NACDL
ENGAGE & EXCHANGE
VIDEO DISCUSSION SERIES

Using Data to Avoid Unwarranted Sentencing Disparities in Federal Cases [NACDL Engage & Exchange]

Online – CLE is not available

Presenters

- Stephen Chahn Lee, former federal prosecutor, solo practitioner focusing on health care fraud and data analytics
- MCM Data Consulting
  - Meredith Patti, former Senior Associate at the National Center on Institutions and Alternatives (NCIA) in their criminal justice division
  - Mary Cate Rush, former Assistant Director of the National Criminal Justice Commission (NCJC)

18 USC 3553(a)FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1)the nature and circumstances of the offense and the history and characteristics of the defendant;

(2)the need for the sentence imposed—

> **(A)**to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

> **(B)**to afford adequate deterrence to criminal conduct;

> **(C)**to protect the public from further crimes of the defendant; and

> **(D)**to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3)the kinds of sentences available;

(4)the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ...

(5)any pertinent policy statement...

(6)the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7)the need to provide restitution to any victims of the offense.

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Data Sets That Allow for Comparisons

Judiciary Sentencing Information (JSIN) data that is publicly available online and that is being rolled out around the country	Raw data files that can be accessed and evaluated using more sophisticated software

Judiciary Studies Use of Online Tool in Presentence Reports

Published on January 25, 2023

Updated April 28, 2023.

The Federal Judicial Center in March began a two-year pilot study of the impact of including in presentence investigation reports comparative sentencing data from the Judiciary Sentencing Information platform (JSIN), a publicly-available online tool developed by the U.S. Sentencing Commission.

In districts assigned to the pilot group, probation officers will include information from the JSIN tool in their presentence reports for two years, beginning on March 27. (The original article stated that the JSIN information would be appended to the reports.) The pilot districts are:
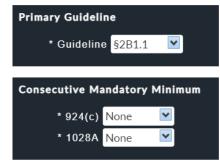
- District of Wyoming
- Middle District of Alabama
- Northern District of Alabama
- Western District of Arkansas
- District of Connecticut
- District of District of Columbia
- Northern District of Georgia
- Central District of Illinois
- Northern District of Indiana
- Northern District of Iowa
- Southern District of Iowa
- Western District of Kentucky
- Western District of Louisiana
- District of Maryland
- District of Massachusetts
- Eastern District of Michigan
- Northern District of Mississippi
- District of New Mexico
- Northern District of New York
- Southern District of New York
- Eastern District of Oklahoma
- District of Puerto Rico
- District of South Carolina
- District of South Dakota
- Eastern District of Tennessee
- Western District of Texas
- District of Virgin Islands
- Western District of Virginia
- Eastern District of Washington
- Western District of Washington
- Southern District of West Virginia

UNITED STATES SENTENCING COMMISSION
Judiciary Sentencing INformation (JSIN)

?

DATA FILTERS

Primary Guideline

* Guideline §2B1.1

Consecutive Mandatory Minimum

* 924(c) None
* 1028A None

Sentence Length Data

"Sentence Length" data includes all cases, as well as alternative months of confinement and probation. Probation sentences are treated as zero months. Generally, "Length of Imprisonment" data is the appropriate choice for judges that have decided to impose a sentence of imprisonment (as opposed to probation or an alternative sentence). As the majority of federal cases involve prison only sentences, the default results provide average and median "Length of Imprisonment." A judge may wish to select the option below, however, if the result for the

PLEASE CLICK ON CELL BELOW TO SELECT CHC AND FINAL OFFENSE LEVEL

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)
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
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
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
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

Zone A (offense levels 1–8)
Zone B (offense levels 9–11)
Zone C (offense levels 12–13)

RESULT

FILTER SELECTED:

Guideline:	§2B1.1
Final Offense level:	19
Criminal History Category:	I
Guideline Range:	30-37

Export Result to Word

FEDERAL DEFENDANTS IN SELECTED CELL

During the last five fiscal years (FY2018-2022), there were 3 with a Final Offense Level of 19 and a Criminal History Categ §5K1.1 substantial assistance departure. For the 339 defend in whole or in part, the average length of imprisonment impo imprisonment imposed was 24 month(s).

The sentencing data provided does not reflect the Commissi sentence to be imposed or represent the Commission's offici information provided reflect the Commission's position rega sentencing information in a court's determination of the app
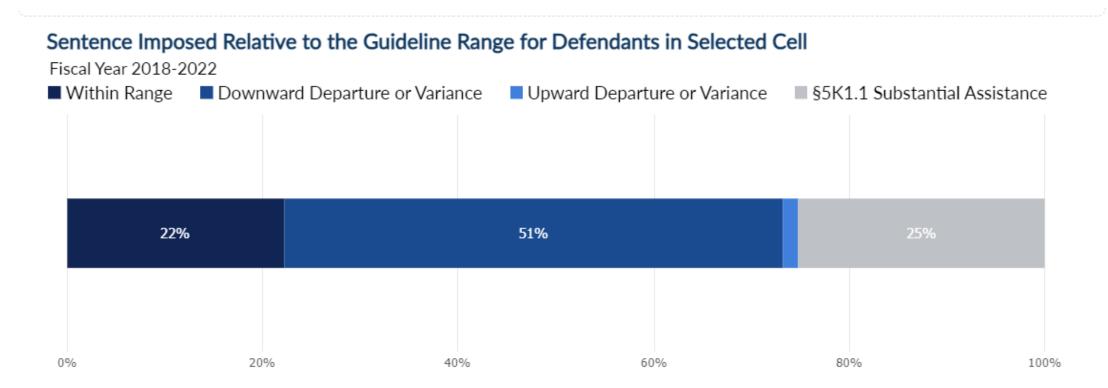
FEDERAL DEFENDANTS IN SELECTED CELL

During the last five fiscal years (FY2018-2022), there were 387 defendants whose primary guideline was §2B1.1, with a Final Offense Level of 19 and a Criminal History Category of I, after excluding defendants who received a §5K1.1 substantial assistance departure. For the 339 defendants (88%) who received a sentence of imprisonment in whole or in part, the average length of imprisonment imposed was 22 month(s) and the median length of imprisonment imposed was 24 month(s).
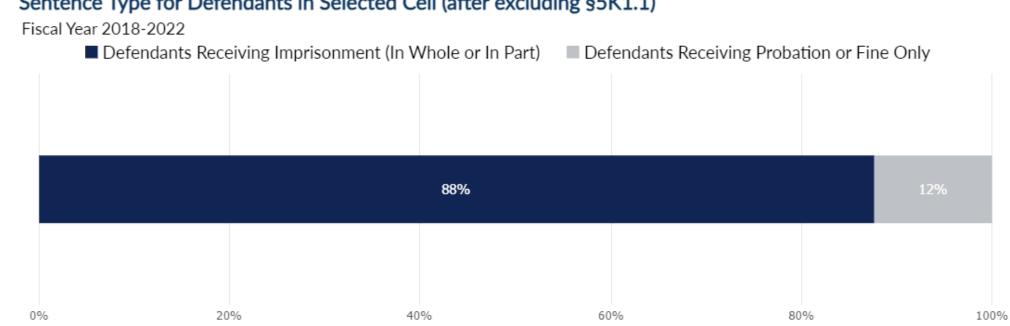
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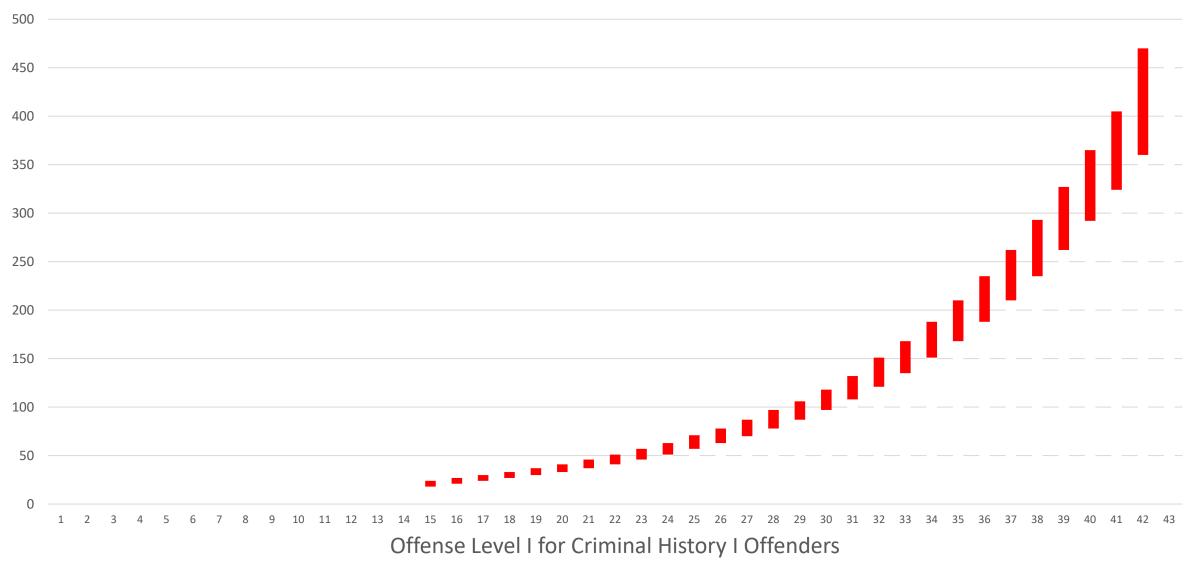
Sentence Imposed Relative to the Guideline Range for Defendants in Selected Cell
Fiscal Year 2018-2022

■ Within Range　■ Downward Departure or Variance　■ Upward Departure or Variance　■ §5K1.1 Substantial Assistance

22%	51%	25%

0%　　20%　　40%　　60%　　80%　　100%

FEDERAL DEFENDANTS IN SELECTED CELL

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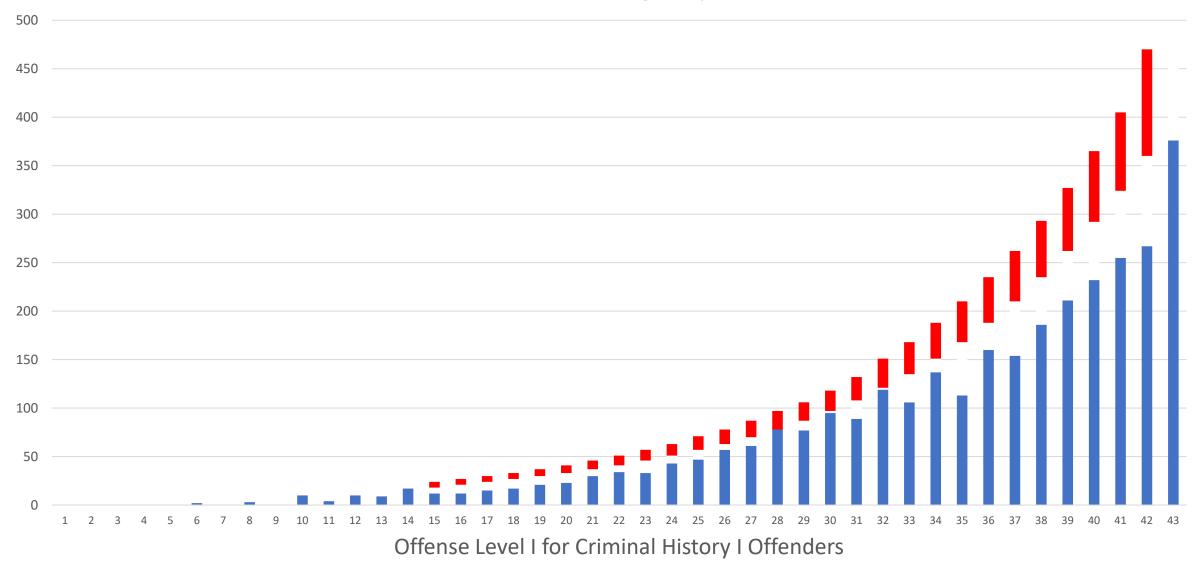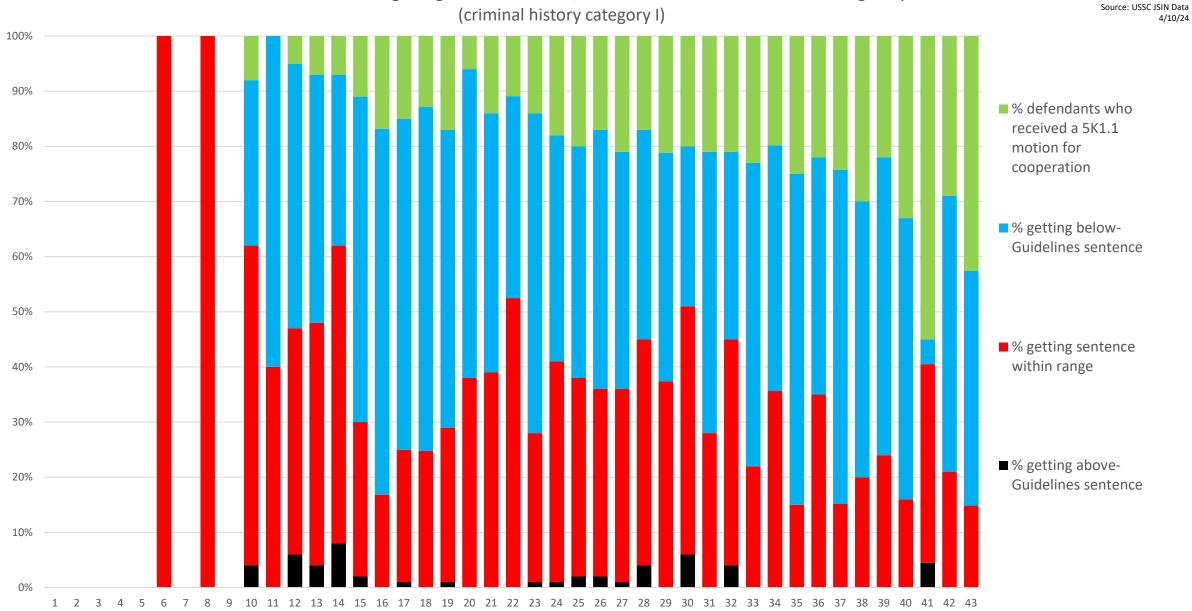
Sentence Type for Defendants in Selected Cell (after excluding §5K1.1)
Fiscal Year 2018-2022

■ Defendants Receiving Imprisonment (In Whole or In Part)   ■ Defendants Receiving Probation or Fine Only

88%	12%

0%   20%   40%   60%   80%   100%

Guideline Ranges in Red

Offense Level I for Criminal History I Offenders

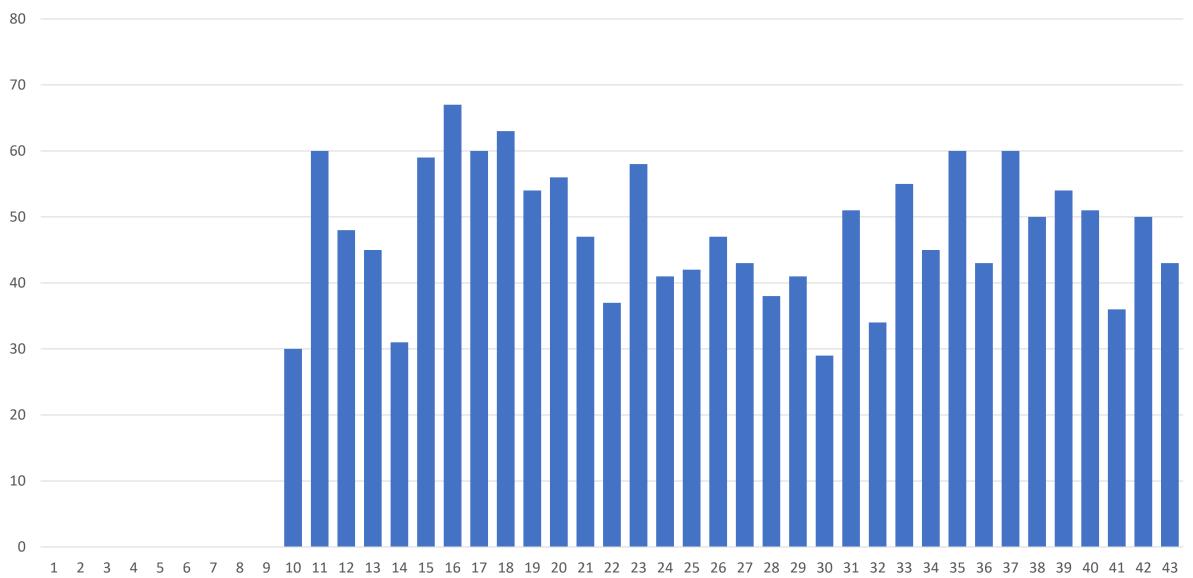2D1.1 Powder Cocaine - Average Imprisonment (Blue)

Offense Level I for Criminal History I Offenders

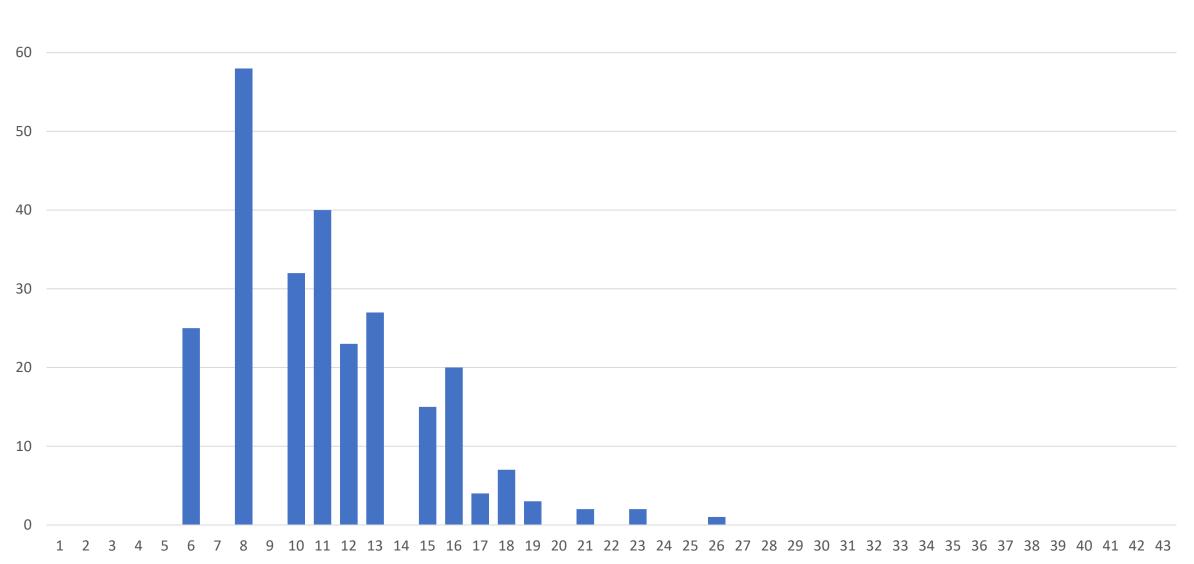2D1.1 Powder Cocaine - Defendants getting sentences above, within and below the Guidelines range - by offense level (criminal history category I)

Stephen Chahn Lee
Source: USSC JSIN Data
4/10/24

% defendants who received a 5K1.1 motion for cooperation

% getting below-Guidelines sentence
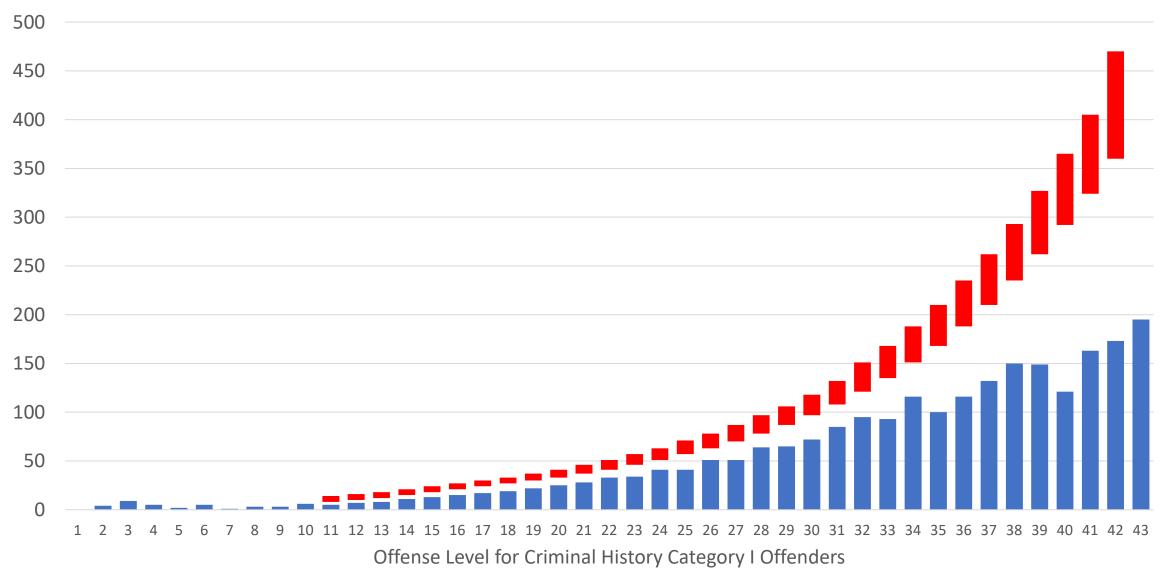
% getting sentence within range

% getting above-Guidelines sentence

% 2D1.1 Powder Cocaine defendants getting sentences below the Guidelines range

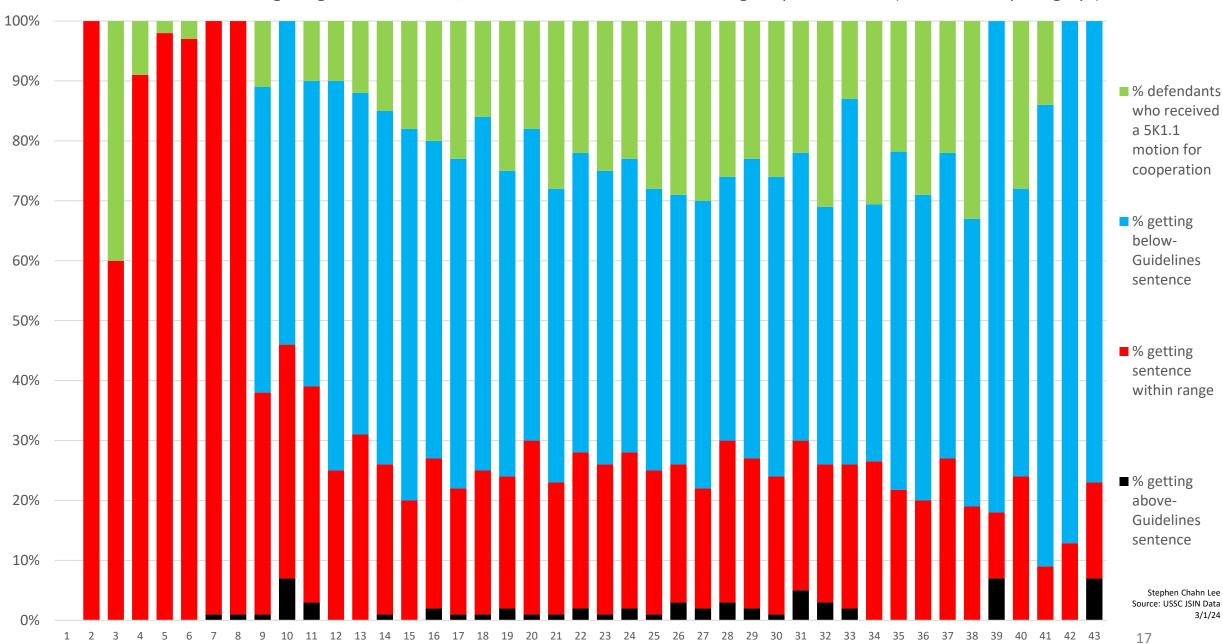2D1.1 Powder Cocaine - % of defendants getting no prison sentence, just probation and/or fine

2B1.1 - Average Sentences (Blue) Are Typically Far Below the Guideline Ranges (Red)

Offense Level for Criminal History Category I Offenders

16

2B1.1 - Defendants getting sentences above, within and below the Guidelines range - by offense level (criminal history category I)

Legend:
- % defendants who received a 5K1.1 motion for cooperation
- % getting below-Guidelines sentence
- % getting sentence within range
- % getting above-Guidelines sentence

Stephen Chahn Lee
Source: USSC JSIN Data
3/1/24

2B1.1 - % of defendants getting sentences below the Guidelines range

Offense Level for Criminal History Category I Offenders

2B1.1 - % of defendants getting no prison sentence, just probation and/or fine

Offense Level for Criminal History Category I Offenders

Data Sets That Allow for Comparisons

Judiciary Sentencing Information (JSIN) data that is publicly available online and that is being rolled out around the country	Raw data files that can be accessed and evaluated using more sophisticated software

2B1.1 - % of defendants getting no prison sentence, just probation and/or fine

Offense Level for Criminal History Category I Offenders

Knowledge is Power ---- Francis Bacon

MCM's Objective

- When preparing an analysis to address 18 USC §3553(a)(6) – avoiding unwarranted sentencing disparities among similar defendants - MCM, like JSIN, utilizes the USSC's datafiles.

- However, JSIN is limited in the information it provides the user.

- The USSC's datafiles contain over 20,000 variables and MCM utilizes all relevant variables when preparing an analysis.

- The USSC datafiles include cases from FY 1999 – FY 2022 (over 1.7 million defendants sentenced nationally).

- While JSIN provides the user with basic sentencing outcomes, it fails to take into account important factors that should be considered when analyzing similar defendants.

Variables Included in the USSC Datafiles Not Captured in JSIN

JSIN does not consider the following:

- **The <u>actual guideline calculation</u> resulting in the Total Offense Level**
  - **(such as Loss amount in fraud/tax cases; drug quantity or type of drug in drug cases; Guideline Specific Offense Characteristics [SOCs] applied; Chapter 3 adjustments, etc.).**
  - **The USSC datafiles contain the precise guideline information for each defendant in the dataset.**

- **Whether the defendant entered into a plea agreement or was convicted after trial**

- **Statute(s) of conviction and Statutory Range**

- **The application or exclusion of other Mandatory Minimums**

- **A description of the precise sentence imposed**
  - **Whether the sentence was time served or to be served;**
  - **In cases where probation or alternatives were part of the sentence, JSIN does not provide the precise number of months imposed.**
  - **In cases where community service was ordered, JSIN does not address community service, or the number of hours ordered.**
  - **Financial penalties imposed**
  - **The USSC datafiles contain all of this information.**

Variables Included in the USSC Datafiles Not Captured in JSIN

JSIN does not consider the following:

- JSIN only provides national outcomes. It does not provide any circuit or district outcomes.

- JSIN does not provide any sentencing information for defendants who received a USSG §5K1.1 substantial assistance downward departure.

- JSIN is limited to the last five fiscal years of available data. By limiting the time period, JSIN cannot consider changes to the Guidelines over time (fraud and tax loss tables get modified; SOCs are added and deleted, etc.).

- In cases where the defendant was sentenced outside the guideline range, JSIN does not provide any information as to why this outside the range sentence was imposed.

  - The USSC datafiles capture all reasons listed on a defendant's Statement of Reasons as to why the sentence imposed was outside the guideline range.

Description of Defendant – John Smith

- John Smith **pleaded guilty** to violating **18 USC §371** and will be sentenced in United States District Court for the Middle District of Florida.

- Mr. Smith is a **Criminal History Category I (zero criminal history points)** and is **not expected** to receive a substantial assistance downward departure pursuant to **USSG §5K1.1**.

- According to Mr. Smith's PSR he is scored according to **USSG §2B1.1**, received a **20-level increase for loss**, and his **Total Offense Level is 27** (70-87 months of imprisonment).

- However, because his **statutory maximum** sentence is 60 months of imprisonment, his guideline range is 60 months of imprisonment.

JSIN Steps

The user would select the following information:

- USSG §2B1.1;

- Total Offense Level 27;

- Criminal History Category I.

JSIN Findings

- There were 168 defendants who met the following criteria:
  - scored according to USSG §2B1.1;
  - Criminal History Category I;
  - Total Offense Level 27;
  - and did <u>not</u> receive a USSG §5K1.1 substantial assistance departure.

- Of these 168 defendants, 166 defendants (99%) received a sentence of imprisonment in whole or in part.

- For these 168 defendants, the average sentence imposed was 49 months and the median sentence was 48 months.

MCM Steps
Using USSC Datafiles

Selected cases that met the following criteria:

- Utilized data from FY 2002 – FY 2022 (this time period was selected because the loss amount and subsequent level increase for this loss amount was not impacted by the changes to the loss table that occurred beginning in the 2015 Guidelines Manual);

- Scored according to USSG §2B1.1 using the 2001 or later Manual;

- Criminal History Category I and had zero criminal history points;

- Entered into a plea agreement;

- Violated 18 USC §371 and only that statute;

- Received a 20-level increase to their guideline calculation for loss;

- Was Total Offense Level 27

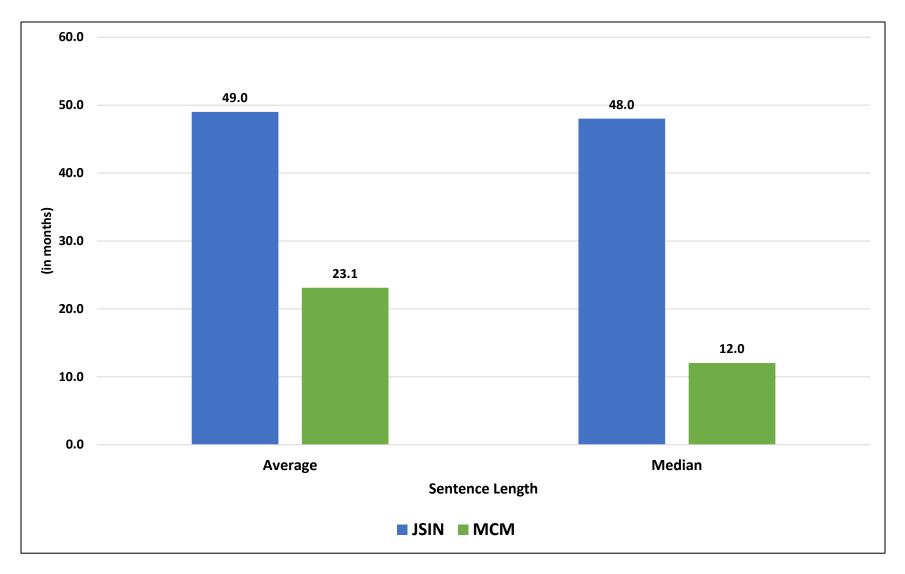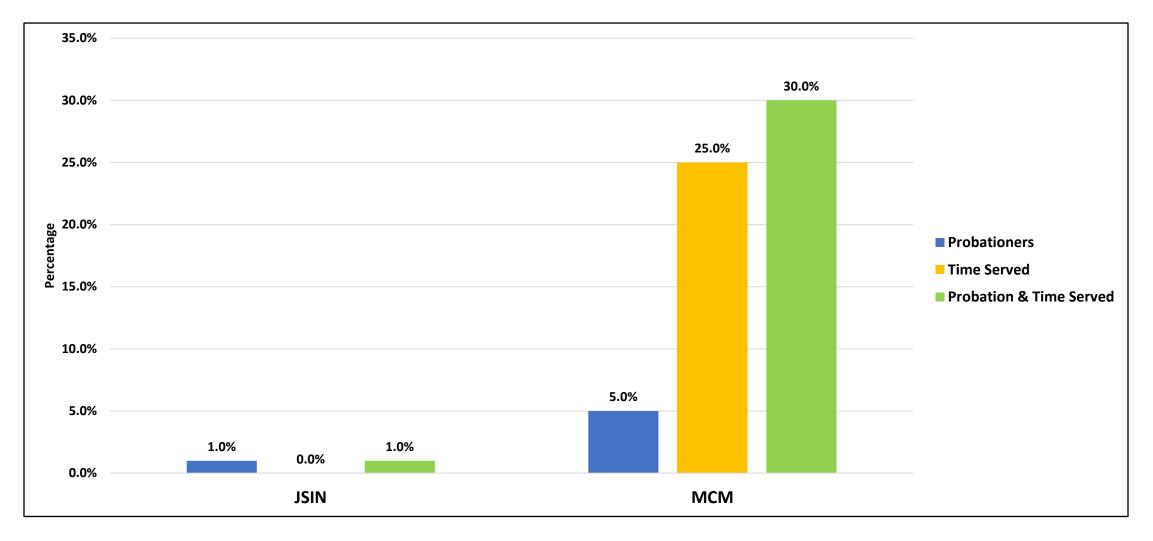- Did <u>not</u> receive a USSG §5K1.1 downward departure.

MCM Findings

There were 20 defendants sentenced nationally who met this criteria.

- **Of these 20 defendants, 1 defendant (5.0%) received a probationary sentence, 5 defendants (25.0%) were sentenced to 1 day of imprisonment (time served), and 14 defendants (70.0%) were sentenced to a term of imprisonment greater than 1 day.**

- **The average sentence imposed on these 20 defendants was 23.1 months of imprisonment and the median sentence imposed was 12 months and 1 day of imprisonment.**

- **None of these 20 defendants were sentenced in the Middle District of Florida.**

Comparison of Outcomes - JSIN v. MCM

Comparison of Findings for Defendants Sentenced to Probation or 1 Day of Imprisonment (Time Served)
JSIN v. MCM

Legend:
- Probationers (blue)
- Time Served (yellow)
- Probation & Time Served (green)

JSIN: Probationers 1.0%, Time Served 0.0%, Probation & Time Served 1.0%

MCM: Probationers 5.0%, Time Served 25.0%, Probation & Time Served 30.0%

Note: JSIN does not address whether an individual was sentenced to time served, in whole or in part.

The Anchoring Effect
or Anchoring Bias

The **anchoring effect or bias** is a psychological phenomenon in which an individual's judgments or decisions are influenced by a reference point or "anchor" which can be completely irrelevant. This phenomenon describes people's tendency to rely too heavily on the first piece of information they receive on a topic. Regardless of the accuracy of that information, people use it as a reference point, or **anchor,** to make subsequent judgments. Because of this, anchoring bias can lead to poor decisions in various contexts, such as salary negotiations, medical diagnoses, and most importantly here, the sentence imposed on a defendant.

Stephen Chahn Lee
slee@stephenleelaw.com
312-436-1790

For more information call 703.971.0217
Meredith Patti, Esq. – mpatti@mcmdataconsulting.com
Mary Cate Rush - mcaterush@mcmdataconsulting.com