CLE SEMINAR

District Update: Restitution, Forfeiture, & Pretrial Release

Hosted at:
Federal Public Defender's Office

Speaker:
FPD Lisa Hay

Portland, Oregon
Live on February 22, 2017
12:00pm to 1:00pm

Medford, Oregon
Via video conference on February 22, 2017
12:00pm to 1:00pm

Eugene, Oregon
Via video conference on February 22, 2017
12:00pm to 1:00pm

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18 USC § 3663. (For the first time authorizes restitution as "a separate component of a federal criminal sentence." Discretionary)

Mandatory Victim Restitution Act (1996)
18 USC § 3663A (mandatory restitution for certain crimes)

Civil Forfeiture
18 U.S.C. § 981(a) used in criminal cases under 28 U.S.C. § 2461(c)

Criminal Forfeiture
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Drug Case Forfeiture
21 USC§ 853

Administrative Forfeiture

FORFEITURE OVERVIEW FOR THE NATIONAL SEMINAR FOR FEDERAL DEFENDERS BALTIMORE MARYLAND JUNE 2, 2011
PREPARED BY ROBERT W. BIDDLE, ESQ, NATHANS & BIDDLE LLP

A. Federal Asset Forfeiture: Introductory Comments for Appointed Counsel

Outside of the admiralty and tax areas, federal asset forfeiture proceedings are a relatively new creature, dating to the Racketeering Influence and Corrupt Organizations Act (RICO), passed in 1970, and, most significantly, to the Comprehensive Crime Control Act of 1984. The pioneering RICO statute permitted the federal government to seize assets which were proceeds of or facilitated violations of the RICO statute, which includes as underlying violations a large number of federal criminal offenses. Most significantly for prosecutors, the RICO asset forfeiture provisions permitted assets to be seized prior to trial.

Under the RICO statute, and the general forfeiture statutes as they have been amended since 1984, there are numerous narcotics and non-narcotics federal criminal violations which permit asset forfeiture. Mail and wire fraud that affects a financial institution, various environment/hazardous waste violations, various motor vehicle violations such as altering or removing a vehicle identification number, motor fuel excise tax violations, and many others are all federal predicates for civil and criminal forfeiture proceedings, in addition to the usual narcotics predicates. Thus, due to the scope of the asset forfeiture statutes, any property that is the proceeds of a variety of illegal conduct or is used to carry out criminal activity may be seized by the federal government.

The federal government may bring two types of asset forfeiture proceedings - civil or criminal. There are also administrative forfeiture actions, a type of civil action, a procedure which federal public defenders may frequently encounter at the early phase of a case.

Federal civil forfeiture proceedings are actions brought directly against particular types of properties, such a parcels of real estate, boats, airplanes, stores, factories, inventory or any type of real or personal property. The actions are entitled “The United States of America v. One Parcel of Real Property Located at...” or some similar name. In general, to prevail in such an action, the government must show probable cause that the property facilitated or was the proceed of certain unlawful activity. To prevail against the government, the owner of the property, or a claimant, must contest the government’s showing of probable cause. The Government can forfeit property upon a showing that it is entitled to do so by a preponderance of the evidence.

Administrative forfeiture proceedings are a type of civil forfeiture initiated and conducted by law enforcement agencies. Until an administrative forfeiture is contested, and sent to a U.S. Attorney for prosecution, the law enforcement agencies have great autonomy in handling administrative forfeitures.

Of particular importance to federal public defenders, the U. S. district courts may appoint counsel to represent claimants in federal civil forfeiture actions pursuant to the Criminal Justice Act (CJA) in situations where CJA counsel is appointed in "a related criminal case." 18 U.S.C. Section 983(b).

In criminal forfeiture proceedings, the other type of federal asset forfeiture procedure, forfeiture is sought as part of a criminal proceeding against a particular person. Thus, unlike a federal civil forfeiture action, the criminal forfeiture proceeding is directly connected to a pending criminal prosecution.

Speaking generally, with an important exception called "substitute assets" discussed further below, under civil or criminal forfeiture procedure, a claimant must either prove that he or she is an "innocent owner" in order to recover its' interest in the property sought to be seized, or that the property was not involved in criminal activity. Generally, a claimant holding a financial interest in property sought to be seized must show that he or she had no knowledge of any criminal activity relating to the property or, alternatively, that if he or she had such knowledge, that he or she took all reasonable steps to halt such illegal activity.

Ultimately, as part of a forfeiture proceeding, a claimant may seek to preserve its interest in property subject to forfeiture before a fact finder, whether it be a judge or jury. To prevail the government must obtain a judgement from the court to liquidate or obtain undisputed ownership of property subject to forfeiture.

B. Administrative Forfeitures

Federal administrative forfeitures are probably the most common type of asset forfeiture action counsel, whether appointed or retained, will encounter in his or her practice. These are the almost routine grist for the federal forfeiture mill--the car or boat seized after contraband is found by agents, the plane seized on the ground following an interdiction flight, funds seized in a bank account deposited by an alleged narcotics trafficker or a person accused of fraud.

Administrative proceedings are in rem civil actions. They may be brought without any judicial intervention. Although the Department of Justice does not administratively seize real property, currency and conveyances and other instrumentalities of crimes in value up to $500,000.00 can be seized and forfeited administratively. The statutes governing administrative forfeitures and some but not all related proceedings are found at 18 U.S.C. Sections 981 and 983-985 and at 19 U.S.C. 1602-1621.

The first step in administrative forfeiture proceedings is generally the physical seizure of the property by the Government. In case of vehicles, seizures can occur in the course of routine traffic stops, search warrants, or the like. Currency can also be seized in similar fashion. The government will provide a party from whom such property is taken with some identification of the agency which has physically taken the property

and the identity of an agent who can be contacted about the property. However, this notice does not constitute notice for the purpose of forfeiture; it is essentially a receipt that the property has been taken by the government pending its determination of what it will do with it.

Property can also be taken pursuant to a warrant, as in a seizure of a bank account.

The law requires notice by the seizing agency to potential claimants in administrative forfeiture cases within a particular statutory time period, which is generally 60 days unless the agency takes defined steps to extend that time. 18 U.S.C. Section 983(a).

Upon a determination by the seizing agency that forfeiture is appropriate, the agency must provide notice of the administrative forfeiture. 19 U.S.C. § 1607(a). The agency should provide personal notice to parties known to the Government to have an interest in the property, and in addition public notice should also be provided in *USA Today* or some other general circulation paper. Id.

The time to file a claim is no earlier than 35 days after the date of a letter from the seizing agency providing personal notice to a claimant. Id. If a claim is not timely filed in accordance with the regulations, a claimant will in all likelihood be barred from disputing the forfeiture on the merits.

Accordingly, counsel should act immediately when a client's property is taken and before the government provides formal notice of the start of the forfeiture process. Counsel should contact the responsible agent, indicate the identity of the client, and request in writing that notice be given immediately to counsel once the forfeiture process is initiated. If these steps are not taken, written notice of the forfeiture may be sent to the wrong address, and public notice may overlooked.

A federal administrative forfeiture claim may be filed by the owner or someone with an interest in the property. Once a party files a claim they are considered a "claimant." A claim by an attorney on behalf of a claimant is not sufficient. The claim must be sworn under penalty of perjury. There is no fee to file a claim.

Besides stating that the claimant has an ownership interest in the property, typically all that is necessary in the administrative claim is to state that the claimant contests or disputes any allegation that the property is subject to forfeiture.

As an alternative to a direct claim on a property, a claimant may seek remission or mitigation of forfeiture. 19 U.S.C. § 1618; 28 C.F.R. § 9.1 et seq. This is essentially a request for mercy from the seizing agency. There is no opportunity for judicial review. Essentially, the claimant waives any claim on the merits to the property, and sets forth facts which merit a return of its interest in the property.

Once a claim is filed, the seizing agency almost always automatically forwards the administrative claim to the United States Attorney's Office for review and possible court action. The Government has 90 days from receipt of a claim to either return administratively seized property or initiate a federal civil or criminal forfeiture action. That decision on filing suit or returning the property is not up to the administrative agency, it is a decision made by the U.S. Attorney.

An opportunity for counsel, whether appointed or retained, arises once a file is received by a U.S. Attorneys' Office following the filing of an administrative claim. Once a file is sent to the U.S. Attorney an Assistant will be assigned to the matter, with whom negotiations can be attempted.

If the U.S. Attorney decides to forfeit the property at issue in the administrative proceeding, either a conventional civil forfeiture suit will be filed or the property will be included within a criminal forfeiture indictment. The civil cases are generally captioned United States of America v. XYZ Property. If a criminal action is brought, the Government will try to forfeit the property in the process of convicting the owner of a particular type of felony violation (a forfeiture predicate) which would allow criminal forfeiture.

C. Civil Asset Forfeiture

Appointed counsel can only be involved in federal civil asset forfeiture where there is a companion criminal case where the appointed attorney is representing the defendant. However, where there is a related criminal case in federal court, not much if anything of importance arises in a federal civil asset forfeiture case. All of the action is in the criminal case. The civil forfeiture case gets stayed (put on hold) until the criminal case is over. If the client is acquitted in the federal criminal case, the forfeiture case may be revived, but at that point appointed counsel would be out of the picture. If the client is convicted after trial or pleads guilty, the plea agreement or the post trial sentencing process will drive the forfeiture of the property subject to the civil asset forfeiture case.

D. Criminal Asset Forfeiture

Criminal asset forfeitures have rapidly become a treasured weapon in the federal prosecutor's arsenal. With sometimes minimal additional effort beyond that required to take a case to trial, prosecutors can bypass the Guidelines provisions for fines and obtain huge money judgments against defendants based on theories of joint and several liability. Restraining orders, obtained ex parte prior to or in connection with an indictment, can have the collateral even if unintended effect of depriving a troublesome defendant of retained counsel. Trial counsel can be so focused on defending the changes on the merits that no time or effort remains to fight the forfeiture battle when the time comes for the jury to address the issue in the criminal trial, or for the court to address it later. The substitute asset provision allows the Government to forfeit assets

which were not proceeds of unlawful activity so long as the Government can show that such assets connected to illegal activity are difficult to obtain.

Criminal forfeitures in recent years have focused on narcotics traffickers. However, every year as part of the war on crime Congress seems to add to the already lengthy list of statutes which permit criminal forfeitures. Mail and wire fraud affecting financial institutions, money laundering, odometer tampering, and health care fraud are only a few of the kinds of charges which can lead to criminal forfeiture judgments.

As appointed counsel, a federal public defender becomes involved in criminal forfeiture as counsel to a defendant charged with a criminal offense and facing related forfeiture charges. Criminal forfeiture actions must be brought against persons or legal entities, not initially against the property to be forfeited itself, and compel forfeiture of assets held or formerly owned by such defendant person or entity. Thus, criminal forfeiture proceedings are in-personam actions and are inescapably connected to federal criminal prosecutions. They are governed by Federal Rule of Criminal Procedure 32.2, 18 U.S.C. Section 982, and 21 U.S.C. Section 853; see also 18 U.S.C. § 1963(h).

Parties with claims to property sought to be forfeited are known as "claimants." As appointed counsel you will be involved in federal criminal asset forfeiture most often where the client is also the defendant. The general rule is that the burden is on the Government to show by a preponderance of the evidence that it is entitled to forfeit the defendant's property in a criminal forfeiture action. See United States v. Voigt, 89 F.3d, 1050, 1081-84 (3d Cir. 1996).

Unless a defendant's assets are restrained prior to indictment, criminal forfeiture actions begin with an allegation in an indictment. See Federal Rule of Criminal Procedure 32.2(a). Thus, the Government must describe, to a level of specificity subject to debate, the defendant's assets sought to be forfeited in the indictment. Id. Similarly, a criminal forfeiture charge is a count of the indictment subject to a separate verdict by the jury. See Federal Rule of Criminal Procedure 32.2(b)(5).

In connection with the preparation or filing of an indictment, the Government is authorized to restrain or even seize assets pending entry of a judgment of forfeiture, a process which may render the defendant initially eligible for appointed counsel. 21 U.S.C. Sections 853(e) and (f), 18 U.S.C. Section 1963(d). The Government is entitled to freeze assets by protective orders to protect its interest in property. Id. Accordingly, courts can "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property" either before or after an indictment is filed. Id. If restraint is sought prior to indictment, the Government is required to show the following:

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will resulting the property

being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered" *Id.*

Defendants are entitled to a hearing on notice if restraint is sought prior to indictment. Id. Pre-indictment restraining orders can last no longer than ninety days unless "extended by the court for good cause shown or unless an indictment . . . has been filed." Id.

The Government may restrain property prior to indictment without prior notice to a defendant if it "demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture . . . and that provision of notice will jeopardize the availability of the property for forfeiture." *Id.* A defendant is entitled to a hearing following entry of an ex parte order. *Id.*

Although not explicitly authorized in the statute, courts generally grant defendants a hearing to contest restraining orders even after the defendant is indicted. The focus of the law on these hearings has been on whether funds can be released so that defendants can hire retained counsel. Accordingly, appointed counsel will probably not be called upon to litigate these issues very often. Courts typically defer to the grand jury's probable cause finding and will not require the Government to make any additional showing of the merits of its case. See United States v. Farmer, 274 F.3d 800 (4th Cir. 2001); United States v. Jones, 160 F.3d 641 (10th Cir. 1998). The court is not required to conduct a mini-trial on the merits of the offense to decide a motion to lift or modify a restraining order. Id.

The Government is also entitled to seize property subject to forfeiture before obtaining a forfeiture judgment. "The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property." 21 U.S.C. Section 853(f).

Although the statutes generally limit the property or the value of the property which may be forfeited to the property used to commit the offense (facilitating property) and to the gross proceeds directly and indirectly derived from offense (proceeds), the statutes allow the Government on a proper showing to forfeit assets belonging to a defendant which are equal in value to the unlawfully used or obtained assets if the

unlawfully used or obtained assets have been spent or are otherwise too difficult for the Government to readily forfeit. This "substitute asset provision" is found at 21 U.S.C. Section 853(p) and 18 U.S.C. Section 1963(m). Thus, if a defendant used property worth $1 million to commit a crime and obtained $2 million through his illegal activity, and if the Government can't obtain the $3 million which had already been disposed of or otherwise spent by the defendant, the Government can obtain $3 million of other assets of the defendant, even if they were totally unrelated to the criminal activity, or could seek to obtain $3 million in assets held by third party nominees or others received from the defendant.

In the Fourth Circuit, and essentially no where else, the Government can restrain substitute assets prior to trial. Elsewhere, typically the Government must wait for a forfeiture judgment to proceed after substitute assets.

Unless it relies on the substitute asset provision, the Government must show a connection between the property sought to be forfeited and the crime to forfeit the property. The Government must show either that the property facilitated the crime or was a proceed of the crime. See United States v. Voigt, 89 F.3d 1050, 1087 (3d Cir. 1996) (discussing showing required of relationship between crime and proceeds of crime to obtain forfeiture); United States v. Two Tracts of Real Property, 998 F.2d 204, 210-214 (4th Cir. 1993) (civil forfeiture but similar principal: substantial connection between crime and real property not shown). The substitute asset provision does not require the Government to trace the facilitating property or the proceeds of the crime into particular assets, although it is required to show that it cannot readily obtain the original facilitating property or the proceeds of the crime. Id.

E. Parting Words For Appointed Counsel

Traditionally, forfeiture was not an important issue for appointed counsel. Clients were indigent or destitute, and had no assets worthy of forfeiture. However, now clients once worth tens of millions of dollars have their assets seized and cannot afford retained counsel, leaving appointed counsel to try to reclaim their assets, most commonly in a federal criminal forfeiture proceeding. An understanding of the basics of how to defend those forfeiture actions may come in handy more often than you might think.

Table 16

Asset Forfeiture Actions Handled By United States Attorneys

Fiscal Year Ended September 30, 2015

	Civil Cases		Criminal Cases		Civil Forfeiture	Criminal Forfeiture	Asset Forfeiture Fund Deposits	Equitable Sharing	Non-Forfeited Assets Applied to Victim Compensation	Forfeited Assets Applied to Victim Compensation
District	Pending	Completed	Pending	Completed	Amount	Amount	Amount	Amount	Amount	Amount
Alabama, Middle	4	5	20	33	$144,278.00	$1,094,169.00	$1,120,949.00	$207,510.00	$0.00	$272,995.00
Alabama, Northern	14	12	23	24	$826,354.00	$390,551.00	$1,206,470.00	$660,917.00	$0.00	$0.00
Alabama, Southern	10	4	15	7	$477,792.00	$1,000,010.00	$809,093.00	$24,700.00	$0.00	$0.00
Alaska	5	4	27	12	$376,720.00	$200,934.00	$702,340.00	$594,242.00	$0.00	$0.00
Arizona	25	21	165	174	$2,826,352.00	$5,242,324.00	$7,619,342.00	$1,581,107.00	$2,914.00	$0.00
Arkansas, Eastern	30	2	71	36	$74,590.00	$1,669,773.00	$1,005,204.00	$628,428.00	$0.00	$0.00
Arkansas, Western	5	5	39	39	$741,232.00	$132,528.00	$846,229.00	$302,979.00	$0.00	$600,000.00
California, Central	239	76	39	8	$24,197,167.00	$2,514,510.00	$5,823,203.00	$2,893,203.00	$0.00	$2,040,055.00
California, Eastern	47	56	145	109	$7,644,356.00	$10,045,695.00	$23,846,469.00	$5,985,866.00	$0.00	$2,436,480.00
California, Northern	39	16	101	76	$260,831.00	$7,357,489.00	$3,883,325.00	$1,082,512.00	$1,071,467.00	$734,025.00
California, Southern	31	26	93	68	$628,527.00	$23,817,949.00	$23,912,605.00	$731,456.00	$0.00	$12,259.00
Colorado	40	34	30	21	$41,170,338.00	$2,396,814.00	$44,658,985.00	$610,049.00	$0.00	$666,074.00
Connecticut	29	26	44	29	$4,805,511.00	$4,280,995.00	$4,400,419.00	$988,815.00	$0.00	$13,997.00
Delaware	6	1	22	7	$15,000.00	$107,925.00	$105,675.00	$43,386.00	$0.00	$6,732.00
District of Columbia	16	3	19	11	$124,010,000.00	$78,226,471.00	$170,365,183.00	$58,490.00	$0.00	$6,507,444.00
Florida, Middle	26	14	178	219	$13,756,556.00	$39,059,402.00	$22,522,901.00	$3,076,194.00	$9,287.00	$1,136,747.00
Florida, Northern	11	8	13	21	$277,018.00	$1,612,203.00	$1,225,084.00	$805,335.00	$0.00	$18,814.00
Florida, Southern	39	21	217	196	$5,231,510.00	$32,618,226.00	$31,113,607.00	$3,277,080.00	$409,700.00	$34,503,231.00
Georgia, Middle	13	9	24	9	$257,507.00	$576,138.00	$271,468.00	$231,430.00	$0.00	$0.00
Georgia, Northern	45	30	63	50	$3,750,350.00	$6,441,582.00	$14,211,304.00	$1,872,635.00	$0.00	$165,165.00
Georgia, Southern	16	13	21	8	$1,203,834.00	$1,017,747.00	$1,421,333.00	$5,936,257.00	$0.00	$12,243.00
Guam	9	3	10	7	$50,402.00	$390,579.00	$50,892.00	$41,536.00	$0.00	$0.00
Hawaii	2	3	17	14	$24,094.00	$1,058,103.00	$2,903,635.00	$2,789,152.00	$0.00	$0.00
Idaho	8	5	60	40	$121,333.00	$2,930,289.00	$2,264,966.00	$566,807.00	$0.00	$59,680.00
Illinois, Central	10	10	24	46	$1,231,003.00	$1,828,557.00	$204,574.00	$60,889.00	$0.00	$0.00
Illinois, Northern	40	36	176	110	$4,469,033.00	$6,841,623.00	$12,490,883.00	$1,913,520.00	$8,182.00	$2,977,275.00
Illinois, Southern	6	7	31	54	$77,963.00	$339,259.00	$437,787.00	$379,498.00	$0.00	$0.00
Indiana, Northern	12	23	75	34	$187,497.00	$2,632,589.00	$1,747,444.00	$162,537.00	$0.00	$58,064.00
Indiana, Southern	20	20	155	34	$440,145.00	$1,832,297.00	$1,795,402.00	$369,552.00	$0.00	$54,708.00
Iowa, Northern	2	8	31	29	$318,678.00	$242,007.00	$502,000.00	$487,081.00	$0.00	$0.00
Iowa, Southern	2	5	86	63	$673,563.00	$3,912,568.00	$4,417,364.00	$851,765.00	$0.00	$87,782.00
Kansas	28	36	193	52	$2,690,786.00	$668,890.00	$3,170,641.00	$3,047,236.00	$185,517.00	$47,565.00
Kentucky, Eastern	22	15	45	92	$277,722.00	$13,565,840.00	$10,879,425.00	$1,191,688.00	$542.00	$6,282,527.00

Table 16 (Continued)

District	Civil Cases Pending	Civil Cases Completed	Criminal Cases Pending	Criminal Cases Completed	Civil Forfeiture Amount	Criminal Forfeiture Amount	Asset Forfeiture Fund Deposits Amount	Equitable Sharing Amount	Non-Forfeited Assets Applied to Victim Compensation Amount	Forfeited Assets Applied to Victim Compensation Amount
Kentucky, Western	24	26	51	43	$8,177,263.00	$1,465,125.00	$7,697,042.00	$1,588,406.00	$0.00	$0.00
Louisiana, Eastern	5	0	16	19	$0.00	$3,121,033.00	$3,177,911.00	$266,439.00	$0.00	$8,871.00
Louisiana, Middle	2	1	32	26	$18,842.00	$2,106,958.00	$524,384.00	$0.00	$0.00	$871,413.00
Louisiana, Western	1	1	13	17	$5,666.00	$109,032.00	$825,308.00	$1,167,850.00	$0.00	$204,935.00
Maine	3	4	12	17	$103,601.00	$520,643.00	$559,926.00	$127,884.00	$0.00	$144,402.00
Maryland	87	52	72	38	$9,432,907.00	$8,649,621.00	$15,354,951.00	$3,582,706.00	$0.00	$21,500.00
Massachusetts	26	16	143	71	$3,068,794.00	$5,053,588.00	$5,588,380.00	$2,273,975.00	$0.00	$427,813.00
Michigan, Eastern	80	36	110	38	$4,733,601.00	$934,844.00	$5,556,078.00	$1,498,106.00	$1,906,347.00	$782,689.00
Michigan, Western	1	2	25	31	$16,414.00	$1,800,347.00	$764,265.00	$521,605.00	$40,000.00	$365,894.00
Minnesota	18	10	103	95	$880,025.00	$2,317,921.00	$3,666,812.00	$868,700.00	$0.00	$12,334,753.00
Mississippi, Northern	7	2	6	3	$46,607.00	$1,411,297.00	$329,769.00	$275,937.00	$0.00	$5,534,961.00
Mississippi, Southern	5	6	28	49	$304,348.00	$1,003,410.00	$750,658.00	$313,845.00	$0.00	$0.00
Missouri, Eastern	35	7	36	31	$476,215.00	$4,591,633.00	$5,603,424.00	$395,154.00	$0.00	$1,869,807.00
Missouri, Western	23	12	76	74	$6,166,651.00	$5,914,955.00	$10,301,613.00	$604,477.00	$0.00	$815,323.00
Montana	6	3	24	28	$254,367.00	$113,168.00	$364,048.00	$270,136.00	$0.00	$0.00
Nebraska	15	12	41	47	$1,141,306.00	$948,591.00	$902,198.00	$524,195.00	$0.00	$0.00
Nevada	74	21	127	82	$1,306,059.00	$17,928,813.00	$14,839,473.00	$931,416.00	$629,910.00	$190,510.00
New Hampshire	15	16	5	6	$1,919,132.00	$1,049,545.00	$2,985,829.00	$459,620.00	$0.00	$0.00
New Jersey	54	19	76	43	$19,289,420.00	$15,345,261.00	$14,804,435.00	$774,616.00	$33,499.00	$3,765,113.00
New Mexico	31	33	26	37	$1,665,430.00	$2,048,746.00	$1,946,543.00	$531,425.00	$0.00	$17,781.00
New York, Eastern	53	41	195	115	$24,979,598.00	$50,604,190.00	$71,778,569.00	$3,657,547.00	$0.00	$14,365,161.00
New York, Northern	11	17	55	50	$6,061,170.00	$1,945,577.00	$7,331,610.00	$7,862,873.00	$0.00	$0.00
New York, Southern	52	28	271	137	$37,073,088.00	$3,903,304,864.00	$4,334,109,356.00	$4,420,397.00	$0.00	$16,472,211.00
New York, Western	38	52	91	58	$4,121,719.00	$7,597,654.00	$7,059,248.00	$3,571,183.00	$0.00	$2,088,347.00
North Carolina, Eastern	49	46	43	59	$1,690,366.00	$6,611,617.00	$3,915,736.00	$548,797.00	$2,400.00	$496,441.00
North Carolina, Middle	19	23	18	14	$5,784,371.00	$1,871,466.00	$2,670,402.00	$669,558.00	$0.00	$0.00
North Carolina, Western	24	13	186	147	$2,276,562.00	$12,414,731.00	$10,704,331.00	$693,530.00	$235,620,039.00	$1,268,676.00
North Dakota	6	1	48	43	$2,600,000.00	$176,092.00	$1,553,717.00	$37,967.00	$0.00	$0.00
Northern Mariana Islands	1	0	0	0	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Ohio, Northern	30	26	43	37	$1,386,808.00	$8,676,695.00	$9,910,128.00	$515,855.00	$5,000.00	$180,170.00
Ohio, Southern	27	19	107	130	$543,521.00	$16,712,682.00	$16,459,788.00	$897,525.00	$0.00	$535,677.00
Oklahoma, Eastern	2	0	2	4	$0.00	$64,814.00	$171,306.00	$1,137.00	$0.00	$139,692.00
Oklahoma, Northern	8	3	29	59	$126,589.00	$2,215,297.00	$1,875,227.00	$383,724.00	$0.00	$1,234,034.00
Oklahoma, Western	19	11	45	50	$7,288,240.00	$23,974,204.00	$31,409,570.00	$468,535.00	$0.00	$428,809.00
Oregon	27	28	74	73	$2,158,017.00	$3,303,200.00	$2,393,506.00	$1,171,413.00	$0.00	$211,648.00

Table 16 (Continued)

District	Civil Cases Pending	Civil Cases Completed	Criminal Cases Pending	Criminal Cases Completed	Civil Forfeiture Amount	Criminal Forfeiture Amount	Asset Forfeiture Fund Deposits	Equitable Sharing Amount	Non-Forfeited Assets Applied to Victim Compensation Amount	Forfeited Assets Applied to Victim Compensation Amount
Pennsylvania, Eastern	15	1	227	71	$27,500.00	$22,571,449.00	$22,110,901.00	$3,635,325.00	$4,808.00	$122,519.00
Pennsylvania, Middle	5	9	18	16	$2,954,552.00	$14,070,801.00	$16,274,206.00	$535,256.00	$0.00	$77,770.00
Pennsylvania, Western	33	12	115	104	$151,700.00	$5,117,349.00	$3,853,734.00	$2,917,532.00	$0.00	$1,004,219.00
Puerto Rico	74	27	79	58	$13,501,970.00	$2,350,899.00	$12,650,780.00	$1,681,963.00	$28,115.00	$0.00
Rhode Island	3	11	16	15	$12,651,941.00	$544,395.00	$7,762,032.00	$8,737,205.00	$0.00	$138,626.00
South Carolina	8	10	48	31	$287,018.00	$22,320,676.00	$23,864,629.00	$277,660.00	$0.00	$651,147.00
South Dakota	3	0	46	33	$0.00	$4,547,202.00	$4,549,990.00	$6,956.00	$0.00	$4,518,566.00
Tennessee, Eastern	22	5	46	24	$236,186.00	$1,068,272.00	$1,735,051.00	$1,427,246.00	$0.00	$346,482.00
Tennessee, Middle	18	8	26	18	$268,864.00	$300,766.00	$178,247.00	$158,292.00	$0.00	$919,880.00
Tennessee, Western	18	10	36	5	$2,097,131.00	$1,023,888.00	$1,564,237.00	$702,639.00	$0.00	$0.00
Texas, Eastern	28	25	153	168	$4,442,571.00	$7,809,144.00	$8,695,941.00	$2,876,918.00	$0.00	$2,203,858.00
Texas, Northern	24	26	191	193	$5,804,520.00	$8,643,225.00	$11,890,283.00	$2,641,243.00	$11,077.00	$808,302.00
Texas, Southern	39	35	121	64	$11,837,967.00	$23,312,685.00	$18,693,144.00	$3,273,515.00	$6,355,514.00	$814,534.00
Texas, Western	50	27	192	102	$8,748,748.00	$13,395,400.00	$17,015,299.00	$1,050,468.00	$1,523.00	$1,017,528.00
Utah	5	7	74	39	$1,276,955.00	$7,716,972.00	$5,171,783.00	$335,542.00	$5,300.00	$0.00
Vermont	3	6	9	10	$938,828.00	$552,824.00	$1,123,562.00	$399,238.00	$0.00	$227,925.00
Virgin Islands	2	1	2	4	$30,000.00	$39,123.00	$46,500.00	$21,410.00	$0.00	$0.00
Virginia, Eastern	15	6	105	119	$264,045.00	$6,307,955.00	$11,782,523.00	$1,320,925.00	$39,766.00	$1,687,781.00
Virginia, Western	4	5	40	58	$1,874,996.00	$37,922,466.00	$40,777,390.00	$1,802,903.00	$0.00	$0.00
Washington, Eastern	17	4	67	24	$13,209.00	$372,094.00	$227,318.00	$133,271.00	$0.00	$4,226.00
Washington, Western	44	20	121	89	$7,002,381.00	$3,814,519.00	$8,231,644.00	$1,796,912.00	$553.00	$429,936.00
West Virginia, Northern	4	4	20	30	$14,770.00	$906,766.00	$447,550.00	$215,653.00	$0.00	$12,980.00
West Virginia, Southern	0	4	6	3	$2,338,886.00	$2,908,101.00	$2,574,677.00	$73,932.00	$0.00	$0.00
Wisconsin, Eastern	15	17	48	26	$3,248,195.00	$1,971,324.00	$4,780,902.00	$1,889,985.00	$175,000.00	$642,539.00
Wisconsin, Western	4	11	8	6	$557,396.00	$1,362.00	$183,056.00	$300,986.00	$2,512.00	$0.00
Wyoming	2	1	3	2	$645.00	$120,992.00	$182,123.00	$5,776.00	$0.00	$0.00
All Districts	2,184	1,436	6,318	4,815	$478,905,713.00	$4,561,664,299.00	$5,226,189,244.00	$123,549,136.00	$246,548,972.00	$139,099,311.00

DATA SOURCE: JUSTICE MANAGEMENT DIVISION, CONSOLIDATED ASSET TRACKING SYSTEM (CATS)

RESTITUTION WORDING FOR PLEA AGREEMENTS (as of 10/11/2016)

Disclosure of Financial Information
Defendant agrees fully to disclose all assets in which defendant has any interest or over which defendant exercises control, directly or indirectly, including those held by a spouse, nominee or third party. Defendant agrees to truthfully complete the Financial Disclosure Statement provided herein by the earlier of 14 days from defendant's signature on this plea agreement or the date of defendant's entry of a guilty plea, sign it under penalty of perjury and provide it to both the United States Attorney's Office and the United States Probation Office. Defendant agrees to provide updates with any material changes in circumstances, as described in 18 U.S.C. § 3664(k), within seven days of the event giving rise to the changed circumstances.

Defendant expressly authorizes the U.S. Attorney's Office to obtain a credit report on defendant. Defendant agrees to provide waivers, consents or releases requested by the U.S. Attorney's Office to access records to verify the financial information. Defendant also authorizes the U.S. Attorney's Office to inspect and copy all financial documents and information held by the U.S. Probation Office.

The parties agree that defendant's failure to timely and accurately complete and sign the Financial Disclosure Statement, and any update thereto, may, in addition to any other penalty or remedy, constitute defendant's failure to accept responsibility under U.S.S.G § 3E1.1.

*{**Use as appropriate**:* Defendant agrees to submit to examination under oath and/or a polygraph examination by an examiner selected by the U.S. Attorney's office, on the issue of defendant's financial disclosures and assets.}

Transfer of Assets
Defendant agrees to notify the Financial Litigation Unit of the United States Attorney's Office before defendant transfers any interest in property with a value exceeding $1,000 owned directly or indirectly, individually or jointly, by defendant, including any interest held or owned under any name, including trusts, partnerships and corporations.

Restitution
The Court shall order restitution to each victim in the full amount of each victim's losses as determined by the Court. *{**Add if applicable**:* Defendant agrees to pay restitution for all losses caused by defendant's conduct, regardless of whether counts of the indictment or information dealing with such losses will be dismissed as part of this plea agreement.}

Defendant understands and agrees that the total amount of any monetary judgment that the court orders defendant to pay will be due and payable immediately. Defendant further understands and agrees that pursuant to Title 18, United States Code, Section 3614, defendant may be resentenced to any sentence which might have originally been imposed if the court determines that defendant has knowingly and willfully refused to pay a fine or restitution as ordered or has failed to make sufficient bona fide efforts to pay a fine or restitution. Additionally, defendant understands and agrees that the government may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613 and 3664(m), notwithstanding any

initial or subsequently modified payment schedule set by the court. Defendant understands that any monetary debt defendant owes related to this matter may be included in the Treasury Offset Program (TOP) to potentially offset defendant's federal retirement benefits, tax refunds, and other federal benefits.

Pursuant to Title 18, United States Code, Section 3612(b)(F) defendant understands and agrees that until a fine or restitution order is paid in full, defendant must notify the United States Attorney's Office of any change in the mailing address or residence address within 30 days of the change. Further, pursuant to Title 18, United States Code, Section 3664(k), defendant shall notify the court and the U.S. Attorney's Office immediately of any material change in defendant's economic circumstances that might affect defendant's ability to pay restitution, including, but not limited to, new or changed employment, increases in income, inheritances, monetary gifts or any other acquisition of assets or money.

***{Add as appropriate}* Advance Payment on Judgment**
Defendant agrees to deliver a certified check or money order to the U.S. Attorney's Office in the amount of $_____ , payable to the "Clerk, U.S. District Court", to be deposited into the Court registry until the date of sentencing and, thereafter, to be applied to satisfy the financial obligations of the defendant, pursuant to the judgment of the Court.

***{Add as appropriate}* Liquidation of Accounts**
The defendant agrees to liquidate all funds on deposit with _____ **(***optional: account number* _____ *in the amount of* $_____,**)** and to pay such funds to the "Clerk, U.S. District Court", as restitution. Payment shall be made to the "Clerk, U.S. District Court" no later than ten days prior to sentencing in this matter.

***{Add as appropriate}* Appearance Bond Released for Restitution**
The defendant authorizes the "Clerk, U.S. District Court" to release the funds posted as security for his/her appearance bond in this case, in the amount of $_____, to be applied to satisfy the financial obligation of the defendant, pursuant to the judgment of the Court.

FEDERAL PRETRIAL RISK ASSESSMENT INSTRUMENT
(PTRA)

DEFENDANT'S NAME: _____ DATE OF ASSESSMENT: _____

OFFICER: _____

PACTS #: _____

DISTRICT: _____

1.0 CRIMINAL HISTORY & CURRENT OFFENSE:

1.1. NUMBER OF FELONY CONVICTIONS ☐

0=NONE
1=ONE TO FOUR
2=FIVE OR MORE

1.2. PRIOR FTAS ☐

0=NONE
1=ONE
2=TWO OR MORE

1.3. PENDING FELONIES OR MISDEMEANORS ☐

0= NONE
1=ONE OR MORE

1.4. CURRENT OFFENSE TYPE ☐

0= THEFT/FRAUD, VIOLENT, OTHER
1=DRUG, FIREARMS, OR IMMIGRATION

1.5. OFFENSE CLASS ☐

0=MISDEMEANOR
1=FELONY

1.6. AGE AT INTERVIEW ☐

0= 47 OR ABOVE
1=27 TO 46
2=26 OR YOUNGER

TOTAL CRIMINAL HISTORY ☐

2.0 OTHER FACTORS:

2.1 HIGHEST EDUCATION

0=COLLEGE DEGREE
1=HIGH SCHOOL DEGREE, VOCATIONAL, SOME COLLEGE
2=LESS THAN HIGH SCHOOL OR GED

2.2 EMPLOYMENT STATUS

CIRCLE APPROPRIATE ITEM BELOW AND RECORD SCORE IN BOX
0=EMPLOYED FULL TIME
0=EMPLOYED PART TIME
0=DISABLED AND RECEIVING BENEFITS
1=STUDENT/HOMEMAKER
1=UNEMPLOYED
1=RETIRED, ABLE TO WORK

2.3 RESIDENCE

0=OWN/PURCHASING
1=RENT, NO CONTRIBUTION, OTHER, NO PLACE TO LIVE

2.4 CURRENT DRUG PROBLEMS

1=YES
0=NO

2.5 CURRENT ALCOHOL PROBLEMS

A=YES
B=NO

2.6 CITIZENSHIP STATUS

0= US CITIZEN
1=LEGAL OR ILLEGAL ALIEN

2.7 FOREIGN TIES

A= YES
B= NO

2.7 (A) DOES THE DEFENDANT HAVE ANY OF THE FOLLOWING TIES TO A FOREIGN COUNTRY?

A= YES
B= NO

CIRCLE ALL THAT APPLY
FAMILY (PARENTS, SIBLINGS, COUSINS, ETC.)
SPOUSE
CHILDREN
SIGNIFICANT OTHER
BUSINESS RELATIONS
FRIENDS
OTHER
NO FOREIGN TIES

IF YES, WHAT COUNTRY OR COUNTRIES?

2.7 (B) DOES THE DEFENDANT MAINTAIN CONTACT WITH ANY INDIVIDUAL IN QUESTION 2.7(A)?

A= YES
B= NO

2.7 (C) IS THE DEFENDANT A CITIZEN OR RESIDENT OF A FOREIGN COUNTRY? IF YES, WHICH COUNTRY OR COUNTRIES? **(PLEASE INDICATE WHAT COUNTRY.)**

A= YES
B= NO

2.7 (D) DOES THE DEFENDANT POSSESS A VALID OR EXPIRED PASSPORT (EITHER U.S. OR FOREIGN)?

A= YES
B= NO

2.7 (E) DOES THE DEFENDANT HAVE ANY FINANCIAL INTERESTS (SUCH AS, PROPERTY, BANK ACCOUNTS, ETC.) OUTSIDE OF THE U.S.?

A= YES
B= NO

2.7 (F) HAS THE DEFENDANT TRAVELED OUTSIDE OF THE U.S.?

A= YES
B= NO

CIRCLE APPROPRIATE ITEM BELOW:
WITHIN THE PAST 1–5 YEARS
WITHIN THE PAST 6-10 YEARS
NO FOREIGN TRAVEL

2.7 (G) WAS TRAVEL IN 2.7(F) FOR ANY OF THE FOLLOWING?

A= YES
B= NO

CIRCLE APPROPRIATE ITEM BELOW:
A=PLEASURE
B=BUSINESS
C=BOTH
D=NOT APPLICABLE

TOTAL OTHER	
TOTAL SCORE [ITEMS 1.1 – 2.7(G)]	

Likelihood of outcomes based on event occurring during pretrial period.

Risk Category	N	%	Risk Score	FTA	NCA	FTA/NCA	TV	FTA/NCA/TV
Category 1	52,677	29	0-4	1%	1%	2%	1%	3%
Category 2	52,653	29	5-6	3%	3%	5%	4%	9%
Category 3	49,920	27	7-8	4%	5%	10%	9%	18%
Category 4	21,779	12	9-10	6%	7%	15%	15%	28%
Category 5	4,710	3	11+	6%	10%	20%	19%	35%

PRETRIAL SERVICES RISK ASSESSMENT (PTRA)
Frequently Asked Questions

Why was the PTRA developed?

The PTRA was developed as a standardized empirically-based risk assessment instrument for use by federal pretrial services. The use of a standardized instrument will help reduce the disparity in risk assessment practices and provide a foundation for evidence-based practices. It will allow for the development of policy that provides guidance to pretrial services agencies regarding release and detention recommendations, including the use of alternatives to detention.

How was the PTRA developed?

The PTRA was developed by capturing data collected from all the persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 who were processed by federal pretrial services. The data set included all of the federal districts, with the exception of the District of Columbia, and consisted of 565,178 defendants.

What does the PTRA measure?

The PTRA is an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear (FTA), new criminal arrest (NCA), and revocations due to technical violations (TV) while on pretrial release. The PTRA comprises of 11 scored and 9 un-scored items that are divided into two categories: criminal history and other. The scored items are as follows: prior felony convictions, prior FTAs, pending cases, offense type, offense severity, age, residence status, employment, education, substance abuse and citizenship status. Alcohol use and foreign ties are not scored at this time. The un-scored items will be analyzed for future revisions aimed at improving the tool.

Is the PTRA valid?

The PTRA is an actuarial instrument, which means it gives the probability of failure for a given group of defendants and not any particular defendant. The PTRA was validated using the data mentioned above, as well as a construction and validation sample. The instrument was also reviewed by a panel of experts. Concurrent validity was assessed based on its correlation with another known predictor of risk, the RPI. Face validity was confirmed through review by an expert panel and officers in the federal pretrial services.

What are the benefits of using the PTRA?

The PTRA is an additional tool that officers will use to determine what level of supervision and conditions a defendant, once released, requires. The PTRA standardizes the estimation of risk and thereby allows for the strategic allocation of scarce resources. Finally, the PTRA will assist districts in evaluating the impact of supervision and conditions.

How long does it take to administer the PTRA?

The PTRA is in sync with completion of the initial intake interview. All of the information the officer requires to complete the PTRA is obtained during that initial interview.

What training is required prior to using the PTRA?

The initial training is 3 hours and covers the principles of effective risk assessment, an overview of the PTRA, detailed discussion of the items on the PTRA, administration and scoring, and a series of exercises related to scoring the PTRA. An online certification process is also required prior to administering the PTRA. Modified training presentations are available for judges, public defenders, AUSAs, and other interested stakeholders.

When will the PTRA be available to my district?

The PTRA tool has been used and evaluated by two districts. Adjustments were made following their feedback. The tool will be made readily available to districts that have participated in the initial training and online certification.

Determining Your Client's Likelihood of Success under Community Supervision and Improving the Odds for a Non-Prison Sentence[1]

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 you 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

Federal Pretrial and Post Conviction Risk Assessments (PTRA and PCRA)

The United States Office of Probation and Pretrial Services (OPPS) has developed two risk assessment instruments to aid with predicting the risk of failure on pretrial release and assessing an individual's risk and needs when placed on supervision after conviction.

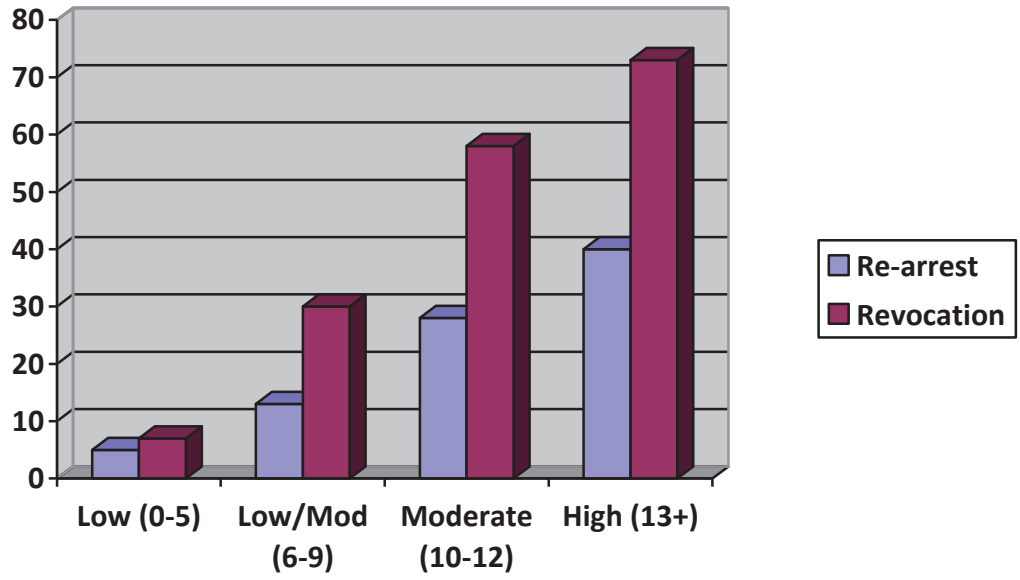
The Federal Pretrial Risk Assessment (PTRA) is designed to predict the risk of failure-to-appear (FTA), new criminal arrest (NCA), and technical violations (TV) while on pretrial release.

The Federal Post Conviction Risk Assessment (PCRA) is designed to predict the risk of re-arrest and reconviction and to identify characteristics that place the individual at risk of reoffending, but which can be changed (dynamic risk factors). The Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, expects to complete training by July 2011 for all probation officers involved in post-conviction supervision.

The PCRA is a 55 item quantifiable instrument that measures a person's risk of recidivism across seven domains: criminal history, including arrests; education and employment; alcohol and drug problems; social networks; cognitions (ant-social attitudes and attitudes toward change); other (housing, finances, recreation); and responsivity factors (personal, cultural, and societal barriers to change). A risk score is determined by adding up the points for the scored items. The points then correspond to a risk of recidivism, which is based on a past analysis of OPPS data.

[1] 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 (May 2009, revised Nov. 2010).

Failure Rate for PCRA Risk Categories

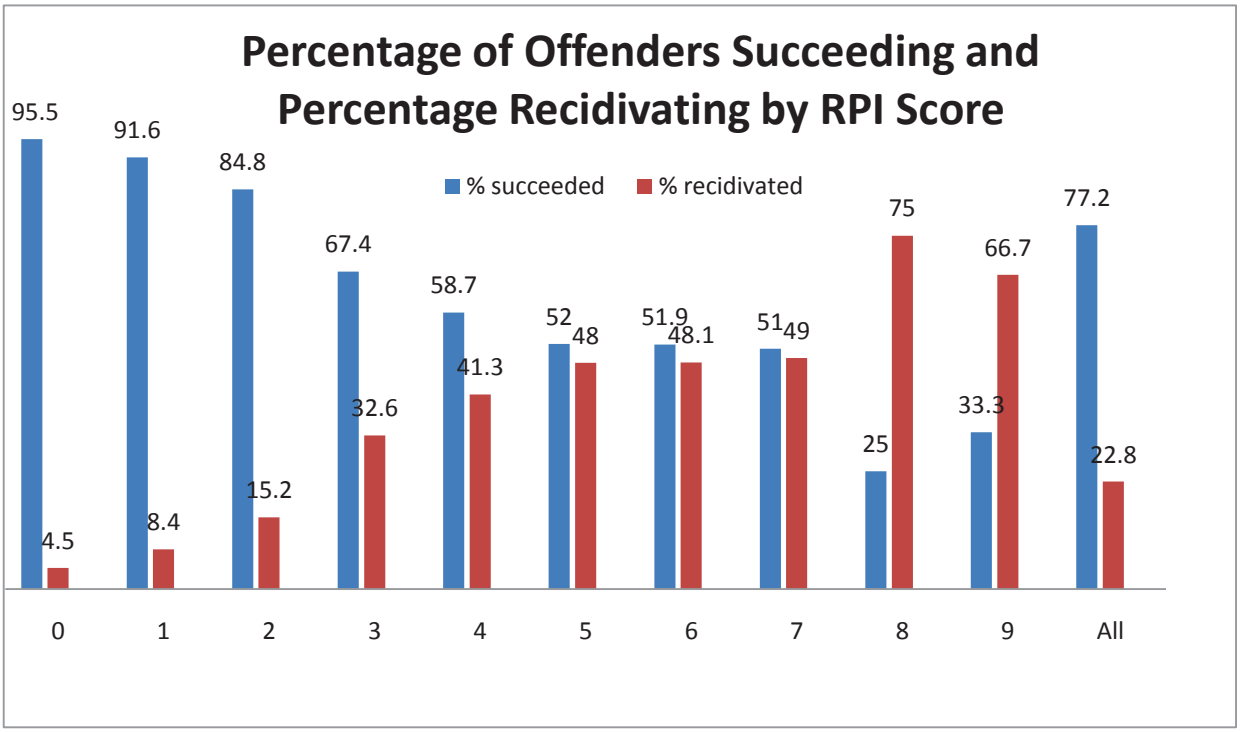


The Risk Prediction Index (RPI)

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, *RIP FAQ'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. 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 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. [2]

[2] 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*, 323 Fed. Appx.

- **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) [3](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 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.

27(2d Cir. 2009)(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).

[3] Available at 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 do. Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, *Myths and Facts About Sex Offenders* (Aug. 2000).[4]

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*.[5] *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

Research has shown that certain socio-cognitive deficits are linked to criminal behavior. Cognitive Centre of Canada: *Treatment of Antisocial Behavior.*[6] Cognitive skills training may help correct

[4] 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).

[5] Available at http://www.wpaonline.org/pdf/Success_in_the_Community_Matrix.pdf.

[6] Available at http://www/cognitive centre.ca ; http://www.csc-scc.gc.ca/text/prgrm/lsp-eng.shtml.

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. [7] 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. For help in identifying symptoms that may suggest a mental impairment, *see* Deana Logan, *Learning to Observe Signs of Mental Impairment*.[8]

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.

It may be helpful to assess your client's vocational skills and focus him or her on building those skills helpful in finding employment.[9] Find out what kind of job placement resources are available in

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[7] Available at http://www.utexas.edu/research/cswr/nida/instrumentListing.html.

[8] Available at http://www.dpa.state.ky.us/library/manuals/mental/Ch17.html.

[9] 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

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 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.

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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.

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. Whom does s/he see and speak with most often? Who is close to him or her? Whom 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). [10] 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.

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

[10] Available at http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

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[11]

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. [12] The

[11] 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.

[12] *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.) (en banc), *cert. denied*, 129 S.Ct. 2735 (2009); *United States v. Tomko*, 562 F.3d 558, 570 (3d 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 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), *cert. denied*, 129 S.Ct. 2804 (2009); *United States v. Tankersley*, 537 F.3d 1100 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2766 (2009); *United*

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.

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. [13]

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 insures that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or

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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).

[13] 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"), *cert. denied*, 129 S.Ct. 2747 (2009).

> 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).[14] It provided no data on the harm caused by these

[14] *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

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. [15] As to why crimes like drug trafficking by low level offenders or firearms possession, require terms of imprisonment, the Commission offered no explanation whatsoever. [16]

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.[17] *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).

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).[i]

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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").

[15] 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.'"

[16] "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).

[17] "[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.

Deconstruct Specific Offender Characteristics that the Guidelines Identify as not "Ordinarily Relevant" or "May Be Relevant" If Present to an "Unusual Degree" to a Court's Decision on Whether to Sentence Outside the Range. USSG §§ 5H1.1 to 5H1.12. [18]

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 generally 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.

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

[18] 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.

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. [19] Some other studies include:

- **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);[20] 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

[19] 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.

[20] Available at http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf.

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.");[21] *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%. S*ee 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).[22]

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 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)l; 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

[21] Available at http://www.justicepolicy.org/article.php?list=type&type=98.

[22] Available at http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

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 Correction*s, 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).[23]

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. Allenabugh, *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.

[23] Available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

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 book for example, the Commission lists the most prevalent reasons for sentences below the guideline range. *See, e.g*, USSC, *2008 Sourcebook of Federal Sentencing Statistics*, at 68-69.[24] 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. 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).

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*

[24] 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.

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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[i] *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 (3d 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 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)).