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## Wherefore Art Thou Guidelines? An Empirical Study of White-Collar Criminal Sentencing and How the Gall Decision Effectively Eliminated the Sentencing Guidelines

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# Wherefore Art Thou Guidelines? An Empirical Study of White-Collar Criminal Sentencing and How the *Gall* Decision Effectively Eliminated the Sentencing Guidelines

S. PATRICK MORIN, JR.\*

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## I. INTRODUCTION

Until the passage of the U.S. Federal Sentencing Guidelines in 1984, federal judges had relatively wide discretion in sentencing federal offenders up to the statutory maximum.<sup>1</sup> This judicial discretion led to a disparity

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1. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) (describing the evolution of federal criminal sentencing and parole prior to 1984); see also U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005) [hereinafter U.S. SENTENCING COMM’N], available at [http://www.ussc.gov/general/USSCoverview\\_2005.pdf](http://www.ussc.gov/general/USSCoverview_2005.pdf) (“Before guidelines were developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense.”). According to a report by the Sentencing Commission, prior to implementation of the SRA, federal crimes carried very broad ranges of penalties; federal judges had the discretion to choose the sentence they felt would be most appropriate. U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004) [hereinafter FIFTEEN YEAR REPORT], available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm). Judges were not required to explain their reasons for the sentence imposed, and the sentences were largely immune from appeal. *Id.* The time actually served by most offenders was determined by the Parole Commission, and offenders, on average, served just 58 percent of the sentences that had been imposed. *Id.* The sentencing process, a critical element of the criminal justice process, was opaque, undocumented, and largely

in the sentences of similarly situated offenders, particularly in white-collar cases.<sup>2</sup> The Guidelines attempted to eliminate this disparity by establishing maximum and minimum sentences for certain offenses based on the characteristics of the crime.<sup>3</sup> An important feature of the Guidelines system was its mandatory nature, which decreased and structured the judiciary's discretion within bounds set by Congress.<sup>4</sup>

The mandatory application of the Guidelines resulted in stiff sentences for white-collar criminals, effectively reducing the disparity in sentencing that had existed prior to implementation.<sup>5</sup> However, in January of 2005, the U.S. Supreme Court held in *United States v. Booker*<sup>6</sup> that the Guidelines' mandatory use of enhancing factors not found by a jury was unconstitutional, and the proper remedy for this constitutional error was to sever the provisions from the statute that made the Guidelines mandatory, rendering the Guidelines advisory.<sup>7</sup> Then, in December of 2007, the Court effectively eliminated the mandatory guideline sentencing entirely in *Gall v. United States*.<sup>8</sup>

Although the *Gall* decision impacts all sentencing within the federal court system, a significant group of criminal defendants that one should expect to be impacted are high-ranking corporate officers convicted of financial crimes. Theoretically, those defendants should now expect to receive lighter sentences, in part because of the subjective factors available to district court judges during sentencing which were expressly rejected by appellate courts prior to *Gall*.<sup>9</sup>

Additionally, because judges often articulate the view that white-collar crime lacks violence and identifiable victims<sup>10</sup>—a belief that tends to obscure the severity of the harm caused by white-collar crimes<sup>11</sup>—their personal views often influence white-collar defendants' sentences. Although

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discretionary. Because of its impenetrability to outside observers, there was a sense that the process was unfair, disparate, and ineffective for controlling crime. *Id.*

2. See FIFTEEN YEAR REPORT, *supra* note 1, at 55–56.

3. 28 U.S.C. § 994(b)(1) (2006) (“The Commission . . . shall, for each category of offense involving each category of defendant, establish a sentencing range . . .”).

4. See *United States v. Booker*, 543 U.S. 220, 293 n.12 (2005) (Stevens, J., dissenting) (noting that Congress had rejected an advisory guidelines scheme when formulating the Guidelines).

5. See Exhibit 1 *infra*.

6. 543 U.S. 220.

7. *Id.* at 258–61.

8. 128 S. Ct. 586 (2007).

9. See generally Claude M. Tusk, *Sentencing Post-Gall: Reasonableness v. Proportionality*, 238 N.Y. L.J. 4 (2007).

10. See STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 64 (1988) (stating that judges' comments “[o]nly rarely . . . indicate any possible similarity between white-collar crimes and violent crimes”).

11. Matthew A. Ford, Comment, *White-Collar Crime, Social Harm, and Punishment: A Critique and Modification of the Sixth Circuit's Ruling in United States v. Davis*, 82 ST. JOHN'S L. REV. 383, 395 (2008).

one of the motivating factors behind Congress's passage of the Guidelines was the relatively light sentences given to white-collar criminals,<sup>12</sup> recent trends demonstrate that judges have increasingly imposed more lenient sentences upon white-collar defendants since the *Booker* decision, a trend which *Gall* could help accelerate.<sup>13</sup>

This note will theoretically analyze why one should expect lighter sentences for defendants convicted of financial crimes, and it will test that theory by examining sentences imposed on Chief Financial Officers (CFOs) from 1998 to 2007.

## II. EXPLAINING THE DOWNWARD DEPARTURE TREND: THE IMPACT OF *BOOKER* AND *GALL* ON THE GUIDELINES

### A. U.S. Sentencing Guidelines Overview

The Guidelines, promulgated under the Sentencing Reform Act of 1984 (SRA),<sup>14</sup> were created under the authority of Congress with three goals in mind: (1) to create a more honest system in which defendants served more of their given sentences,<sup>15</sup> (2) to establish a uniform sentencing scheme that limited disparity across federal jurisdictions, and (3) to enact a proportional system that “impose[d] appropriately different sentences for criminal conduct of different severity.”<sup>16</sup> The SRA attempted to accomplish its goals by eliminating parole and forming a Sentencing Commission whose task it would be to create a set of guidelines designed to limit sentencing disparities throughout the country.<sup>17</sup> The Commission's specific job was to “rationalize the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment,

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12. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988).

13. Adam Liptak, *Given the Latitude to Show Leniency, Judges May Not*, N.Y. TIMES, Dec. 11, 2007, at A28. Recent statistics show that 12 percent of sentences today are below the Guideline range, an increase from 5.5 percent in 2004. *Id.* Interestingly, sentences below the Guideline range have been given in 11.9 percent of today's cases, while only 1.6 percent of sentences have been above Guideline range. Linda Greenhouse, *Court Restores Sentencing Powers of Federal Judges*, N.Y. TIMES, Dec. 10, 2007, at A1.

14. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1837 (1984).

15. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1(A)(3) (2007) (stating that proponents of sentencing reform complained that in many cases “good time” credits and parole dramatically reduced defendants' sentences to, in some cases, one-third of the actual sentence handed down by the district court).

16. *Id.*

17. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 701–02 (2005).

and to do the kind of leg work in determining the appropriate sentencing practices that Congress had been unable or unwilling to do.”<sup>18</sup>

Congress instructed the Commission to establish maximum and minimum sentences for certain offenses based on the characteristics of the crime.<sup>19</sup> Each crime was to have a particular value of severity that would be reflected in a defendant’s sentence.<sup>20</sup> Among the principal targets for more serious penalties under the new Guidelines system were white-collar and violent repeat offenders.<sup>21</sup> Because the Guidelines were mandatory, they did not reflect a specific sentencing philosophy, but attempted to codify empirical data about how crimes were sentenced in the past into a system that produced consistent and predictable results that could be adjusted as the need arose.<sup>22</sup> Although many judges opposed implementation of the Guidelines and saw them as a power grab by the legislative branch,<sup>23</sup> there was little they could do to stop their passage.<sup>24</sup>

The mandatory Guidelines resulted in stiff sentencing for white-collar criminals. As shown in Exhibit 1,<sup>25</sup> the sentencing of white-collar criminals during this period demonstrates the effectiveness of mandatory guidelines, ensuring that defendants were given sentences reflecting the nature of their crimes as designated by Congress, not sentences based upon subjective factors determined by judges.

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18. Nancy Gertner, Speech, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573–74 (2005).

19. 28 U.S.C. § 994(b)(1) (“The Commission . . . shall, for each category of offense involving each category of defendant, establish a sentencing range . . .”).

20. 28 U.S.C. § 994(m). The statute also instructs the Commission to “insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.” *Id.*

21. U.S. SENTENCING COMM’N, *supra* note 1, at 2.

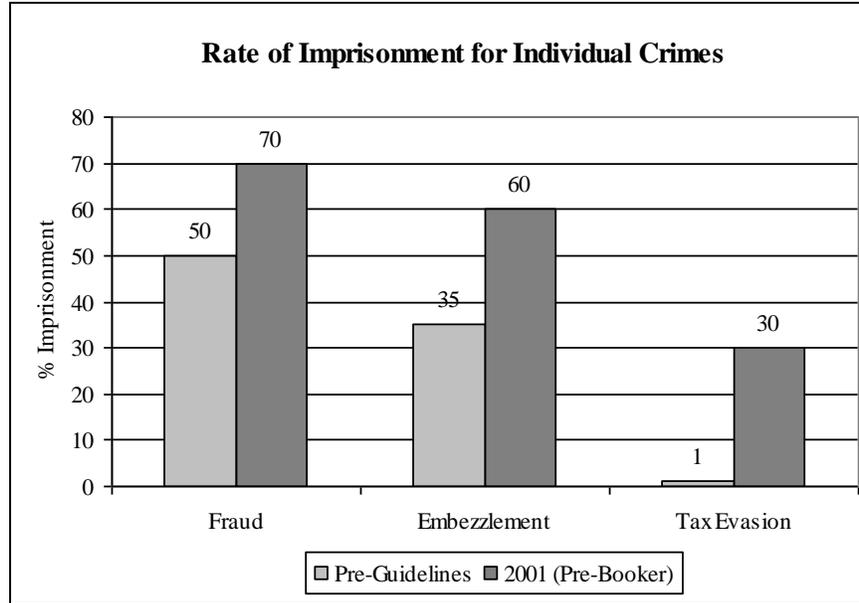
22. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1(A)(3) (2007) (“For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point.”).

23. “A 1992 poll found more than half of all federal judges believed that the federal guideline system should be completely eliminated, while a 1997 survey concluded that more than two-thirds of federal judges viewed the guidelines as unnecessary.” Carol P. Getty, Panel Session Paper, *Twenty Years of Federal Criminal Sentencing*, 7 J. INST. JUST. INT’L STUD. 117, 119 (2007).

24. 28 U.S.C. § 994.

25. FIFTEEN YEAR REPORT, *supra* note 1, at 57–58.

## Exhibit 1



## B. Booker and Its Aftermath

The *Booker* decision required district courts to consider the guideline range established in the same fashion as before, but the courts could now “tailor the sentence in light of other statutory concerns as well . . . .”<sup>26</sup> The judge must consider the Guidelines<sup>27</sup> and other factors listed in 18 U.S.C. § 3553(a), but is not required to impose a sentence specified by the Guidelines.<sup>28</sup> Although “[j]udicial fact-finding is permitted as long as it is understood that the guidelines are not mandatory,”<sup>29</sup> a judge is required to

26. United States v. Booker, 543 U.S. 220, 245 (2005).

27. The two main components of the federal guidelines were the seriousness of the offense and the defendant’s criminal history. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2006). In applying the guidelines in each case, the sentencing court first determined the appropriate base level for the offense of conviction under Chapter Two (Offense Conduct). *Id.* § 1B1.1(a). The court then made any adjustments to that level as warranted by factors detailed in Chapters Two and Three (Adjustments). *Id.* §§ 1B1.1(b)–(c). Next, the court determined the defendant’s criminal history category under Chapter Four (Criminal History and Criminal Livelihood). *Id.* § 1B1.1(f). Based on the total calculated offense level after adjustments and the criminal history category, the court determined the corresponding guideline range on the guideline range chart listed in Part A in Chapter Five. *Id.* § 1B1.1(g). If, after determining the applicable guideline range, the court believed that range did not adequately reflect the proper punishment for the specific defendant, the court could depart upward or downward from the guideline range only for reasons listed in Chapter Five, Section K. *Id.* §§ 1B1.1(h)–(i), 5G1.1(c).

28. *Booker*, 543 U.S. at 264.

29. United States v. Mooney, 401 F.3d 940, 949 (8th Cir. 2005).

state “in open court” the reason for a particular sentence, and, if the sentence is outside of the Guidelines, the court must provide a specific reason for the different sentence.<sup>30</sup> Also, on appellate review, *Booker* directed the courts to evaluate a sentence under a “reasonableness” standard.<sup>31</sup>

Although *Booker* rendered the Guidelines merely advisory, one change of note was the emergence of the non-guideline sentence in which a district court finds that no Chapter Five departures apply to the defendant,<sup>32</sup> but instead the court relies exclusively on the factors listed in 18 U.S.C. § 3553 in sentencing the defendant.<sup>33</sup> To determine the non-guideline sentence, the court must consider the advisory guideline range in making its determination, but if it finds a compelling reason under Section 3553 to impose a sentence above or below the Guidelines, it may now do so.<sup>34</sup>

According to the U.S. Sentencing Commission’s Special Post-*Booker* Coding Project,<sup>35</sup> as of February 22, 2006, 10.8 percent of post-*Booker* white-collar cases have involved sentences “otherwise below the range,” meaning that a district court granted either a *Booker* departure, or some other non-government sponsored or guideline-authorized downward departure from the guideline range.<sup>36</sup> This is the second highest percentage of downward-departures of any guideline—only the downward departure for

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30. 18 U.S.C. § 3553(c) (2003).

31. *Booker*, 543 U.S. at 263.

32. U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(h), 5G1.1(c). Chapter Five, Section K provides the valid bases under which a district court may depart (upward or downward) from the guideline range. The most frequently used departure is the substantial assistance motion listed under section 5K1.1—allowing the district court, upon motion by the government, to depart from the guidelines based on a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense”; but section 5K also provides for several other departures, including a downward departure for a victim’s conduct in provoking the behavior (section 5K2.10), and an upward departure for damage or loss not taken into account by relevant conduct (section 5K2.5). *Id.* §§ 5K1.1, 5K2.5, 5K2.10.

33. 18 U.S.C. § 3553(a). This section instructs sentencing judges, in crafting a defendant’s sentence, to consider, among other things:

(2) the need for the sentence imposed—

- (A) to reflect 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 from the defendant; and
- (D) to provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner.

*Id.*

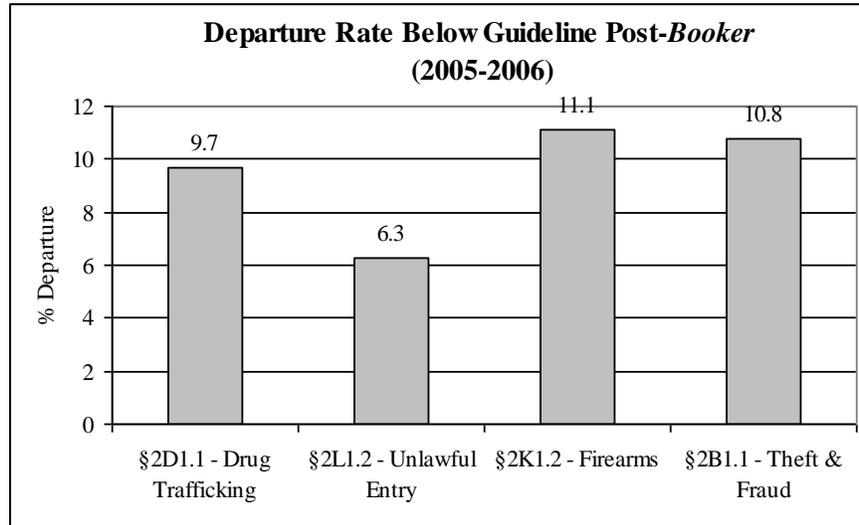
34. *Booker*, 543 U.S. at 264–65.

35. U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING app. D-5 (2006) [hereinafter *BOOKER REPORT*], available at [http://www.ussc.gov/booker\\_report/Booker\\_Report.pdf](http://www.ussc.gov/booker_report/Booker_Report.pdf).

36. *Id.*; see also Exhibit 2 *infra*.

firearms was higher.<sup>37</sup> Moreover, as shown in Exhibit 3,<sup>38</sup> the average deviation from the white-collar guidelines, at just over 93 percent, was much higher than the average deviation from other guidelines.<sup>39</sup>

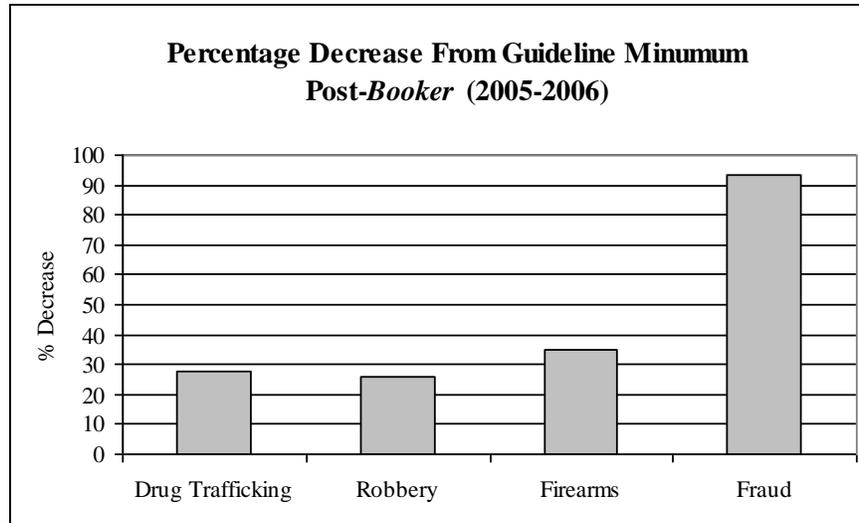
**Exhibit 2**



37. BOOKER REPORT, *supra* note 35, at app. D-5. 9.7 percent of defendants sentenced under section 2D1.1 (drug trafficking) have received downward variances, and 11.1 percent of defendants sentenced under section 2K2.1 (firearms) have received downward variances. See Exhibit 2 *infra*.

38. See BOOKER REPORT, *supra* note 35, at app. D-24.

39. *Id.*; see also Exhibit 3 *infra*. Ironically, one of the motivating factors behind Congress's institution of the Guidelines was the lighter sentencing of white-collar defendants. See Breyer, *supra* note 12, at 22 (stating that the Sentencing Commission "considered present sentencing practices, where white-collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair"). Also, in response to a wave of corruption marked by the collapse of Enron and an accounting scandal at WorldCom, President Bush created the Corporate Fraud Task Force. See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002). In a speech announcing the creation of this task force, President Bush stated, "This broad effort is sending a clear warning and a clear message to every dishonest corporate leader: You will be exposed and you will be punished . . . We will deter corporate crimes by enforcing tough penalties." David Voreacos & Bob Van Voris, *Bush Fraud Probes Jail Corporate Criminals Less Than Two Years*, BLOOMBERG.COM, Dec. 13, 2007, [http://www.bloomberg.com/apps/news?pid=email\\_en&refer=trac&sid=awztp90u5kEo](http://www.bloomberg.com/apps/news?pid=email_en&refer=trac&sid=awztp90u5kEo). Of the 1,236 convictions from 2002 to 2007, only 1,133 defendants were sentenced; 47 percent of those got a year or less in prison. *Id.*

**Exhibit 3****C. Gall v. United States**

Almost three years after *Booker*, the Court held in *Gall* that sentences above or below the Guidelines' ranges are to be reviewed by courts of appeals under an abuse-of-discretion standard, not a reasonableness standard.<sup>40</sup> The Court explained that while a district court judge must give "serious consideration to the extent of any departure from the Guidelines," the Guidelines are in effect only advisory.<sup>41</sup> The Court also rejected an appellate rule that required "extraordinary" circumstances to justify a sentence outside the guideline range because the Guidelines are merely a starting point—they are not the only consideration in sentencing.<sup>42</sup> Moreover, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."<sup>43</sup> Thus, the Court's ruling effectively reduced the authority of the Guidelines, enabling district court judges to impose the sentences they deem appropriate, while limiting an appellate court's ability to overturn sentences to cases where the sentencing judge makes either a procedural error or abuses his discretion in determining the factors supporting the sentence and any justified deviation from the Guidelines.

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40. *Gall v. United States*, 128 S. Ct. 586, 591 (2007).

41. *Id.* at 594.

42. *Id.* at 594–96.

43. *Id.* at 597.

In a federal system where 97 percent of criminal defendants plead guilty,<sup>44</sup> the clear winners of the Court's position in *Gall* appear to be criminal defendants. Although sentencing enhancements for white-collar crimes are heavily based upon the amount of loss caused by defendants and the number of victims harmed by their conduct, judges have continued to sentence defendants involved in financial crimes that cause massive amounts of financial damage to either probation or only a few months in prison.<sup>45</sup> Judges have repeatedly used these subjective enhancements as a method to depart from the possible calculated sentences, thus ensuring sentences more lenient than the Guideline range.<sup>46</sup> As a result of this judicial conduct, defendants may be more willing to take their chances with a sympathetic judge than to negotiate with prosecutors.<sup>47</sup>

### III. EXAMINING THE DOWNWARD TREND: FINANCIAL CRIMES AND SENTENCING

The post-*Gall* world creates enormous opportunities for district court judges to have a major impact on sentencing jurisprudence in the United States, and for white-collar defendants to persuade sentencing judges to move downward from guideline ranges based on subjective factors.<sup>48</sup>

Factors such as the defendant's age, health, character, lack of prior criminal record, family and community ties, and charitable activities were expressly rejected by appellate courts prior to *Gall*.<sup>49</sup> Now that these factors are fair game to justify sentences, it will be important to note whether the newfound freedom bestowed on district court judges causes a return to the non-uniform sentencing that led to the creation of Guidelines in the first place, or instead creates a new type of uniform jurisprudence that establishes more standardized and recognized justifications for deviating sentences.<sup>50</sup> The following sections will test this hypothesis by examining CFO sentencing during the past ten years.

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44. Douglas F. Fries, Comment, *The Federal Sentencing Guidelines Weight-Loss Plan: Just How Mandatory Are the "Advisory" Guidelines after United States v. Booker?*, 55 CASE W. RES. L. REV. 1097, 1112 (2005).

45. Alan Ellis & James H. Feldman, Jr., *Representing White Collar Clients in a Post-Booker World*, CHAMPION, Sept.–Oct. 2005, at 14.

46. See *infra* Part III.B. (showing Post-*Booker* cases applying subjective factors in giving downward-departure sentences to criminal defendants).

47. Gilles R. Bissonnette, Comment, "*Consulting*" the Federal Sentencing Guidelines After Booker, 53 UCLA L. REV. 1497, 1520 (2006).

48. See generally Tusk, *supra* note 9.

49. *Id.*

50. *Id.* One author opines:

Judicial discretion in sentencing and individualized justice—it sounds like the good old days. Well, the good old days—at least for judges, defense attorneys and defendants—are

### A. *Pre-Booker Sentencing*

As discussed above, the mandatory character of the Guidelines prior to *Booker* provided white-collar defendants with firm uniform sentences based on the nature of their crimes, not on subjective factors established by the court, and were reviewed for reasonableness if the sentence was outside the guideline range. The following cases examine white-collar sentencing under this mandatory Guidelines standard.

An example of the stiff sentences imposed on white-collar criminals during the pre-*Booker* period is presented in *United States v. Lloyd*.<sup>51</sup> William Lloyd, CFO of The Targus Group during the late 1990s, utilized his company's credit facilities and cash flow for his own personal benefit and covered up his activities by creating false and fraudulent entries on the company's books, eventually embezzling over \$40 million.<sup>52</sup> Lloyd pled guilty to fifteen counts of wire fraud, money laundering, and aiding and abetting, and was sentenced to thirty-seven months in prison, with a calculated Guidelines range of thirty to thirty-seven months.<sup>53</sup> The judge allowed Lloyd to plead guilty to a reduced number of counts, but, in exchange for this, the judge sentenced him to the maximum number of months allowable within the guideline range.<sup>54</sup>

Another case demonstrating the stiff sentences imposed during this period is *United States v. Atnip*.<sup>55</sup> In one of the largest insurance schemes in the history of the United States, Gary Atnip served as the CFO of Franklin American Corporation, one of the various insurance companies acquired by financier Martin Frankel's business empire. During his tenure as the CFO from 1991 to 1999, Atnip helped Frankel defraud insurance companies of over \$200 million and transfer those assets into Frankel's private bank accounts in Switzerland.<sup>56</sup> In a deal with the government intended to reduce his possible sentence, Atnip agreed to cooperate by pleading guilty to one count of money laundering and conspiracy to violate the Racketeer

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back again . . . [a]nd the shackles on federal trial judges in the form of the U.S. Sentencing Guidelines have been loosened so much, they might just slip off entirely.

Robert G. Seidenstein, *Sea Change in Sentencing: Power Returned to Fed Judges in the Trenches*, 16 N.J. LAWYER: THE WEEKLY NEWSPAPER NO. 51 1 (2007).

51. *United States v. Lloyd*, No. 01-0155 (C.D. Cal. Dec. 2, 2002).

52. *Id.*

53. *Id.* The exact range was not available because the records are sealed, but this estimated range is based on the 1998 Guidelines.

54. Lloyd was initially charged with twenty-five counts, but the government agreed to recommend a reduced sentence in exchange for pleading guilty. *Id.*

55. No. 02-0369 (D. Conn. June 19, 2003).

56. *A 10th Person Pleads Guilty in Big Scheme to Bilk Insurers*, N.Y. TIMES, Dec. 23, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9E06E6DA173CF930A15751C1A9649C8B63>.

Influenced Corrupt Organizations Act (RICO).<sup>57</sup> The court accepted the government's motion for downward departure and a calculated sentencing range of 121 to 151 months, sentencing Atnip to 121 months imprisonment.<sup>58</sup>

Although sentencing judges could impose a sentence outside the guideline range pre-*Booker*, the factors that judges could rely upon were strictly limited,<sup>59</sup> and appellate courts carefully scrutinized sentences outside the Guidelines for reasonableness.<sup>60</sup> A case demonstrating the reasonableness standard is the high-profile criminal probe against HealthSouth's former CFO, Michael Martin, who cooperated with the government against his former boss, CEO Richard Scrushy, in exchange for a more lenient sentence.<sup>61</sup> Martin pled guilty to conspiracy to commit securities fraud, mail fraud, and falsifying books, resulting in a calculated guideline range of 108 to 135 months imprisonment.<sup>62</sup> Although the government filed a section 5K1.1 motion for downward departure based on Martin's substantial assistance, and recommended a sentence of sixty-two months imprisonment,<sup>63</sup> the court instead decided to sentence Martin to sixty months of probation.<sup>64</sup> The Eleventh Circuit reversed Martin's sentence as unreasonable, stating that "Martin's cooperation, even viewed as extraordinary and commendable, cannot erase the enormity of Martin's underlying criminal conduct in the billion-dollar fraud scheme he played a major role in perpetrating."<sup>65</sup>

As demonstrated in the pre-*Booker* Guidelines sentencing cases shown in Exhibit 4 below, a judge's discretion in sentencing outside the guideline range was strictly limited. Although this type of mandatory sentencing did not give the courts the ability to deviate from the Guidelines sentences to

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57. *Atnip*, No. 02-0369.

58. *Id.*

59. See U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(h), 5G1.1(c).

60. Bissonnette, *supra* note 47, at 1518.

61. United States v. Martin, 135 F. App'x 411, 412 (11th Cir. 2005).

62. *Id.* at 412-13.

63. *Id.*

64. *Id.* at 414.

65. United States v. Martin, 455 F.3d 1227, 1241 (11th Cir. 2006). When the fraud committed by HealthSouth's officers was made public, the stock plummeted from \$3.91 per share to \$0.11 per share. *Id.* at 1230. The court noted that a conservative estimate of the stock value loss attributed to Martin's fraud was approximately \$1.4 billion. *Id.* at 1230-31. This was the second time that the Eleventh Circuit had remanded Martin's sentence to the district court; therefore this time the circuit court directed the case to be reassigned to a different judge, because "the original judge would have difficulty putting his previous views and findings aside." *Id.* at 1242. Of the seventeen officers charged with crimes in the HealthSouth scandal, only four were sentenced to any imprisonment, the longest sentence being 27 months served by former CFO Weston Smith. See Michael Tomberlin, *HealthSouth Whistleblower Smith Gets OK to Start Prison Sentence During Appeal*, BIRMINGHAM NEWS, Oct. 25, 2005, at A1. At Smith's sentencing, Judge Propst noted that others involved in the fraud had not received as much prison time as Smith, which he attributed to other individuals being "wrongfully acquitted or sentenced too lightly." *Id.*

meet the individual factors of a defendant, it did provide greater uniformity in white-collar sentencing.<sup>66</sup> Thus, the Guidelines did, for the most part, fulfill Congress's intent in establishing uniform sentencing by removing subjective factors and a judge's personal views in the calculation of a white-collar defendant's sentencing.

#### Exhibit 4

Company	Name & Position	Guideline Range	Sentence	Trial or Plea
BFG, Inc.	Patrick Bennett, CFO	188 to 235 months	264 months imprisonment	Trial
Franklin American Corp.	Gary Atnip, CFO	121 to 151 months (approx. calculation of offense level 32 in 1998 Guidelines)	121 months imprisonment	Plea
Ferrofluidics Corp.	Jan R. Kirk, CFO	63 to 78 months	63 months imprisonment	Plea
HealthSouth	Michael Martin, Former CFO	108 to 135 months	Originally 60 months probation; resentenced to 7 days imprisonment; sentence remanded as "unreasonable" and still pending	Plea
Targus Group	William Lloyd, CFO	37 to 46 months (approx. calculation of offense level 21 in 1998 Guidelines)	37 months imprisonment	Plea
The Sirena Apparel Group	Richard Gerhart, CFO	4 to 10 months (approx. calculation of offense level 9 in 1998 Guidelines)	4 months imprisonment	Plea

#### B. Post-Booker Sentencing

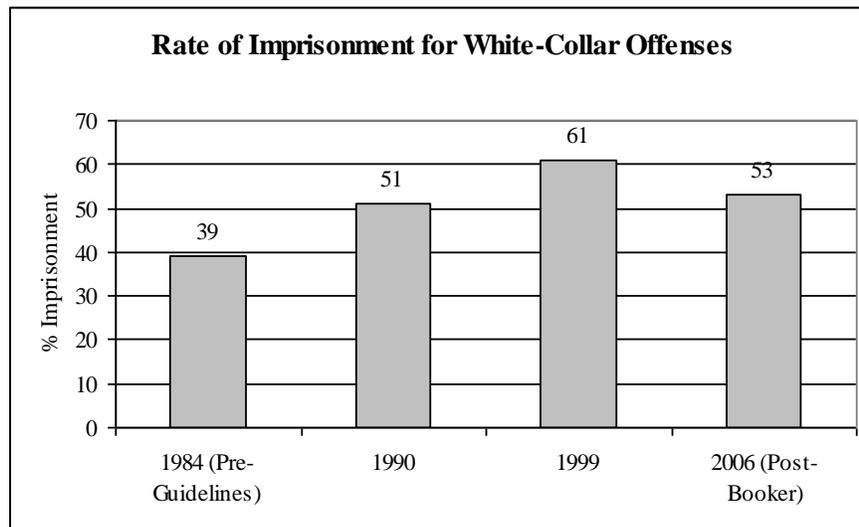
With the elimination of the mandatory nature of the Guidelines following *Booker*, judges became free to deviate from the sentencing ranges. The subjective factors which were previously not allowed to be taken into con-

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66. See Exhibit 4 *infra*.

sideration in sentencing could now be used to calculate and justify ranges outside the Guidelines. As shown in Exhibit 5,<sup>67</sup> the pre-Guidelines sentencing disparities had been significantly reduced during the mandatory Guidelines period, but following *Booker* they were executing an about-face, resulting in increased numbers of downward-departure sentences for white-collar offenders.

**Exhibit 5**



One factor that has a significant impact in the calculation of the Guideline sentences for white-collar defendants is the amount of loss attributed to a defendant's fraudulent actions.<sup>68</sup> Courts have continued to struggle in determining how to properly and effectively assess investor loss in fraud cases, especially because of the numerous economic and highly technical factors used to determine loss.<sup>69</sup> Furthermore, since determining loss is an imprecise and subjective exercise, courts are able to manipulate investor loss numbers to either reduce or increase the sentence of a defendant.<sup>70</sup>

67. FIFTEEN YEAR REPORT, *supra* note 1, at 58.

68. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2008).

69. See generally Lawrence J. Zweifach et al., *Loss Causation and the Criminal Prosecution of Securities Law Violations*, 1505 PLI/CORP. 327 (2005) (discussing the difficulty of determining loss for the purpose of sentencing white-collar criminals).

70. *Id.*

The impact of the investor loss calculation in a defendant's Guideline range is demonstrated in *United States v. Olis*.<sup>71</sup> In that case, Jamie Olis's original calculated sentence of 292 months in prison was based upon an "actual loss" to investors of \$105 million from his actions.<sup>72</sup> However, the court recalculated Olis's sentence based instead on an "intended loss" of \$79 million, reducing the guideline range to 151 to 188 months.<sup>73</sup> The court relied on *Booker* to apply a downward-departure because it saw the calculated range as "unreasonable," sentencing Olis to only seventy-two months.<sup>74</sup> Similarly, in *United States v. Shanahan*,<sup>75</sup> Robert Gagalis, the former CFO of Enterasys, was found guilty of securities fraud, wire fraud, and conspiracy charges related to a revenue recognition scheme.<sup>76</sup> Although the court accepted the method used by the government's expert witness to calculate the loss to investors, the court reduced the total loss amount from \$144 million to only \$97 million, a figure just below the \$100 million threshold that would have almost doubled Gagalis's sentencing range.<sup>77</sup>

Another factor having an enormous impact in the calculation of Guideline sentencing is whether a defendant cooperates with government prose-

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71. 429 F.3d 540 (5th Cir. 2005). Jamie Olis, the Senior Director of Tax Planning and International at Dynegy, was convicted in 2005 for his participation in a scheme that led to accounting fraud. *Id.* at 541. Olis, along with two other co-workers, participated in "Project Alpha," a complicated scheme that borrowed \$300 million to make it appear as if money was generated through Dynegy's operations. *Id.* Dynegy facilitated this scheme through the creation of a special purpose entity (SPE) owned by Deutsche Bank and Credit Suisse. *Id.* The SPE bought natural gas at market prices, and sold it to Dynegy at a discount; Dynegy then sold the gas at the market price, allowing Dynegy to classify the \$300 million as operating cash flow and \$79 million in net income, which was then reported as a tax benefit. *Id.* at 541-42. Under SEC regulations, classification of this transaction as operating income, as opposed to a financial transaction, required the SPE to be independent from Dynegy and the financier to bear the risk of its investment. *Id.*

72. *Id.* at 542.

73. *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048, at \*10 (S.D. Tex. Sept. 22, 2006).

74. *Id.* at \*13. Even though Olis's sentence was less than half of the Guidelines minimum, it was not overturned as an "unreasonable" sentence by the appellate court. *Id.*

75. No. 04-0126, 2007 DNH 097 (D. N.H. Aug. 15, 2007).

76. *Id.* Unlike most other securities fraud cases, Enterasys's CEO, Enrique Fiallo, pled guilty to one count of securities fraud and agreed to cooperate with federal prosecutors against the officers who worked directly underneath him at Enterasys. *Id.* Based upon Fiallo's substantial assistance, the court sentenced him on November 19, 2007 to four years imprisonment and two years of supervised release. *Id.* Gagalis conspired with several other executive officers to conceal information about the "three-corner" deals from its outside auditors in order to falsify revenue figures and meet Wall Street analysts' expectations. *Id.* The "three-corner" deals generated revenue when Enterasys invested money in other companies in exchange for equity or debt interests in those companies, but there was an understanding that the "investment" money would immediately be used to purchase Enterasys's products from third-party distributors, enabling Enterasys to conceal the link between the "investment" money and the sales transactions. *Id.* Enterasys and the companies involved in these "three-corner" transactions generated "side letters" agreeing to the terms of the deals, but the letters were kept secret and undisclosed from auditors. *Id.* Thus, Enterasys was able to avoid the proper application of the revenue recognition criteria.

77. *Id.*

cutors or instead decides to try his chances in court. Although plea bargain agreements are a very important tool wielded by government prosecutors, judges have used prosecutors' section 5K1.1 motions for downward departures as a method to deviate even further downward from Guidelines, sometimes significantly more than the prosecutors' recommended sentences.

In *United States v. Sullivan*,<sup>78</sup> WorldCom's CFO, Scott Sullivan, pled guilty to charges of conspiracy, securities fraud, and making false financial filings, while agreeing to cooperate with the government against CEO Bernie Ebbers.<sup>79</sup> The district court calculated Sullivan's guideline range of 262 to 327 months imprisonment, but based upon Sullivan's substantial assistance in obtaining the conviction of Ebbers,<sup>80</sup> the court imposed a downward-departure sentence of only sixty months imprisonment.<sup>81</sup> Again, a downward-departure sentence for substantial assistance was demonstrated in *United States v. Fastow*,<sup>82</sup> where Enron's former CFO, Andrew Fastow, agreed to testify against his former employers in exchange for a reduced sentence.<sup>83</sup> Although the court calculated Fastow's guideline range as 108 to 132 months, he was sentenced to only seventy-two months imprisonment largely because of his "substantial assistance."<sup>84</sup>

Although both investor loss and substantial assistance are some of the most significant factors in determining a white-collar defendant's sentence, they do not make up an exclusive list. As shown by the cases listed in Exhibit 6, below, CFOs have continually been sentenced below the Guidelines, a trend that has significantly increased post-*Booker*.

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78. No. 02-1144 (S.D.N.Y. Aug. 12, 2005). Sullivan was only one of the many charged in engineering the \$11 billion accounting fraud at WorldCom, the country's second-largest phone carrier, which eventually led to one of the largest bankruptcies in history.

79. *Id.* Since Sullivan had testified against Ebbers at the government's request, the prosecution filed a section 5K1.1 motion for a downward departure based on Sullivan's substantial assistance in getting a conviction on Ebbers. *Id.*

80. *Id.* Assistant U.S. Attorney David Anders, who led the prosecution stated to the court: "Without Mr. Sullivan's cooperation, it is likely that Ebbers would never have been brought to justice . . . I think it's fair to describe his efforts as exceptional." Jennifer Bayot & Roben Farzad, *Ex-WorldCom Officer Sentenced to 5 Years in Accounting Fraud*, N.Y. TIMES, Aug. 12, 2005, at C1.

81. *Sullivan*, No. 02-1144. Interesting to note is the disparity between going to trial and cooperating with prosecutors. While Sullivan got a sentence of five years in prison, Ebbers received twenty-five years. As one former federal prosecutor notes, "if you see the light and cooperate with the government, the government will use that cooperation to mitigate any fines and penalties." See Bayot & Farzad, *supra* note 80.

82. No. 02-0665 (S.D. Tex. Sept. 27, 2006).

83. Fastow testified against both Enron's CEO, Jeffery Skilling, and Chairman, Kenneth Lay. *Id.*

84. *Id.* Skilling's Guideline range was 292 to 365 months, and he received a sentence on the low end of the scale (292 months). *United States v. Causey*, No. 04-0025-2 (S.D. Tex. Oct. 25, 2006).

**Exhibit 6**

<b>Post-Booker Sentencing</b>				
<b>Company</b>	<b>Name &amp; Position</b>	<b>Guideline Range</b>	<b>Sentence</b>	<b>Trial or Plea</b>
Dynegy	Jamie Olis, Sr. Dir. Tax Planning & International	151 to 188 months	72 months imprisonment	Trial
Enterasys	Robert Gagalis, CFO	135 to 168 months	138 months imprisonment	Trial
Adelphia	Timothy Ri- gas, CFO	Max. sentence 215 years	240 months imprisonment	Trial
Leslie Fay Co.	Paul Polishan, CFO	108 to 135 months	108 months imprisonment	Trial
Smith Technologies	Richard Boyer, CFO	87 to 108 months (approx calculation of offense level 29 in 1998 Guidelines)	12 months imprisonment	Trial
Impath, Inc.	David J. Cammarata, CFO	51 to 63 months (ap- prox calculation of offense level 24 in 2001 Guidelines)	1 month im- prisonment	Plea
WorldCom	Scott Sullivan, CFO	262 to 327 months	60 months imprisonment	Plea
HealthSouth	Weston L. Smith, Former CFO	Max. sentence 300 months - 5K1.1 mo- tion recommendation of 60 months	27 months imprisonment	Plea
HealthSouth	William T. Owens, CFO	Max. sentence 360 months	60 months imprisonment	Plea
Enron	Andrew Fastow, CFO	108 to 132 months	72 months imprisonment	Plea
CUC International / Cendant	Cosmo Corigliano, CFO	78 to 97 months	36 months probation	Plea
Qwest Commu- nications	Grant Graham, CFO	8 to 14 months	Time already served	Plea

## IV. CONCLUSION

Yes, as through this world I've wandered  
I've seen lots of funny men;  
Some will rob you with a six-gun  
And some with a fountain pen.<sup>85</sup>

As obvious today as it was at the time the great folk singer Woody Guthrie wrote the words above, society has differentiated between crimes of violence and white-collar crimes. Although both acts result in harm to victims, the victims of white-collar crimes are more difficult to directly identify and associate with the crime, and judges have historically been more lenient on those criminals as opposed to criminals who commit violent crimes. This was the disparity Congress attempted to correct by instituting sentencing guidelines in the first place, by providing sentences which corresponded to the impact of an offender's crime.

However, *Gall* drastically reduced the authority of the Guidelines, possibly eliminating its power entirely. Even after the Court's decision in *Booker*, the Guidelines still played a major role in the sentencing of criminal defendants by requiring district courts to calculate the guideline ranges, even where the court is not required to give a guideline sentence when there is a compelling reason under 18 U.S.C. § 3553 to depart from the calculated range. But, since the departure sentences were subject to review for reasonableness, circuit courts had the ability to remand sentences that were unreasonable in comparison to the guideline range. The *Gall* decision eliminated an appellate court's ability to reject unreasonable departure sentences by restricting their review to the abuse of discretion standard. Thus, the Court effectively told district court judges that they can ignore the Guidelines and sentence defendants as they see fit, as long as they give "lip service" to the Guidelines.<sup>86</sup>

If the post-*Booker* trend in white-collar sentencing continues, judges will continue to impose downward-departure sentences. Although there are a few exceptions to this trend—as seen in the recent wave of high-profile white-collar cases where defendants were given significant sentences<sup>87</sup>—these exceptions are few and judges continue to deliver below-

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85. WOODY GUTHRIE, *Pretty Boy Floyd*, on STRUGGLE (Asch Records 1944) (quoted by Ford, *supra* note 11, at 396), available at [http://www.woodyguthrie.org/Lyrics/Pretty\\_Boy\\_Floyd.htm](http://www.woodyguthrie.org/Lyrics/Pretty_Boy_Floyd.htm).

86. *Gall v. United States*, 128 S. Ct. 586, 604 (2007) (Alito, J., dissenting).

87. *See* *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) (sentencing WorldCom CEO Bernie Ebbers to twenty-five years imprisonment); *United States v. Forbes*, No. 02-0264 (D. Conn. Jan. 23, 2007) (sentencing CUC International/Cendant's Chairman Walter Forbes to 151 months imprisonment with a Guidelines range of 151 to 188 months); *United States v. Causey*, No. 04-0025-2 (S.D.

guideline sentences to white-collar defendants. Many courts and commentators continue to believe that even the advisory Guideline sentences for white-collar criminals are particularly excessive and inconsistent with section 3553(a)'s instruction that sentences be "sufficient, but not greater than necessary" to achieve statutory sentencing goals.<sup>88</sup> For example, Judge Rakoff noted the "travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."<sup>89</sup>

While some legal experts argue that the recent lengthy sentences handed out to white-collar defendants might appear harsh,<sup>90</sup> the Sentencing Commission's study of "15 Years of Guidelines Sentencing" noted that the white-collar Guidelines were written to "ensure a short but definite period of confinement for a larger percentage of these 'white collar' cases, both to ensure proportionate punishment and to achieve adequate deterrence."<sup>91</sup> Many of the subjective factors that may now be considered at sentencing—such as the defendant's old age,<sup>92</sup> family ties and responsibilities,<sup>93</sup> or a history of community service<sup>94</sup>—are likely to have special relevance during the sentencing phase. These factors give particular advantage to white-collar defendants, who typically have the resources to make extensive sentencing presentations and arguments. Moreover, unlike defendants who have dealt drugs or committed crimes of violence, white-collar criminals are more likely to have engaged in charitable good works or to have maintained significant ties to their local community. Thus, white-collar crimi-

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Tex. Oct. 25, 2006) (sentencing Enron CEO Jeffrey Skilling to 292 months imprisonment with a Guidelines range of 292 to 365 months).

88. See Simon Romero, *Revision of 24-Year Prison Term Ordered in Accounting Fraud*, N.Y. TIMES, Nov. 2, 2005, at C3 (stating Olis became a poster child for excessive punishment for white-collar crime); Andrew Ross Sorkin, *How Long to Jail White-Collar Criminals?*, N.Y. TIMES, Sept. 16, 2005, at C1 (arguing long sentences handed down for corporate officers were excessive); Neil Weinberg & Mary Ellen Egan, *Criminal Injustice System*, FORBES, Apr. 26, 2004, at 42 (arguing against harsh sentences for corporate officers).

89. *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (imposing forty-two month sentence when the Guidelines range was eighty-five years to life, where the court concluded that "the evidence showed that Adelson was sucked into the fraud not because he sought to inflate the company's earnings, but because, as President of the company, he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others").

90. See *supra* note 87.

91. FIFTEEN YEAR REPORT, *supra* note 1, at vii.

92. Even prior to *Gall*, some district court judges had already given downward departures based on the fact that individuals are less likely to commit crimes as they get older. See, e.g., *Simon v. United States*, 361 F. Supp. 2d 35, 48 (E.D.N.Y. 2005) (stating that the recidivism rate drops dramatically for defendants with significant criminal histories but who are over forty years old).

93. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2004).

94. See *United States v. Coughlin*, No. 06-20005, 2008 WL 313099, at \*4-5 (W.D. Ark. Feb. 1, 2008) (justifying the defendant's sentence based upon factors such as the defendant's age, health, and charitable contributions, and longstanding history of community service).

nals are more likely to benefit from these factors than other types of criminals.

Although the Guidelines were specifically drafted to increase the likelihood of imprisonment and the length of sentences in white-collar cases, the *Gall* decision should generally weaken the power and leverage of the Guidelines, resulting in shorter sentences for white-collar criminal defendants. But, will we see the disparity in sentencing of white-collar criminals return to the same levels that existed prior to the Guidelines? If the post-*Booker* trend continues as demonstrated in the exhibits above, it is apparent that the disparity will increase and judges will continue to impose downward-departure sentences upon white-collar defendants, but more specifically upon CFOs.