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Federal Sentencing: A Judge's Personal Sentencing Journey Told Through the Voices of Offenders He Sentenced

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Federal Sentencing: A Judge’s Personal Sentencing Journey Told Through the Voices of Offenders He Sentenced

Mark W. Bennett*

Abstract

Federal sentencing is a tragic mess. Thirty years of conflicting legislative experiments began with high hopes but resulted in mass incarceration. Federal sentences, especially in drug cases, are all too often bone-crushingly severe.

In this Article, the Honorable Mark Bennett, a retired federal judge, shares about his journey with federal sentencing and his strong disagreement with the U.S. Sentencing Guidelines by telling the stories of some of the 400 men and women he sentenced during his twenty-five years as a federal judge.

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* The Honorable Mark W. Bennett retired after twenty-four years as a U.S. district judge for the Northern District of Iowa on March 2, 2019 to become the first director of the Drake University Law School’s Institute for Justice Reform & Innovation.

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I. Introduction

Federal sentencing is a tragic mess. Thirty years of conflicting legislative experiments began with high hopes but resulted in mass incarceration.¹ Federal sentences, especially in drug cases, are all too often bone-crushingly severe. That is especially true for most of the endless drug offenders I see: non-violent, low-level, long-term and severe drug addicts. These folks stand before me for sentencing in sharp contrast to the super violent drug cartel kingpins we read about and see on television, Netflix, and in the movies.²

This Article reveals much of my journey through the arc of federal sentencing. The reveal comes from the voices of the men and women I have sentenced and the over four hundred I have visited in federal prisons while I was a sitting federal district judge for nearly a quarter century.³ I retired on March 2, 2019.

1. Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 649 (2016).

2. Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3, 3 (2018) [hereinafter Bennett, *Addicted to Incarceration*].

3. I first wrote about visiting offenders I had sentenced in 2011. See Mark W. Bennett, *Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304, 304–05 (2011) (reflecting on seven years of visiting inmates).

Most of the names of the offenders in this Article are obscure and little-known except by their families. Conversely, a few are very well known for the U.S. Supreme Court jurisprudence their cases generated. Many law review⁴ and other articles and media reports⁵ have documented my opposition to the War on Drugs

4. See, e.g., Mark W. Bennett, *A Judge's Attempt at Sentencing INCONSISTENCY After Booker: Judge (Ret.) Mark W. Bennett's Guidelines for Sentencing*, 41 CARDOZO L. REV. 243, 256–65 (2019) (explaining how federal judges engage in district court activism to achieve criminal justice reform); Bennett, *Addicted to Incarceration*, *supra* note 2, at 15–17, 20–22 (discussing the current sentencing scheme prior to the First Step Act and several proposed reforms); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 754, 780 (2018) (analyzing the history and effects of Afrocentric facial feature bias in the criminal justice system); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 106 (2017) (finding that both federal and state court trial judges have greater anti-Jewish and anti-Asian implicit biases than members of the general public and that the implicit biases affect the length of the sentence in a white-collar sentencing scenario); Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 981 (2017) (criticizing the fraud Guideline on numerous grounds); Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 392 (2017) (asserting that Afrocentric facial feature and skin tone biases are the next frontier of racially biased sentencing); Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 877 (2014) (discussing mass incarceration and the need for more federal judges to express “policy” disagreements with the U.S. Sentencing Guidelines and urging Congress towards sentencing reform); Mark Osler & Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 121, 129, 137, 153, 163 (2014) (discussing the rise of mass incarceration and the role of Congress, the U.S. Sentencing Commission, and federal judges in it and a path for reform); Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495–96, 529 (2014) (explaining the powerful cognitive “anchoring” effect of the federal sentencing guidelines which leads to overly harsh sentences and suggesting a modest, simple, and practical reform to reduce the anchoring effect).

5. See, e.g., Mark Bennett & Mark Osler, *The Wrong People Decide Who Goes to Prison*, CNN, <https://www.cnn.com/2013/12/03/opinion/bennett-osler-sentencing/index.html> (last updated Dec. 3, 2013, 7:49 AM) (last visited Mar.

and my criticism of the bone-crushing severity of federal sentencing, congressionally mandated mandatory minimums, and the U.S. Sentencing Commission's federal sentencing guidelines. Jessica Roth recently described my decision to speak out about the unfairness of federal sentencing:

[S]ince at least 2012, Judge Bennett has written extensively about the need to reform sentencing policy in a variety of publications and has granted numerous interviews to journalists. Acknowledging that “[f]ederal judges have a longstanding culture of not speaking out on issues of public concern,” he explained that he was “breaking with this tradition” because the “daily grist” of unjust mandatory minimum sentencing for non-violent drug offenders “compels [him] to.”⁶

28, 2020) (“[O]ur analysis of the way these enhancements have been used reveals a deeply disturbing dirty little secret of federal sentencing: the stunningly arbitrary application of these enhancements by prosecutors within the Department of Justice.”) [<https://perma.cc/YQL3-67FX>]; Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, NATION (Oct. 24, 2012), <https://www.thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri> (last visited Mar. 28, 2020) (“If lengthy mandatory minimum sentences for nonviolent drug addicts actually worked, one might be able to rationalize them. But there is no evidence that they do.”) [<https://perma.cc/JHK8-GMDW>]; THE HOUSE I LIVE IN (BBC 2012) (directing by Eugene Jarecki, the film was the Official Selection and Winner of the Grand Jury Prize at Sundance Film Festival 2012); Eli Saslow, *Against His Better Judgment*, WASH. POST, June 6, 2015, at A1 (“Bennett had often viewed his job as less about presiding than abiding by dozens of mandatory minimum sentences established by Congress in the late 1980s for federal offenses.”).

6. Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 190 (2018). Professor Roth uses the term “new” activism hesitantly because she recognizes the term “activism” has “become little more than an epithet for describing judges and decisions with which the speaker disagrees.” *Id.* at 190 (footnote omitted). She uses the term for two reasons. First, it describes “an active and engaged judicial posture rather than a passive, reactive one.” *Id.* (footnote omitted). “Second, it taps into important debates about the proper role of the judge in our democracy, debates that have not fully explored the hortatory and other forms of judicial activity described in this Article.” *Id.* (footnote omitted).

Many of my judicial decisions have reflected my strong disagreement with many of the deeply flawed U.S. Sentencing Guidelines.⁷

7. See, e.g., *United States v. Nawanna*, 321 F. Supp. 3d 943, 952 (N.D. Iowa 2018) (disagreeing with the methamphetamine Guidelines on policy grounds because they are based on a flawed assumption that methamphetamine purity is a proxy for role in the offense); *United States v. Feauto*, 146 F. Supp. 3d 1022, 1040 (N.D. Iowa 2015) (concluding that a direction to disregard or nullify a statutory mandatory minimum sentence when resentencing a defendant, pursuant to Amendment 782 and policy statement U.S.S.G. § 1B1.10(c), exceeds the Sentencing Commission's statutory authority and/or violates the non-delegation doctrine and the separation-of-powers principle), *aff'd on other grounds sub nom.* In other words, the authority to nullify mandatory minimums is not a power that the Sentencing Commission could usurp or one that Congress could delegate). *Id.* *United States v. Koons*, 850 F.3d 973 (8th Cir. 2017), *aff'd*, 138 S. Ct. 1783 (2018); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1023 (N.D. Iowa 2013) (stating a policy disagreement with the methamphetamine quantity Guidelines, which systemically overstate defendants' culpability); *United States v. Newhouse*, 919 F. Supp. 2d 955, 957 (N.D. Iowa 2013) (disagreeing with the Career Offender Guideline when applied to a defendant, like Newhouse, who is a nonviolent, recidivist drug addict occupying a low-level role in the drug trade in order to obtain drugs for her addiction, but recognizing that some offenders have earned Career Offender status and should be sentenced within the Career Offender Guideline, and, in rare instances, higher); *United States v. Williams*, 788 F. Supp. 2d 847, 880 (N.D. Iowa 2011) (rejecting the U.S. Sentencing Guidelines using the "new" 18:1 ratio, for the same reasons as the "old" 100:1 ratio and based on additional concerns that they create a "double whammy" on crack defendants, penalizing them once for the assumed presence of aggravating circumstances in crack cocaine cases and again for the actual presence of such aggravating circumstances in a particular case); *United States v. Vandebrake*, 771 F. Supp. 2d 961, 1011 (N.D. Iowa 2011) (varying upward from the U.S. Sentencing Guidelines based on policy disagreements with the relatively lenient treatment of antitrust violations when compared to fraud sentences), *aff'd*, 679 F.3d 1030 (8th Cir. 2012); *United States v. Golden*, 679 F. Supp. 2d 980, 985 (N.D. Iowa) (reiterating rejection of the 100:1 crack-to-powder ratio in U.S.S.G. § 2D1.1, note 10, categorically, on policy grounds), *aff'd*, 394 F. App'x 347 (8th Cir. 2010); *United States v. Jacob*, 631 F. Supp. 2d 1099, 1112 (N.D. Iowa 2009) (reiterating categorical rejection, on policy grounds, of U.S.S.G. § 2G2.2, concerning sexual exploitation of a minor in the form of interstate transportation of child pornography because it improperly skews sentences upward); *United States v. Gully*, 619 F. Supp. 2d 633, 640–41 (N.D. Iowa 2009) (rejecting the 100:1 crack-to-powder ratio in the guidelines on policy grounds); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009)

I am a retired U.S. district judge who spent more than one third of my life populating the Federal Bureau of Prisons. I sentenced more than 4,000 offenders spanning twenty-four years on the bench. I did this in five different districts—from both districts in Iowa to the near farthest reaches of our federal courts in the District of the Northern Mariana Islands. I imposed sentences from probation (not often enough) to affirming two juries’ verdicts to impose the federal death penalty.⁸ I also reviewed numerous state and federal sentences as a district judge on habeas review. Finally, I sat by designation numerous times on the courts of appeals, where I reviewed federal sentences on direct appeal and federal and state sentences on habeas review. Before that, I was in private practice for seventeen years as a civil rights, civil liberties, and criminal defense lawyer, almost exclusively in our federal courts. Up to the day I retired as a federal judge, I was passionate about judging and loved most of it. I even thought I was at my very best in sentencing, but I have not missed it for a second—except for the judges I was so exceptionally fortunate to have as colleagues and the folks I worked with at the courthouses in our district, especially our incredibly dedicated U.S. probation officers.

I found the collective weight of so many sentencings more emotionally draining and soul robbing than the deaths of my son, all my siblings, and my parents. My decision to retire freed me from being a cog in the nations’ machinery of injustice—driven primarily by nonsensical and politically motivated congressionally mandatory minimum sentences and extraordinarily harsh federal sentencing guidelines. One of my friends commented to me recently that he had not seen me so

(rejecting categorically, on policy grounds, the U.S. Sentencing Guidelines for child pornography cases).

8. See *United States v. Honken*, 381 F. Supp. 2d 936, 1056 (N.D. Iowa 2005) (“The simply horrific nature of the murders, and the presence of very strong aggravating factors and relatively weak mitigating factors, resulted in the imposition of the death penalty for the murders of the two children.”); *United States v. Johnson*, 239 F. Supp. 2d 924, 927 (N.D. Iowa 2003) (noting that Johnson was sentenced to death for her involvement in the murder of five witnesses to the drug-trafficking enterprise of Johnson’s boyfriend, Honken).

happy since my days of practicing law. I am not asking for sympathy, just understanding. Nobody forced me to take what is considered one of finest legal jobs in the country, a job that outsiders will mark as the pinnacle of the arc of my legal career.

This Article follows my presentation at the *Washington and Lee Journal of Civil Rights and Social Justice* 2019 Annual Symposium: Issues in Federal Sentencing: Privilege, Disparity, and a Way Forward. I know something of privilege—White privilege—I have been the beneficiary of it all of my life. I grew up in an upper-middle-class family in a White neighborhood in St. Paul, Minnesota, with few wants. My elementary and junior high school were one hundred percent White. Yet, my parents were strong civil rights proponents and taught me that everyone on life's journey was a son or daughter of a higher being and entitled to be treated with dignity and respect. They fought innumerable battles for my younger brother, David, who was born with severe mental retardation and cerebral palsy. I saw warriors for justice first-hand. I lived with them and loved them deeply. They have long since passed but they remain my role models and heroes. The title of the panel I was on for the 2019 Annual Symposium included the phrase “Dignity in the Courtroom.” That was my highest aspiration—not always obtained—that offenders be treated with unparalleled dignity. My steady stream of amazing law clerks often commented to me in private that I was so tough on the lawyers but so passionate and kind to the offenders.

From a macro lens, in addition to the severity of federal sentencing, the racial disparity in federal sentencing is also deeply troubling. A recent finding by the United States Sentencing Commission (“Commission”), utilizing sophisticated multivariate regression analysis, found that “Black male offenders continued to receive longer sentences than similarly situated White male offenders.”⁹ The Commission found that

9. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/J87C-AYQF].

“Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders” during fiscal years 2012 to 2016.¹⁰ Male Hispanic offenders received sentences that were 5.3 percent longer than White male offenders during fiscal years 2012 to 2016.¹¹

The vignettes you are about to read are both real and fictional. Real in the sense that everything you read actually happened. Fictional in the sense that some of the names, places, and voices are composites of real events in my nearly quarter century of federal sentencing.

II. The Voices of Offenders I Have Sentenced

A. Anthony Jones

I only met Judge Bennett once back in the early 2000s when I was serving a lengthy federal sentence for crack cocaine distribution in the Kansas City area. I was imprisoned at the Federal Bureau of Prisons facility, Terminal Island, in Long Beach, California. Yeah, what a terrible name for a prison. It was a routine day just like every other one and early in the afternoon I got asked by the warden’s office if I was willing to meet with a fellow who was touring the prison and wanted to talk to a few inmates about life inside this joint. The warden’s office said no staff would be present because the guy wanted our straight scoop. I agreed and was taken to a small room where two other inmates from different cell blocks were seated. I recognized both, a Hispanic gang-banger from East L.A. with prison tats over his entire body and face. I didn’t know his real name, but his prison gang name was “El Salivotas” (the Drooler) because part of his face was paralyzed in a prison knife fight. The other guy was an Anglo meth dealer who goes by “L.A. Ice.” I was the only Black con in the room. The door opened suddenly, and this middle-aged, casually dressed Anglo walked in and smiled and held out his hand to each of us to shake our hands and said simply, “My name is Mark, and I am here to ask about

10. *Id.*

11. *Id.* at 8.

your experiences with the federal criminal justice system and your incarceration here at Terminal Island. May I sit down in the empty chair? What are your names?" After we gave him our names, he called each of us by our first name and asked that we use his first name "Mark." Then he said:

To make full disclosure, my name is Mark Bennett, and I am a U.S. district judge from the Northern District of Iowa. I am here for the sole purpose of asking each of you if you are willing to help me become a better judge by sharing your criminal justice and personal stories with me.

The next 90 minutes were gone in a flash. Judge Bennett asked question after question about our lives growing up; any role models in the community; early criminal activity; how we got caught on our latest federal crime; what we thought of the legal process, our defense lawyers, the prosecutors, the U.S. probation officers, the sentencing judge, the length of our sentences, safety and programming in Terminal Island; and our hopes for the future. When Judge Bennett said it was time to wrap up and for him to leave, I started sobbing, uncontrollably. Judge Bennett placed his hand on my knee and asked in a soft voice, "Tony, did I say something to upset you?" After I caught my breath I was able to mumble, "No, it's just in my wildest dreams I never thought I would be in a small room with a federal judge and that he would ask my opinions about things."

As I left Terminal Island, my mind was swimming with information from the inmates. That last contact with Tony and his sobbing left an indelible impression on me and was mostly what I was thinking about as I traveled back to Iowa the next day. It was on that plane ride home that I decided visiting offenders that I had sentenced would be an important piece of gleaning a deeper understanding of the federal criminal justice system. It was not until many years later, when I watched a YouTube video by Bryan Stevenson, founder and executive director of the Equal Justice Initiative, titled "The Power of Proximity," that I began to fully appreciate how and what the

offenders taught me.¹² It was by being proximate with offenders I had sentenced, in their environments, not mine, where my real education took place.

B. David Johnson and Thirty or So Other Offenders at the Federal Prison in Yankton, South Dakota

The federal prison camp in Yankton, South Dakota, was a federal prison I liked to recommend to the Bureau of Prisons (BOP) for non-violent offenders serving a sentence of less than 120 months (requirements for admission). Not only was it the closest federal prison to Iowa, but it had one of the largest 500-hour residential drug treatment programs in the BOP. All of the offenders going through the drug treatment program lived in the same cellblock for the length of the program.

My first visit there was shortly after my visit to Terminal Island. I communicated with the warden to set up the visit. I had read about the prison in Yankton and knew it was on the site of a former private college that had gone bankrupt and, ironically, whose president had gone to federal prison for fraud. It was located in a very nice residential part of Yankton and looked like dozens of other private colleges in small Midwestern cities.

I saw lots of folks walking on campus, no perimeter fences or guard towers like at Terminal Island. It was not until I drove up to the entrance that I could see all the male inmates wore brown, drab, identical prison clothing. While I was walking to the building in which I had been told the warden's office was, an

12. See Fortune Magazine, *The Power of Proximity: CEO Initiative 2018*, YOUTUBE (June 28, 2018), <https://www.youtube.com/watch?v=1RyAwZIH04Y> (encouraging listeners to “get ‘proximate’ to suffering and understand the nuanced experiences of those who suffer from and experience inequality”) [<https://perma.cc/8CE6-LVFU>]. Stevenson believes that “if you are willing to get closer to people who are suffering, you will find the power to change the world.” Leandra Fernandez, *Empathy and Social Justice: The Power of Proximity in Improvement Science*, CARNEGIE FOUND. ADVANCEMENT TEACHING (Apr. 21, 2016), <https://www.carnegiefoundation.org/blog/empathy-and-social-justice-the-power-of-proximity-in-improvement-science/> (last visited Mar. 28, 2020) [<https://perma.cc/V377-UQS7>].

old main type building, I was greeted by several inmates I recognized, and we exchanged smiles. After a tour of the prison, the warden took me to the drug treatment dorm, where I would meet with inmates I had sentenced who were in the residential drug treatment program. There were over thirty offenders in the room when I entered. I had no prepared remarks, and I was nervous not knowing what kind of reception I would receive. I pride myself in getting anyone, including strangers, to engage in conversation, but this was different, way different.

As I stood in the front of the room, I could not get any kind of response from the offenders. So I asked point blank: "Why is nobody speaking?" No one initially responded. Then an offender I recognized, because I had recently sentenced him, David Johnson, raised his hand and said: "Judge, ain't you here to raise our sentences? I got a lower sentence than I expected and even lower than my worthless defense lawyer asked you for."

That caught me off-guard because I had not anticipated it. I assured the offenders, "I can neither raise nor lower your sentences, and I am here to visit with you and find out how each one of you is doing." Once that was out of the way, the offenders were incredibly curious and talkative. Curious as to why I was there to meet with them and anxious to ask questions from everything about my expectations for them on supervised release (the relatively new name for what replaced parole) to advice on parenting, job prospects when they are released, and which programs to take at the prison.

I had many further visits to Yankton to meet with inmates I had sentenced. We had far ranging discussions—less about their cases and more about prison programs and the expectations I, our probation officers, and other judges in our district had for them and what is expected on supervised release when they got out. I always mentioned that I was a parent and how fulfilling that was for me. That generated most of my discussion with the offenders about who to reconnect with—family and especially children. Sadly, for between eight and ten percent of the offenders visited in federal prisons, I was their only visitor.

C. Steven Spears

I am Steve Spears, and I was sentenced by Judge Bennett in 2005 for possession with intent to deliver crack cocaine. Judge Bennett announced in my sentencing that he disagreed with the U.S. Sentencing Guideline that treated one gram of crack as equal to one hundred grams of powder cocaine. Under this 100:1 ratio, the U.S. Probation Office determined my original guideline sentencing range was 324 to 405 months. Judge Bennett rejected the 100:1 ratio and adopted a 20:1 ratio. Judge Bennett indicated that this reduced my guideline range to 210 to 262 months. Because I also had a twenty-year mandatory minimum sentence, Judge Bennett sentenced me to the minimum he could: 240 months. It then gets complicated. This is what I came to understand by reading the various court decisions that followed and what was explained to me by my new lawyers. My original lawyer didn't even ask the judge to reduce my sentence based on the 100:1 disparity; Judge Bennett did that on his own. The Eighth Circuit, en banc, reversed Judge Bennett and remanded my case for resentencing, holding that there was no authority authorizing district courts to reject the 100:1 ratio and use a different ratio in sentencing defendants for crack cocaine offenses.”¹³ My new lawyers appealed to the U.S. Supreme Court and it reversed the Eighth Circuit and remanded it back to them.¹⁴ The Eighth Circuit again, en banc, reversed Judge Bennett and remanded it back to him to resentence me to the higher guideline range of 324 to 405.¹⁵ I appealed again to the

13. See *United States v. Spears (Spears I)*, 469 F.3d 1166, 1173–74 (8th Cir. 2006) (en banc) (“The district court stated its sentencing decision was based solely on the Perry rationale and the other § 3553(a) factors would be considered only if the sentence was reversed on the 20:1 ratio.”).

14. See *Spears v. United States*, 552 U.S. 1090, 1090 (2008) (vacating and remanding in light of *Kimbrough v. United States*, 552 U.S. 85 (2007), which held that the Anti-Drug Abuse Act did not require a 100:1 ratio application during sentencing).

15. See *Spears v. United States (Spears II)*, 533 F.3d 715, 716 (8th Cir. 2008) (en banc) (“In Spears’s case, we did not need either to adopt or endorse the proposition outlined in *Gunter* and now *Kimbrough* because the district

*U.S. Supreme Court, and they reversed the Eighth Circuit yet again and confirmed that Judge Bennett had the right to disagree with the 100:1 ratio and substitute a 20:1 ratio.¹⁶ The Supreme Court flatly rejected the Eighth Circuit approach that sentencing judges did not have the right to categorically reject the 100:1 ratio and substitute their own ratio.¹⁷ Now I get to quote from a Supreme Court case that bears my name, *Steven Spears*: “A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity.”¹⁸ This reduced my sentence from the 324 to 405 months that the Eighth Circuit thought I deserved to the 240-month mandatory minimum that Judge Bennett gave me, a reduction of more than ten years. Judge Bennett indicated at the end of the sentencing that he would have gone lower had Congress not handcuffed his discretion with this mandatory minimum twenty-year sentence.*

Shortly after the *Spears* Supreme Court decision, I reduced the crack/powder ratio that I used in sentencing crack cocaine offenders from the 20:1 ratio to a 1:1 ratio.¹⁹ The *Spears* case also reflected something I found deeply troubling as a federal judge with a very heavy criminal caseload. I was often shocked by the lack of quality representation by defense lawyers.

court did not just ‘consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.’”) (citation omitted).

16. See *Spears v. United States*, 555 U.S. 261, 265–66 (2009) (“[T]he District Court’s choice of replacement ratio was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission’s expert judgment that a 20:1 ratio would be appropriate in a mine-run case.”).

17. See *id.* at 265–66 (“[W]e now clarify that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.”).

18. *Id.* at 265.

19. See *United States v. Gully*, 619 F. Supp. 2d 633, 640 (N.D. Iowa 2009) (reporting my first decision adopting the 1:1 crack/powder sentencing ratio and rejecting the 100:1 ratio on policy grounds).

Because we were dealing with a person's liberty, I would often raise legal issues, including mitigating factors that the defense failed to raise. I would give the parties an opportunity to discuss them and grant a continuance if either lawyer wanted one. Way too often I gave a sentence that was less than the defense lawyer asked for. I was surprised to find so many walking violations of the Sixth Amendment of the U.S. Constitution.²⁰ On the other hand, there were several truly amazing defense lawyers, including some from the Federal Public Defender's Office. I tried as best I could to give what I thought was just sentence regardless of the quality of counsel. The federal prosecutors who came before me were very talented and exceptionally honest and strait forward. We tangled often on legal issues and what a fair sentence would be, but they were also often helpful in pointing out how aggravating factors affected mitigation factors in the difficult balancing act that is federal sentencing.

D. Demetrius Gully

I pled guilty without a plea agreement to four counts of distributing crack cocaine arising from controlled buys. Using the 100:1 federal sentencing advisory guideline range in effect at the time of my sentencing, my guideline range was 108 to 135 months. If Judge Bennett could be persuaded to use a 1:1 crack/powder ratio, my guideline range would drop to 30 to 37 months.²¹ The judge went farther than my defense lawyer argued for and, on his own, decided to adopt a 1:1 crack/power ratio.²² I thought that was awesome news till the judge finished with his analysis of my sentencing. He started with the 1:1 crack/powder

20. See, e.g., *Spears I*, 469 F.3d at 1169 (noting that my sentence was at least a twenty-six percent decrease and at most a forty-one percent decrease from what the guidelines required, and which defendant's counsel did not request).

21. See *Gully*, 619 F. Supp. 2d at 636 (describing the effects of aggravating and mitigating factors on the lowered—1:1—base offense level).

22. See *id.* at 640–45 (highlighting the policy issues with the 100:1 crack-to-powder ratio and the role the U.S. Supreme Court's holding in *Kimbrough* should have in untying the hands of federal judges at sentencing).

ratio but then increased my sentence under what he referred to as “the 3553(a) factors.” Bennett stated that my history of assaultive behavior, including towards women; my continued drug dealing while on pretrial release; that I was more than a “street dealer” of crack; my repeated criminal conduct; and the likelihood that I would reoffend justified a sentence of 84 months.²³ Still, I did better than the 100:1 ratio by twenty-four months.

It made a lot of sense to me to use a 1:1 crack/powder ratio and then increase the sentence if other factors like violence and weapons were present. Data from the United States Sentencing Commission indicate that such factors are more often present in powder cases than crack cases.²⁴ But, at bottom they are not present in a majority of the cases, so to use those factors to justify a 100:1 ratio is like using a sledgehammer where a scalpel will do.²⁵

E. Billy Williams

I was told by my defense lawyer that as the first offender to be sentenced by Judge Bennett after the passage of the Fair Sentencing Act of 2010 (“FSA”),²⁶ he did not know if the judge

23. *See id.* at 646 (“[Given these aggravating factors,] a sentence of 84 months of incarceration—more than twice the upper end of his alternative guideline range based on a 1:1 ratio—was sufficient, but not greater than necessary in this case.”).

24. *See* U.S. SENTENCING COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 117 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> (noting that aggravating factors caused an increase in 8.6% of powder cases and 5.9% of crack cases) [<https://perma.cc/5F8J-QTRP>].

25. *See id.* (noting that aggravating factors played no role in adjusting federal sentences in 93% of all drug cases, 91.4% of powder cocaine cases, and 94.1% of crack cases).

26. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372–73 (reducing disparities in cocaine sentencing, eliminating mandatory minimums for simple possession, increasing penalties for major drug

would follow his prior 1:1 crack/powder ratio from the Gully decision or follow the congressional mandate of the FSA, which my lawyer told me reduced the 100:1 crack/powder ratio but only to 18:1. As you all might expect, I was really nervous at my sentencing. Judge Bennett said in my sentencing that he assumed when he heard about the passage of the FSA that he would be required to now use the 18:1 crack/powder ratio.²⁷ He went on with a lengthy explanation, much of which I really did not understand, until I had the time to study his complex written decision that he was sticking to his guns on the 1:1 crack/powder ratio. My favorite part of Judge Bennett's sentencing opinion in my case was his conclusion:

*Make no mistake: I believe that the replacement of the 100:1 crack-to-powder ratio of the 1986 Act and associated Sentencing Guidelines with the 18:1 crack-to-powder ratio of the 2010 FSA and the November 1, 2010, amendments to the Sentencing Guidelines was a huge improvement, in terms of fairness to crack defendants. While such incremental improvement is often the nature of political progress on difficult social justice issues—and, in this instance, the increment is perhaps unusually large—an incremental improvement is not enough to make me abdicate my duty to “[c]ritically evaluat[e] the crack/cocaine ratio in terms of its fealty to the purposes of the Sentencing Reform Act.” See Whigham, 754 F.Supp.2d at 247, 2010 WL 4959882 at *7.*

traffickers, and emphasizing defendants' role and behavior during commission of drug offenses).

27. In my sentencing opinion in *Williams* I wrote:

When I first learned that the 2010 FSA was about to be passed, I just assumed that I would change my opinion from a 1:1 ratio to the new 18:1 ratio, because I assumed that Congress would have had persuasive evidence—or at least some empirical or other evidence—before it as the basis to adopt that new ratio. I likewise assumed that the Sentencing Commission would have brought its institutional expertise and empirical evidence to bear, both in advising Congress and in adopting crack cocaine Sentencing Guidelines based on the 18:1 ratio. Failing that, I assumed that the prosecution would present at the presentencing hearing in this case some evidence supporting the 18:1 ratio.

United States v. Williams, 788 F. Supp. 2d 847, 849–50 (N.D. Iowa 2011).

Performing that duty here, I must reject the Sentencing Guidelines using the “new” 18:1 ratio, just as I rejected the Sentencing Guidelines using the “old” 100:1 ratio, based on a policy disagreement with those guidelines, even in “mine-run” cases, such as this one. I must do so, because I find that the “new” 18:1 guidelines still suffer from most or all of the same injustices that plagued the 100:1 guidelines, including the failure of the Sentencing Commission to exercise its characteristic institutional role in developing the guidelines, the lack of support for most of the assumptions that crack cocaine involves greater harms than powder cocaine, the improper use of the quantity ratio as a “proxy” for the perceived greater harms of crack cocaine, and the disparate impact of the ratio on Black offenders. I also find that the “new” guidelines suffer from some additional concerns, in that they now create a “double whammy” on crack defendants, penalizing them once for the assumed presence of aggravating circumstances in crack cocaine cases and again for the actual presence of such aggravating circumstances in a particular case.

In one respect the “new” 18:1 guideline ratio is more irrational and pernicious than the original 100:1. When the 100:1 ratio was enacted, Congress and the Sentencing Commission did not have access to the overwhelming scientific evidence that they now have. This overwhelming scientific evidence now demonstrates that the difference between crack and powder is like the difference between ice and water—or beer and wine. Can anyone imagine a sentence that is many times harsher for becoming legally intoxicated by drinking wine rather than beer? Of course not.²⁸

I really did expect that the FSA's new 18:1 ratio would be based on empirical evidence that was not present or available when the original 100:1 ratio was adopted. But that clearly was not the case despite my efforts to give the United States an opportunity to establish the empirical basis for the 18:1 ratio. As I wrote in the *Williams* decision, the 18:1 ratio of the FSA

28. *Williams*, 788 F. Supp. 2d at 891–92.

was a disappointing political compromise.²⁹ Not disappointing that it was a compromise, which I view as helpful in politics, but disappointing because of the total lack of empirical evidence that was readily available to Congress. Interestingly, after both the *Gully*³⁰ and *Williams*³¹ decisions, the government never appealed any of my crack ratio sentences.

F. Lori Ann Newhouse

When I was sentenced in 2013 by Judge Bennett for possession of twenty grams of methamphetamine, the PSR (presentence report) classified me as a “Career Offender” under the federal sentencing guidelines.³² My lawyer explained to me that this raised my federal sentencing guideline range from 70 to 87 months to what Judge Bennett described as “a staggering and mind-numbing 262–327 months.”³³ The judge recognized that I was a “low-level pill smurfer,”³⁴ that is someone who went to various stores to gather precursor chemicals for someone to cook meth.³⁵ In my case, I was smurfing pseudoephedrine pills used in cough and cold remedy medications sold over-the-counter.³⁶

29. See *id.* at 880 (“Not only was the 18:1 ratio . . . the product of political compromise, not an authoritative rationale, it continued the same flaws that were present in the 100:1 ratio in the 1986 Act.”).

30. See *Gully*, 619 F. Supp. 2d at 637 (adopting the 1:1 crack/powder sentencing ratio on an as-applied basis).

31. See *Williams*, 788 F. Supp. 2d at 853 (maintaining a 1:1 ratio in spite of the unreasoned mandate of the Fair Sentencing Act of 2010 to implement a 18:1 ratio).

32. See *United States v. Newhouse*, 919 F. Supp. 2d 955, 957 (N.D. Iowa 2013) (noting that defendants with at least two previous drug or violent crime convictions and sentences are statutorily classified as “career offenders” under § 4B1.1 of the FSA).

33. *Id.* at 958.

34. *Id.* at 957.

35. See *id.* (citing Rob Bovett, *Methamphetamine: Casting a Shadow Across Disciplines and Jurisdictions*, 82 N.D. L. REV. 1195, 1208 n.86 (2006)).

36. See *id.* at n.2 (“In order to obtain sufficient quantities of pseudoephedrine, methamphetamine manufacturers have increasingly turned to pill smurfers to make multiple purchases of products containing

The judge noted in his sentencing opinion that I “was just one of thousands of ‘low hanging fruit’—non-violent drug addicts captured by the War on Drugs and filling federal prisons far beyond their capacity.”³⁷ The facts of my case were unusual. The judge called me a “one-day” Career Offender because the predicate crimes for me being a Career Offender occurred in 2002 when I was twenty-two. I was in a motel room with three others when law enforcement found 3.29 grams of meth and 14.72 grams of psilocybin magic mushrooms.³⁸ I was sentenced to probation in state court for these two charges, by the same judge, but on different days.³⁹ Judge Bennett noted something that I still find incredible:

For reasons unknown, but likely random, the local prosecutor filed the two charges on separate days. Ironically, if the two charges had been filed in the same charging document or the defense lawyer, the prosecutor, the judge or the court administrator had scheduled the two sentencings for the same day—Newhouse would not be a Career Offender.⁴⁰

Because of these weird facts, the judge analyzed the Career Offender Guideline in great detail and stated his policy disagreement with the Career Offender Guideline as applied to my facts and varied downward to my mandatory minimum sentence of 120 months.⁴¹

pseudoephedrine from multiple stores—a process known in the methamphetamine trade as ‘smurfing.’”).

37. *Id.* at 958.

38. *See id.* at 957 (“Newhouse was charged in state court and pled guilty to possession with intent to deliver.”).

39. *See id.* at 957–58 (sentencing by Chief Judge Arthur Gamble of the Fifth Judicial District of Iowa).

40. *Id.* at 958.

41. *See id.* at 992 (reducing the sentence indicated under the Career Offender Guidelines by 54.2 percent to 63.3 percent).

I used the variance factors in 18 U.S.C. § 3553(a) to determine the final sentence.⁴² I was especially concerned with the flip-side of unwarranted sentencing disparity: unwarranted sentencing uniformity—a problem that I find is both as important as unwarranted sentencing disparity and so often overlooked in federal sentencing.⁴³

G. Jason Pepper

Like Steven Spears's, my sentencing by Judge Bennett went to the U.S. Supreme Court.⁴⁴ My case is really complicated procedurally. There are four Eighth Circuit reported decisions referred to in my Supreme Court decision as Pepper I–Pepper IV.⁴⁵ But cutting to the chase, my original federal sentencing guideline range on my meth case was 97 to 121 months.⁴⁶ The judge departed down to a sentence of two years.⁴⁷ In Pepper I, the Eighth Circuit decided the judge had considered an impermissible factor and reversed and ordered resentencing.⁴⁸ I

42. See 18 U.S.C. § 3553(a) (2018) (including nature and circumstances of offense, defendant's criminal history, and the purpose and desired effect of the sentence on the offender).

43. See *United States v. Newhouse*, 919 F. Supp. 2d 955, 977–79 (N.D. Iowa 2013) (noting that blindly applying sentencing uniformity to defendants who are convicted of similar crimes without considering the mitigating and aggravating factors of each case individually often results in sentencing disparity).

44. See *Pepper v. United States*, 562 U.S. 476, 480 (2011) (“The United States Court of Appeals for the Eighth Circuit concluded in this case that the District Court, when resentencing petitioner after his initial sentence had been set aside on appeal, could not consider evidence of petitioner's rehabilitation since his initial sentencing.”).

45. See *id.* at 482–86 (noting that the 8th Circuit decided *Pepper I* in 2005, *Pepper II* in 2007, *Pepper III* in 2008, and *Pepper IV* in 2009).

46. See *United States v. Pepper*, 412 F. 3d 995, 996 (8th Cir. 2005) (noting that the government filed a motion to have the range reduced given Pepper's informing on two other individuals involved with illegal drugs and weapons).

47. See *id.* at 997 (granting the government's motion).

48. See *id.* at 999 (“[N]amely [the district court's] desire to sentence Mr. Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton.”).

was released from federal prison just three days after the decision in *Pepper I*.⁴⁹ At the resentencing hearing before Judge Bennett, I offered considerable testimony about my rehabilitation. As the U.S. Supreme Court noted, this evidence included that I had successfully completed the 500-hour drug treatment program while in federal prison, that after my release I enrolled as a full-time student in a community college and earned straight A's, that I obtained part-time employment a few weeks after my release from prison and that I have maintained this employment, and that I was in compliance with all my conditions of supervised release.⁵⁰ My father also testified that while he had no contact with me for five years prior to me going to prison that he had re-established a relationship with me because the drug treatment program in prison "sobered me up" and made my way "of thinking change" and that I was "much more mature" and "serious in terms of planning for the future."⁵¹ Finally, my U.S. probation officer testified that a sentence of twenty-four months was reasonable and that I was at a low risk of re-offending and also prepared a sentencing memo with further reasons supporting the twenty-four month sentence.⁵²

Based on this evidence, Judge Bennett again gave me a sentence of twenty-four months, based in large part on my post-sentencing rehabilitation.⁵³ The government again appealed, and the Eighth Circuit again reversed, holding that

49. See *Pepper*, 562 U.S. at 482 (beginning supervised release immediately after).

50. See *id.* at 482

[M]y life was basically headed to either where—I guess where I ended up, in prison, or death. Now I have some optimism about my life, about what I can do with my life. I'm glad that I got this chance to try again I guess you could say at a decent life . . . My life was going nowhere before, and I think that it's going somewhere now.

51. See *id.* at 482–83 (“[A]nd that as a consequence, he had reestablished a relationship with his son.”) (citations omitted).

52. See *id.* at 483 (noting also that *Pepper*'s substantial assistance to law enforcement was of great import).

53. See *id.* (“[C]oncluding that ‘it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send this defendant back to prison.’”).

post-sentencing rehabilitation was “an impermissible factor to consider in granting a downward variance.”⁵⁴ After my first appeal to the U.S. Supreme Court and another reversal of the Eighth Circuit, my second appeal to the U.S. Supreme Court resulted in the landmark holding that post-sentencing rehabilitation may, in appropriate cases like mine, support a downward variance from the federal sentencing guideline range.⁵⁵

On his final resentencing, Jason Pepper was sentenced to time served by another judge in our district after I stated on the record in my last resentencing of Mr. Pepper that my oath of office did not allow me to give a greater sentence than the twenty-four months.⁵⁶

H. Willie Hayes

I was a low level, non-violent addict meth dealer sentenced by Judge Bennett. My lawyer pointed out in a sentencing memorandum that the meth guidelines had increased from their original range of 46 to 57 months—had I been sentenced back in 1987 when the guidelines were first promulgated—to 168 to 210 months, a staggering 360 percent increase.⁵⁷ My lawyer argued that the drug guidelines should be given less deference than other

54. See *id.* (affirming the downward departure for the defendant’s substantial assistance but rejecting the additional downward departure for his post-sentencing rehabilitation).

55. Cf. *id.* at 504 (highlighting U.S. Supreme Court precedent that allowed for increases in sentencing based on the offenders conduct immediately following his or her original sentencing).

56. See THOMAS W. HUTCHINSON, SIGMUND G. POPKO, DEBORAH YOUNG, MICHAEL P. O’CONNOR & CELIA M. RUMANN, *FED. SENT’G L. & PRAC.*, § 11.9.3 n.22 (2020 ed.) (stating that Pepper’s time-served sentence on remand was reported in a legal blog from the Iowa Public Defender Office).

57. See *United States v. Hayes*, 948 F. Supp. 2d 1009, 1012 (N.D. Iowa 2013) (arguing that the Sentencing Commission strayed from its institutional role and drafted a particular guideline that failed to promote the sentencing goals of the Fair Sentencing Act).

*guidelines because they were not crafted based on empirical evidence or the institutional expertise of the United States Sentencing Commission.*⁵⁸ *After a lengthy discussion of the meth guideline, the judge noted the guideline was “deeply flawed” and that he had a strong policy disagreement with it.*⁵⁹ *He decided the remedy was to slash the meth guideline by one third in my case and all future meth cases.*⁶⁰

I wrote that the “Guidelines were intended to be evolutionary in nature, and policy disagreements provide a valuable function in the process of constantly improving them.”⁶¹ After lawyers seized on my *Hayes* decision and argued it even for high-level major drug sellers, including violent ones who were not addicts but sold drugs for greed, I limited it for the most part to low-level, non-violent drug addicts. These were the vast majority of drug offenders I sentenced.

I. Brandon Beiermann

*Perhaps I am near to last in this Article because my crime is often considered one of the most reprehensible by the public and the criminal justice system, both the folks who work in the Federal Bureau of Prisons, and other inmates. As Judge Bennett noted in his opinion, I was the first Eagle Scout he sentenced, and I had no prior criminal record.*⁶² *I was charged with and*

58. *See id.* (“Hayes asserts that the methamphetamine Guidelines fail to promote the goals of sentencing in 18 U.S.C. § 3553(a) because they have a strong potential to overstate the seriousness of a defendant’s record and risk of reoffending, resulting in unwarranted sentencing disparities.”).

59. *See id.* at 1031–33 (applying a three-step 8th Circuit methodology for recalculating sentencing ranges in light of conflicts with public policy).

60. *See id.* at 1031 (“[A]fter reducing the Guidelines range by one third to account for my policy disagreement, I will reserve the ability to adjust the figure upwards and downwards as I weigh the 18 U.S.C. § 3553(a) factors.”).

61. *Id.* at 1031.

62. *See United States v. Beiermann*, 599 F. Supp. 2d 1087, 1090 (N.D. Iowa 2009) (“This case raises the question of the merits of the advisory United States Sentencing Guideline for defendants convicted of child pornography offenses . . .”).

convicted of three counts of possessing, receiving, and sending on my computer to others images of child pornography.⁶³

I had graduated from high school and was happily married with two children. I had been sexually abused by a relative when I was six and seven years old. I was never involved in “hands-on” impermissibly touching a child or teenager. I lived in a small town and considered myself to be a loner. Judge Bennett insisted that before he could sentence me, he wanted an expert psychologist to evaluate me for purposes of testifying at trial, including a risk assessment of the likelihood of further sex crimes.⁶⁴

The expert psychologist testified in my contested sentencing hearing based on his own evaluation and a prior one that I had from Catholic Charities. The expert testified that I did not pose a serious risk of sexual violence but would benefit from participation in a sex offender treatment program.⁶⁵

My advisory federal sentencing guideline range was 210 to 262 months. As the judge wrote in his opinion, this guideline range substantially exceeded both the mandatory minimum of sixty months and, at the top of the range, exceeded even the statutory maximum, which would be illegal for a judge to impose.⁶⁶ The judge even pointed out that the maximum possible sentence on count 3, ten years’ incarceration, was irrationally and grossly exceeded by the guideline range of 210 to 262.⁶⁷ Of course, I could not be sentenced above a statutory maximum on

63. See *id.* at 1091 (charging for conduct that occurred between September of 2005 through January 11, 2006).

64. See *id.* at 1091–94 (disallowing the prosecutor from interviewing or even speaking with the psychologist prior to sentencing or calling the expert as a witness during the sentencing hearing).

65. See *id.* at 1094 (“[H]is understanding of his offense is limited and his social skills are such that he is likely to benefit from referral to such a program.”).

66. See *id.* at 1098 (violating 18 U.S.C. § 2252A(b)(1)–(2)).

67. See *id.* at 1097 (indicating that this range was calculated after accounting for aggravating and mitigating factors).

*any count. My statutory maximum on counts 1 and 2 was twenty years, somewhere in the middle of my sentencing range.*⁶⁸

*Judge Bennett joined an increasing cadre of federal sentencing judges who had strong policy disagreements with the harshness of the guidelines.*⁶⁹ *His opinion discusses the myriad of factors that judges should consider in cases like mine: whether the guideline is based on empirical research or evidence, the degree of deference to give this advisory guideline, the extensive reasons for the judge's categorical rejection on policy grounds of the guideline, the consideration of all the § 3553(a) sentencing factors as well as the parsimony clause of § 3553.*⁷⁰ *After factoring in all this information, Judge Bennett imposed a sentence of ninety months followed by ten years of supervised release with many restrictive conditions of supervised release.*⁷¹

Beiermann was one of the early child porn offenders I sentenced. Towards the end of my judicial career of populating the Federal Bureau of Prisons, I would have substantially reduced Beiermann to closer to, if not at, the sixty-month mandatory minimum but increased his term of supervised release. This would have reduced the harshness of his sentence yet given the criminal justice system many years to ensure Beirmann did not reoffend—and if he did, then treat him more harshly by invoking progressive discipline. Much empirical work needs to be done to verify if progressive discipline is truly evidence based and if there is a better approach to repeat offenders on supervised release.

68. *See id.* at 1098 (falling between the prescribed range of 17.5 years and 21.8 years).

69. *See id.* at 1100 (citing federal district courts in Illinois, Iowa, Kansas, Nebraska, Ohio, and Wisconsin).

70. *See id.* at 1097–117 (including the need to avoid sentencing disparities and to provide restitution to victims).

71. *See id.* at 1117 (basing the sentence on limited precedent and the avoidance of both unwanted sentencing disparities and inapplicable sentencing similarities).

J. Hector Rodriguez

I am Hector Rodriguez. In 2014, after serving forty-eight months in federal prison I ran into my sentencing judge, Judge Mark W. Bennett, at a local Walmart in Sioux City, Iowa, on a busy Saturday afternoon. When I saw him in an aisle, I ran up to him and asked if he was Judge Bennett. He said "Yes," and I introduced myself as a person he had sentenced and reached out my hand to shake his. He warmly shook my hand with both his hands and asked, "Hector, what did I sentence you for and for how long, and how long have you been out?" I responded: "You gave me forty-eight months for a drug conspiracy case, but the prosecutors had asked for 150 months. I have been out for four years and successfully completed my thirty-six months of supervised release without a problem." Judge Bennett congratulated me on my success. I told him,

It meant a lot to me when you came and visited me in federal prison to see how I was doing and actually sat next to me during the noon meal and asked all about my family. At the time I was shocked to see you. After you left, I knew I was not going to disappoint you when I got out. Judge Bennett, my wife and two daughters are in the aisle looking at pots and pans, would you wait here while I get them, I would love for them to meet you?

Judge Bennett said, "I would be honored to meet your family, Hector." He then met my family and gave my wife and daughters big hugs and told them how important their support for me was in my rehabilitation and my becoming a productive member of society. He also told them how "proud he was of me and that my family and I should hang our heads high because I had not only paid my debt to society but was now a very productive and important member of society." We all parted ways with tears of joy in our eyes. When Judge Bennett had sentenced me years earlier I was stunned when at the end of the sentencing, he came off the bench, walked over to where I had been sitting next to my defense counsel, and shook my hand. I was in leg and arm irons, so it was difficult but he did shake my hand. He said in a soft voice: "Hector, you are a good man, father, and

husband, who made some very bad choices. I hope you will take advantage of the educational and work skills classes in prison and become the productive member of society that your family and I hope you can be.” He then turned to walk back to his chambers. My defense lawyer told me that he forgot to tell me Judge Bennett usually does this. He wants to say something positive as the last person in the free world I would see for many years, my lawyer explained. It was something about the judge’s humanity I will never forget.

One of the most fulfilling parts of my federal judgeship, especially in a small town of 85,000 was the fact that I frequently ran into offenders I had sentenced and/or members of their families. They were most always extremely polite. Often, when I ran into family members of an offender who was still incarcerated, they had questions about the sentence, even if they had been at the sentencing. I greatly enjoyed the opportunity to arrange a meeting with them in my chambers or at a coffee house, donut shop, etc., to go over in detail the presentence report and my statement of reason for the sentence I gave. I answered all their questions, and they left with a much greater understanding of the harshness of federal sentencing when my hands were tied by the prior mandatory nature of the guidelines and the bone-crushing mandatory minimum sentences, even after the guidelines became advisory. As a public servant I viewed this as an important part of increasing public confidence in both the federal judiciary and the criminal justice system. If I sensed an interest, I also discussed with them actions they could take to help with criminal justice reform.

III. Conclusion

I have previously written that federal judges are *addicted* to lengthy incarceration.⁷² There are many reasons for this. That needs to change. If I were anointed King of Federal

72. See Bennett, *Addicted to Incarceration*, *supra* note 2, at 4 (resulting in overcrowded federal prisons).

Sentencing for a Day, my first act would be to slash the existing federal sentencing guideline ranges by fifty percent or some other percentage a Commission—made up of progressive judges and experts on penology—would suggest. I suggest a fifty percent reduction because no one disputes that the original U.S. Sentencing Commission, when reviewing 10,000 pre-sentence reports to calculate the U.S. Sentencing Guidelines, ignored all cases where offenders received probation, which accounted for nearly fifty percent of the sentences across all case types reviewed.⁷³

My second reform as king would be to abolish all mandatory minimums in drug cases and most other criminal cases. Federal judges know when an offender deserves a very long sentence, usually to protect the public from that offender.

Another recommendation I have is to strongly encourage federal judges to meet with offenders they have sentenced. Judge Stephen R. Bough from the Western District of Missouri has written an exceptionally powerful piece, *Getting to Know a Felon*.⁷⁴ Every federal judge and any academics or students interested in criminal justice reform should read Judge Bough's article. Truly getting proximate with offenders I had sentenced by visiting them in their prisons had more impact on my sentencing philosophy than all of the many thousands of Supreme Court, courts of appeals, and district court sentencing decisions and scholarly articles I have read.

Both the United States Sentencing Commission and Congress should have many sessions with both current and former federal offenders to brainstorm about criminal justice reforms.

Finally, both the United States Sentencing Commission and Congress should invite the leading criminal justice scholars and experts, especially those who have worked with exciting criminal justice reforms in the states and done empirical studies

73. See *id.* at 17–20 (stating that the Commission gave no reason for why it excluded probation sentences from its calculations).

74. See Stephen R. Bough, *Getting to Know a Felon*, 87 UMKC L. REV. 25, 26–29 (2018) (using vignettes to illuminate the benefits of federal judges' learning the stories of convicted felons).

to see what evidence-based practices the federal criminal justice system should adopt.

No article on federal sentencing reform should be published without thanking the incredibly talented and diligent U.S. probation officers who advise U.S. magistrate judges on pretrial release or detention, supervise defendants on pretrial release, draft amazingly thorough and comprehensive presentence reports for district judges, and supervise offenders on release after their prison terms expire. Federal probation officers are the true unsung heroes of the federal criminal justice system. My reform efforts would not have been possible without their many discussions with me about the fairness of federal sentencing.