© author's name | stock.adobe.com

Defense Lawyers Can 'Rewrite' the Sentencing Guidelines, One Case at a Time

Over 90 percent of federal defendants plead guilty, and 83 percent of those who go to trial are convicted on at least one count.[1]

In most indicted federal cases, the question is not how to persuade a jury at trial, but how to convince a judge at sentencing. Specifically, the question is how to obtain a sentence below the range recommended by the Sentencing Guidelines. The primary answers are the traditional ones: put the focus on the person, not just the crime; tell the judge the rest of the story. But those sound approaches can be complemented and enhanced by two things that almost no defense lawyers use: the U.S. Sentencing Commission's data on actual sentences, and precedents "hidden" from standard legal search engines.

For many defendants, analysis of the Commission's data will show that "similarly situated" people actually receive sentences far below the Guidelines range. And a judge who learns that actual sentences are lower than the Guidelines should be less inclined to cling to those ranges.

Judges should also be less inclined to anchor a sentence to a Guidelines range when they learn of comparable cases that received a non-Guidelines sentence. Such cases are effectively hidden from standard legal search engines because judges rarely write opinions when they issue sentences but, by re-identifying hundreds of thousands of cases anonymized in the Commission's data set, defense counsel can uncover a treasury of relevant precedent.

When these two resources are used together — when lawyers have both concrete statistical analyses and dozens of relevant "hidden" precedents — they give defense lawyers in federal cases new ways to reduce unwarranted sentencing disparities between similarly situated defendants. Using the Commission's own data and relevant re-identified precedents, defense lawyers can effectively "rewrite" the Guidelines, one case at a time.

The Guidelines claim to rest on an empirical foundation.

Whatever justifications supporters of the Guidelines may choose to advance, the Guidelines themselves base their claim to authority on their purported empiricism. When Congress enacted the Sentencing Reform Act of 1984, it directed the Sentencing Commission to "establish sentencing policies and practices that … assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." But the Commission could not agree on which purposes should predominate.[2] For example, it could not agree whether principles of just deserts should be given greater weight than incapacitation. Instead, it decided to derive principles and sentence lengths from past practice. Thus, the Commission issued Guidelines that it claimed were based on an empirical study of past sentences.[3]

BY MICHAEL L. YAEGER

But in fact, as scholars have observed, the sentences the Commission recommended substantially expanded the length of past sentences.[4] This is especially true for white collar offenses, where the Commission expressly "decided to abandon the touchstone of prior past practice"[5] and instead increased penalties.

The Guidelines are vulnerable to genuine empiricism.

Given that the Guidelines' recommendations derive their persuasive authority from their claimed empiricism, their weight can be reduced by showing that they do not accord with actual sentencing practice. In fact, the Supreme Court has held that when the Commission diverges from "empirical data and national experience," as it did with the sentencing ranges for crack cocaine sentences, it diverges from its "characteristic institutional role" and thus has less persuasive authority than it otherwise would.[6]

In many cases the actual sentencing practice does in fact diverge, as the Sentencing Commission itself makes clear in its annual "Sourcebook," a summary description of the data the Commission collects. According to the 2019 Annual Report and Sourcebook of Federal Sentencing Statistics, approximately 23 percent of all sentences imposed in 2019 were "Non-Government Variances." In other words, almost a quarter of all sentences were cases in which (1) "the sentence imposed was below the applicable guideline range"; (2) "the prosecution did not initiate, propose, or stipulate to the sentence"; and (3) the sentencing judge declined to remain within the Guidelines' framework.[7]

Of course, there are limits to the usefulness of the summary statistics that the Sourcebook provides, but that is very different from the value of the actual data itself. The annual sourcebooks tend to provide statistics for an entire category of offenses, such as the average sentence for *all* fraud crimes at *any* offense level or criminal history. It is easy for a prosecutor to argue that such broad statistics do not describe how similarly situated defendants are treated by the courts. The "average fraud sentence" is not a terribly helpful concept when the Guidelines emphasize loss and losses range from $100,000 to $100 million. But the actual data that the Commission collects and makes available for independent review allow for far more granular and apposite analysis.

The data files made available by the Commission allow researchers to compare defendants with the same Chapter 2 offense Guideline, offense level, and criminal history category. For example, consider defendants sentenced under USSG § 2B1.1, offense level 17, and criminal history category I. Those defendants reside in precisely the same position on the Sentencing Table, so they face the same recommended range of imprisonment, namely, 24-30 months.

After all, when the government seeks a "Guidelines sentence" for a defendant, it is implicitly comparing him or her to people in the same position on the Sentencing Table and implicitly asserting that he deserves the same treatment. The Guidelines Manual is a several-hundred page book designed to place a person in a single rectangle on a one-page grid. By definition, therefore, a Guidelines sentence is one within the specific range of months where the applicable Guideline, offense level, and criminal history category place a defendant. From a Guidelines view, to be subject to the same Guideline and in the same rectangle on the grid is what it means to be similarly situated; that is the reason the Guidelines recommend that those people receive a sentence in the same range.

Comparing defendants in a Guidelines & Sentencing Table subgroup, such as § 2B1.1 / 17 / I, is the kind of empirical analysis that allows defense lawyers to counter the Guidelines' recommendations.

Figure 1: Sentencing Table (in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

November 1, 2016

Figure 1. In the Sentencing Table, the range is boxed in red for emphasis. To defend the Guidelines is to defend the view that, absent a specified ground for "departure," such as § 5K1.1 or § 5K3.1, all the people in a Guidelines & Sentencing Table subgroup should receive a sentence in that same range.

Studying a spot on the Sentencing Table shows the value of empirical data.

For a defendant in the § 2B1.1 / 17 / I subgroup, the Guidelines range is 24-30 months, but the actual median sentence is far lower. In fact, from 2014 to 2018, there were more than 1,000 defendants in that subgroup, and the actual median sentence was approximately 12 months — not the average, the median. In other words, even though the Guidelines recommended a sentence of 24-30 months, 50 percent of those defendants received a sentence of 12 months or less. That is less than half of the Guidelines range. Further, a little bit more than 68 percent of the defendants are under the Guidelines range. The histogram (Figure 2) breaks it down further.

Note, too, that the most common sentence by far is probation (about 28 percent), and that the second most common sentence (about 15 percent) is exactly at 24 months — the precise bottom of the Guidelines range. The judges imposing probation knew, of course, that they were imposing a sentence below many of their peers. But perhaps the judges who imposed a sentence of precisely 24 months mistakenly thought that they, too, were imposing a relatively low sentence. After all, they were giving a sentence "at the bottom of the range." Perhaps if those judges knew that they were actually imposing a relatively high sentence — indeed, a sentence that was higher than what was meted out in 68 percent of similar cases — they would have made a different choice and sentenced *below* the Guidelines range, not within it.

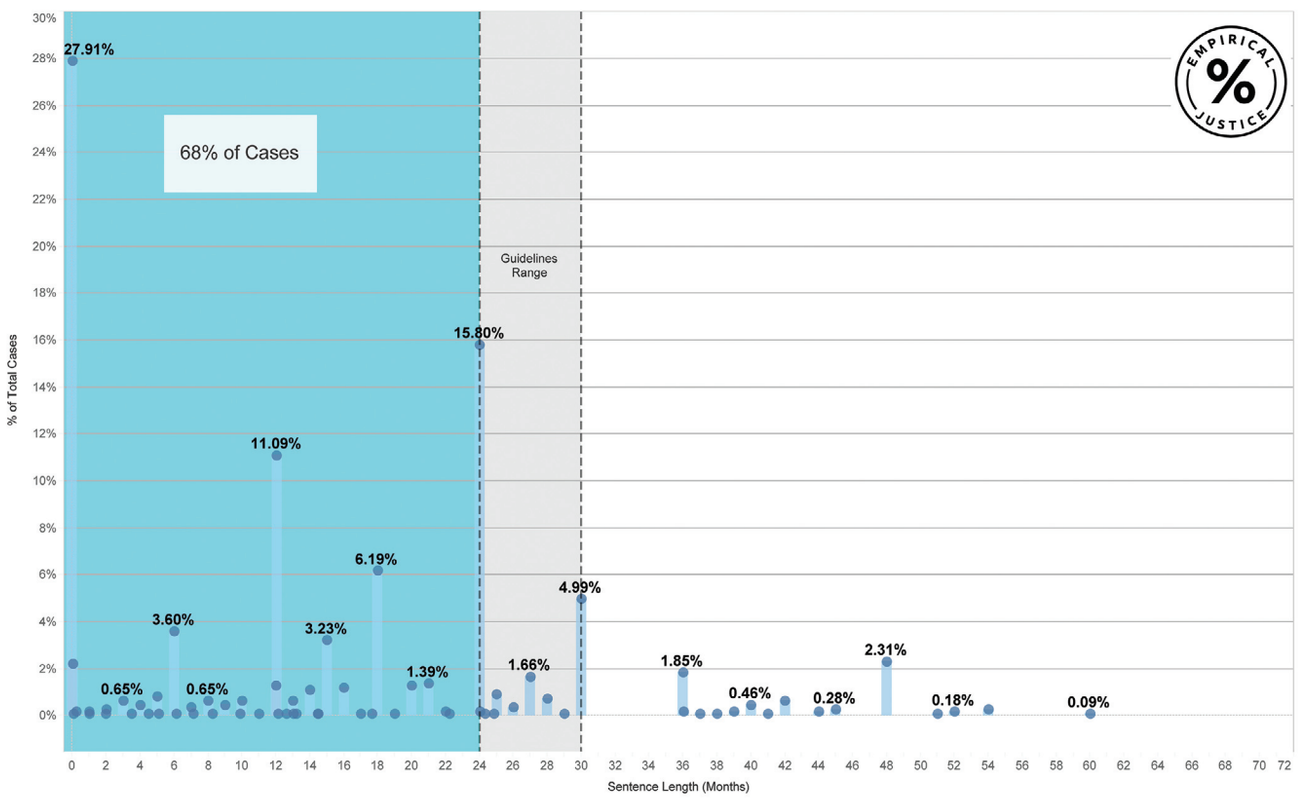
To be sure, there are other questions to ask and factors to consider, such as whether the defendants sentenced beneath the Guidelines range were cooperating witnesses who received credit for "substantially assisting in the prosecution of another" under USSG § 5k1.1. But the answers may be surprising. In fact, when defendants receiving such credit are removed from the sample discussed here, more than 42 percent of the remaining defendants still receive sentences of 12 months or less, and a little more than 59 percent still receive sentences beneath 24 months.

Equipped with these statistics, defense counsel could show the court that a sentence substantially below the Guidelines is not exceptional, but typical. The Guidelines have not standardized sentencing as much as one might presume, and thus an individual judge cannot avoid the unwarranted disparity decried by 18 U.S.C. § 3553(a) merely by adhering to the Guidelines range. To combat unwarranted disparity, lawyers and judges need statistical analysis of actual sentences.

Sentencing precedent is often 'hidden' but has high value.

Statistical analysis is even more valuable when it is coupled with precedent, and specifically individual cases of similarly situated defendants who have received non-Guidelines sentences. The problem is finding the cases. Standard legal search engines are not much help because the overwhelming majority of sentences are imposed without a written opinion. So the precedents land like snow in April, dissolving on contact. The Commission's dataset does not supply an answer, either, because the Commission deliberately de-identifies the cases it collects. That is, the Commission collects the names of cases and judges, but deliberately strips that information out of its dataset and creates completely new identification numbers for cases. It even cuts out the individual day on which a defendant is sentenced, leaving just the month and year. But there *are* ways to re-identify cases — it has been done for hundreds of thousands of cases. And when re-identification can be done, it gives lawyers a

Figure 2: 2014–2018: USSC § 2B1.1, Criminal History I, Offense Level 17 (24–30 months)



means for convincing judges that is both new and helpfully familiar.

When a lawyer provides a sentencing judge with summaries of apposite precedents complete with case names, case numbers, and the names of the deciding judges, the lawyer brings the judge back to a position of strength. Nothing is more natural to a common law practitioner than looking to precedent and reasoning by analogy. Re-identified cases allow lawyers to go further than the categories that the Commission chooses to collect and code, giving judges an even stronger sense that a non-Guidelines sentence is appropriate. And where a particular judge has considered similar cases before, lawyers can even cite a judge's previous work as support for their position.

There are limits to this approach, of course. Statistics are no substitute for stories in sentencing advocacy; the focus needs to be on the person, and on the personal. But statistics are a useful and underused complement. Data can help tell the story that the Guidelines need to be rewritten, and every sentencing can be an opportunity to rewrite them.

Notes

1. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/. ("Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2 percent of them went to trial. The overwhelming majority (90 percent) pleaded guilty instead, while the remaining 8 percent had their cases dismissed…").

2. Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15-17 (1988).

3. *See* U.S.S.G., Ch. 1 pt. A(3) (1987); Breyer, 17 HOFSTRA L. REV. at 7; Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 11 FED. SENT. R. 180, 1999 WL 730985 *3 (Vera Inst. Just.) (Feb. 1, 1999).

4. *See, e.g.*, KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 59-63 (1998).

5. Breyer, *supra* note 2, 17 HOFSTRA L. REV. at 22-23.

6. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

7. 2019 Sourcebook at 84, Table 29, nn. 4 and 7. Another 2 percent were "Non-Government Departures." Moreover, that 23 percent of Non-Government Variances and 2 percent of Non-Government Departures is in addition to the approximately 40 percent of cases that were departures or variances on government motion, such as substantial assistance departures under U.S.S.C. § 5K1.1 or early disposition departures under § 5K3.1. ■

About the Author

Michael L. Yaeger is a shareholder in the Government Investigations group of Carlton Fields and the founder of Empirical Justice (www.empiricaljustice.com), a consultancy that provides statistics and services to defense lawyers designed to enhance their sentencing advocacy. He was an Assistant U.S. Attorney in the Eastern District of New York.

Michael L Yaeger
Carlton Fields
New York, NY
212-380-9623
EMAIL MYaeger@carltonfields.com
WEBSITE www.carltonfields.com