
# Truth in Sentencing?

# The Gonzales Cases

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Speaking at the National Center for Victims of Crime in Washington, D.C. on June 21, Attorney General Alberto Gonzales criticized federal sentencing since the Supreme Court handed down its opinion in *United States v. Booker*, 125 S. Ct. 738 (2005) in January. *See* "Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech," Washington, D.C, July 21, 2005.

In *Booker*, the Supreme Court held that the U.S. Sentencing Guidelines violated the Sixth Amendment right to jury trial because they mandated increased sentences based on facts found by a judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt. To save the Guidelines from unconstitutionality, the Court made them advisory.

Accordingly, judges are required to impose a sentence that is "sufficient, but not greater than necessary," to accomplish the goals of sentencing, which are to achieve just punishment, reflect the seriousness of the offense, promote respect for law, deter the defendant and others from future crime, protect the public, and provide education and treatment, when needed, in the most effective manner.[1] In determining that sentence, the judge must consider the nature of the offense, the history and characteristics of the defendant, the sentencing guidelines and policy statements, the need to avoid unwarranted disparities among similarly situated defendants, and the need to provide restitution.[2] The government and the defendant each have the right to appeal the sentence on the basis that it was unreasonable.

According to statistics published by the United States Sentencing Commission since *Booker* was decided, judges are sentencing below the guideline range at the same rate as they were in 2001 and 2002, while the rate of sentencing above the guideline range has doubled.[3]

In his speech, however, the Attorney General expressed concern that the advisory guidelines had resulted in a "drift toward lesser sentences," resulting in the loss of a "critical law enforcement tool." He said he would support legislation that would not disturb judicial discretion to sentence above the guideline range, but would severely limit discretion to sentence below it.

The Attorney General described four cases that he said supported his view.

Criminal defense attorneys from the National Association of Criminal Defense Lawyers and the Federal Public and Community Defenders represent thousands of defendants every year in federal sentencing proceedings. Lawyers from these interested groups cooperated in closely examining the cases relied on by the Attorney General. Their analysis revealed that in each case the Attorney General's description was incomplete in important respects and failed fairly to describe the judges' reasons for imposing the sentence. What follows is a complete description

[1] 18 U.S.C. § 3553(a)(2).

[2] 18 U.S.C. § 3553(a)(1), (3)-(7).

[3] United States Sentencing Commission, Numbers on Post-*Booker* Sentencings (May 5, 2005), available at http://ussc.gov/Blakely/PostBooker_5_26.pdf.

of the cases referenced by the Attorney General.

New York Case Involving Possession of Child Pornography

According to Attorney General Gonzales, the ability of judges to exercise discretion "threatens the progress we have made in ensuring tough and fair sentences for federal offenders." To illustrate his point, he said:

> That threat is illustrated by the story of two defendants, both convicted of similar charges involving possession of child pornography, one in New York, the other across the Hudson River in New Jersey.
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> The New York defendant faced a sentencing range of 27 to 33 months in prison, but received only probation.
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> The New Jersey defendant faced a sentencing range of 30 to 37 months and was given a sentence of 41 months in prison.
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> So in the New Jersey child pornography case, the judge deemed it necessary to protect the public from the defendant and imposed a sentence slightly above the guideline range. In the New York case, however, the judge reasoned that the defendant would benefit from continued psychological treatment and ordered probation only.

The record of the New York case reflects that the judge's overriding concern was protection of the public. Far from revealing that the judge only concerned himself with the needs of the defendant, the record is a striking demonstration of how judicial discretion can better protect society than mandatory guidelines.

Studies show that sex offenders are 25% less likely to re-offend than non-sex offenders,[4] and that sex offender treatment cuts recidivism by more than half.[5] The Federal Bureau of

[4] Department of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 at 2 (Re-arrest rate for sex offenders was 43% while re-arrest rate for non-sex offenders was 68% – this study does not discuss sex offender treatment or its effect).

[5] Looman, Jan *et al.*, Recidivism Among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario), Journal of Interpersonal Violence 3, at 279-290 (Mar. 2000) (reduction from 51.7 percent to 23.6 percent with treatment); Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming); Center for Sex Offender Management, Recidivism of Sex Offenders 12-14 (May 2001) (charts showing 18% with treatment v. 43% without treatment; 7.2% with relapse prevention treatment v. 13.2% of all treated offenders v. 17.6% for untreated offenders); Orlando, Dennise, Sex Offenders, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group

Prisons, however, has only one Sex Offender Treatment Program, at FMC Butner. It has only 112 beds, and turns away many inmates who seek treatment. As a result, only 1% of sex offenders in federal prison receive sex offender treatment before they are released.[6]

The defendant in this case pled guilty to receiving and possessing 75 images of child pornography on his computer, for which the sentencing guideline range was 27 to 33 months. At the time of sentencing, he had already been in a highly structured residential treatment program for 18 months.[7] The program included 24-hour supervision and monitoring, with a full daily schedule of counseling, psychiatric care, group therapy, and twelve-step meetings. The defendant paid for his treatment with the proceeds of the sale of his cooperative apartment.

The judge had before him hundreds of pages of reports and letters from medical, psychiatric and counseling professionals, including a psychiatrist hired by the government. All of them said that the defendant had benefited from the treatment he had received. No one claimed that he was completely rehabilitated, but rather that continued treatment would maximize the chance of rehabilitation. The defendant had not engaged in any criminal or improper conduct since entering the program.

The judge also had a lengthy conversation with the defendant during the sentencing hearing, in which the defendant, in his own words, described each component of his daily treatment regime and the effect it had on him. In addition to psychological counseling, psychiatric care and group therapy, the program was a spiritual fellowship that had brought him back to God, and he had invested his life in it. He said that every day he faced his powerlessness and addiction, and continually relied on the support, networks, education and treatment he had. He said there was no reason for him to be on the computer again, and that while he had been in complete denial about the victimization aspect of his behavior, he was squarely facing that issue

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treatment; a Vermont Department of Corrections study showed 7.8% recidivism rate for those who participated in treatment, .5% for those who completed treatment).

[6] United States Sentencing Commission, Report of the Native American Advisory Group at 27-28 & n.52 (Nov. 4, 2003), available at http://www.ussc.gov/NAAG/NativeAmer.pdf; Federal Correctional Complex, Butner, North Carolina, Doctoral Psychology Internship 2005/2006 at 7 (June 15, 2004), available at http://www.bop.gov//jobs/students/pdfs/cpdipbut.pdf. In March 2004, FMC Devens established a "Sex Offender Management Program," in which sex offender-specific psychology programs are not required. See U.S. Department of Justice, Federal Bureau of Prisons, Federal Medical Center Devens, Sex Offender Management Program at 2-3, 4 (March 1, 2004).

[7] The defendant voluntarily entered the program immediately after his arrest by Pennsylvania state authorities in a sting in which the defendant traveled to meet an agent posing on the internet as a thirteen-year-old girl. Upon his arrest, he signed a waiver of rights permitting the seizure and search of his computer, as a result of which the 75 images were found and the defendant was prosecuted federally. A year after his arrest, the Pennsylvania state court judge sentenced the defendant to ten years' probation with a condition of residential treatment for two years, one year of which he had already completed. The state court judge concluded that this maximized the chance that the defendant would not be a danger to society.

now. He wondered why his family still loved him, and hoped to make amends by learning to live in society as a good person free of addiction.

The judge seriously considered the guideline sentence and the law enforcement interest in deterring others, but found that the interest of the community in curing the defendant's criminal problem outweighed general deterrence.

While the judge accepted the opinion of the government's expert that there was a risk of re-offense, he recognized that if imprisoned the defendant would be released one day. Thus, the question before him was what sentence would best assure that the defendant would not re-offend. The government claimed that the defendant could receive treatment while in prison, or after his release. The judge, however, had no evidence before him of what kind of treatment, if any, the defendant might receive in prison or what the result would be. In the opinion of the defendant's treating therapist, the defendant would lose ground that he had gained if his treatment were interrupted. The judge found that unlike others who had appeared before him who had entered residential drug treatment programs, all of whom had absconded, the defendant had remained and faithfully participated in the program, without resuming any criminal behavior, over a substantial period of time. The judge believed that on this record of successful participation in a rigorous treatment program, it would be "foolhardy" to remove the defendant.

The judge therefore imposed a sentence of five years' probation, with the condition that the defendant continue in residential treatment, comply with all of the program's recommendations and regulations, move to a sober house approved by the program if and when the program deemed it appropriate, and not separate from the program without the judge's approval. In addition, the defendant was ordered to have no unsupervised contact with minors.

The government did not appeal this sentence.

Kansas Bank Fraud Case

The Attorney General described a bank fraud case in Kansas as follows:

> In a case involving white collar crime, a Kansas rancher got 1.8 million dollars in cattle loans, falsely claiming that he was using the money to buy live cattle. He even took bank officials to livestock pens and claimed that the cows he was showing them were purchased with loan proceeds, when, in fact he lost all the money speculating on the cattle futures market. He pled guilty to defrauding the bank and faced a sentencing range of 37 to 46 months under the guidelines. But the judge gave him probation only, reasoning, in part, that the defendant had suffered enough when the bank foreclosed on his house.

The real story of this case reveals why the judge sentenced the defendant as he did. The guideline range for a fully culpable bank fraud offender causing a $1.5 million loss with no mitigating circumstances was 37 to 46 months. That sentence would not have been appropriate on the unique facts of this case -- even when the guidelines were mandatory.

The defendant was a thirty-five-year-old cattle rancher in a small town in Kansas, where he, his wife and two teenaged children, parents and sister had lived all their lives. He worked hard, was active in the community and in his children's lives, and had no criminal history whatsoever.

Like many American farmers and ranchers in recent history, the defendant was struggling to provide a living for his family and a service to his country. He thought he had an opportunity to improve his ranching business when a person who turned out to be a con artist proposed to store a large number of cattle on the defendant's ranch for future resale if he would expand his operation. The defendant took out a revolving agricultural loan from the town bank (where he and his family had banked for years), built and expanded in anticipation of the new business, and bought some cattle of his own. A statement of facts prepared by the prosecutor in this case reveals that the defendant purchased 4,000 head of cattle, contrary to Mr. Gonzales' suggestion that the defendant did not use any of the loan proceeds to buy cattle.

As time passed, the con artist placed no cattle on the defendant's ranch. Instead, he talked the defendant into writing him numerous checks, telling him these were short-term loans just to keep him afloat, but he never repaid them. There were insufficient funds to cover these checks, but the bank paid most of them, adding the amounts to the outstanding balance on the loan after calling the defendant for permission. When the defendant realized the man was a fraud, he played the cattle futures market in the hope of repaying the bank. He wrote a number of large checks to the Chicago Futures Exchange for which, again, there were insufficient funds. The bank also covered these checks by adding to the loan balance. There were over 100 overdrafts at the bank.

The defendant lost a substantial amount of money on the cattle futures market, and saw that he could not repay the bank and was going to lose the farm. He had an emotional breakdown, for which he was hospitalized, then walked into the bank and disclosed what he had done. Out of shame and guilt over what he had done to his family and community, the defendant moved with his wife and children to a town a distance away. There, he took a modest job as a groundskeeper for the local school district, and a second job as well, in order to support his family and begin to repay the bank. The defendant placed the family farm into bankruptcy and lost everything. (Contrary to Mr. Gonzales' statement, there were no foreclosure proceedings.)

The defendant was indicted in one count for bank fraud, to which he pled guilty. In sentencing the defendant, the judge found that the guideline range of 37 to 46 months was greater than necessary to satisfy the purposes of sentencing for six carefully explained reasons, *none* of which was that the defendant had "suffered enough when the bank foreclosed on his house."

First, the defendant never intended to deprive the bank of its money. Instead, he believed the representations of a con artist, and when they turned out to be false, attempted to keep up with his loan payments by using the futures market.

Second, the guideline range was driven by the bank's $1.5 million loss,[8] but this did not account for the bank's role in increasing the loss amount by adding to the loan balance when presented with numerous insufficient-funds checks, rather than declining to honor them.

Third, it was impossible to conclude that the defendant was a danger to society or would re-offend, given his history and character, as reflected in his lack of criminal record, solid employment history, devotion to his family, confession to the bank, and many letters of support from people in the home town he left.

Fourth, the offense had significant collateral effects: the suffering of his wife and children, the defendant's separation from lifelong friends and parents, and the loss of the farm that he and his father had worked hard to establish.

Fifth, incarceration would have little if any deterrent effect on others, and any such deterrence was offset by the need to remain employed to pay restitution.

Sixth, the difference between this sentence and the guideline sentence did not create "unwarranted" disparity, because equality is not to treat different facts the same, but to treat different facts differently, using a set of consistent standards.

The judge sentenced the defendant to one day of time served and three years of supervised release, and ordered restitution. The conditions of supervised release included payment of restitution, disclosure of all financial information to the Probation Officer, and a prohibition against any credit or borrowing without advance approval. As of this date, the defendant has made all required restitution payments.

The government did not appeal this sentence.

There is a postscript to this story. Soon after his indictment in Kansas, the defendant traveled to Oklahoma where he voluntarily disclosed to law enforcement authorities that he had written checks for insufficient funds, which the con artist had then used in a check-kiting scheme in that state. The defendant did not profit from that scheme. He was then indicted for one count of bank fraud in Oklahoma, to which he pled guilty. The defendant disclosed his conduct and pled guilty with no agreement or expectation that the government would request a lower sentence based on information he had provided about the con man. To its credit, the government filed a motion requesting a sentence below the guideline range shortly before sentencing. The guideline range was 10-16 months. The judge sentenced the defendant to 3 months incarceration, five years of supervised release, 200 hours of community service, and restitution. The sentence was based on the nature of the offense, the defendant's history and character, and the government's motion.

[8] The outstanding balance on the loan was $1.8 million. The bank recovered approximately $333,000 from the sale of cattle, grain, machinery and equipment. Since then, the bank has also received just over $3,000 from the bankruptcy court.

New York Tax Evasion Case

> Attorney General Gonzales described this case as follows:
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> This New York defendant was sentenced in 2003 for evading the payment of more than six million dollars in taxes by such means as moving out of the country valuable assets – including a fleet of Rolls Royces. Under the then-mandatory sentencing guidelines, the defendant was sentenced to 41 months in prison. The judge said he would have liked to impose a considerably lesser sentence, but felt constrained by the guidelines. A year and half later, after the *Booker* decision, the defendant petitioned the court for re-sentencing and the judge reduced his sentence to seven months in prison and seven months of home confinement.
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> The judge noted that the defendant's age and the need to take care of his wife – not normally relevant sentencing factors pre-*Booker* – now justified a lesser sentence.

In this case, the judge presided over a three-month trial after which the defendant was convicted of attempting to evade taxes and falsely understating his assets to the IRS. Years before the conduct for which he was on trial, the defendant had set up a trust with his daughter as beneficiary. His defense was that he believed in good faith that he was not required to disclose to the IRS assets held in trust for his daughter, based on his understanding of New York state property law.

At the initial sentencing, the judge found by a preponderance of the evidence that the "tax loss," defined as the value of assets the defendant attempted to conceal from the IRS (three Rolls Royces and a piano) was just over $1.2 million. Contrary to the Attorney General's statement, there was no finding that the defendant evaded the payment of $6 million in taxes.

Having heard the evidence and arguments at trial, the judge recognized that the defendant's good faith belief defense was a "close" question that "could be decided the other way." He said that the "incremental morality" embodied in the guideline range was "harsher" than was appropriate in this case and that he would like to sentence the defendant to "something considerably lower." Nonetheless, the judge believed that the guidelines prohibited him from taking account of the defendant's incremental morality, the needs of his disabled wife, or his advanced age, and imposed a guideline sentence of 41 months.

The Attorney General's statement that "[a] year and half later, after the *Booker* decision, the defendant petitioned the court for re-sentencing" is inaccurate. The Supreme Court granted certiorari in *Booker* while the defendant's appeal was being briefed. The Second Circuit held all supplemental briefing while awaiting the Supreme Court's *Booker* opinion. Once *Booker* was decided, the Second Circuit summarily remanded the case for re-sentencing. There was no delay, late filing or anything out of the ordinary in this procedure. This defendant in fact

preserved the error at his initial sentencing, arguing that judicial factfinding by a preponderance of the evidence was unconstitutional.

At re-sentencing, the judge rejected the government's argument for a sentence of imprisonment of 57-71 months, as well as the defendant's argument for a sentence of home detention with no incarceration. The court relied on three primary factors to impose a sentence that was sufficient, but not greater than necessary, to achieve the purposes of punishment.

First, the court considered the guideline range of 41-51 months, and the requirement under 18 U.S.C. § 3553(a)(2)(A) that the sentence be "just," which meant that the defendant must be punished "proportionately" to what he had done and to his circumstances. The court concluded that the offense was serious and therefore required incarceration.

Second, the defendant would be 70 years old on his next birthday. Relying in part on a recent statistical study by the Sentencing Commission showing a dramatic drop in recidivism with age,[9] the court found that it was unlikely that the defendant would commit further crimes from which the public needed to be protected.

Third, the defendant was needed to care for his wife. At the initial sentencing, the court heard testimony and reviewed documentary evidence that she suffered from hysterical amnesia and hyperventilation syndrome, which manifested in attacks of extreme shortness of breath, gasping and parasthesias throughout her limbs, after which she was unable to remember events or recognize familiar people and places. Due to her psychiatric illness, she had been unable to work for the past six years. In addition, she had asthma, from which her own mother had died, suffered pain and swelling in her joints, and had a recent blood test indicating the presence of autoimmune liver disease. At re-sentencing, the defendant described his wife's condition as noticeably deteriorated. Her rheumatoid arthritis had spread from her hip and shoulder joints to her knees, feet, wrists and hands. She was extremely jaundiced, often nauseous, more confused than usual, and her breathing was more labored. She had no relatives in the United States and no source of support other than the defendant.

The judge sentenced the defendant to seven months in prison, followed by seven months in home confinement, followed by three years of supervised release. As a condition of supervised release, the judge ordered the defendant to make arrangements with the IRS to reduce his tax liability if he had not done so already.

The government has filed a notice of appeal.

South Carolina Drug and Gun Case

[9] See United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 12 ("Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.)

The Attorney General described a case in which a federal judge in South Carolina sentenced a 21-year-old African American male to ten years in prison as follows:

> In one recent case, a South Carolina man pled guilty to federal weapons and drug trafficking charges. The firearms in his possession included a fully automatic machine gun, two assault rifles, and two pistols. After his arrest on these charges, this defendant was released on bond. While out on bond, he failed a drug test and absconded from electronic monitoring. Federal marshals caught up with him and, after a six-hour standoff, tear- gassed him out of the house where he was hiding. Under the federal sentencing guidelines, this individual, who had a long history of state charges related to assault and drug possession, faced up to 27 years in prison. However, post-*Booker*, the judge sentenced him to only 10, offering no explanation. The Department is appealing this unreasonably low sentence.

This case began as a state matter when an informant told local authorities that the defendant possessed a large quantity of cocaine powder. They searched the defendant's apartment, found 5.38 grams of powder cocaine, 11.77 grams of marijuana, and several firearms, and arrested him. The defendant was then 20 years old.

Pursuant to a federal program in which state cases involving possession of firearms are picked up by federal authorities, the defendant was indicted in federal court, where he pled guilty to possessing a controlled substance with intent to distribute, and possessing four firearms (two rifles and two pistols) after having been previously convicted of an offense punishable by more than one year.

The defendant's prior record consisted of the following state law offenses: (1) assault and battery, a misdemeanor under state law punishable by 0-10 years,[10] (2) "Failure to Stop for a Blue Light," meaning failure to stop when signaled by a police officer, a misdemeanor under state law punishable by 90 days to three years,[11] (3) possession of crack cocaine in an amount less than one gram, a felony under state law punishable by 0-5 years,[12] and (4) resisting arrest (while being arrested for the crack cocaine), a misdemeanor under state law punishable by not more than one year.[13] Each of these offenses is classified as non-violent under South Carolina law.[14]

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[10] State v. Hill, 254 S.C. 321, 330-31 (1970).

[11] S.C. § 56-5-750(B)(1).

[12] S.C. § 44-53-375(A).

[13] S.C. § 16-9-320(A).

[14] S.C. §§ 16-1-60, 16-1-70.

The defendant committed the first two offenses on separate occasions at age 17, the other two at the same time when he was 18, and pled guilty to all four on the same day at the age of 18. He was sentenced under South Carolina's Youth Offender Act to a suspended sentence, served seven months when probation was revoked, and was on parole when arrested on what would become the federal charges. Because South Carolina (unlike many other states) treats 17-year-olds as adults, all of these convictions were "countable" under the criminal history rules of the U.S. Sentencing Guidelines.[15]

The defendant's guideline sentence was multiplied nine-fold by this youthful, relatively minor, criminal history. If the defendant had had no criminal history, his guideline sentence would have been 21-27 months. With his criminal history, his guideline sentence was 84-105 months. Through operation of the Career Offender Guideline, his guideline sentence was 188-235 months. (The defendant did not face 27 years, as the Attorney General stated, but approximately 15 years.[16])

Under the Career Offender guideline, a defendant's base offense level and criminal history category are not set by the normal rules. Instead, the base offense level is pegged to the statutory maximum for the offense of conviction, and the criminal history category is automatically the highest on the chart. The Career Offender guideline applies if the defendant was at least eighteen when he committed the offense of conviction (the defendant here was 20), the offense of conviction was either a crime of violence or a controlled substance offense (here, neither was a crime of violence, but one was a controlled substance offense), and the defendant "has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[17]

As noted, each of the defendant's prior offenses, other than possession of less than one gram of crack cocaine, was a misdemeanor under South Carolina state law, and all were classified as non-violent under state law. However, under the Career Offender guideline, a "prior felony conviction" includes all offenses punishable by more than one year even if classified as misdemeanors under state law. And a "crime of violence" includes not only offenses that involve force, but offenses that "present a serious potential risk of physical injury to another."[18] The Fourth Circuit Court of Appeals has held that South Carolina's "Failure to Stop for a Blue Light" is a "crime of violence" under federal sentencing law, on the theory that

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[15] U.S.S.G. §§ 4A1.2(d), 4B1.2, comment. (nn.1, 3).

[16] The statutory maximum for the controlled substance offense of conviction was 30 years. Thus, the career offender guideline required a base offense level of 34. See U.S.S.G. § 4B1.1. A reduction of three points for acceptance of responsibility brought the total offense level to 31. In criminal history category VI, the guideline range was 188-235 months.

[17] U.S.S.G. § 4B1.1.

[18] U.S.S.G. § 4B1.2(a)(2).

disobedience of a police officer's signal to stop poses a threat of confrontation between the police and occupants of the vehicle.[19]

Thus, this 20-year-old defendant was deemed a "career offender" for federal sentencing purposes based on his convictions for assault and failing to stop for a blue light at the age of 17, both non-violent misdemeanors under state law. The "career offender" classification had the effect of raising his guideline sentence from 84-105 months to 188-235 months.

In a recent study, the United States Sentencing Commission found that the severe penalties under the Career Offender guideline had a racially disparate impact on Blacks that was not warranted by an increased risk of recidivism. The report said:

> In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although *Black offenders* constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they *were 58 percent of the offenders subject to the severe penalties required by the career offender guideline*.[20]

The study found that most Black offenders fell within the Career Offender guideline based on prior controlled substance offenses, most likely because drug sales in impoverished minority neighborhoods take place outside where they are easier to detect, and concluded that the racial disparity was not warranted. The racial disparity was not warranted because the recidivism rate for people whose "career offenders" status is based on controlled substance offenses is no more than that for offenders in the criminal history category in which they would have been placed under the normal criminal history rules.[21]

Here, the defendant would not have been a "career offender" absent his failure to stop for a police officer. As many courts and commentators have recognized, and many studies have shown, Blacks are stopped by the police and not charged with any crime or only with traffic offenses in disproportionate numbers, often called "driving while black."[22] The available record

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[19] United States v. James, 337 F.3d 387, 391 (4th Cir. 2003).

[20] See United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 133-34 (2004) (emphasis supplied).

[21] Id.

[22] See Bingham v. City of Manhattan Beach, 341 F.3d 939, 954 (9th Cir. 2003); Washington v. Lambert, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); Smith v. City of Gretna Police Dept., 175 F. Supp.2d 870, 874 (E.D. La. 2001); Martinez v. Village of Mount Prospect, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); United States v. Leviner, 31 F. Supp.2d 23, 33 (D. Mass. 1998); David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 341-52 (1998); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board, 28 Colum. Hum. Rts. L. Rev. 551, 554-69 (1997); Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional

does not disclose whether the defendant was stopped for "driving while black," but he is black and was not charged with any offense on that date other than failing to stop.

Whether or not the stop was racially motivated, it would seem that the defendant's failure to stop would not warrant the severe "career offender" penalty of 188-235 months. No violence appears to have ensued, no drugs or weapons were found, and the defendant was 17 years old.

In many cases, application of the Career Offender guideline produces a sentence that is excessive and wasteful. In some of those cases, courts have imposed sentences that better reflected the seriousness of the offense and the risk of recidivism.[23] In a case quite similar to this one, a federal judge in Virginia reduced the defendant's career offender guideline sentence from 188 to 120 months, which would have been his guideline sentence under the normal criminal history rules.[24] The defendant had committed the career offender predicates (nine counts of breaking and entering sentenced on two separate occasions) during a six-week period in the middle of which he turned seventeen. Citing the Supreme Court's recent opinion striking down the death penalty for juveniles, the judge stated that "[j]uveniles have an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressure, and their character is not as well formed as an adult's. Thus, 'it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'"[25]

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Police Practice, 6 J.L. & Pl'y 291, 296 (1997); David Harris, Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology, 544, 560-69 (1997); Christopher Hall, Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong and the Evolution of Police Discretion, 76 Tex. L. Rev. 1083, 1088 (1998); Matthew Dolan, Summit Addresses Biased Police Stops Officials, Citizens Discuss Solutions in the Shadow of Hampton Incident, The Virginian-Pilot and The Ledger-Star, Norfolk, Va., November 22, 1998, Al; Rick Sarlat, Racial Profiling on Interstates is Under Attack: Pa. Legislation drafted, The Philadelphia Tribune, May 26, 1998, 1A.

[23] See, e.g., United States v. MacKinnon, 401 F.3d 8 (1st Cir. 2005) (remanding for re-sentencing where the district court, before Booker, found that the career offender guideline produced a sentence that was "obscene" and "unwarranted by the conduct."); United States v. Hubbard, 369 F. Supp.2d 146, 148 (D. Mass. 2005) (imposing sentence of 108 months rather than 188-235 month career offender range based on diminished capacity from appallingly traumatic childhood which "directly precipitated his life on the streets and his conduct as a career offender"); United States v. Williams, __ F. Supp.2d __, 2005 WL 1378764 (M.D. Fla. 2005) (sentencing defendant to 204 months because career offender sentence of 360 months to life was out of character with the seriousness of the offense, was not necessary to achieve deterrence or incapacitation, and would undermine respect for law); United States v. Person, __ F. Supp.2d __, 2005 WL 995559 (D. Mass. 2005) (departing downward from 262 to 84 months where career offender status based on one drug distribution and resisting arrest "grossly overstated" seriousness of defendant's criminal history); United States v. Carvajal, No. 04-CR-222AKH, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005) (imposing sentence of 168 months because career offender guideline of 262 months was "excessive," and would be "greater than necessary, to comply with the purposes" set forth in the statute, including rehabilitation, which cannot be achieved without hope).

[24] United States v. Naylor, 359 F. Supp.2d 521 (W.D. Va. 2005)

[25] Id. at 524, quoting Roper v. Simmons, 125 S. Ct. 1183, 1195-96 (2005).

Furthermore, while in many cases, offenses committed before the age of 18 are not counted as career offender predicates because the state in which they were committed counts them as juvenile offenses, the law of the state in which this defendant was convicted treated him as an adult. "These technical distinctions concerning age" persuaded the judge that he should not apply the career offender guideline.[26] The government did not appeal that sentence.

As noted above, the South Carolina defendant's Career Offender guideline sentence was 188-235 months, and his guideline sentence under the normal criminal history rules would have been 84 to 105. The judge sentenced him to 120 months.

The judge had before him evidence that the defendant grew up in a housing project with his mother and three younger sisters. The housing project where they lived was, apparently, notoriously run down, dangerous, and overrun with crime. When the defendant was a young teenager, his mother was involved with a man who abused drugs and abused her, which he witnessed. He was an A/B student but dropped out of school in the tenth grade when he received the Youthful Offender sentence. Upon his release, he obtained his GED, and was currently enrolled in a nearby technical college. He had a job at a barbershop, and was the father of four children.

Defense counsel requested a 120-month sentence, the maximum possible sentence for the firearm count, so as "not to extinguish all hope from this young man's life and to give him a sentence that allows him to one day get back into the mainstream of America as a productive citizen and abide by the law."

The prosecutor acknowledged the hardships the defendant faced growing up, but stressed that he had made his own choices, and recited his criminal record, as well as two recent arrests for simple possession of drugs. The prosecutor also reminded the judge that while out on bond under home detention, the defendant had tested positive for drugs, had left home for a day or two, and then been arrested for violating the conditions of release. The prosecutor did not describe this as a "standoff," however. After the probation officer found that the defendant was not at home, authorities learned that he was in a particular house. They contacted him repeatedly on his cell phone to coax him out, he refused, and they tear gassed the house. Records show that there were three other people in the house, and that a gun was found inside. However, there is no indication that anyone showed it or attempted to use it, or that it belonged to the defendant.

The judge (1) imposed a sentence of 120 months incarceration, (2) recommended that the Bureau of Prisons place the defendant in its intensive drug treatment program and provide him with education to develop a marketable skill, and (3) ordered six years of supervised release including drug treatment and drug testing.

The judge explained his reasons to the defendant personally. First, he had made serious mistakes in his young life, and every time he made a mistake, the punishment increased. Second, he had responsibilities as a father, which he would not be able to carry out in the near future

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[26] Id. at 524-25.

because of the sentence he faced. Third, on the one hand, the poor environment in which he grew up undoubtedly contributed to the direction his life had taken. At the same time, he had made his own choices. Fourth, he was 21 years old, still young enough to learn to make better choices. He had shown some capacity to do so, and thus could use his ten-year term of imprisonment as an opportunity to gain more education and become a productive, law-abiding citizen.

The prosecutor had not asked for any particular sentence, but objected on the basis that the sentence the judge imposed was "outside the guideline range," explaining that it was her "duty, when a sentence is outside the guideline range, we are to note our objection and preserve an opportunity to appeal should the Department of Justice decide." The government has appealed the sentence.

Conclusion

None of these cases reflects a failure of the judiciary or of the sentencing system: Each sentence was sufficient but not greater than necessary to achieve just punishment, deterrence, protection of the public, and needed education or treatment, taking into account the nature of the offense, the history and characteristics of the defendant, and the need to avoid unwarranted disparity as well as unwarranted uniformity.