No. 06-7949

In The Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICI CURIAE* OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a sentence outside the range recommended by the United States Sentencing Guidelines with a finding of extraordinary circumstances.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, other than the two representing the petitioners in this matter and in No. 06-6330, *Kimbrough v. United States*. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their Assistants. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. The issue presented in this case is of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

This Court should reject the extraordinary circumstances test and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). If district court judges are permitted to sentence according to the now-governing sentencing law, 18 U.S.C. § 3553(a), with required appellate deference to their sentencing judgments, they can, for the first time, impose sentences that are sufficient, but not greater than necessary, to satisfy sentencing purposes, in light of all relevant statutory factors; provide vital feedback to the Commission which it can use to improve its policies; and

[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *Amici Curiae* made a monetary contribution to the preparation or submission of the brief.

develop a common law of sentencing that is useful and informative to other courts, litigants, and the Commission.

The concept of sentencing reform, as envisioned by early reformers, adopted by Congress, and advocated by the first Sentencing Commission, was of a partnership in which the district courts, particularly through reasoned judgments in sentencing outside the guideline range, would play a pivotal role. The courts of appeals would affirm reasonable departures and synthesize the district courts' reasons, the Commission would learn, and the Guidelines would evolve. This concept was never realized for a number of reasons. The mandatory nature of the Guidelines, their restrictions on individualized sentences, and close appellate scrutiny essentially forbade district courts to consider, and thus they rarely discussed, whether the Guidelines accomplished sentencing purposes, avoided unwarranted disparities, or appropriately took account of individual circumstances. This inhibited the development of a common law of sentencing and the contemplated dialogue between the courts and the Commission.

Following *Booker*, the possibility again arose that the system would reflect and respond to the reasoned judgments of sentencing courts. Since then, however, a majority of the courts of appeals has adopted the extraordinary circumstances test to justify sentences outside the guideline range, which, as before *Booker*, asks whether the sentence is reasonable with regard to the Guidelines, prohibits critical evaluation of Commission policies, and permits courts of appeals to substitute their own judgments for those of the district courts. This method of review again stifles an exchange between the courts and the Commission, bears no resemblance itself to a sentencing common law, discourages the district courts from developing their own sentencing common law, and is now unlawful and unconstitutional.

This Court should now make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). The district courts are best situated to ensure that the goals of sentencing are met in individual cases, to develop a common law of sentencing, and to provide the Commission with the information it needs to improve its generally applicable advice.

ARGUMENT

I. The Original Intent Was That Sentencing Policy and Practice Would Evolve in Response to the Actions and Views of Sentencing Courts.

One of the chief principles espoused by those who sought to reform sentencing in the 1970s and 1980s was that the courts would adopt a reasoned approach to sentencing, and their work, set forth in reasons for sentences and sentencing opinions, would inform other courts and potentially be incorporated into sentencing guidelines. In the Sentencing Reform Act (SRA), Congress adopted this principle in a number of provisions, and it was embraced by the first Sentencing Commission.

Before the SRA, district court judges were not required to state reasons for their sentencing decisions, and there were virtually no sentencing opinions by district court judges or appellate courts. From the beginning of the movement for a rationalization of sentencing, it was the hope of Marvin Frankel, Norval Morris and other early reformers that judges would state reasons for their sentences and that appellate courts would synthesize those reasons into a consistent body of sentencing jurisprudence. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State*

Experiences, 91 Nw. L. Rev. 1441, 1444-46, 1448 (1997). In this way:

> The courts would have the responsibility . . . for developing a jurisprudential approach to those occasions in which it is appropriate to set guideline presumptions aside. The commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges would coexist with, or even be incorporated into, the guidelines themselves.

Id. at 1455.

Congress embraced this principle in several provisions of the SRA. District courts would state their reasons, 18 U.S.C. § 3553(c), the Commission would collect, study and disseminate those reasons, 28 U.S.C. §§ 994(w), 995(a)(15), and appellate courts would uphold "reasonable" departures, having regard for the sentencing court's reasons and the factors set forth in § 3553(a). 18 U.S.C. § 3742(e) (1990). Congress thought that appellate courts would:

> provide case law development of the appropriate reasons for sentencing outside the guidelines. . . . For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to amend the guidelines to reflect the factor.

S. Rep. No. 98-225, at 151 (1983).

The original Commission also contemplated that the district courts would provide the feedback through which the Guidelines, which did not resolve every issue at the outset, would evolve. It viewed the initial set of guidelines as "but the first step in an evolutionary process," which

would result from "continuing research, experience and analysis." U.S.S.G. § 1A1.1, pt. A, ¶ 3. Later Commissions could "write and re-write guidelines, with progressive changes," by "monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so." *Id*., ¶ 4(b). As explained by then-Chief Judge Breyer, "the very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993). Appellate courts would presumably write opinions placing cases "within a broader perspective of sentencing law." *Id.* at 950.

Thus, from the beginning, one foundation of the reformed system was that appellate courts would synthesize sentencing judges' substantive reasoning into a common law of sentencing, and that this would coexist with, and potentially be incorporated into, the Guidelines. Reitz, *supra*, at 1455.

II. Before *Booker*, The Intent That Decisions of Sentencing Judges Would Contribute to a Sentencing Common Law and Evolution of the Sentencing Guidelines Was Not Fulfilled.

Due to the mandatory nature of the Guidelines, policies adopted by the Commission, and close appellate review enforcing the Guidelines, a common law of sentencing did not develop, and productive dialogue between the courts and the Commission was largely missing.

Though judges were always nominally directed to impose sentences in compliance with § 3553(a), at the same time, they were required to impose the guideline

sentence, whether or not it complied with § 3553(a), unless the facts happened to fit a departure as defined and approved by the Commission, or there was a circumstance not adequately considered by the Commission in formulating its guidelines, policy statements or official commentary. 18 U.S.C. § 3553(b)(1) (2004).

Further reducing the possibility of the courts influencing the development of the Guidelines, the Commission severely narrowed the district courts' discretion to consider the adequacy of the Guidelines. The Commission classified as never or not ordinarily relevant all history and characteristics of the offender other than criminal history, and either did not mention, narrowly defined, or limited the impact of mitigating circumstances of the offense. *See* U.S.S.G. Ch. 5, pts. H, K. p.s.; U.S.S.G. § 3B1.2. Even though the Guidelines could not possibly take into account all factors that are relevant to individual sentencing decisions,[2] the Commission nevertheless placed a wide range of mitigating factors off limits, a decision that was both contrary to congressional intent and unexplained.[3] This decision effectively pre-empted the courts' ability to consider what factors might properly constitute grounds for mitigation of sentence.

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[2] U.S.S.G. § 1A1.1, pt. A ¶ 4(b); U.S. Sentencing Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003).

[3] The Commission was directed to consider the relevance of a variety of offender characteristics, 28 U.S.C. § 994(d), and to reflect the "general inappropriateness of considering" education, vocational skills, employment record, family ties and community ties "in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). Congress explained that the purpose of § 994(e) was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," but "each of these factors," in § 994(d) and (e), "may play other roles in the sentencing decision." S. Rep. No. 98-225, at 175 (1983).

Further, the "statutory injunction to uphold 'reasonable' departure sentences . . . receded far into the distance." Reitz, *supra*, at 1468. When judges imposed sentences outside the guideline range for reasons not explicitly encouraged in the Guidelines' policy statements, including the failure of a particular guideline to satisfy sentencing purposes, the courts of appeals quickly reined them in. *See, e.g., United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) ("To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines."); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) ("Disproportionality does not, in itself, provide an appropriate basis for a downward departure."); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court's reliance on defendant's family ties and responsibilities, majority "pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant's life will be frustrated by this court.").[4]

[4] Appellate courts commonly trumped the judgments of the district courts through "spectacles of dueling discretion," in which "the circuit court often recognized that the 'kinds' of factors cited by the sentencing court were supportive of departure, but decided that their 'degree' was not," and "applied their own instincts as to the placement of the case on a continuum." Reitz, *supra,* at 1467-68; *see also* Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2048, 2050-51 (1992) ("Both the Commission and the courts of appeals should be responding more positively to the pressures from trial judges to increase their authority to mitigate."); 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, 25-26, 78-84 (2003) (hereinafter "*Reason Behind the Rules*") ("Departure in cases where the Guidelines result in disproportionate punishment, or inadequate or excessive incapacitation, provides

(Continued on following page)

Thus, the efforts of sentencing courts to provide feedback to the Commission about which guidelines were in need of revision were thwarted, and their views had no discernible impact on the Commission's policy choices.[5] By all accounts, including that of the Commission, the ideal model of policy development envisioned in the SRA was never fully implemented, and the goals of sentencing reform have been, at best, partially achieved. *See* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 142-46 (2004); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker, 38 Ariz. St. L.J. 425, 450 (2006) (hereinafter "*Immediate and Long-Term Effects*"); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis,* 105 Colum. L. Rev. 1315 (2005); Linda Drazga Maxfield, U.S. Sentencing Comm'n, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* ES2-7 (Mar. 2003).

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feedback to the Commission about which guidelines are most in need of revision [but] many appellate courts have opted to enforce [the Guidelines] more rigidly than anyone predicted or than the relevant statutes appear to require.").

[5] The Commission mentioned appellate decisions reviewing departures in only five of nearly 700 amendments. *See* U.S.S.G., App. C, amends. 602 (forbidding post-sentencing rehabilitation), 582 (narrowing diminished capacity), 603 (narrowing aberrant behavior), 604 (permitting departure based on conduct that was dismissed or not charged as part of a plea agreement), 645 (permitting departure based on discharged term of imprisonment).

III. After *Booker*, Aggressive Appellate Review of Sentences Outside the Guideline Range Again Forecloses the Possibility of District Court Feedback to the Commission, Discourages Development of a Sentencing Common Law, and Is Now Unlawful and Unconstitutional.

With this Court's decision in *Booker*, the possibility arose that the district courts, which now for the first time were unambiguously required to impose sentences sufficient, but no greater than necessary, to satisfy sentencing purposes in light of all relevant circumstances, would be able to engage in critical evaluation of the Guidelines and that this might lead to their improvement.[6] This potential is being nipped in the bud, however, by an aggressive form of review that is indistinguishable from the *de novo* standard excised by *Booker*.

This method of review asks not whether the sentence is reasonable with respect to § 3553(a), *Booker*, 543 U.S. at 261, but whether it is reasonable with respect to the

[6] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 230 (2005) (noting historical inability of district courts to critically evaluate guidelines, but after *Booker*, "review conducted by individual judges as they consider the particular cases before them . . . could produce, as others have advocated in the past, a 'common law' of sentencing"); Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 Fed. Sent. Rep. 165, 2007 WL 1296012, *5 (2007) (Guidelines should be "critically evaluated in each case . . . for their fealty or lack of fealty to the purposes of sentencing [with] the reasons carefully spelled out."); Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 375 (2006) (*Booker*'s "remedial opinion, by emphasizing the provisions of § 3553(a) and essentially demanding a sentencing process focused on the exercise of reasoned judgment by federal judges . . . creat[es] the possibility of developing a purpose-driven 'common law of sentencing' . . . which means that judges now can and must give more sustained attention to the broader goals of sentencing reform.").

Guidelines, and defers not to the record findings of sentencing judges, *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), but to the assumed findings of the Commission. This intrusive standard impedes the Commission's ability to learn from the district courts' experience, *United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989), and discourages the development of a useful, healthy and transparent common law. *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 (M.D. Fla. 2007).

In those circuits applying the extraordinary circumstances test, appellate courts have simultaneously required virtually no explanation for within-guideline sentences and rejected even the most detailed justifications for non-guideline sentences, thereby "discouraging the development of individualized, policy-driven sentences where the facts so warrant," Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence after* Booker, 18 Fed. Sent. Rep. 174, 2007 WL 1895180, *5 (2006), just as before *Booker*. Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: the Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 105 (1999) ("Appellate judges have principally sought to ensure compliance with the Commission's guideline determinations.").

Just as the mandatory nature of the Guidelines before *Booker* hindered judicial evaluation of the substance of the Guidelines, the extraordinary circumstances test does the same. As one district court judge observed, it "sounds very much like the old departure standard" and "improperly elevates the guidelines above the other factors set forth in section 3553(a)." *United States v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006). Indeed, the decisions of courts of appeals under this standard are fundamentally indistinguishable from the pre-*Booker* regime, for they routinely reverse on the ground that the district judge's reason is discouraged,

prohibited or not recognized by Commission policy and is therefore absolutely not permitted or is not sufficiently "extraordinary" to overcome that obstacle. *See, e.g., United States v. Richardson*, No. 05-4817, 2007 WL 1413075, *2 (4th Cir. May 11, 2007) (defendant's prior good character, lack of criminal record and influence of relationship with principal conspirator were "not so extraordinary as to support" non-guideline sentence, and reliance on factors Commission deemed "not ordinarily relevant" (youth) or "not appropriate" (post-sentence rehabilitation) was "misplaced"); *United States v. Borho*, 485 F.3d 904, 912-13 (6th Cir. 2007) (district court must offer "compelling justification" if factors discouraged by guidelines form basis of "substantial variance" from guideline range); *United States v. Funk*, 477 F.3d 421, 427-31 (6th Cir. 2007) (disagreement with career offender guideline as applied to nature and circumstances of defendant and offense is "an impermissible sentencing factor"); *United States v. Simmons*, 470 F.3d 1115, 1130-31 (5th Cir. 2006) (court must "explain why the prohibited or discouraged factor, as it relates to defendant, is so extraordinary that the policy statement should *not* apply.") (emphasis in original); *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) ("we do not share the district court's view that [defendant's] charitable works were so extraordinary that they should be given weight despite the contrary view of the Sentencing Commission"); *United States v. Wallace*, 458 F.3d 606, 611 (7th Cir. 2006) (judge's stated belief "that culpability should be measured by actual loss . . . was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts"); *United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir. 2006) (reversing sentence to probation, in part, because "[t]he Court's logic does not convince us that [defendant's] age and health are so extraordinary that they eliminate the need for imprisonment"). Further, in

applying this standard, the courts of appeals substitute their own judgments for those of the district courts as to findings of fact, *United States v. Davis*, 458 F.3d 491, 502 (6th Cir. 2006) (Keith, J., dissenting), the weight to be given the facts, *United States v. Cage*, 451 F.3d 585, 595 (10th Cir. 2006), and the appropriate sentence. *United States v. Thurston*, 456 F.3d 211, 220 (1st Cir. 2006). This has rendered illusory the discretion of district courts to apply the standards of § 3553(a) to the cases before them, has stymied judicial evaluation of whether the Guidelines are consistent with § 3553(a) in operation, and defeats any serious possibility that sentencing principles developed by district courts might ultimately be recognized in the Guidelines.

By forbidding district courts to disagree with any Commission policies, a majority of the courts of appeals would end, before it has begun, the discussion whether those policies further the goals of § 3553(a). *See* Carissa Byrne Hessick & Andrew Hessick, Rita, Claiborne, *and the Courts of Appeals' Attachment to the Sentencing Guidelines*, 19 Fed. Sent. Rep. 171, 2007 WL 1296013, *5 (2007) (discussing appellate courts' "insistence that sentences not be based on a sentencing court's disagreement with policy decisions of the Guidelines or on facts that might affect sentences of more than a small number of defendants"); *United States v. Pruitt*, 487 F.3d 1298, 1314-15 & n.3, 1317-18 (10th Cir. 2007) (McConnell, J., concurring) (explaining that appellate courts' role is not to ensure that the guidelines reflect good policy, but to affirm guideline sentences even when the policy reflected therein is "misguided," and to reverse district courts' stated disagreements with admittedly "misguided" Commission policies, because Congress entrusted policy questions to the Commission). In short, as before *Booker*, the appellate courts have created a "veto over trial court innovations" that leaves little room for district court discretion or "the

human element of sentencing decisions," "chok[ing] off" the very jurisprudence Congress and the first Commission expected would enable the system to evolve. *See* Reitz, *supra*, at 1455, 1458, 1471; *see also Rita*, 127 S. Ct. at 2469; *id*. at 2482-83 (Scalia, J., concurring).

Moreover, this position effectively restores mandatory Guidelines and the accompanying Sixth Amendment violation. It forbids a judge to increase, or decrease, a sentence unless the judge finds facts not found by a jury or admitted by the defendant. *Rita*, 127 S. Ct. at 2466. It does not allow a non-guideline sentence based on a conclusion that the guideline sentence, as a matter of policy, fails to reflect § 3553(a) considerations or reflects an unsound judgment, or that a different sentence is appropriate "regardless." *Id*. at 2465, 2468; *see also Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (sentencing system that does not permit sentencing increase based on "general objectives of sentencing" alone without a "fact-finding anchor" violates the Sixth Amendment). As the government has conceded, to avoid the Sixth Amendment violation, judges must be free to disagree with the guidelines, even when the case is typical,[7] that is, in the absence of extraordinary facts.

A statistical comparison illustrates that limiting district court discretion to sentence outside the guideline range, absent extraordinary circumstances, effectively restores mandatory Guidelines and recreates the Sixth Amendment violation. In circuits that do not use the extraordinary circumstances test (District of Columbia, Second, Third, and Ninth circuits), non-guideline sentences were reversed as unreasonable in only 5.9% of

[7] Transcript of Oral Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007); Transcript of Oral Argument at 50, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007).

cases. Appeals courts employing the extraordinary circumstances test (First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh circuits), reversed three times more often, holding 18.8% of non-guideline sentences unreasonable. The Eighth Circuit, which reversed Mr. Gall's sentence, reversed non-guideline sentences 35.1% of the time.[8]

The impact of the extraordinary circumstances test on sentences imposed by district court judges is apparent. According to recent Commission statistics, the rate of non-guideline sentences imposed by judges in extraordinary circumstances circuits is 34.9% less than in non-extraordinary circumstances circuits,[9] demonstrating the "substantial gravitational pull" that "in practical terms preserve[s] the very feature of the Guidelines that threatened to trivialize the jury right." *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting); *see also id.* at 2473 (Stevens, J., concurring); *id*. at 2478 n.3 (Scalia, J., concurring).

In short, the requirement that there be extraordinary circumstances to permit a sentence outside a guideline range and that such a sentence may not be based upon disagreement with Commission policy forecloses the

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[8] *See* Appendix. These statistics were compiled from the data contained in the Court of Appeals Review, filed as an Appendix to the Brief *Amici Curiae* of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioners, *Rita v. United States*, Case No. 06-5618 and *Claiborne v. United States*, Case No. 06-5754 (Dec. 18, 2006).

[9] Of the 23,212 sentences imposed in extraordinary circumstances circuits, 2,847, or 12.3%, were outside the guideline range (not including government-sponsored below-guideline sentences). Of the 9,355 sentences imposed in non-extraordinary circumstances circuits, 1,553, or 16.6%, were outside the guideline range (not including government-sponsored below-guideline sentences). *See* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report*, 2d Quarter Release, Through March 31, 2007, Table 2.

possibility of feedback by district courts to the Commission, discourages development of a sentencing common law, and is both unlawful and unconstitutional under *Booker* and *Rita*.

IV. Requiring Deference to District Courts' Application of § 3553(a) to Individual Cases Will At Last Permit the Development of a Sentencing Common Law and a Dialogue with the Commission.

The essential component of a system that *can* produce sentences that meet the purposes of sentencing, avoid unwarranted disparities, and take account of individual circumstances, and that *can* evolve over time, is the ability of district court judges to impose non-guideline sentences within the framework of § 3553(a), to explain those sentences, and to have their judgments respected.

District court judges can fulfill this uniquely vital role now that they are no longer required, or permitted, to defer to the Commission's policy judgments, *Rita*, 127 S. Ct. at 2465, and appellate courts may no longer "grant greater factfinding leeway to [the Commission] than to a district judge." *Id*. at 2463. After an independent evaluation, the judge may conclude that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," "the Guidelines reflect an unsound judgment, or . . . do not generally treat certain defendant characteristics in the proper way," or "the case warrants a different sentence regardless." *Id.* at 2465, 2468. In explaining why, the judge can provide valuable information to the Commission, other judges, and also importantly to the defendant. *See Immediate and Long-Term Effects*, *supra*, at 464 ("Many sentencing judges engage in thoughtful consideration of the Commission's guidelines and policy statements, as well as the statutory factors found at 18 U.S.C. § 3553(a), and

issue illuminating sentencing opinions. . . . A detailed statement of reasons or written sentencing opinion can provide valuable feedback to the Commission and explain to the appellate courts how the guidelines failed in a particular case.").

When an appellate court "substitute[s] its judgment for that of the sentencing court as to the appropriateness of a particular sentence," *Williams v. United States*, 503 U.S. 193, 205 (1992) (internal citation and quotation marks omitted), it is inherently less reliable and less informative than the district court decision reviewed, and thus less helpful to the Commission. *See Koon v. United States*, 518 U.S. 81, 98-99 (1996) ("'To ignore the district court's special competence . . . risk[s] depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case.'") (quoting *Rivera*, 994 F.2d at 951). And, because sentencing involves consideration of "unique factors that are little susceptible of useful generalization," *Koon*, 518 U.S. at 99, appellate court decisions are of marginal utility to other courts. *Buford v. United States*, 532 U.S. 59, 65-66 (2001) (fact-bound nature of determination "limits the value of the appellate court precedent, which may provide only minimal help when other courts consider other . . . circumstances").

The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts, and gains insights not conveyed by the record. *Rita*, 127 S. Ct. at 2471-72 (Stevens, J., concurring); *Pierce v. Underwood*, 487 U.S. 552, 560 (1988). "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita*, 127 S. Ct. at 2469. "District courts have an institutional advantage over

appellate courts [because they] must make a refined assessment of the many facts bearing on the outcome, informed by [their] vantage point and day-to-day experience in federal sentencing." *Koon*, 518 U.S. at 98. *Accord Pruitt*, 487 F.3d at 1318 (McConnell, J., concurring) (role of appellate courts "cannot be to ensure that the sentence is properly calibrated to the particular circumstances of the offender and the offense. District judges, who interact with the defendant and hear the evidence in the case, are far better situated than appellate judges to make these judgments.").

District court judges are better-situated than appellate courts to determine whether "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or whether "the Guidelines reflect an unsound judgment." *Rita*, 127 S. Ct. at 2465, 2468. This too is a fact-bound determination within the special competence and experience of the district courts. It requires the finding and weighing of facts particular to the offense and the offender, and broader purpose-related facts as well, such as the statistical likelihood of recidivism of persons of the defendant's age, educational level and work history, the deterrent value and societal cost of lengthy prison sentences for the type of offense, the community's view of the seriousness of the offense,[10] the efficacy of substance abuse or other mental health treatment. *See, e.g., United States v. Brennan*, 468 F. Supp. 2d 400, 404-08 (E.D.N.Y. 2007); *United States v. Holden*, No. 06-20345, 2007 WL 1712754 (E.D. Mich. June 13, 2007); *United States v. Nellum*, Crim. No. 2:04-30, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Perella,* 273 F. Supp. 2d 162 (D. Mass. 2003). The question is not amenable to "the normal law-clarifying benefits that come from an appellate decision on

[10] 28 U.S.C. § 994(c)(4), (5).

a question of law," as the answer depends on a "diffuseness of circumstances." *Pierce*, 487 U.S. at 561-62. Further, district courts can better identify persistent problems with the Guidelines, *see, e.g., United States v. Ibanga*, 454 F. Supp. 2d 532 (E.D. Va. 2006) (relevant conduct rules as applied to acquitted conduct "run[ ] afoul of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a)"); *United States v. Saenz*, 429 F. Supp. 2d 1081 (N.D. Iowa 2006) (describing massive disparities routinely arising from U.S.S.G. § 5K1.1), because they see so many more cases than appellate courts do. *Koon*, 518 U.S. at 98; U.S. Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, Tables 2 and 55 (88.6% of sentences imposed by district courts were not appealed).

Judges can make findings based on expert testimony and reports, criminological research, health and sociological studies. They are no longer confined to consulting only the guidelines, policy statements and official commentary of the Commission to determine whether a circumstance was "adequately taken into consideration" such that a departure is warranted, 18 U.S.C. § 3553(b)(1) (2004), but must conduct their *own* assessments in discharging their statutory duties under § 3553(a). *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").[11] As trial judges whose daily

[11] *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

function is to hear and evaluate evidence, they are well-positioned to consult pertinent research and studies and to assess the validity and relevance of such studies in light of the facts of the case and their extensive sentencing experience.

The Commission itself has conducted studies that have not been incorporated into the Guidelines but upon which judges can and should rely. In addition to the reports on crack cocaine sentencing,[12] the Commission's *Fifteen Year Report* identifies serious problems with the career offender guideline, the relevant conduct rules, the drug guidelines generally, and various forms of disparity that have increased under the Guidelines, most notably racial disparity and hidden disparities caused by the government's practices as permitted and encouraged by the Guidelines.[13] It has published three reports on recidivism, acknowledging that the criminal history rules were never based on empirical evidence and identifying numerous factors that predict reduced recidivism which are not included in the Guidelines and factors that do not predict recidivism which are included in the Guidelines.[14] While

[12] With one possible exception, *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007) (district court erred in neglecting to consider Commission's findings), the courts of appeals have restricted the ability of district courts to rely on the Commission's findings in its crack cocaine reports. *United States v. Willis*, 479 F. Supp. 2d 927, 933-35 (E.D. Wis. 2007) (discussing appellate case law regarding use of Commission's crack reports and their impact on sentencing under § 3553(a)).

[13] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 47-55, 76, 82, 91, 94, 102-06, 111-15, 117, 122, 131-35, 140-42 (2004).

[14] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "*Measuring Recidivism*"); U.S. Sentencing Comm'n, *Recidivism and the First Offender* (May 2004); U.S. Sentencing

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the rules remain unchanged, judges can and should rely on these extra-guideline findings to impose non-guideline sentences that better comply with § 3553(a).[15]

There are many areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include studies on brain development by the National Institutes of Health and others, as cited by the district court in this case,[16] research showing the efficacy and cost savings of drug treatment, education and job training over lengthy

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Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005).

[15] *See United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (relying on *Fifteen Year Report*'s discussion of career offender guideline to impose non-guideline sentence); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (relying on *Fifteen Year Report* to point out disparities arising from government's unilateral power to reward cooperation, contrasting restrictions on aberrant conduct guideline with recidivism reports); *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Ali*, Crim. No. 1:05-5, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006) (imposing non-guideline sentence, citing recidivism reports).

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

incarceration in reducing crime,[17] reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value,[18] research on the adverse impact of incarceration on children and families,[19] analyses of the suitability of members

[17] 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); Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 Law & Contemp. Probs. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, January 2007 (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

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

[19] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children* (Dec. 2001), presented at U.S. Dep't of Health and Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (2002) (discussing impact of parental incarceration on children and benefits of alternatives to incarceration); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001) (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing

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of immigrant populations for intermediate sanctions,[20] reports on the efficacy of victim mediation as an alternative to incarceration,[21] and studies demonstrating that contrary to myth, recidivism rates for sex offenders are lower than in the general criminal population, and that community treatment for sex offenders is effective.[22]

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effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); Patricia M. Wald, "*What About the Kids?*": *Parenting Issues in Sentencing*, 8 Fed. Sent. Rep. 137, 1995 WL 862004 (1995) (discussing growing body of research showing that children fare better in their parents' care than in foster care or elsewhere).

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

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

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

Thus, district judges can inform the Commission of issues it has not identified, help it to understand issues it has not resolved, and alert it to issues it may have thought were closed. For example, after *Booker*, district courts have informed the Commission that the career offender guideline (from which the Guidelines permit a departure of only one level) fails to distinguish between serious and non-serious offenses by substantially reducing career offender sentences in many cases.[23] In *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006), the judge pointed out that the definition of career offender predicates covers misdemeanor convictions, contrary to 28 U.S.C. § 994(h), from states with misdemeanors punishable by more than one year. In *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007), the judge identified a "structural problem" in the relevant conduct rule as shown by two different probation officers "calculating" ranges of 37-46 months and 151-188 months for two identically-situated defendants in the same case. In *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), the judge explained how calculations under the fraud guideline based on unintended loss and various overlapping adjustments resulted in a "patently absurd" life sentence. *United States v. Gener*, Crim. No. 04-424-17, 2005 WL 2838984

[23] *See* U.S. Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 137-40 (Mar. 2006); *see, e.g., United States v. Person*, 377 F. Supp. 2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005); *United States v. Serrano,* Crim. No. 04-424, 2005 WL 1214314, at **7-9 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, Crim. No. 04-222, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005). *But see United States v. Moreland*, 366 F. Supp. 2d 416 (S.D. W. Va. 2005) (reducing 360-month career offender sentence to 120 months under § 3553(a)), *rev'd*, 437 F.3d 424 (4th Cir. 2006) (vacating and remanding for imposition of sentence of no less than 240 months under extraordinary circumstances test).

*5 (S.D.N.Y. Oct. 26, 2005) illustrated the problem with including juvenile adjudications with a sentence of 60 days or more in the criminal history score where the juvenile offense is trivial and the length of confinement results not from the gravity of the offense but family circumstances and special needs. This kind of feedback is invaluable because it results from concrete, living contests between adversaries which sharpen and focus the issues, *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-21 (1998); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382-83 (1980), whereas thorough adversarial testing does not occur at the rulemaking level. *See* Stith & Dunn, *supra* note 6; Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U. L.Q. 1199 (1999); Samuel J. Buffone, *The Federal Sentencing Commission's Proposed Rules of Practice and Procedure*, 9 Fed. Sent. Rep. 67, 1996 WL 931745 (1996).

District court judges are also better-equipped than appellate courts to avoid unwarranted disparities, first because they see so many more cases, and second, as Congress recognized at the outset, because judges are "able to make informed comparisons between the case at hand and others of a similar nature . . . after a comprehensive examination of the characteristics of the particular offense and the particular offender." S. Rep. No. 98-225, at 52-53 (1983). Today, judges can make such comparisons based not only on the cases they sentence, but on sentences imposed by other judges as well. *See, e.g., United States v. Boyden*, No. 06-20243, 2007 WL 1725402 (E.D. Mich. June 14, 2007) (concluding that the guideline sentence would not avoid unwarranted disparity based on review of state and federal sentences in Michigan for similar and more serious conduct). Judges have access to confidential information on the precise sentencing reasons and statistics for all judges in their district. *See Richardson v.*

United States, 477 F. Supp. 2d 392, 402-05 (D. Mass. 2007). They can and do consult Commission statistics, Commission studies, and studies by other experts in order to impose sentences that avoid unwarranted disparities. *See, e.g., United States v. Miranda-Garcia*, Crim. No. 6:05-202, 2006 WL 1208013 (M.D. Fla. May 4, 2006); *United States v. Belvett,* Crim. No. 6:04-199, 2005 WL 852649 (M.D. Fla. Mar. 17, 2005).

This case illustrates both how a district court judge can contribute valuable information to the Commission by analyzing factors that the Commission treats narrowly in a more nuanced way through the prism of section 3553(a), and how the extraordinary circumstances test stifles the development and flow of useful information. The Guideline Manual deems age as "not ordinarily relevant." U.S.S.G. § 5H1.1. However, as the district court noted, the Commission has published a study, not reflected in the Manual, finding that recidivism rates drop as age increases. *United States v. Gall*, 374 F. Supp. 2d 758, 762 n.2 (S.D. Iowa 2005). The study shows that the recidivism rate for offenders under age 21 is 35.5%, that it drops to 31.9% for offenders age 21-25 (Mr. Gall's age at the time of the offense), and that it drops dramatically to 23.7% for offenders age 26-30 (his age at the time of sentencing). *See Measuring Recidivism*, *supra* note 14, at 28, Exhibit 9. What the Commission's study does not explain is *why* recidivism drops with age. One reason, according to research by the National Institutes of Health cited by the district court judge, is that the region of the brain that inhibits risky behavior is not fully formed until age 25. *Gall,* 374 F. Supp. 2d at 762 n.2. This was relevant to Mr. Gall's moral culpability as he committed the offense when he was 21, and was relevant to his current risk of recidivism at age 26. Pursuant to extraordinary circumstances review, the court of appeals deemed the study an

"improper factor." *United States v. Gall*, 446 F.3d 884, 890 (8th Cir. 2006).

Another example is the way in which the district court treated Mr. Gall's drug and alcohol addiction. The Guidelines forbid consideration of this circumstance. U.S.S.G. § 5H1.4. However, consistent with its view that prison is not an appropriate means of promoting rehabilitation, 18 U.S.C. § 3582(a), Congress suggested that the Commission might recommend that a drug dependent defendant be placed on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173. Here, Mr. Gall's addiction to drugs and alcohol helped to explain his criminal activity, he was waging a successful battle against it, and the district court made treatment a condition of his probation. *Gall*, 374 F. Supp. 2d at 762, 763 n.4. As another district court judge has explained:

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

Perella, 273 F. Supp. 2d at 164. The court of appeals gave no weight to this factor.

Finally, the district court gave considerable weight to aspects of Mr. Gall's conduct and character in ways the Guidelines fail to recognize, *i.e.,* his voluntary withdrawal from the conspiracy, completion of his college degree, employment and successful operation of his own business. The judge viewed Mr. Gall's financial profit from the offense from two relevant perspectives: On the one hand, he profited and therefore should be punished; on the other, though he had few financial resources, he turned his back on what was for him a highly profitable venture. These circumstances gave the district court great confidence that he would not recidivate and was not a danger to society. 374 F. Supp. 2d at 762-64. Under the Guidelines, sentences for drug offenses are driven by quantity, which, as in this case, often overstates the seriousness of the offense and overrides other, more relevant, circumstances.[24] To the extent the Guidelines can be said to recognize withdrawal from a conspiracy, it is only by excluding drug quantities the defendant did not agree to distribute in any event. U.S.S.G. § 1B1.3, comment. (n.2). And, although the Commission has found that education and employment predict greatly reduced recidivism, *Measuring Recidivism*, *supra* note 14, at 12, the Guideline Manual deems those

[24] According to Paul J. Hofer, the Commission's Senior Research Associate, "the original Commission clearly preferred objective factors, such as drug weight or dollar amount, to subjective ones," but the result "is that important moral questions of culpability are relatively neglected, while more easily quantifiable issues of harm are elevated to a significance and exactitude beyond their worth. Even former Commissioners have noted that requiring judges to determine the exact amount of drugs or monetary loss involved in an offense gives the Guidelines a false precision." *Reason Behind the Rules*, *supra* note 4, at 70-71 (citing Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 11 Fed. Sent. Rep. 180, 1999 WL 730985 (1999)).

factors "not ordinarily relevant." U.S.S.G. §§ 5H1.2, p.s., 5H1.5, p.s.

Each of the district court's careful findings could provide valuable insight to the Commission and to other judges if permitted to stand. The court's analysis might suggest to the Commission that it collect and study pertinent research on brain development, and current research on the relationships among addiction, crime, treatment and recidivism. *See* 28 U.S.C. § 991(b)(1)(C) (directing Commission to ensure that sentencing policies and practices reflect advancement in knowledge of human behavior). It might suggest that, even on the wholesale level, the guidelines could recognize that quantity should not predominate over others factors with a greater bearing on sentencing purposes. The court of appeals, however, substituted its own judgment for that of the district court, finding that the district court (1) "gave too much weight to Gall's withdrawal from the conspiracy" because he "benefited" by not being sentenced under a later, more severe guideline (which would have violated the *Ex Post Facto* Clause) or for drug quantities distributed by others after he withdrew (which would have violated the Guidelines' definition of relevant conduct), (2) "did not properly weigh the seriousness of Gall's offense," citing the effects on health of using ecstasy which presumably explain why the drug is illegal, and (3) "placed too much emphasis on Gall's post-offense rehabilitation" because probation "lies outside the limited range of choice dictated by the facts of the case." *Gall*, 446 F.3d at 889-90.

This is not a common law of sentencing that is useful to other judges or the Commission. It undermines the quality and transparency of sentencing and prevents the Guidelines from evolving. As one judge recently observed,

while grappling with a remand based on his having mentioned his discomfort with the 100:1 crack-to-powder-cocaine sentencing ratio:

> The natural result of this will be to shield the guidelines from judicial scrutiny and to stifle the development of sentencing law. The Sentencing Commission will receive little meaningful input from district judges who, being on the front lines of sentencing issues but without a personal or professional stake in their outcome, are among those best able to provide objective, informed analysis.

Williams, 481 F. Supp. 2d at 1301-02; *see also United States v. Williams*, 472 F.3d 835, 847 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc) ("the panel opinion has the perverse effect of discouraging district court judges from stating the reasons for imposing sentence – the less they say, the less that can be used as a basis to reverse them.").

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit, and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a), and may not engage in the aggressive review that most courts of appeals are now using. This will finally permit the kind of dialogue between sentencing

courts and the Commission, and among the courts, that was intended at the beginning.

Respectfully submitted,

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APPENDIX

RATIO OF REVERSALS FOR OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Extraordinary Circumstances Circuits Only[1]	Extraordinary Circumstances Circuits Only[2]
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	7 / 118 reversed (5.9 %)	69 / 367 reversed (18.8 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA: 0% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT: 41.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

[1] The District of Columbia and the Second, Third, and Ninth Circuits have not adopted an "extraordinary circumstances" test for non-guideline sentences.

[2] The First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have adopted an "extraordinary circumstances" test for non-guideline sentences.

SECOND CIRCUIT: 6.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT: 2.8% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT: 24.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT: 10.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT: 14.3% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT: 17.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT: 35.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

NINTH CIRCUIT: 7.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	24	1	Above Guideline	0	0
Below Guideline	20	1	Below Guideline	4	2

TENTH CIRCUIT: 4.8% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	9	0	Above Guideline	0	0
Below Guideline	11	0	Below Guideline	0	1

ELEVENTH CIRCUIT: 7.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	47	0	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	5	6