

## WRITING A SENTENCING MEMORANDUM

There are any number of ways to write a sentencing memorandum that asks the judge to impose a sentence below the advisory Sentencing Guidelines range, and no one form will fit every case. Sentencing in federal court, though, has taken on a certain precision that often requires citation to authority and a theory beyond a request for mercy or a vague notion of fairness. Here are some suggestions about preparing a sentencing memorandum that incorporates that approach.

There are some essentials for the memorandum. In it you should (1) mention the “parsimony clause;” (2) remind the court of the limited role of the Guidelines; (3) explain why the Guidelines shouldn’t carry much weight in your case; (4) consider the federal sentencing statute, 18 U.S.C. § 3553(a); and (5) tie the circumstances of your case to § 3553(a).

Typically, and for the sake of clarity, a good way to start the memo is with a paragraph that briefly describes the client’s circumstances that justify the below-Guidelines sentence, makes reference to the parsimony clause, and states what sort of sentence you are requesting:

Defendant, John Doe, is seventy-nine years of age. He served in the United States Army during the Korean War and was a member of the Merchant Marines at the close of World War II. He suffers from significant health problems, notably congestive heart failure, and is at considerable risk for a heart attack and sudden death. He has no prior criminal history and, prior to his retirement, worked steadily. He appears to present little risk to anyone. Given these circumstances, a sentence of probation with a period of home detention would be “sufficient, but not greater than necessary,” to comply with the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Whether to ask for a specific sentence or something less precise, such as “less than the 262 to 327 months called for by the Guidelines,” is, of course, the sort of judgment lawyers make every

day and will vary from one case to the next.

Incidentally, the phrase “sufficient, but not greater than necessary” is the “parsimony clause.” It should be central to any sentence handed down in federal court and, hence, central to any sentencing memorandum. In its entirety it reads: “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 “purposes set forth in paragraph (2)” are the need for the sentence to: reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other treatment in the most effective manner.<sup>1</sup>

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**<sup>1</sup>§ 3553 Imposition of Sentence**

**(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 -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28

In a day when, as United Supreme Court Justice Anthony Kennedy put it, “our resources are misspent, our punishments too severe, our sentences too long,”<sup>2</sup> the idea of a sentence that is no longer than necessary is a remarkable consideration.<sup>3</sup> The point, though, is that the often used standard of “reasonableness” is not the standard in the district court. When the case is reviewed by the appellate court, they will ask whether the question is reasonable. In the district court, though, the question is that of just how short a sentence will suffice.<sup>4</sup>

At any rate, having succinctly set out in that first paragraph what you are asking for and why, the task is to set out your client’s circumstances in a detailed, compelling, and accurate way. This is essentially a discussion of the sort of facts that have always been mentioned at sentencing: the children who will suffer; the client’s devotion to his family; the service in the Marines; the stroke the client suffered last spring; the client’s limited intellect; the history of depression; the client’s remarkable work history; the fact that the your client’s prior convictions

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U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(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.

<sup>2</sup>Justice Kennedy’s speech at the August 9, 2003, annual meeting of the American Bar Association.

<sup>3</sup>The idea fits in nicely, too, with another Congressional admonition that has worked itself into many a sentencing memo: “The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a).

<sup>4</sup>See Douglas A. Berman, “Judge Posner’s important and flawed work in Cunningham,” *Sentencing Law and Policy*, Nov. 14, 2005 at <http://sentencing.typepad.com>, and Berman, “Remarkable new district court ruling on applying Booker,” Jan. 10, 2006, *id.*

consist of sales of tiny quantities of crack cocaine; the impact that alcoholism or drug addiction has had; the steps your client has already taken toward treatment or rehabilitation. The list goes on and on.

It may be, of course, that you are not relying so much on your client's history, but, instead, the circumstances of the offense. If that is so, then this portion of the memorandum will discuss the client's minimal role in the conspiracy, the benign reason the client possessed the firearm, why it is the loss calculation overstates the harm done, or the role the client's addiction to prescription drugs played in the offense.

Be ruthlessly accurate in describing your client's circumstances and the circumstances of the offense. Nothing will reduce your effectiveness as a lawyer or the effectiveness of a particular argument more than misleading or incorrect information.

Accordingly, part of the job at sentencing is to document these claims. If there are meaningful hospital or medical records, school records, police reports, psychological reports, newspaper articles, job evaluations, or any kind of written documentation that support your claim, put them together as part of an exhibit to be introduced at sentencing.<sup>5</sup> Letters from employers, friends, or family, can be used much the same way. Then, too, you may need to rely on live testimony at the sentencing hearing to corroborate your claims. The key here is to be aware that (1) what you say is not evidence; (2) the documentation makes your presentation more compelling; and (3) should you get a below guidelines sentence there will need to be evidence in the record to support the judge's decision.

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<sup>5</sup> If the records are not self-explanatory, you may need some written explanation of them. If, for example, there are medical records, it might be a good idea to hire a nurse to review them and provide a summary that explains the medical information.

In the memorandum you can include excerpts from the documents or letters and/or you can discuss the testimony you expect to present at the sentencing hearing. Especially if the documents are extensive or complicated, it makes sense to secure the Government's consent to submit the exhibits to the judge in advance of the sentencing hearing so that he or she will have an opportunity to look at them closely. Letters, too, should go to the judge in advance of the hearing.

Once you've set out the facts, the next step is to set out the law. The Booker<sup>6</sup> decision was published in January of 2005, and the judges are well aware of it, so there isn't much value in explaining the decision. The role the Guidelines play, though, is still very much debated and is likely to become clearer in the weeks to come when the Supreme Court issues its decision in the Claiborne and Rita cases.<sup>7</sup> In the meantime, though, it is worth mentioning that, at least here in the Eleventh Circuit, there no presumption that the advisory Guidelines range is the correct sentence. Here's an example of the argument:

As recognized in Hunt, there has been a continuing debate among the courts as to how much weight should be given to one of the listed factors, the Sentencing Guidelines. 459 F.3d at 1183-1184. The decision in Hunt, however, has resolved the debate for the Eleventh Circuit. In the decision, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Rather, a "district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." 459 F.3d at 1185. Thus, as recognized by Judge Tjoflat in United States v. Glover, 431 F.3d 744, 752-753 (11<sup>th</sup> Cir. 2005), in some cases the Guidelines may have little persuasive force in light of some of the other § 3553(a) factors.

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<sup>6</sup>United States v. Booker, 543 U.S. 220 (2005)

<sup>7</sup>Rita v. United States, Case No. 06-5754; Claiborne v. United States, Case No. 06-5618.

“Hunt” is Hunt v. United States, 459 F.3d 1180 (11<sup>th</sup> Cir. 2006) . It might be worthwhile, as well, to dispel the sort of pre-Booker thinking that only unique circumstances will justify a below-Guidelines sentence. *See* United States v. Castro-Suarez, 425 F.3d 430, 436 (7<sup>th</sup> Cir. 2005); United States v. Cull, 446 F.Supp.2d 961, 966 (D. Wis. 2006).

Having addressed the more general concepts, you can move to the specifics, the relevant portions of § 3553(a), and explain why they justify a lesser sentence. For the sake of clarity, it makes sense to list the factors in the memorandum. In Hunt, the Court distilled the factors from the statute in a way that can easily be cited in a memorandum:

- (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 . . .;
- (5) any pertinent [Sentencing Commission] 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.

459 F.3d at 1182.

In most instances, it will be the first factors listed, “the nature and circumstances of the offense and the history and characteristics of the defendant,” that you’ll be relying upon. You’ll need to specifically address, too, the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment;” “the need to provide adequate deterrence;” and “the need to avoid unwarranted sentence disparities among

defendants.”

Thus, the client’s drug addiction, his family responsibilities, his service in the Army, that his priors involved small quantities of drugs, and so on are the “history and characteristics of the defendant” that justify a lesser sentence. The client’s limited role in the cocaine conspiracy, the client’s benign reason for possessing the firearm, and the client’s limited gain are all “circumstances of the offense” that justify a lesser sentence.

In addition to framing whatever circumstances there might be in the language of § 3553(a), it is worthwhile, as it has always been in sentencing, to explain how the circumstances justify a lesser sentence. If it is the client’s limited role in the offense, his good intentions, or that the crime was out-of-character, it is obvious why a lesser sentence would be appropriate. If, however, the circumstance is that the client might have had a miserable and deprived youth, the rationale for the lesser sentence may not be so clear. While a difficult life might be deserving of some compassion, some assurance that the criminal conduct will not reoccur or that the client’s difficulties somehow mitigate the crime might gain more yardage. That same miserable upbringing might mean more to the judge’s sentencing decision if it says something about the client’s character, in that he has done much to overcome his disadvantages, or if it explains why he was so easily tempted to sell cocaine or so easily led by others. Similarly, while circumstances such as old age and poor health might be cause for some compassion, they are more meaningful if they mean the chances for recidivism are reduced or that, maybe, the client will suffer inordinately in prison.

Some of the most compelling memoranda include published research or analysis that will support the argument or show why the Sentencing Guidelines aren’t deserving of much weight.

There is, for example, a 2004 report from the Department of Justice that explains that older prisoners age faster in prison,<sup>8</sup> and that incarceration for first-time older individuals is especially difficult.<sup>9</sup> The United States Sentencing Commission has done research showing that the older the individual, the less likely he is to commit new offenses.<sup>10</sup> The Commission has explained, too, exactly why there is no justification for the disparity in the sentencing scheme between those involved in crack cocaine and those involved with powder cocaine<sup>11</sup>, and that the career criminal provision of the Guidelines doesn't always have much of a relationship to the likelihood of recidivism.<sup>12</sup> The Constitution Project, a bipartisan organization that once included now Supreme

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<sup>8</sup>“[S]everal important factors seem to speed the aging process for those in prison. These factors include the amount of stress experienced by new inmates trying to survive the prison experience unharmed; efforts to avoid confrontations with correctional staff and fellow inmates; financial stress related to inmates’ legal, family, and personal circumstances . . .” National Institute of Corrections, Department of Justice, *Addressing the Needs of the Elderly, Chronically Ill, and Terminally Ill Inmates* at 8 (2004 ed.).

<sup>9</sup>“First time incarcerated older inmates are frequently severely maladjusted and especially at risk for suicide, explosiveness, and other manifestations of mental disorder. Since their behaviors are not well tolerated by other inmates their victimization potential is high.” *Id.* at 11.

<sup>10</sup>“Recidivism rates decline relatively consistently as age increases. Generally the younger the offender, the more likely the offender recidivates. . . Among all offenders under the age 21, the recidivism rate is 35.5%, while offenders over the age of 50 have a recidivism rate of 9.5 percent.” United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12 (Nov. 2004).

<sup>11</sup>“After carefully considering all of the information currently available - some 16 years after the 100-to-1 drug quantity ratio was enacted - the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.” United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 91 (May 2002).

<sup>12</sup>“The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules in Chapter Four of the Guidelines Manual.” United States Sentencing

Court Justice Alito, has criticized the Guidelines for over-reliance on drug quantity and loss calculations.<sup>13</sup> There is research out there, too, about the difficulties suffered by children when their mother goes to prison or about the difficulty in overcoming addiction to prescription drugs. The Defender Services Training Branch web page at [www.fd.org](http://www.fd.org) contains a listing of articles and reports that contain some of this information.<sup>14</sup> There are any number of published opinions, too, that criticize one aspect or another of the Guidelines and that can be used to show that the Guidelines should be given little weight in your case.<sup>15</sup> Maybe most importantly, be sure to

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Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (Nov. 2004).

<sup>13</sup>The Project's Sentencing Initiative report concludes that the Sentencing Guidelines "place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant's role in the criminal conduct." The Constitution Project, *Principles for the Design and Reform of Sentencing Systems* at 2. (Available at <http://www.constitutionproject.org/article.cfm?messageID=101>).

<sup>14</sup><http://www.fd.org>. From the opening page, go to the Booker/Fanfan Resource page, and then scroll down until you find the article *Using Studies and Statistics to Redefine the Purposes of Sentencing*. Further down on the same page there are other articles that you'll find useful, including *Section 3553(a)(2) and the USSC's Newly Released Reports on Recidivism and Presumptively Unreasonable: Using the Sentencing Commissions Words to Attack the Advisory Guidelines*.

<sup>15</sup>*See, e.g., United States v. Qualls*, 373 F.Supp. 2d 873, 876-877 (E.D. Wis. 2005) ("There may well be cases in which the career offender guideline creates sentences far greater than necessary, such as where the qualifying offenses are designated crimes of violence but really do not suggest a risk justifying such a sentence, fleeing and walk away escape cases, for instance"); *United States v. Milne*, 384 F.Supp.2d 1309, 1312 (E.D. Wis. 2005) ("With their almost singular focus on loss amount, the guidelines sometimes are insufficiently sensitive to personal culpability"); *United States v. Ennis*, 468 F.Supp.2d 228, 230 (D. Mass. 2006) ("And since the Guideline drafters did not bother to describe the reason for making quantity talismanic, the sentencing purposes advanced by the quantity guideline, § 2D1.1, or what to do when quantity-driven sentences are wholly at odds with any rational sentencing scheme, judges were left 'just to weigh the drugs and mechanically compute the offense level.'").

include in the memorandum those opinions in which courts have imposed below-Guidelines sentences where the circumstances are similar to those in your case.<sup>16</sup> Most of those will be district court cases, but they can pave the way for a below-Guidelines sentence by showing that other courts have relied on the same criteria.

In arguing that the Guidelines shouldn't carry much weight, it is important to make a distinction between a categorical rejection of the Guidelines and the claim that they aren't due much consideration in a particular case. This may change once the Supreme Court decides Claiborne and Rita, but, for now, the Eleventh Circuit's position is clear:

The decisions of this Court principally distinguish between varying from an advisory Guidelines range based on a case-specific, individualized application of the 18 U.S.C. § 3553(a) factors and varying from an advisory Guidelines range based on a categorical rejection of Congress's clearly expressed sentencing policy as embedded in the Guidelines and its statutes. The latter amounts to error, while the former falls within the scope of the district court's discretion intended by Booker.

United States v. Williams, 472 F.3d 835, 835-836 (11<sup>th</sup> Cir. 2006) (Black, J. concurring in the denial of rehearing en banc).

Finally, there is the need to address those § 3553(a) circumstances upon which the Government often relies. Sometimes it is just a matter of arguing that what you're asking for does satisfy the need for the offense to "reflect the seriousness of the offense," "promote respect for the law," and "to provide just punishment" or that it will provide "adequate deterrence" and

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<sup>16</sup>See "128 Mitigating Factors: Cases Granting, Affirming, or Suggesting Mitigating Factors" at <http://www.fd.org/odstb/BookerMain.htm>; "Case Authority for Booker Variances" Panel Newsletter for the Northern District of Florida, October 19, 2005 at <http://www.fpd-fln.org>.

“protect the public from further crimes” of your client. Know, though, that there are opinions that recognize that unfairly long or disproportionate sentences promote *disrespect* for the law:

In sum, Williams is a street-level dealer of crack cocaine. He is not a kingpin, managing a large-scale drug enterprise. While the sale of crack cocaine is a serious offense, severity is a relative concept, and a guideline sentence of 30 years would be grossly disproportionate to the seriousness of this offense. It would not provide just punishment. Indeed, in this case, I find that it offends the very notion of justice. As such, it would obviously not promote respect for the law.

United States v. Williams, 2007 U.S. Dist. LEXIS 14303, 15-16 (M.D. Fla. March 1, 2007) .<sup>17</sup> If you're fortunate and some of that recidivism research applies to your client, it should rebut the concerns about protecting the public and deterrence. Then, too, many of the advisory Guidelines sentences are so long that something less than the recommended range will obviously satisfy these concerns.

As for uniformity, bear in mind that § 3553(a)(6) addresses “*unwarranted* sentence disparities”:

Treating offenders who are not equally culpable the same is a false equality, not at all consistent with the admonition "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

United States v. Ennis, 468 F.Supp.2d 228, 235-236 (D. Mass. 2006). That, of course, is in many ways the heart of the Sentencing Guidelines problem, they impose a “false equality.” When it comes to imposing a fair sentence, the single mother with three children who will suffer if she

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<sup>17</sup>See also United States v. Lazenby, 439 F.3d 928, 934 (8<sup>th</sup> Cir. 2006) (“But the extreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), it also suggests an arbitrary level of decision-making that fails to “promote respect for the law,” § 3553(a)(2)(A)”)

goes to prison is not the equal of a 30 year old man who has no dependents. The fellow who finds himself classified as a career offender because he sold a total of 6 grams of cocaine on three separate occasions is not the equal of a honest-to-goodness drug trafficker. A 79 year old man in frail health who is found in possession of child pornography is not the equal of a much younger man who presents a real risk to children. In making the argument, it doesn't hurt, either, to refer back to the Supreme Court's recognition in Koon v. United States, 518 U.S. 81, 113 (1996), of the tradition in federal sentencing "for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

Here in the Northern District, where the average sentence is twice the national average, the Government's argument about uniformity is especially weak. Don't be afraid to cite the latest statistics from the United States Sentencing Commission. In a drug case, for example, you could include something like:

It is, furthermore, a concern that should carry little weight in this District given the disparity between sentences imposed in the Northern District of Florida and the rest of the nation. According to the United States Sentencing Commission's *2006 Source Book of Federal Statistics*, the average sentence in the Northern District of Florida for drug trafficking offenses in fiscal year 2006 was 153.3 months, which was 82% higher than the national average of 84.4 months. Given the statistics, a lesser sentence in Mr. Doe's case would only decrease that disparity.

(The 2006 Sourcebook of Federal Sentencing Statistics is available at [www.ussc.gov](http://www.ussc.gov)).

Finally, if, of course, there is a need to provide restitution to the victims or a need for your client to receive training, education, or medical care "in the most effective manner," those are circumstances that would tend to support an argument for a lesser sentence. The need to

consider “the kinds of sentences available,” would seem to be inherent in any sentencing decision and probably not worthy of mention in the memorandum. The need to consider the Guidelines and the “pertinent policy statements” is what you’ve addressed in explaining why the Guidelines shouldn’t be given much weight.

Beyond the details of the sentencing memorandum, there are the questions of whether you should also pursue a traditional departure under the Guidelines and, for that matter, whether you should file a sentencing memorandum in a particular case. The court is obligated to consider whether a departure is warranted before addressing whether a lower sentence is appropriate on the basis of a Booker analysis. *See United States v. Jordi*, 418 F.3d 1212, 1215 (11<sup>th</sup> Cir. 2005). Thus, if there is a basis for arguing that your client is entitled to a Guidelines departure you should argue for one in the memorandum. As the restrictions on Guidelines departures make for the bigger hurdle, it makes sense to present that argument first. That way, even if you’ve been bloodied in the harder of the two arguments, the easier Booker analysis may seem the obvious solution.

As for deciding whether to file a memorandum, it is fair to say that there are a significant number of cases where a Guidelines sentence will seem reasonable and the best that can be expected. A sentencing memorandum might be useful to stress those circumstances that would justify a sentence at the lower range of the Guidelines, but it wouldn’t be the sort of memorandum discussed here. Then, too, there are cases where the court has no choice, but to impose a mandatory minimum sentence. Obviously, a sentencing memorandum would simply have no role to play. In a case where the client is the beneficiary of a substantial assistance motion, there may be no need for a memorandum unless there are some factors that might justify

a sentence even lower than what you might expect based on the assistance provided.

One kind of case is especially deserving of mention when considering whether to file a memorandum: those in which the defendant is charged with trafficking in crack cocaine.<sup>18</sup> In addition to the Sentencing Commission's conclusion that there is no justification for the disparity between crack and powder cocaine, there are a number of courts that have criticized the crack cocaine sentencing scheme, with the most recent being United States v. Pickett, 475 F.3d 1347 (D.C. Cir. 2007).<sup>19</sup> Nonetheless, the Eleventh Circuit, along with a majority of the other circuits, have held that a sentencing court's disagreement with the 100 to 1 ratio cannot be used to justify a lesser sentence. *See* United States v. Pope, 461 F.3d 1331 (11<sup>th</sup> Cir. 2006). There is a memo available on our web page that makes the case for imposing a lesser sentence based on the disparity.<sup>20</sup> Given the Pope decision, though, your sentencing memorandum need not include those sort of arguments. All it really needs to say is that, while the defendant recognizes the Eleventh Circuit's holding in Pope and recognizes the court's obligation to follow the precedent established by the Eleventh Circuit, the defendant, nonetheless, contends that the court should impose a lesser sentence on the basis of the Sentencing Commission's findings and that the D.C. Circuit Court of Appeals in Pickett has correctly decided the issue.

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<sup>18</sup>If, of course, the quantities are so large that it would make little difference whether the calculations were based on crack or powder, the argument wouldn't have any value. Most of the cases, though, involve much smaller quantities.

<sup>19</sup>"It has taken many years, but the court finally has concluded that it is authorized to hold, and does hold, that a district court, in sentencing a defendant, may properly take into account the fact that the 100-to-1 ratio embedded in the Sentencing Guidelines for crack-to-powdered cocaine offenses bears no meaningful relationship to a defendant's culpability." Pickett, 475 F.3d at 1356 (Rogers, J. concurring).

<sup>20</sup>[http://www.fpd-fln.org/sample\\_sentencing\\_memos.htm](http://www.fpd-fln.org/sample_sentencing_memos.htm)

Jim Skuthan, who is the Chief Assistant Federal Public Defender in the Middle District of Florida came to Gainesville in 2006 and made a presentation about sentencing memoranda. At the end of his presentation, he wondered aloud whether there would be post-conviction claims of ineffective assistance of counsel based upon claims that defense counsel failed to make the sort of arguments typically found in a good sentencing memorandum. The answer to that question isn't in yet, but it is clear that in many cases the best practice in federal court includes the preparation of a sentencing memorandum. That is why you'll find them in the cases of the most prominent defendants, the Jeffrey Skillings, the Jack Abramoffs, and the "Scooter" Libbys of the world. It is the best practice because sentencing memoranda filed sufficiently in advance of the sentencing hearing reach the judge when he or she is reaching initial conclusions about the appropriate sentence. Sentencing memoranda, too, help lawyers organize and think through the issues, provide a judge who is inclined to impose a lesser sentence with the careful analysis and presentation of facts that he or she will need to justify the sentence, and remind all involved what was said not long after the Supreme Court issued the Booker decision by Judge Adleman in United States v. Ranum, 353 F. Supp.2d 984, 987 (E.D. Wisc. 2005):

Sentencing will be harder now than it was just a few months ago. District Courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. Booker is not an invitation to do business as usual.

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*March 29, 2007*