. Probation, *The Supervision of Federal Offenders, Monograph 109*, III-10, (March 2007 Update), available at fd.org.<sup>2</sup> The RPI measures seven variables: (1) the offenders' age at the start of supervision; (2) the number of arrests before the instant offense; (3) employment status; (4) history of illegal drug use or alcohol abuse; (5) prior history of absconding from supervision; (6) whether the offender has a college degree; and (7) whether the offender was living with a spouse and/or children at the start of supervision. It assigns a value to each variable. The values are then totaled to arrive at an RPI score between 0 to 9. The RPI score can then be compared to the scores of other offenders to assess the risk of recidivism. Lower scores are associated with lower recidivism rates.

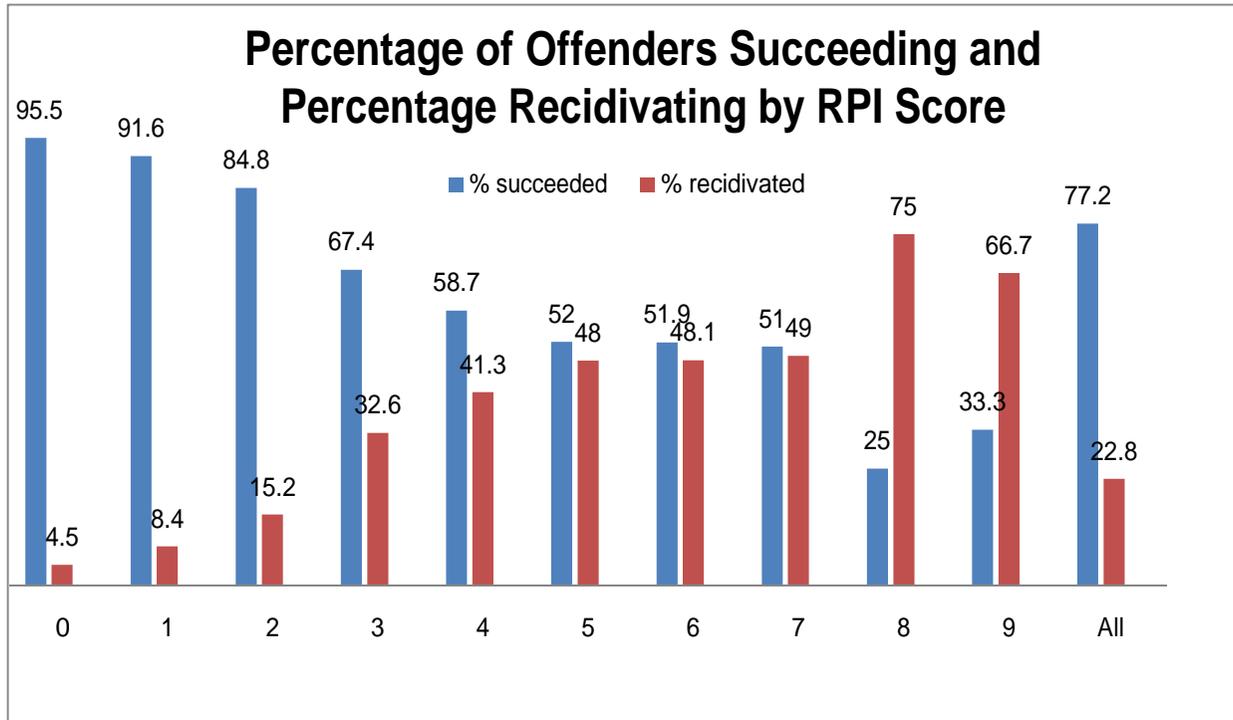
The Federal Judicial Center has published descriptive information about the recidivism rates associated with the RPI score, including the kind of recidivistic activity (rearrest, technical), as well as the nature of the original offense, offender's age, and prior arrest history. Data contained in that publication will help you flesh out your arguments on why the judge should take a chance with your client. See Federal Judicial Center, *RPI Profiles: Descriptive Information about Offenders Grouped by Their RPI Scores* (May 1997). For example, offenders with RPI scores of 0, 1 or 2 had a recidivism rate of just 10.5%, compared to 38% for those with RPI scores of 3, 4, or 5, and 53.4% for those with RPI scores of 6, 7, 8, or 9. Within the 0-2 group, offenders under 40 had higher recidivism rates (about 13%) than older ones (about 8%). Even then, nearly 1/3 of the rearrests were for traffic violations. The data is also worth examining because it may help debunk the notion that clients with higher offense levels under the guidelines (*i.e.*, those in Zone D) are not suitable candidates for alternative sentences. For

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<sup>1</sup> Prepared by Denise C. Barrett, National Federal Defender Sentencing Resource Counsel, Office of the Federal Public Defender for the District of Delaware, with assistance from members of the National Federal Defender Sentencing Resource Counsel Project: Amy Baron-Evans, Anne Blanchard, Jennifer Coffin, Paul Hofer, and Sara E. Noonan. (May 2009).

<sup>2</sup> Probation officers may also use other, more refined, assessment tools, including the Level of Services Inventory-Revised (LSI-R). See Brenda Vose, et.al., *The Empirical Status of the Level of Service Inventory*, 72 Federal Probation (2008).

instance, among the offenders with RPI scores of 0, 1, and 2, drug offenders recidivated at only a slightly higher rate (12.1%) than white collar offenders (10.0%). *Id.* at 9.



### Other Ways to Assess the Risk of Recidivism

The literature on risk assessment is robust and growing. Simple internet searches will reveal helpful data. Listed here are some factors that suggest your client may have a reduced likelihood of recidivism and may do well with an alternative sentence.

- Age.** Increased age bears a strong correlation with lower recidivism. According to Sentencing Commission data, “[r]ecidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50. USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12 and Exhibit 9 (May 2004). The U.S. Parole Commission has long included age as part of its Salient Factor Score because it is a validated predictor of recidivism risk. USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 1, 8 & n.29 (Jan. 2005). Although the Commission has not modified the guidelines to take this data into account, courts are now free to rely on this data to vary from a guideline when the defendant’s age predicts a reduced likelihood of recidivism.<sup>3</sup>

<sup>3</sup> Courts have cited such data in imposing below guideline sentences. *See, e.g., Gall v. United States*, 128 S.Ct. 586, 601 (2008) (approving district court’s use of studies to bolster conclusion that defendant’s youth at time of crime supported below-guideline sentence); *United States v. Hamilton*, 2009 WL

- **Gender.** Women recidivate at a lower rate than men, including those in criminal history categories V and VI. *Measuring Recidivism, supra*, at 11 & Exhibit 9.
- **Educational and Vocational Skills.** The Commission’s own research shows that educational attainment is relevant to risk of recidivism. Overall, recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree). *Measuring Recidivism, supra*, at 12 and Exhibit 10. Evidence-based research shows that post-offense educational and vocational training is correlated to lowered risk of recidivism. See Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exs. A.1 & 4 (Oct. 2006) <sup>4</sup>(setting forth a comprehensive review of programs that have demonstrated an ability to reduce recidivism, which includes both prison-based and community-based educational programs).
- **Employment.** The Commission’s own studies demonstrate that stable employment in the year prior to arrest is associated with a lower risk of recidivism. See *Measuring Recidivism, supra* at 12 & Ex. 10. Reducing barriers to post-offense employment is also key to reducing recidivism. See USSC, *Symposium on Alternatives to Incarceration* (2008), at 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that the district’s employment program has resulted in a 33% reduction in recidivism rates); see also *id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting that the district’s revocation rate as “lower than the circuit and the national rates” as a result of employment program).
- **First or Near First-Offender.** Commission studies show that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism. See USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 15 (2005).
- **Marital Status.** Commission studies show that recidivism rates are lower for defendants who are or were ever married, even if divorced. See *Measuring Recidivism, supra*, at 11 & Exhibit 10.
- **Offense Level.** The offense level is NOT a predictor of recidivism. According to the Commission, “[t]here is no correlation between recidivism and guideline’s offense level.

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995576,\*3 (2d Cir. April 14, 2009) (unpub) (remanding for resentencing where district court may not have understood that it had discretion to disagree with “Guidelines’ refusal to consider age and its correlation with recidivism”); *United States v. Martinez*, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (unpub) (notifying counsel considering non-guideline sentence based, in part, on defendant’s age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (unpub) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study).

<sup>4</sup> Available at [www.wsipp.wa.gov/rptfiles/06-10-1201.pdf](http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf)

Whether an offender has a low or high guideline offense level, recidivism rates are similar. While surprising at first glance, this finding should be expected. The guidelines' offense level is not intended or designed to predict recidivism." *Measuring Recidivism, supra*, at 15.

- **Fraud, Larceny, and Drug Offenders.** These defendants are among the least likely of all offenders to recidivate. See *Measuring Recidivism, supra*, at 13 & Exhibit 11.
- **Sex Offenders.** These defendants have no higher rates of recidivism than others. Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, *Myths and Facts About Sex Offenders* (Aug. 2000).<sup>5</sup>

## II. Assessing your Client's "Criminogenic" Needs and Building a Strong Foundation for Success in the Community

A client's success in community living depends upon a strong foundation across several domains: cognitive ability, education, employment, residence, family, health and sobriety, criminal justice compliance, and social/civic connections. While developed to assess the needs of women involved in the criminal justice system, the Women's Prison Association's matrix for assessing needs provides a helpful framework for thinking about the needs of our clients and how best to meet them. See Women's Prison Association, *Success in the Community: A Matrix for Thinking about the Needs of Criminal Justice Involved Women*.<sup>6</sup> See generally Mark Sherman, *Special Needs Offenders Bulletin: Reducing Risk through Employment and Education* (2000) (discussing how to assess and reduce risk of disadvantaged offenders with low employment and educational levels); Christopher T. Lowenkamp, *Adhering to the Risk and Need Principles: Does It Matter for Supervision-Based Programs?*, 70 *Federal Probation* (2006) (discussing how programs that target more "criminogenic" needs achieve greater declines in recidivism); Council of State Governments Justice Center, *Improving Outcomes for People with Mental Illness under Community Corrections Supervision: A Guide to Research-Informed Policy and Practice* 15 (2009) (identifying "big eight" risk factors generally associated with recidivism for all criminal justice populations).

In conducting a risk and needs assessment, counsel may wish to hire a mitigation investigator or social worker who is adept at assessing a client's needs and accessing community resources. In cases where counsel is unable to hire an investigator, counsel will have to spend time with the client and his or her family to learn the client's strength and weaknesses. Some areas that counsel should explore include the following.

### Cognitive Skills

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<sup>5</sup> Sex offenders may have these risk factors, as well as others. See generally Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, *Recidivism of Sex Offenders* (May 2001). For an actuarial tool that may help you assess your client's risk of committing another sex offense, go to [www.static99.org](http://www.static99.org).

<sup>6</sup> Available at [http://www.wpaonline.org/pdf/Success\\_in\\_the\\_Community\\_Matrix.pdf](http://www.wpaonline.org/pdf/Success_in_the_Community_Matrix.pdf).

Research has shown that certain socio-cognitive deficits are linked to criminal behavior. Cognitive Centre of Canada: *Treatment of Antisocial Behavior*.<sup>7</sup> Cognitive skills training may help correct these deficits, reducing recidivism as a result. If your client has trouble in the following areas, you should consider finding a program that can help him or her “think before acting, recognize the consequences of his [or her] behavior, respond to interpersonal problems in alternative pro-social ways, and determine how his [or her] behavior and actions impacts others.” Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come From and What They Do*, 72 Federal Probation (2008). Some signs that your client may lack cognitive skills:

- unstable upbringing or living arrangements
- unstable employment
- 3 or more prior arrests
- substance abuse history
- history of truancy, FTA, supervision violations
- poor social skills
- inability to recognize problem areas
- difficulty resolving interpersonal problems
- unaware of consequences
- unrealistic goal setting
- poor regard for others
- narrow and rigid thinking

### **Health and Sobriety**

If you client abuses drugs/ alcohol, suffers from an untreated mental or medical condition, or has erratic access to necessary medication, he will be at greater risk of reoffending. Help your client obtain drug treatment, mental health treatment, medication, and adequate medical care. This will require creative use of community resources and sometimes pushing pretrial services to find programs that fit your client’s needs. You may find the Texas Christian University Drug Screen (TCUDS-II) helpful in assessing the extent of your client’s substance abuse problems.<sup>8</sup> U.S. Probation recommends this instrument to officers preparing presentence investigation reports. See *Office of Probation and Pretrial Services, the Presentence Investigation Report, Publication 107*, at 21 (March 2006), available at [fd.org](http://fd.org). For help in identifying symptoms that may suggest a mental impairment, see Deana Logan, *Learning to Observe Signs of Mental Impairment*.<sup>9</sup>

### **Employment**

Employed clients stand a much better chance of success living in the community. Help your client find gainful employment. Minimally, the client needs to find a job that pays enough for self-support. Ideally, the client will find one that provides enough money to support his or her family and pay off other bills.

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<sup>7</sup> Available at <http://www.cognitivecentre.ca> ; <http://www.csc-scc.gc.ca/text/prgrm/lsp-eng.shtml>.

<sup>8</sup> Available at <http://www.utexas.edu/research/cswr/nida/instrumentListing.html>.

<sup>9</sup> Available at <http://www.dpa.state.ky.us/library/manuals/mental/Ch17.html>.

It may be helpful to assess your client's vocational skills and focus him or her on building those skills helpful in finding employment.<sup>10</sup> Find out what kind of job placement resources are available in your community. Check with your probation office to see if they have a workforce development specialist. Work with your client to identify and overcome roadblocks that will hinder his or her ability to find and maintain suitable employment. Such roadblocks may include lack of skills, lack of transportation, poor social skills, and poor organizational skills. Encourage your client to assemble all documents necessary for employment (driver's license, other forms of identification, resumes) and to attend local job fairs.

### **Education/Literacy**

Help your client learn to read, obtain a GED, or enroll in college/vocational classes. Educational attainment (as measured by last grade completed) may not correlate with literacy. Assessing literacy in a client can be difficult. Even clients who can read may not comprehend very well or be able to communicate in writing. Most clients will not freely admit that they cannot read or understand and have become adept at masking their problems. Some possible signs of a reading problem:

- Becomes defensive or makes excuses for not reading over a form or other document (will do it later, needs glasses)
- Doesn't write down court dates or appointments, says s/he'll remember
- Doesn't respond to your requests in writing
- Seems to review documents too quickly or very slowly
- Claims to be reading, but gives vague answers about what (just a magazine, not that good)
- Spells phonetically and/or mixes LoWer/UppEr case

### **Housing**

Explore your client's housing history. If s/he is homeless or moves frequently, the risk of violating community supervision increases. Unstable housing history may often be a sign of deficits with cognitive skills (see above). Help your client find suitable housing – a transitional residence, an apartment, rental unit, or other stable and safe living arrangement.

### **Money Management**

A client's ability to manage his or her personal affairs by setting realistic spending goals and maintaining a budget is key to successful community living. Explore how your client handles money. Does s/he have enough to get through each week? Does s/he have a bank/credit accounts? How well does s/he manage them – does he bounce checks, over-extend credit? If your client needs help with

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<sup>10</sup> While most vocational assessment tools must be administered by qualified personnel, some tests are suitable for self-administration or by a person lacking credentials in test administration. Two tests suitable for adults is IDEAS™ (IDEAS Interest, Determination, Exploration, and Assessment Systems®), available through Pearsons Assessments, and The SDS (Self-Directed Search), available at <http://www.self-directed-search.com>. The tests might be good for a client who has little employment experience. Test results may help motivate a client and help him or her see that s/he has untapped potential, which is worth exploring.

learning how to manage money, you might want to provide a referral to a financial literacy program conducted by a public library or community organization. Local banks may sponsor such workshops at various places throughout the community.

### **Familial/Social Relationships/Anger Management**

Encourage your family to maintain ties with his or her family, pay child support, visit children, and reconcile with estranged family members. The more family support a client has, the more likely s/he will be to succeed. Determine the strengths of your client's interpersonal skills and relationships with family/friends. Clients with good social skills and who know how to manage their anger are more likely to succeed under supervision. Ask your client to tell you about his or her friends and family. Who does s/he see and speak with most often? Who is close to him or her? Who can s/he talk to about things that might be bothersome? When s/he gets angry with a friend or family member, how does s/he let them know?

### **Transportation**

Help your client figure out how s/he is going to get to work on time, attend treatment sessions, and visit with family. This may involve helping your client decide which bus routes to take, how to buy less expensive weekly/monthly passes, or how to get a driver's license or buy an affordable car.

### **Making Amends, Building Empathy, and Pro-social Attitudes**

Consider pursuing restorative justice options that may help your client apologize for his conduct, make restitution to victims, engage in community reconciliation, or otherwise repair the damage he or she caused. See James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998) (collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had significantly lower recidivism rates).<sup>11</sup> Participation in restorative justice activities may help your client learn constructive ways of conflict resolution, motivate him toward rehabilitation, and help him resist criminal thinking patterns.

## **III. Persuading the Judge to Impose an Alternative Sentence**

### **Try to Work within the Guidelines**

While generally trying to limit the sentencing options available for a court to consider, the guidelines themselves acknowledge that "[p]robation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." USSG Ch. 5, Part B, intro. comment.

They also recognize that there may be circumstances where community confinement is preferable to a term of imprisonment even for offenders in Zone C. See USSG § 5C1.1, n.6 (noting cases where departure is warranted to accomplish a treatment purpose).

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<sup>11</sup> Available at [http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf).

For clients with criminal history categories above III, keep in mind that the guidelines only discourage the use of substitutes for imprisonment for those defendants in cases where “such defendants have failed to reform despite the use of such alternatives.” USSG § 5C1.1, n. 7. With these clients, show that they were never provided with an alternative, or that whatever alternative sentence they received was poorly designed or inadequate to meet their needs. Then explain why your alternative proposal stands a much better chance of meeting the client’s “criminogenic” needs.

### **Deconstruct the Guidelines<sup>12</sup>**

Deconstruction refers to a critical analysis of the history and basis of the various guidelines to determine if they are based on empirical evidence, past practice, national experience, or otherwise reflect sound policy judgments. Judges are now invited to consider arguments that the guidelines themselves fail properly to reflect § 3553(a) considerations, reflect an unsound judgment, do not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Judges “may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,” *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (internal quotation marks omitted), and when they do, the courts of appeals may not “grant greater factfinding leeway to [the Commission] than to [the] district judge.” *Rita*, 127 S. Ct. at 2463. Whatever respect a guideline may deserve depends on whether the Commission acted in “the exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 575. This role has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and experts in the field. *Rita*, 127 S. Ct. at 2464-65. “Notably, not all of the Guidelines are tied to this empirical evidence.” *Gall v. United States*, 128 S. Ct. 586, 594 n.2 (2007). When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion for a court to conclude that it fails to achieve the § 3553(a)’s purposes, even in “a mine-run case.” *Kimbrough*, 128 S. Ct. at 575.

Under 18 U.S.C. § 3553(a) (4) and *Booker*, the district judge must consider the guidelines, but is not required to follow them. See *Rita*, 127 S. Ct. at 2465; *Kimbrough*, 128 S.Ct. at 570; *Nelson v. United States*, 129 S.Ct. 890 (2009); and *Spears v. United States*, 129 S.Ct. 840 (2009) (court may vary based upon disagreement with guideline). When a guideline is not based on empirical evidence, is not the product of “careful study,” does not reflect national experience, is not responsive to judicial feedback, or reflects unsound judgment even in a mine-run case, a court should give it little or no weight.<sup>13</sup> The

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<sup>12</sup> Guideline deconstruction is an ongoing effort of the National Federal Defender Sentencing Resource Counsel Project. Periodically check the fd.org website for papers deconstructing the various guidelines. For a general guide on deconstruction, see Amy Baron-Evans, *Introduction and “How-to” Guide to Deconstructing the Guidelines* (2009), available at fd.org. If you have undertaken your own deconstruction and wish to share it, please send it to one of the project members.

<sup>13</sup> See also *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc), petition for cert. filed, 77 USLW 3516 (Feb. 23, 2009); *United States v. Tomko*, 562 F.3d 558, 570 (3rd Cir. 2009); *United States v. Evans*, 526 F.3d 155, 161 (4th Cir.) (rejecting challenge to upward variance in identity fraud case because, “as the Solicitor General conceded in *Kimbrough*, a sentencing judge may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines”), cert. denied, 129 S. Ct. 476 (2008); *United States v. Williams*, 517 F.3d 801, 809-10 (5th Cir. 2008) (“The Supreme Court reiterated in *Kimbrough* what it had conveyed in *Rita v. United States*, which is that as a general matter, courts may vary from Guidelines

job of defense counsel is to provide the court with the reasons why the advisory guidelines should not be given much weight in the court's § 3553(a) analysis. Providing such reasons has become known within the defense community as "deconstruction."

### Deconstruct the Zones

The sentencing table is divided into four zones with rigid rules about which defendants must be imprisoned (Zone D) or partially imprisoned (Zone C), and which may be eligible for probation with a condition of confinement, including community confinement, intermittent confinement, or home detention, (Zone B) or probation only (Zone A). Post-*Booker*, these zones, like all other guidelines are advisory. Even though most offenders who receive alternatives sentences are in Zones A and B, nothing prohibits a court from imposing an alternative sentence for a defendant in Zone C or D. In Fiscal Year 2008, 15.5% of the offenders in Zone C either received probation with some sort of confinement and probation only; 3.5% of offenders in Zone D received such sentences. USSC, 2008, *Sourcebook of Federal Sentencing Statistics*, at 34, Table 16.

The zone limits on a court's sentencing options are not statutorily required. Federal defendants are eligible for probation unless they have been convicted of a class A felony (carrying a term of life or death) or a Class B felony (carrying a term of 25 years or more), the statute of conviction expressly prohibits probation, or the defendant is sentenced to prison for a non-petty offense at the same time. 18 U.S.C. §§ 3559(a) and 3561(a).

Nor are the zone limits required by the Sentencing Reform Act (SRA). In the SRA, Congress issued several directives regarding the kinds of sentences that should be imposed. Only three directives -- 28 U.S.C. § 994(h) (career offenders), § 994 (i) (repeat felony offenders, criminal enterprise or livelihood, crime of violence while on release for another felony offense, and major drug traffickers) and § 994(j) ("person convicted of a crime of violence that results in serious bodily injury"), required the Commission to specify terms of imprisonment for certain offenders.<sup>14</sup>

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ranges based solely on policy considerations, including disagreements with the Guidelines.") (internal punctuation and citations omitted); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008), cert. denied, No. 08-9523 (April 27, 2009); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008), *petition for cert. filed*, No. 08-10263 (Mar. 4, 2009); *United States v. Tankersley*, 537 F.3d 1100 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3517 (U.S. Mar. 2, 2009) (No. 08-1104); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008); *United States v. Smart*, 518 F.3d 800, 808-09 (10th Cir. 2008).

<sup>14</sup> Keep in mind that the career offender guideline, like all guidelines, is advisory. See, e.g., *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Lidell*, 543 F.3d 877, 884-85 (7th Cir. 2008) (noting that "section 994(h) only addresses what the Sentencing Commission must do; it doesn't require *sentencing courts* to impose sentences 'at or near' the statutory maximums"), *petition for cert. filed*, No. 08-9853 (April 16, 2009). But see *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009) (career offender provision encapsulates congressional policy in 28 U.S.C. § 994(h)). The petition for rehearing in *Vazquez*, available at [fd.org](http://fd.org), discusses why this decision was wrongly decided and why a court is free to disagree with guidelines promulgated as a result of congressional directives.

Significantly, two other provisions of 28 U.S.C. § 994 required the Commission to consider alternative sentencing options:

28 U.S.C. § 994(j) states: “The Commission shall 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 U.S.C. § 994(k) states: “The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”

Neither of these provisions directed the Commission to construct a system that placed a large number of individuals in prison or otherwise limited sentencing options. In the legislative history of these provisions, Congress noted that “if an offense does not warrant imprisonment for some purpose of sentencing, the committee would expect that such a defendant would be placed on probation.” S Rep. No. 98-225 at 171 n. 531 (1983); see also *id.* at 92 (Committee “expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions”); *id.* (“It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.”).

The Commission’s decision to limit probation and other alternative sentencing options was not based on past practice or national experience. The Commission quite plainly veered from past practice when it decided to limit sentencing options. “Between 1987 and 1991, as the full impact of the sentencing guidelines gradually emerged in federal courts, the use of simple probation was cut almost in half. It continued to decline throughout the guidelines era. By 2002, the percentage of offenders receiving simple probation was just a third what it had been in 1987.” USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at vi (2004). That trend has continued. See USSC, *Alternative Sentencing in the Federal Criminal Justice System* (2009).

Nor was the Commission’s decision to limit sentencing options the product of “careful study based on extensive empirical evidence.” *Gall*, 128 S.Ct. at 594. The Commission’s original explanation for disregarding past practice and requiring periods of imprisonment for even first offenders convicted of economic crimes did not cite any empirical evidence. In the introductory commentary, the Commission stated:

Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of

imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

USSG Ch 1, Pt. A, intro. comment. Nowhere did the Commission explain why it viewed economic crimes as “serious” within the meaning of 28 U.S.C. § 994(j).<sup>15</sup> It provided no data on the harm caused by these offenses to support a finding that they were somehow equivalent to crimes of violence or even crimes against persons. Nor did the Commission provide any empirical evidence that its theory of “significant deterrence” was a sound one.<sup>16</sup> As to why crimes like drug trafficking by low level offenders or firearms possession, require terms of imprisonment, the Commission offered no explanation whatsoever.<sup>17</sup>

The Commission also has not responded to judicial feedback about the need to expand the availability of alternatives to incarceration. “Judges responding to [a] 2002 Commission survey were very positive about the availability of [ ] alternatives to incarceration. The majority of district judges urged greater availability of probation with confinement conditions, particularly for drug trafficking offenders (64 percent), and the majority of circuit judges requested that such sentencing options be made either more available or not reduced from their current availability). Across all types of offenses, only a small minority of judges (approximately 15 percent) urged reduced availability of these options.” *Fifteen Year Report, supra*, at 44-45.<sup>18</sup> See also *USSC, Alternatives to Incarceration Project, The Federal Offender: A Program of Intermediate Punishments*, Message from the Director (Dec. 28, 1990); see also *id.* at 5-9 (identifying numerous benefits of alternative sanctions, including cost savings, efficiency and increased fairness at sentencing).

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<sup>15</sup> See also *United States v. Davern*, 970 F.2d 1490, 1502 n.7 (6th Cir. 1992) (Merritt, J., dissenting) (“The Sentencing Commission does not mention but rather has chosen simply to ignore the language of 28 U.S.C. § 994(j)"); see also *id.* at 1506 n.14 (noting that, at the time, less than 15% of federal defendants receive straight probation, compared with the pre-Guidelines statistic of 42.4%, "even though the enabling statute expressly approves the imposition of probation-only sentences for first-time offenders who have not been convicted of a crime of violence"); *United States v. Edgar*, 971 F.2d 89, 98 (8th Cir. 1992) (Heaney, J., concurring in part and dissenting in part) (noting that "[t]he guidelines have not even come close to complying with this mandate").

<sup>16</sup> Even it had, current empirical evidence proves the original theory wrong. Certainty of punishment is a far more significant deterrent than severity. See Discussion, *infra*, “Show Why Lengthy Terms of Imprisonment are not Necessary to ‘Send a Message.’”

<sup>17</sup> “[T]he Commission amended the Sentencing Table in 1992 to expand modestly the number of offenders who were eligible for alternative confinement, in order to take advantage of the increasing availability of a new technology (electronic home monitoring).” *Fifteen Years of Guideline Sentencing, supra*, at 44; see amendment 462 (November 1992).

<sup>18</sup> “[I]n sentencing drug trafficking offenders, more than half of responding district court judges (and a somewhat smaller proportion of responding circuit court judges) would like greater access to straight probation, probation-plus-confinement, or “split” sentencing options. Slightly more than 40 percent of both responding district and circuit court judges also would like greater availability of sentencing options (particularly probation-plus confinement or “split” sentences) for theft and fraud offenses. (Q11).” *Fifteen Years of Guideline Sentencing, supra*, Appendix C, at 4.

Post-*Booker*, judicial feedback about the need for more sentencing options continues to grow. District judges have imposed probation only sentences or other alternatives in cases that fall clearly within Zone D, finding that such sentences meet the purposes of sentencing in § 3553(a) far better than a term of imprisonment. See, e.g., *Gall*, 128 S.Ct. at 594 (finding that court did not abuse its discretion in imposing a three year probationary term where guidelines called for sentencing within range of 30-37 months).<sup>1</sup>

**Deconstruct Specific Offender Characteristics that the Guidelines Identify as not “Ordinarily Relevant” to a Court’s Decision on Whether to Sentence Outside the Range. USSG §§ 5H1.1 to 5H1.12.**<sup>19</sup>

Because a court must consider, *inter alia*, the “history and characteristics of the defendant” and the need for the sentence to “provide the defendant with needed vocational training, medical care, or other correctional treatment in the most effective manner,” 18 U.S.C. § 3553(a), the district court is not free to ignore these factors as the guidelines suggest. The guidelines do not embody all the applicable § 3553(a) factors. As the Commission itself acknowledges, it is not possible to “foresee and capture in a single set of guidelines the vast range of human conduct potentially relevant to a sentencing decision.” U.S. S.G. Ch. 1, Pt. A; USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (2003).

You should argue to your judge that *Booker* has made Part H of Chapter 5 obsolete. See *Rita v. United States*, 127 S. Ct. 2456, 2473 (2007) (Stevens, J., concurring) (Although various factors are “not ordinarily considered under the Guidelines,” § 3553(a) (1) “authorizes the sentencing judge to consider” these factors and “an appellate court must consider” them as well). In *Gall*, the Court made no mention of the Commission’s policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements, including age, employment, discontinued use of drugs, and voluntary withdrawal from the conspiracy.

Point out to the court how the Commission went well beyond what Congress envisioned when it made certain factors, like age, education, employment, vocational skills, or family and community ties off limits in a court’s decision to sentence a person to probation and/or community confinement. Congress directed the Commission to ensure that the guidelines and policy statements, “in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant,” 28 U.S.C. § 994(e); see also 28 U.S.C. § 994(k) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”). Congress did not direct the Commission to ensure that the guidelines reflect the inappropriateness of considering these factors when recommending a term of probation or other alternative sanction. Indeed, Congress contemplated that these factors might call for a sentence of probation or other alternative to incarceration. *Id.* at 172-73. Rather than place these factors off limits to the district court, Congress merely wanted to ensure that individuals were not unnecessarily imprisoned because of these factors. The Commission thought otherwise, but provided no empirical evidence for its decision.

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<sup>19</sup> A paper deconstructing these provisions should be forthcoming from the Federal Defender Sentencing Resource Counsel Project. Periodically check the fd.org website for new papers.

### **Deconstruct the Specific Chapter 2 or Chapter 4 Guideline at Issue in Your Case and the Criminal History Score**

Follow the general framework of deconstruction discussed above and as set forth in various deconstruction papers found at fd.org. Also look at *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker* (August 2006), available at fd.org, for background and resources supporting the argument that other guidelines are not based on empirical evidence, do not advance sentencing purposes, and do not avoid unwarranted disparities or unwarranted similarities.

### **Remind the Court That It Must Consider the 3553(a) Factors in Deciding Whether to Impose a Term of Probation or Imprisonment**

Congress expected that the threshold question for the courts in any case in which probation is statutorily allowed would be whether probation is sufficient or whether prison is required:

The court, in determining *whether* to impose a term of [probation or] imprisonment, and, *if* a term of [probation or] imprisonment is to be imposed, in determining the length of the term [and the conditions of probation] shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a) (emphasis supplied); 18 U.S.C. § 3562(a). Congress included the phrase “to the extent that they are applicable” to “acknowledge [] the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.” S. Rep. No. 98-225 at 119, n. 415.

### **Provide Evidence That Your Proposal, Tailored to Meet your Client’s Needs, Fits the Purposes of Sentencing and May Better Protect the Public**

Once you have individualized your sentencing package by identifying your client’s needs and finding community resources to meet them, back up your plan with the scientific studies that show alternatives work. Some of these studies are discussed earlier in this paper.<sup>20</sup> Some other studies include:

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<sup>20</sup> Other studies and statistics are available in *The Federal Public Defender’s Office Sentencing Resource Manual: Using Studies and Statistics to Redefine the Purposes of Sentencing* (last updated Sept. 2008). The National Institute of Corrections maintains an extensive library of research regarding correctional practices, available at <http://nicic.gov>. A search of the library may help you uncover articles and research studies that may help you convince the court your alternative is workable.

- **Drug treatment studies.** Evidence-based research shows that properly matched treatment programs for addicted offenders are effective in reducing recidivism. See, e.g., Nat'l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006) (concluding that "treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. . . . Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings" because every dollar spent toward effective treatment programs yields a \$4 to \$7 dollar return in reduced drug-related crime, criminal costs and theft);<sup>21</sup> 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) (for every \$1 spent on drug treatment, \$7 is saved in general social savings, primarily in reduced offending and also in medical care); 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 (March 2004) ("Dollar for dollar, treatment reduces the societal costs of substance abuse more effectively than incarceration does.");<sup>22</sup> see also *id.* at 18 ("A prison setting is ill-suited for the most effective approach to persistent drug abuse, which consists of a broad framework of substance abuse counseling with "job skill development, life skills training, [and] mental health assessment and treatment.").

At the Commission's recent Symposium on Alternatives to Incarceration, evidence-based research was presented to show that properly matched treatment programs for addicted offenders are effective in reducing recidivism. See USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008). For example, the Washington State Institute for Public Policy found that community drug treatment reduces recidivism by 9.3%, while prison drug treatment programs reduce recidivism by only 5.7%, and that treatment-oriented intensive supervision reduces recidivism by 16.7%. See *Washington State Institute for Public Policy, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Ex. 4 at p. 9 (October 2006).<sup>23</sup>

**Mental health treatment.** The Council of State Governments Justice Center recently released a report that summarizes the kind of community mental health treatment programs proven to work. See *Council of State Governments Justice Center, Improving Outcomes for People with Mental Illness Under Community Corrections: A Guide to Research Informed Policy and Practice* (2009). Therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences can reduce recidivism rates. See Dale E. McNeil, Ph.D. and Renée L. Binder, M.D., *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 *Am. J. Psychiatry* 1395-1403 (Sept. 2007); Ohio Office of Criminal Justice

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<sup>21</sup> Available at [http://www.nida.nih.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf).

<sup>22</sup> Available at <http://www.justicepolicy.org/article.php?list=type&type=98>.

<sup>23</sup> Available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (April 2007). While your district court may not have a problem-solving court, many of the same conditions of these programs may be implemented through U.S. Probation. Often a mentally ill defendant's need for special attention is confused with increased risk, when the factors used to predict recidivism for these defendants is the same as for all defendants. *Improving Outcomes*, supra, at 15.

- **Sex offenders.** Sex offenders can be managed in the community. See generally Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction* (2008); Berlin, F.S. et al., *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcome*, 12 Am. J. of Forensic Psych. 3 (1991); U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration).

### **Show Why a More Severe Sentence May Undercut the Purposes of Sentencing**

A sentence of imprisonment may undermine the statutory purposes of sentencing, particularly specific deterrence, because it may result in a mismatch between the offender's risks and needs. According to studies reported in *Federal Probation: A Journal of Correctional Philosophy and Practice*, "[the 'risk principle'] states that the intensity of an offender's supervision and treatment must be proportional to his or her level of risk. Offenders with a high risk of recidivism must be intensely supervised and receive comprehensive treatment services. Conversely, offenders with a low risk of recidivism should receive minimal services. Recent research indicates that the failure to follow the risk principle leads to higher recidivism rates." Scott VanBenschoten, *Risk/Needs Assessment: Is This the Best We Can Do?* 72 *Federal Probation* (2008); see also James Austin, *How much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, 70 *Federal Probation* (2006) ("prior research has shown that assigning low-risk people to treatment they really don't need actually increases recidivism"); see also Christopher T. Lowenkamp, et. al., *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?*, 70 *Federal Probation* (2006).

Prison may also increase the risk of recidivism by exposing an offender to the "criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties." USSC, *Sentencing Options Under the Guidelines*, at 10 (Nov. 1996). Incarceration profoundly disrupts the communities in which defendants reside. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality." Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005).<sup>24</sup>

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<sup>24</sup> Available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

In addition to placing an individual offender at risk, a prison sentence may undercut the need for a sentence to promote respect for the law. As the Court acknowledged in *Gall*, “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” 128 S.Ct. at 599 (quoting district court opinion).

### **Show Why Lengthy Terms of Imprisonment are not Necessary to “Send a Message”**

The evidence on the deterrent value of imprisonment is ambiguous at best, and not a sound basis upon which to sentence. See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 61-62 (2003). In drug cases, incarceration has little effect in reducing crime because demand drives the crime and low-level dealers and couriers are easily replaced. See The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 6-7 (2005). Nor do lengthy terms of imprisonment have a deterrent effect on white-collar offenders, presumably the most “rational” group of offenders. See Sally S. Simpson, *Corporate Crime, Law, and Social Control*, 6, 9, 35 (Cambridge University Press) (2002); David Weisburd, et.al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 687 (1995) (reporting no difference in deterrence between probation and imprisonment).

The deterrence literature has been reviewed several times by groups of scientific experts at the request of sentencing policymakers. Typical of the findings on marginal deterrence is that of the Institute of Criminology at Cambridge University. See Andrew von Hirsch, et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999). The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. It examined the effects of changes to both the *certainty* and the *severity* of punishment. While significant correlations were found between the certainty of punishment and crime rates, the “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance.” *Id.* at 2. The report concludes that “the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects.” *Id.* at 1.

### **Use Sentencing Statistics to Show that Other Courts are Imposing Alternative/Below Guideline Sentences for a Multitude of Reasons**

You may find helpful data in the USSC, *Sourcebook of Federal Sentencing Statistics*, which is published each year. In tables 25A and 25B of the 2008 book for example, the Commission lists twenty-nine of the most prevalent reasons for sentences below the guideline range. USSC, *2008 Sourcebook of Federal Sentencing Statistics*, at 68-69.<sup>25</sup> Many of the previously “discouraged” factors in USSG § 5H are included as reasons for lower sentences. Your judge may take some comfort in knowing that other judges have provided similar reasons for a below guideline sentence.

The Sourcebook also identifies the frequency of below guideline sentences by primary offense and guideline. *Id.* at 76-81. That data shows for example that judges imposed below guideline

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<sup>25</sup> The Commission has over 160 categories for coding departures and below guideline sentences, but only reports on the more prevalent ones. See USSC, *Variable Codebook for Individual Offenders: Standardized Research Data Files for Fiscal Years 1999 to 2008* (2009), at A-9 to A-13. Reasons that do not fit into the coded categories are reported in the data files. In 2008, judges gave close to 200 reasons for outside the guideline sentences, which did not fit into the 160 or so coded categories.

sentences (non-government sponsored) in 13.4% of drug trafficking cases, 15.5% of firearm cases, and 33% of child pornography cases.

Offenders convicted of larceny, fraud, and white collar offenses stand the best chance of getting probation only or probation with a condition of confinement. See *Alternative Sentencing, supra*, at 8, Table 6. If your client is lucky enough to have committed one of those offenses where offenders more often receive alternatives, then point that out. Even if your client committed an offense like robbery or falls within criminal history category VI, the right combination of § 3553(a) factors can result in probation with or without conditions of confinement. *Id.* (46 U.S. citizen offenders in criminal history category VI received probation).

The Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org>, provides access to a wealth of data, including the kinds of cases where judges are imposing alternative sentencing options and sentences below guideline sentences (for reasons other than 5K1.1 or government-sponsored below range sentences). For example, in 2007 judges imposed probation only sentences in at least 13.5% of cases with final offense levels that fell within Zone D. BJS Federal Justice Statistics Program website (departure status by USSC offense type) (type of sentence imposed by final offense level).

### **Be Sure to Protect your Record**

If the judge imposes an alternative that varies from the sentencing options available in the Zones, make sure that the judge articulates that he or she has considered all of the § 3553(a) factors, including the “kinds of sentences” available under the guidelines, *i.e.*, the 3553(a) (4) factor. See *United States v. Duhon*, 541 F.3d 391, 398 (5th Cir. 2009) (when imposing probation, court erred in not acknowledging the guidelines fell within Zone D, which prohibit probation).

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<sup>i</sup> See also *United States v. Duhon*, 541 F.3d 391 (5th Cir. 2009) (affirming five year probationary sentence for child pornography defendant in guideline range of 27-33 months where sentence of imprisonment would have interfered with defendant’s psychological treatment and made him lose social security disability benefits); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008) (affirming five year probation sentence for child pornography defendant in guideline range of 46-57 months); *United States v. Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008) (affirming sentence in case involving convictions for health care fraud and embezzlement; the district court cited as one of several mitigating factors the defendant’s “history of strong employment” in granting a variance from 30-37 months’ imprisonment to one day of imprisonment followed by three years’ supervised release [to be partially served in a community confinement facility], in part so that the defendant could continue to work); *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008) (affirming a below-guideline sentence in heroin trafficking case of one year and a day in prison, plus a year of home confinement and five years of supervised release, where the guidelines called for a sentence of 63-78 months); *United States v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (affirming sentence of two years probation and three months home confinement for Zone D defendant (18 to 24 months, CHC I) convicted of two counts of wire fraud); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008) (affirming sentence of three years probation for Zone D defendant (37 to 46 months) convicted of possession of pseudoephedrine, knowing it would be used in the manufacture of methamphetamine), *cert. denied*, 129 S. Ct. 1689 (2009); *United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008) (affirming sentence of probation, community service, and restitution for Zone D defendant (41 to 51 months) convicted of selling over \$1 million worth of counterfeit “access cards” that allowed customers to access digital television without paying); *United States v. McFarlin*, 535 F.3d 808 (8th Cir. 2008) (affirming sentence of three years probation for Zone D defendant (78 to 97 months, reduced to

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the statutory maximum of 60 months) convicted of conspiracy to distribute crack under 18 U.S.C. § 371); *United States v. Tomko*, 562 F.3d 558 (3rd Cir. 2009) (en banc) (affirming probation, community service, and restitution for tax evasion defendant in Zone D ( 12 to 18 months)).