

The Myth of the All-Powerful Federal Prosecutor at Sentencing

Adam M. Gershowitz

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE MYTH OF THE ALL-POWERFUL FEDERAL PROSECUTOR AT SENTENCING

ADAM M. GERSHOWITZ[†]

INTRODUCTION

Prosecutors are widely considered to be the most powerful actors in the criminal justice system.¹ And federal prosecutors are particularly feared.² While some recent scholarship casts doubt on the power of prosecutors,³ the prevailing wisdom is that prosecutors run the show, with judges falling in line and doing as prosecutors recommend.⁴

This Article does not challenge the proposition that prosecutors are indeed quite powerful, particularly with respect to sentencing. There are many structural advantages built into the system that combine to give prosecutors enormous influence over sentences. For example, prosecutors have considerable power to

[†] Vice Dean and Hugh & Nolie Haynes Professor of Law, William & Mary Law School. Thanks to Karly Newcomb and Gabby Vance for excellent research assistance.

¹ Many scholars have made this assertion. For a collection of the boldest assertions of the power of prosecutors, see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176–78, 187–91 (2019). For fair measure, I should acknowledge that I am among those who have made this assertion repeatedly. See Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?* 51 WAKE FOREST L. REV. 677, 677–78 (2016) (“No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009) (“Prosecutors are the most powerful actors in the American criminal justice system.”); Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 84 (2008) (“[T]here are steps that can be taken to encourage the system’s most powerful actors—prosecutors—to exercise their authority in a manner likely to decrease incarceration.”).

² See ROBERT H. JACKSON, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940) (“[A]ssembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

³ My colleague Jeff Bellin is the leading voice questioning the scope of prosecutorial power. He does not question that prosecutors are powerful, but instead persuasively argues that the amount of power ascribed to them is over-stated. See Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1204, 1213 (2020); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 175–76, 182–85 (2019); Jeffrey Bellin *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (disputing that prosecutors are the root cause of prison growth).

⁴ See *infra* note 10 and accompanying text.

bring a slew of charges that will increase the prospects of a large sentence.⁵ Prosecutors also hold the cards in determining whether defendants should receive the benefit of substantial assistance motions for their cooperation.⁶ The wide swath of aggravating factors in criminal statutes and the Federal Sentencing Guidelines also gives prosecutors considerable bargaining power over sentencing in plea bargaining.⁷ Moreover, prosecutors have a strong lobbying presence to push legislatures to enact tougher sentencing regimes.⁸ All told, there are considerable structural advantages that prosecutors hold in influencing the ultimate sentence a defendant will face. This Article therefore does not question that prosecutors hold a lot of power with respect to sentencing.

What this Article does question however is the supposedly significant persuasive power that federal prosecutors have to influence judges at sentencing hearings. After criminal charges have been filed, after the plea bargains—or trials—have concluded, and after the guidelines ranges have been calculated, we eventually reach the final moment in the courtroom. Prosecutors stand in front of the judge and argue for a specific sentence that should be imposed on a defendant. Often the sentence recommended by the prosecution varies considerably from the position advocated by the defense attorney; prosecutors sometimes base their arguments on drug quantities that are higher than were computed in the guidelines calculations, or they argue for other sentencing enhancements to apply.⁹ Prosecutors sometimes argue strenuously against mitigating factors raised by the defense, such as poor health, family problems, or advanced age. In short, the final event in a criminal case is a good old-

⁵ See, e.g., Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 UNIV. PA. L. REV. 79, 86 (2005); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 11 (2012) (“The prosecutor’s charging decisions control [the sentencing] range to begin with.”); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–56 (2006) (explaining how sentencing ranges and a large number of different offenses empowers prosecutors with respect to plea bargaining and sentencing).

⁶ See, e.g., Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 102 (2018).

⁷ See Frank M. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336, 1338–39 (2005).

⁸ See Rachel A. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005).

⁹ See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 329 (2009) (“[D]ozens of sentencing enhancements are scattered throughout the federal criminal law . . .”).

fashioned, silver-tongued lawyering battle between the prosecutor and the defense attorney.

Conventional wisdom has it that in these final moments, when the defendant is about to learn his real fate, prosecutors have considerable influence over the judges they appear before.¹⁰ We typically assume that federal prosecutors, cloaked with the prestige of representing the people of the United States of America, are more likely to persuade the judge than the defense attorneys who are pleading for mercy on behalf of a recently convicted defendant.

That conventional wisdom about prosecutorial persuasiveness at sentencing appears to be based more on lore than data. To date, there has been no study analyzing how often judges actually follow the sentencing recommendations of prosecutors. This Article begins to fill that gap and offers reason to question the longstanding assumption that federal prosecutors are influential at sentencing hearings.

Relying on a dataset I assembled of 130 doctors prosecuted for illegal opioid distribution between 2015 and 2019, this Article shows that judges *rejected* federal prosecutors' sentencing recommendations over two-thirds of the time. Put differently, prosecutors lost much more often than they prevailed at

¹⁰ See, e.g., Russell M. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 925 (2016) ("Prosecutors also have the power to influence sentences, either directly through their charging decisions or through sentencing 'recommendations' to judges. Because judges usually defer to these recommendations, prosecutors effectively command the power to set sentences even in jurisdictions that formally allow judges wide sentencing discretion."); Inga Ivsan, *To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine our Adversarial System of Justice*, 39 N.C. CENT. L. REV. 134, 145 (2017) ("Judges openly defer to prosecutors, rarely challenging plea agreements and frequently following prosecutors' sentencing recommendations."); Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1324 (1999) ("First, judges usually follow the nonbinding recommendation in type B agreements."); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1065 (1976) (noting that "[s]tudents of the criminal courts of many American jurisdictions have noted that judges almost automatically ratify prosecutorial charge reductions and sentence recommendations"); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 443 (1971) ("While the assistant prosecutor's sentence recommendation is not binding, Philadelphia judges generally adhere to it."); Ani Ogenesian, Note, *The Confrontation Clause: Employing The Greatest Legal Engine Ever Invented for the Discovery of Truth to Promote Justice in Criminal Courts*, 51 LOY. L.A. L. REV. 681, 693 (2018) ("In addition, prosecutors may recommend lenient and reduced sentencing to a trial judge. Judges are highly deferential to prosecutors' recommendations and rely heavily upon 'the government's substantial assistance motion' and 'evaluation of the assistance received' in making sentencing determinations.").

sentencing. And judges often rejected the prosecutors' sentencing positions by dramatic margins. In 23% of cases, judges imposed a sentence that was half or even less than half of what prosecutors recommended. In 45% of cases, judges imposed a sentence that was at least one-third lower than what prosecutors requested. In short, prosecutors lost most of the time at sentencing, and they often lost big.

Although this sentencing data involves a unique type of defendant in a particular category of cases, it should nevertheless give us pause about the conventional narrative that prosecutors are all-powerful. Prosecutors, quite simply, may not wield as much power in the courtroom as we have thought.

Part I of this Article describes the cases of doctors who were convicted and sentenced for illegally distributing opioids. Part I explains how I located a large sample of federal cases involving drug-dealing doctors and where I procured the prosecutors' sentencing recommendations that are usually hidden from public view. Part II reports the findings that prosecutors often lose at sentencing. In particular, Part II demonstrates that whether prosecutors made sentencing recommendations within, below, or above the Federal Sentencing Guidelines, judges consistently rejected those recommendations and imposed shorter prison terms than prosecutors sought. Part II also reports the surprising finding that prosecutors did not seek to penalize defendants who went to trial by recommending sentences at the high-end of the guidelines range. Finally, Part III considers the extent to which we can extrapolate larger conclusions from a unique dataset of quasi-white-collar offenders.¹¹

¹¹ Defining the term "white-collar crime" is a surprisingly difficult and longstanding problem. See, e.g., Lucian E. Dervan & Ellen S. Podgor, "White-Collar Crime:" *Still Hazy After All These Years*, 50 GA. L. REV. 709, 714–15 (2016) (explaining the difficulty of defining the term and noting that the "failure to have a clear definition . . . can also skew sentencing statistics. This is particularly true when statutory conduct is lumped together without a recognition that different forms of criminality may be prosecuted under generic statutes.").

I. IDENTIFYING THE DOCTORS WHO FUELED THE OPIOID CRISIS AND THE PROSECUTORS' SENTENCING RECOMMENDATIONS

A. *Drug Dealers in White Coats*

Some doctors contributed to the opioid crisis by inadvertently over-prescribing oxycontin and similar drugs.¹² This Article does not focus on the doctors who acted in good faith and were tricked into prescribing narcotics to drug-seeking patients. Instead, this Article considers the doctors who engaged in criminal activity by selling opioids for cash.¹³ These doctors acted just like street drug dealers by selling drugs rather than prescribing them for medical needs. While doctors are authorized to prescribe controlled substances, they are not permitted to do so without a legitimate medical purpose and outside the standard of practice.¹⁴ Doctors who see patients for only a moment in order to sell pills without conducting physical examinations or diagnostic tests are engaged in drug dealing in violation of federal and state law.¹⁵

In some cases, the doctors' misconduct was extremely obvious—seeing up to 100 patients a day, charging upwards of \$300 in cash for a prescription, or engaging in conspiracies to import fake patients and write them unnecessary prescriptions.¹⁶ Some doctors prescribed millions of illegitimate pills.¹⁷ Other doctors engaged in less egregious criminal activity by running legitimate medical practices, but selling opioids on the side to earn extra cash or to feed their own addictions.¹⁸ In some cases, the doctors—including cardiologists, radiologists, and even a

¹² See Adam M. Gershowitz, *The Opioid Doctors: Is Losing Your License a Sufficient Penalty for Dealing Drugs*, 72 HASTINGS L.J. 871, 886–87 [hereinafter Gershowitz, *The Opioid Doctors*].

¹³ See Adam M. Gershowitz, *Punishing Pill Mill Doctors: Inconsistent Sentences in the Opioid Epidemic*, 54 U.C. DAVIS L. REV. 1053, 1055–56 (2020) [hereinafter Gershowitz, *Punishing Pill Mill Doctors*].

¹⁴ See 21 C.F.R. § 1306.04(a) (explaining that “[a]n order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription” and the person issuing it “shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances”).

¹⁵ See *id.*

¹⁶ See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1065, 1078.

¹⁷ See *id.* at 1067–68, 1074–75, 1078, 1080, 1083, 1086, 1093–95.

¹⁸ See, e.g., Press Release, U.S. Dep’t of Justice, U.S. Atty’s Office E.D. Cal., Physician Practicing in Grass Valley and Yuba City Sentenced to Over 4 Years in Prison for Illegal Prescription Practice (Feb. 22, 2018), <https://www.justice.gov/usao-edca/pr/physician-practicing-grass-valley-and-yuba-city-sentenced-over-4-years-prison-illegal> [https://perma.cc/X4VM-XTLH].

pathologist working as a medical examiner—had no business prescribing opioids at all, no less large quantities of pills.¹⁹

Because it takes considerable resources to identify these doctors and build a successful case against them, drug-dealing doctors are typically prosecuted by U.S. Attorney's Offices with greater resources rather than state prosecutors who are already stretched very thin.²⁰ In recent years, the Department of Justice has ramped up the number of prosecutions against doctors.²¹ Nevertheless, given the scope of illegal opioid prescribing, the number of prosecutions is still relatively modest.²² The reason for this is that doctor prosecutions are resource-intensive—often requiring undercover DEA sting operations, reviewing tens of thousands of pages of medical records, and hiring expert physicians to testify that doctors were nefariously selling drugs rather than being duped by clever drug-seeking patients.²³ Given the enormous investment of time and resources to prosecute drug-dealing doctors, when a doctor is convicted and sentenced, the U.S. Attorney's Office typically takes a victory lap and issues a press release describing the doctor's misconduct and the sentence imposed.²⁴

¹⁹ See, e.g., Torsten Ove, *Ex-Doctor Gets Prison for Opioid Diversion Scheme*, PITTSBURGH POST-GAZETTE, May 10, 2019 (radiologist); Press Release, U.S. Dep't of Justice, U.S. Atty's Office D. Nev., Nevada Cardiologist Sentenced to 3 Years in Prison for Unlawful Distribution of Opioids (May 8, 2019), <https://www.justice.gov/usao-nv/pr/nevada-cardiologist-sentenced-three-years-prison-unlawful-distribution-opioids#:~:text=Patel%2C%20a%20northern%20Nevada%20cardiologist,United%20States%20Attorney%20Nicholas%20A> [<https://perma.cc/MA5U-TBYB>] (cardiologist); Press Release, U.S. Dep't of Justice, U.S. Atty's Office N.D. Ga., Former Georgia Medical Examiner Sentenced for Opioid Conspiracy (Aug. 30, 2018), <https://www.justice.gov/usao-ndga/pr/former-georgia-medical-examiner-sentenced-opioid-conspiracy> [<https://perma.cc/TZS8-96MQ>] (pathologist).

²⁰ See Gershowitz, *The Opioid Doctors*, *supra* note 12, at 913–14.

²¹ See Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis, America's Addiction to Punitive Prohibition and the Promise of Free Heroin*, 80 OHIO ST. L.J. 788, 808–09 (2019) (describing federal efforts to cut opioid prescriptions through increased prosecutions).

²² See Gershowitz, *The Opioid Doctors*, *supra* note 12, at 875, 886–894.

²³ See *id.* at 917.

²⁴ The Appendix of this article includes citations to nearly 100 press releases from U.S. Attorney's offices announcing the final sentences imposed on doctors convicted of illegal distribution of opioids. See *infra* endnotes i–cxxx.

B. Collecting Data on Doctor Prosecutions and Sentencing Recommendations

Relying on press releases from U.S. Attorney's Offices and news reports in Westlaw and Lexis news databases, I identified 169 doctors who were convicted of illegally prescribing or conspiring to prescribe opioids under the federal drug distribution statutes between 2015 and 2019.²⁵ I then reviewed the docket and filings in each case in an effort to locate the Government's sentencing recommendations. I reviewed plea agreements, sentencing memoranda filed by the federal prosecutors and the defense attorneys, and transcripts of sentencing hearings. These filings turned up the Government's sentencing recommendations for most of the cases.

Unfortunately, prosecutors did not file sentencing memoranda in all cases. In some cases, prosecutors did file sentencing memoranda, but those documents were sealed and not publicly accessible.²⁶ While the prosecution's sentencing position almost certainly would have been revealed at the sentencing hearing, transcripts do not exist for some sentencing proceedings. In pleading guilty, defendants typically waive their appellate

²⁵ I ran the following search in the Westlaw news database: "doctor or dr. and opioid or oxy! or vicodin or hydrocodone or fentanyl and (sentence /30 month! Or year) & DA(aft 12-30-2014 & bef 01-01-2020)." I then had two research assistants conduct the same search in the Lexis database in case additional documents could be found there. These searches returned more than 5,000 documents, which I then reviewed one-at-a-time. During my review, I excluded doctors who were convicted solely of possessing drugs for personal use. I also excluded doctors who were convicted only of health care fraud, Medicaid fraud, or other related offenses. I focused only on doctors who were convicted in federal court of illegally distributing drugs or conspiring to do so. Finally, in reviewing the federal drug distribution cases, I excluded doctors who were convicted of drug distribution that caused the death of the victim. Those cases carry a mandatory minimum sentence of twenty years which dramatically reduced the sentencing range and thus the power of prosecutors to recommend a particular sentence. *See* 21 U.S.C. § 841(b)(1)(A)(viii). After applying this methodology, I was left with a sample of 169 cases. I am certain that this number is under-inclusive and that there are likely a number of other doctors who were federally prosecuted for opioid distribution between 2015 and 2019. I may have missed such cases because there were no news reports or press releases about the prosecutions, perhaps because they occurred in small towns without a major news outlet. While U.S. Attorneys' Offices commonly write press releases when a doctor is convicted or sentenced for dealing opioids, it is also possible that short-staffed offices may have skipped writing press releases in some cases. While I am certain that the full universe of cases is larger than my sample, I have no reason to believe my sample of 169 cases is not representative.

²⁶ In all likelihood, some sentencing memoranda were sealed in order to shield victims who may have overdosed, as well as to hide the identity of cooperating witnesses who prosecutors want to keep confidential.

rights,²⁷ and therefore do not spend the money to buy an expensive transcript of the sentencing proceeding.

In an attempt to fill in the gaps in my data, I contacted the prosecutors and defense attorneys who litigated the cases. While a number of lawyers provided missing information about their cases, some did not reply. In the end, I had to exclude thirty cases for which I could not acquire any information about the prosecutor's sentencing position.

In reviewing the court filings, I was also forced to exclude nine additional cases. First, I excluded three cases in which the federal prosecutors did not make a specific numerical sentencing recommendation.²⁸ Second, I also excluded three cases in which prosecutors' sentencing positions were too open-ended to assess whether the judges were following the prosecutors' recommendations.²⁹ For instance, prosecutors asked for a "significant sentence of incarceration" for Dr. William Bacon and his guidelines range was up to 240 months, but the judge imposed seventy-two months.³⁰ While my instinct was that seventy-two months was not what the prosecutor meant by "significant

²⁷ Federal circuit courts have consistently upheld appellate waivers in plea agreements. See Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597, 629 (2002). Indeed, there is evidence that defendants sometimes trade their appellate rights for sentencing concessions from the prosecutor. See Nancy J. King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 232–36 (2005).

²⁸ This included the cases of Drs. Luis Collazo, Keyhosrow Parsia, and Clarence Verdell. See Government's Sentencing Memorandum at 7–8, *United States v. Collazo* (E.D. Mich. May 29, 2015) (No. 2:12-cr-20595-NGE-MKM); Transcript of Sentence at 31–33, *United States v. Verdell* (E.D. Pa. Feb. 1, 2018) (No. 2:16-cr-00340-LS); Email from Robert Livermore, Ass't U.S. Att'y, to author (Oct. 15, 2019, 12:19 PM EST) (on file with author) (noting that he did not make a sentencing recommendation in the Parsia case). I did, however, include cases in which prosecutors informed the court that they had "no objection to the guidelines calculation" as I believed that the court would interpret that language as an endorsement of a sentence within the guidelines range. In the interest of clarity, when prosecutors used that language, I included it in the tables below.

²⁹ About one-third of all federal U.S. Attorney's Offices have a policy of not recommending specific sentences for cooperating defendants. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518 (2004).

³⁰ See Sentencing Transcript at 18, 25, *United States v. Bacon*, No. 7:16-cr-00002-HL-TQL (M.D. Ga. Dec. 5, 2018); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., M.D. Ga., Sentences Handed Down for Illegal Pill Mills Operating in Valdosta and Columbus (Dec. 7, 2018), <https://www.justice.gov/usao-mdga/pr/sentences-handed-down-illegal-pill-mills-operating-valdosta-and-columbus> [<https://perma.cc/9LFD-EGQ9>].

sentence,” that assessment would be only a guess.³¹ Accordingly, I excluded Dr. Bacon’s case.

Finally, I also excluded three cases in which prosecutors made a 5K1.1 motion to reduce a sentence for substantial assistance³² but did not specify how much of a departure would be appropriate. For example, in the case of Dr. Jerome Sherard, prosecutors agreed with the pre-sentence report that the guidelines range was 210 to 262 months. Prosecutors sought an unspecified decrease for cooperation under 5K1.1 and the judge imposed sixty months.³³ Because I could not determine whether the dramatic difference between the guidelines range and the ultimate sentence is what the prosecutor was requesting, I did not include this case or others that were similarly ambiguous.³⁴

In sum, I excluded thirty cases for lack of information and nine additional cases because of the impossibility of properly coding them. Thus, after starting with 169 doctors who were

³¹ Similarly, in the case of Dr. Kevin Lowe, prosecutors requested a “substantial sentence” but did not include a specific number. The guidelines range called for a sentence of up to 240 months and the judge imposed 144 months. *See* Press Release, U.S. Dep’t of Just., U.S. Att’y’s Off., S.D.N.Y., Doctor and Owner of Bronx Clinics Involved in Illegal Distribution of More than 5 Million Oxycodone Pills Is Sentenced to 12 Years in Prison (Jan. 11, 2016), <https://www.justice.gov/usao-sdny/pr/doctor-and-owner-bronx-clinics-involved-illegal-distribution-more-five-million> [<https://perma.cc/X36L-ZKKL>]; *United States v. Lowe*, 1: 14-cr-00055-LGS (S.D.N.Y. Jan. 7, 2016), at 15, 21. It was impossible to tell however whether the 144 months was an endorsement or a rejection of the prosecutor’s request for a “substantial sentence.” The third case in this category was Dr. Moshe Mirilashvili. The prosecution maintained that the guidelines calculation was 292-365 months, and it requested a “substantial sentence.” The court imposed 160 months. *See* Press Release, U.S. Dep’t of Just., U.S. Att’y’s Off., S.D.N.Y., New York Doctor Sentenced to More Than 13 Years in Prison for Unlawfully Dispensing Nearly 1 Million Oxycodone Pills (Sept. 28, 2016), <https://www.justice.gov/usao-sdny/pr/new-york-doctor-sentenced-more-13-years-prison-unlawfully-dispensing-nearly-1-million> [<https://perma.cc/HH35-7VM4>]; Sentencing Memorandum of the United States at 11, *United States v. Mirilashvili*, No. 1:14-cr-00810-CM (S.D.N.Y. Sept. 21, 2016).

³² *See* U.S.S.G. 5K1.1 (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

³³ *See* Minute Entry for Sentencing, *United States v. Sherard*, No. 1:12-cr-00104-004 (E.D. Tn. Apr. 30, 2015); *United States’ Response to Defendant’s Request for a Downward Variance* at 2, 20, *United States v. Sherard*, No. 1:12-cr-00104-004 (E.D. Tn. Apr. 23, 2015).

³⁴ The cases of Dr. William Belfar and Dr. Johnny DiBlasi fall into this category. *See* Government’s Sentencing Letter at 2, *United States v. Belfar*, No. 13-cr-807-ALC (S.D.N.Y. Dec. 6, 2018); *See* Email from Matthew Josephson, Ass’t U.S. Att’y, S. Dist. of Ga., to author (Oct. 21, 2019, 9:24 AM EST) (on file with author).

sentenced for opioid dealing and subtracting 39 cases, I was left with a sample of 130 cases for this study.³⁵

II. THE DOCTORS, THE PROSECUTORS' RECOMMENDATIONS, AND THE ACTUAL SENTENCES

This study explores the prosecutors' success, at the moment of sentencing, in convincing judges to impose their recommended sentence. To explore the cases in a manageable way I begin by breaking them into two categories: (A) cases in which judges followed the prosecutors' sentencing recommendations; and (B) cases in which judges rejected the prosecutors' sentencing recommendations. Thereafter, I explore other variables: (C) whether prosecutors were unsuccessful because their recommendations were tethered closely to guidelines calculations that judges thought were too high; (D) whether judges rejected prosecutors' recommendations because the prosecutors were trying to impose an above guidelines sentence or high-end guidelines sentence on defendants who went to trial rather than plead guilty; and (E) whether judges were more inclined to follow prosecutors' recommendations in later years when the opioid crisis was better known.

I begin with the modest number of cases in which judges did in fact follow the prosecutors' recommendations.

A. *Judges Followed the Prosecutors' Sentencing Recommendations in Only 1/3 of Cases*

Of the 130 cases where doctors were sentenced for illegally distributing opioids, judges followed prosecutors' sentencing recommendations in only forty-two cases.³⁶ This amounts to

³⁵ For each of the 130 cases, I was able to ascertain the federal district where it was prosecuted, the year of prosecution, whether the defendant plead guilty or went to trial, the government's sentencing range, and the ultimate sentence. For 117 of the 130 cases, I was also able to determine the guidelines range. In the other thirteen cases, the guidelines range was inaccessible. While the probation office prepares a presentence report for each case that specifies a guidelines range, unfortunately, the presentence report is sealed and available only to the parties, not the public. *See, e.g.*, *United States v. Munir*, 953 F. Supp.2d 470, 476 (E.D.N.Y. 2013) ("Presentence reports operate outside the realm of the First Amendment's protections and are not considered public documents under the common law."). Thus, if the guidelines range is not stated in other documents—such as the transcript of the sentencing hearing—it is not available.

³⁶ Even this number is somewhat inflated though because in seven of the forty-two cases the prosecutor's sentencing recommendation was a negotiated part of the plea agreement. Thus, in seven of the forty-four cases, judges were really following

judges following prosecutors' recommendations in only about one-third of the cases.

The extent of the doctors' misconduct in these forty-two cases ran the gamut in terms of seriousness. For instance, Dr. Julio Gabriel Diaz, who was known as the "[c]andyman," was running a pill mill.³⁷ In just one year, he wrote 1.7 million prescriptions for painkillers, with patients paying cash and receiving quantities and combinations of drugs that other doctors who testified said were unheard of.³⁸ The judge imposed a 327 month, within guidelines, sentence.³⁹ On the opposite extreme, prosecutors successfully sought sentences for defendants who were writing small numbers of illegal prescriptions⁴⁰ or doctors who appeared to be improperly prescribing drugs to get the money necessary to feed their own addictions.⁴¹ In these types of cases, prosecutors sought only a few months or years in prison and convinced judges that those sentences were appropriate.

When prosecutors were successful in their sentencing recommendations, those recommendations were typically for a sentence within the guidelines range. I was able to identify the guidelines range for thirty-three of the forty-two cases. In those thirty-three cases, prosecutors recommended a guidelines sentence in nineteen cases, and a below guidelines sentence in thirteen cases. In only one instance did prosecutors advocate for a sentence above the guidelines range and convince the judge to impose that higher sentence.

Table 1 shows the cases in which prosecutors were successful in persuading judges and the underlying data in those cases,

the plea deal agreed to by both parties, not a sentencing recommendation of the prosecutor that conflicted with the defense position.

³⁷ See Press Release, U.S. Dep't of Just., U.S. Att'y's Office, C.D. Cal., Santa Barbara Doctor Sentenced to Over 27 Years in Federal Prison for Writing Huge Quantities of Dangerous Narcotics (Dec. 7, 2015), <https://www.justice.gov/usao-cdca/pr/santa-barbara-doctor-sentenced-over-27-years-federal-prison-writing-prescriptions-huge> [https://perma.cc/Q7ED-4XGM].

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See Press Release, U.S. Dep't of Just., U.S. Att'y's Office, W.D. Va., Norton Doctor Sentenced on Federal Drug Charges (Dec. 15, 2017), <https://www.justice.gov/usao-wdva/pr/norton-doctor-sentenced-federal-drug-charge> (discussing Dr. Felix Shepard who plead guilty to writing 47 illegal prescriptions).

⁴¹ See, e.g., *Cave City Dentist Sentenced in Federal Court*, WBKO (Mar. 20, 2017), <https://www.wbko.com/content/news/Cave-City-dentist-sentenced-in-federal-court-416645193.html> [https://perma.cc/DE2G-6HAZ] (discussing case of dentist, Christopher Steward).

including the guidelines range, the government's sentencing recommendation, and the ultimate sentence.

Table 1: Cases Where the Judge *Followed* the Prosecutor's Recommendation

Doctor	Trial or Plea	Year	Guidelines Range	Government's Recommendation	Judge's Sentence
Arman Abovyan ⁱ	Trial	2019	135-168 months	135-168 months	135 months
Michael Alson Smith ⁱⁱ	Plea	2019	N/A	36 months	36 months
Nevorn Askari ⁱⁱⁱ	Plea	2017	210-240 months	66 months	66 months
Muhammad Wasim Ali ^{iv}	Plea	2016	N/A	30 months (pursuant to plea deal)	30 months
Shelinder Aggarwal ^v	Plea	2017	N/A	180 months (pursuant to plea deal)	180 months
Sardar Ashrafkhan ^{vi}	Trial	2017	Life	At least 229 months	276 months
Rafael Beier ^{vii}	Trial	2017	188-235 months	188-235 months	192 months
Wayne Celestine ^{viii}	Plea	2019	70-87 months	84 months	84 months
Steven Joseph Collins ^{ix}	Plea	2015	108-135 months	120 months	120 months
Albert R. Cowie ^x	Plea	2017	24-30 months	24-30 months	24 months
Howard Greg Diamond ^{xi}	Plea	2019	N/A	240 months (pursuant to plea deal)	240 months
Julio Gabriel Diaz ^{xii}	Trial	2015	262-327 months	262-327 months	327 months
Sundiata El-Amin ^{xiii}	Trial	2018	188-235 months	151 months	151 months
Frederick Floyd ^{xiv}	Plea	2018	N/A	120 months	120 months
Fred Gilliard ^{xv}	Plea	2019	N/A	54 months (pursuant to plea agreement)	54 months
Jaime Guerrero ^{xvi}	Plea	2016	N/A	100 months	100 months
Tod Hagins ^{xvii}	Plea	2018	57-71	57-71 months	57 months

			months		
Stanley Heatwole ^{xxviii}	Plea	2017	0-6 months	0-6 months	Probation
Steven Hefter ^{xxix}	Plea	2019	135-168 months	87 months	87 months
Eric Jacobson ^{xx}	Plea	2016	135-168 months	84-108 months (negotiated agreement with defense)	96 months
Pawankumar Jain ^{xxi}	Plea	2019	135-168 months	108 months	108 months
Richard Johns ^{xxii}	Plea	2017	108-135 months	108-135 months	108 months
James Brian Joyner ^{xxiii}		2016	70-87 months	70-87 months	70 months
Gurcharan Singh Kanwal ^{xxiv}	Plea	2018	0-13 months	High End of 0-13 months	Probation
John Katsetos ^{xxv}	Plea	2015	168-210 months	84 months (pursuant to plea agreement)	84 months
Michael Kostenko ^{xxvi}	Plea	2017	235-240 months	235-240 months	240 months
Nibedita Mohanty ^{xxvii}	Plea	2015	108-135 months	30-84 months	48 months
Adelfo Pamatmat ^{xxviii}	Trial	2017	292-360 months	At least 180 months	228 months
Devendra I. Patel ^{xxix}	Plea	2019	30-37 months	37 months	37 months
Robert Tinoco Perez ^{xxx}	Plea	2019	57-71 months	57 months	57 months
Shriharsh Laxman Pole ^{xxxi}	Plea	2019	135-168 months	87 months	87 months
Robert Rand ^{xxxii}	Plea	2017	78-97 months	120 months	120 months
Richard Rydze ^{xxxiii}	Trial	2018	N/A	120 months	120 months
Clarence Scranage ^{xxxiv}	Trial	2017	360 months to Life	360 months	360 months
Felix Shepard, Jr. ^{xxxv}	Plea	2017	46 months	0-36 months	6 months

Sanjay Sinha ^{xxxvi}	Plea	2015	63-78 months, but 60-month statutory maximum	Lower 50% of Guidelines Range, but moot b/c of statutory maximum	60 months
Christopher Steward ^{xxxvii}	Plea	2017	18-30 months	18-30 months	18 months
Rassan M. Tarabein ^{xxxviii}	Plea	2018	135-168 months	No more than 60 months (under plea deal)	60 months
Tad W. Taylor ^{xxxix}	Trial	2019	N/A	240 months	240 months
Margaret Temponeras ^{xl}	Plea	2019	36-84 months (pursuant to binding plea agreement)	84 months	84 months
Donald Willems ^{xli}	Plea	2017	108-135 months	120 months	120 months
Jerry Yee ^{xlii}	Plea	2015	46-57 months	Below Guidelines	12 months

Total Cases: 42

B. Judges Rejected Prosecutors' Recommendations in Two-Thirds of Cases

The heart of this Article is the cases in which judges rejected prosecutors' sentencing recommendations. And there are a lot of those cases. In 88 of 130 cases—a striking 68% of cases—judges declined to follow the prosecutor's proposed sentence.

Even more striking than the number of rejections is the extent to which the judges differed from the prosecutor's recommendations. In twenty-six of the eighty-eight cases (30%), judges sentenced defendants to half or even less than half of what prosecutors recommended. In another twenty-seven cases, judges imposed sentences that were 30% to 49% less than what prosecutors recommended.

Indeed, prosecutors even lost big when judges imposed *more* prison time than the prosecutors recommended. Judges sentenced doctors to more prison time than prosecutors recommended in six cases. And in four of those six cases, the difference between the

prosecutor's recommendation and the judge's sentence was 50% or more.

As Table 2 documents below, when prosecutors' recommendations at sentencing were rejected, the variations were notably large. In fifty-eight of the eighty-eight cases (66%), there was a 30% or greater difference between the prosecutors' recommendation and the actual sentence. Put differently, in almost two-thirds of the cases where prosecutors lost at sentencing, the margin of the loss was 30% or greater.

Finally, as Table 2 also indicates, prosecutors lost in very serious cases as well as in cases involving relatively small quantities of drugs. Some of the doctors were running egregious pill mills and prescribed millions of pills in exchange for cash. Some doctors even conspired to import fake patients who would fill prescriptions and turn them over to street dealers who would in turn pay the doctors. These pill mill cases typically carried huge guidelines ranges. Prosecutors lost at sentencing in these cases. But they also lost in cases in which the doctors' behavior was much less egregious.

Table 2: Cases Where the Judge *Did Not Follow* the Prosecutor's Recommendation

Doctor	Trial or Plea	Year	Guideline Range	Government's Recommendation	Judge's Sentence	Difference from Govt Rec. ⁴²
Venkat Aachi <small>xliii</small>	Plea	2019	30-37 months	30 months	24 months	-20%
Troy Adolfson <small>xliiv</small>	Plea	2019	N/A	Probation	18 months	+100%
Omar Almusa	Plea	2019	37-46 months	37-46 months	24 months	-35%

⁴² When the Government recommended a sentence within the guidelines range (rather than a specific number of months), I utilized the bottom of the guidelines range when the judge sentenced below, and the top of the guidelines range in the handful of cases where the judge exceeded the range. For cases in which the Government recommended Life, I converted this to fifty years (600 months) in order to be able to compute a percentage difference between the government's recommendation and the judge's sentence. Similarly, I converted probation and home confinement to zero months so that I could compute a percentage difference between the government's recommendation and the judge's sentence.

xlvi						
Hussein Awada ^{xlvi}	Plea	2015	135-168 months	108-134 months	84 months	-22%
Gavin Awerbuch ^{xlvii}	Plea	2017	70-87 months	52 months	32 months	-38%
Sathish Babu ^{xlviii}	Plea	2015	46-57 months	57-71 months	18 months	-68%
Dwight L. Bailey ^{xlix}	Trial	2019	151-188 months	240 months	151 months	-37%
Alan Barnett ^l	Plea	2017	10-16 months	No objection to 10-16 month range	Probation	-100%
Matthew Bennet ^{li}	Plea	2015	46-57 months	46-57 months	36 months	-22%
Noel Blackman ^{lii}	Plea	2017	57-71 months	71 months	50 months	-30%
Joseph Burton ^{liii}	Plea	2018	168-210 months	168 months	96 months	-43%
Mark Buzzard ^{liv}	Plea	2018	87-108 months	108 months	72 months	-33%
Nicholas Capos Jr. ^{lv}	Plea	2018	70-87 months	Low end of the guidelines range	52 months	-26%
Daniel Cham ^{lvi}	Plea	2018	151-188 months	168-210 months	160 months	-5%
James Chaney ^{lvii}	Trial	2017	Life	Life	180 months	-70%
Zongli Chang ^{lviii}	Plea	2019	108-135 months	120 months	135 months	+13%

James Earl Chapman ^{lix}	Trial	2015	292-365 months (subject to 240 month statutory maximum)	240 months	120 months	-50%
Michael Roger Chiarotino ^{lx}	Plea	2016	63-78 months	78 months	36 months	-54%
John Couch ^{lxi}	Trial	2017	360 months to Life	420 months	240 months	-43%
Gazelle Craig ^{lxii}	Trial	2018	860 months	860 months	420 months	-51%
Fanny Dela Cruz ^{lxiii}	Plea	2016	168-186 months	117 months	96 months	-18%
Michael Lee Cummings ^{lxiv}	Plea	2019	57-71 months	57 months	30 months	-47%
Donovan Dave Dixon ^{lxv}	Trial	2018	235-293 months	288 months	240 months	-17%
Richard Evans ^{lxvi}	Trial	2017	70-87 months	At least 180 months	60 months	-67%
Madhu Garg ^{lxvii}	Plea	2016	46-57 months	36 months	18 months	-50%
John M. Gayden ^{lxviii}	Trial	2018	235-293 months	293 months	235 months	-20%
Jeanne E. Germeil ^{lxix}	Trial	2019	262-327 months	262 months	210 months	-20%
Alan Arnold Godofsky ^{lxx}	Trial	2018	121-151 months	121-151 months	60 months	-50%
Carlos Godoy	Plea	2017	70-87 months	49 months	12 months	-76%

lxxi						
Jose Jorge Abbud Gordin ho ^{lxxii}	Plea	2016	46-57 months	46-57 months	96 months	+68%
Timoth y Gowder lxxiii	Trial	2019	480 months	480 months	252 months	-48%
Horace Paul Guerra IV ^{lxxiv}	Plea	2018	10-13 months	No less than 13 months	12 months and a day	-8%
Jeffrey Gundel lxxv	Plea	2016	108-135 months	108-135 months	78 months	-28%
Gary Hartma n ^{lxxvi}	Plea	2019	87-108 months	108 months	100 months	-7%
Clella Louise Hayes lxxvii	Plea	2017	N/A	24 months	12 months and a day	-50%
Brian Heim lxxviii	Plea	2015	57-71 months	70-87 months	63 months	-10%
Steven Arthur Holper lxxix	Plea	2019	57-71 months	71 months	41 months	-42%
Francis co Huidor- Figuero a ^{lxxx}	Plea	2016	46-57 months	8-14 months	Probation	-100%
Jay K. Joshi lxxxi	Plea	2019	18-24 months	78 months	15 months	-81%
Edd Jones lxxxii	Plea	2017	6-12 months	6-12 months	18 months	+50%

Alex Kafi lxxxiii	Plea	2019	108-135 months	108 months	60 months	-44%
Azad Khan lxxxiv	Trial	2018	41-51 months	41-51 months	24 months	-41%
David Kirkwood lxxxv	Plea	2018	87-108 months	108 months	70 months	-35%
Naeem Kohli lxxxvi	Trial	2015	121-151 months	151 months	24 months	-84%
George Kudman lxxxvii	Trial	2017	292-365 months	292-365 months	48 months	-84%
Mahesh Kuthuru lxxxviii	Plea	2015	33-41 months	33-41 months	28 months	-15%
Shouping Li lxxxix	Plea	2019	37-46 months	41 months	12 months and one day	-71%
Oscar Linares xc	Plea	2016	51-71 months	71 months	57 months	-20%
John Alan Littleford xci	Plea	2019	87-108 months	108 months	87 months	-19%
Ernesto Lopez xcii	Trial	2019	188-235 months	96 months	60 months	-38%
Avinoam Luzon xciii	Plea	2018	168-210 months	168-210 months	110 months	-35%
Gracia Mayard xciv	Plea	2015	70-87 months	60 months	54 months	-10%
Donatus O. Mbanefo xcv	Trial	2018	188-235 months	No objection to guideline calculation	96 months	-49%

Pravin V. Mehta ^{xcvi}	Plea	2016	57-71 months	57-71 months	24 months	-58%
Andres Mencia ^{xcvii}	Trial	2018	60-78 months	240 months	78 months	-67%
Joel Miller ^{xcviii}	Trial	2016	33-41 months	120 months	60 months	-50%
Joel Adrian Milline ^{xcix}	Plea	2015	87-108 months	87-108 months	66 months	-24%
Michael Minas ^c	Trial	2016	151-188 months	160 months	96 months	-40%
Rodney Moret ^{ci}	Plea	2018	97-121 months	121 months	75 months	-38%
Sukhwinder Multanji ^{cii}	Plea	2017	24-30 months	24 months	14 months	-42%
Christopher Owens ^{ciii}	Plea	2018	37-46 months	46 months	41 months	-11%
Marios Papachristou ^{civ}	Plea	2018	37-46 months	No objection to guideline calculation	24 months	-35%
Bharat Patel ^{cv}	Plea	2018	87-108 months	87-108 months	54 months	-38%
Constantino Perales ^{cvi}	Plea	2018	151-188 months	High End of 151-188 month range	144 months	~ -20%
Michael Randall ^{cvi}	Plea	2016	57-71 months	57-71 months	32 months	-44%
Roy Reynolds ^{cvi}	Trial	2018	168-210 months	168 months	50 months	-70%
William	Plea	2017	108-130	60 months	54 months	-10%

Richard son ^{cxix}			months			
Edward Ridgill ^{cx}	Trial	2018	87-108 months	97 months	60 months	-38%
Robert Ritchea ^{cxii}	Plea	2017	108-135 months	No more than 70 months	120 months	+71%
Kenneth Rivera- Kolb ^{cxiii}	Plea	2019	37-46 months	37	30 months	-19%
Romie Earl Roland ^{cxiiii}	Trial	2017	235-293 months	199 months	130 months	-35%
Anthony Rossi ^{cxv}	Plea	2017	6-12 months	No objection to guideline calculation	Probation	-100%
Xiulu Ruan ^{cxvi}	Trial	2017	Life	480 months	252 months	-48%
Russell Sachs ^{cxvii}	Plea	2017	87-108 months	30-37 months	24 months	-20%
Gilbert Sanchez ^{cxviii}	Plea	2018	N/A	120 months (pursuant to plea deal)	145 months	+21%
James Stein- Sheridan Shelby ^{cxix}	Plea	2019	63-78 months	36 months	15 months home confinement	-100%
Derron McRae Simon ^{cx}	Plea	2015	235-293 months	235-293 months	180 months	-23%
Alan Summers ^{cxxi}	Plea	2018	57-71 months	57-71 months	48 months	-16%
Andrew Sun ^{cxii}	Trial	2015	63-78 months	235 months	63 months	-73%

Deborah Gayle Thomas ^{cxxii}	Plea	2017	135-168 months	Nothing Less than 135 months	120 months	-11%
John Van Wu ^{cxxiii}	Plea	2019	46-57 months	57 months	51 months	-11%
Carlos Luis Venegas ^{cxxiv}	Trial	2019	240 months (pursuant to statutory maximum)	240 months	156 months	-35%
Mackie James Walker, Jr. ^{cxxv}	Plea	2018	210-240 months	210-240 months	188 months	-10%
Frederick Weintraub ^{cxxvi}	Plea	2016	37-46 months	37-46 months	18 months	-51%
Henri Wetselaar ^{cxxvii}	Trial	2017	360 months to Life	240 months	120 months	-50%
Simon Lee Wilcox ^{cxxviii}	Trial	2016	188-235 months	188 months	100 months	-47%
Richard Williams ^{cxxix}	Plea	2017	108-135 months	87-108 months	60 months	-31%
Gerald Wiseberg ^{cxix}	Plea	2016	N/A	72 months	36 months	-50%

Total Cases: 88

The big-picture takeaway from Tables 1 and 2 is that prosecutors lost a lot more than we would expect. Conventional wisdom has long been that prosecutors call the shots at sentencing. Yet, in 88 of 130 cases, judges rejected prosecutors' sentencing recommendations. As noted, the prosecutors often lost big. More than one-third of the eighty-eight cases involved judges sentencing at 50% or greater difference from what prosecutor requested. In 66% of cases, judges imposed a sentence that varied

from the prosecutor's recommendation by 30% or more. Usually, when prosecutors' recommendations failed it was because they sought more prison time than the judge was willing to impose. But in six cases, prosecutors actually sought less time than the judge imposed.

The next question to consider is why prosecutors lost at sentencing. There are a number of possibilities. First, it could be that prosecutors are sticking to the guidelines ranges while judges are departing from them. Second, prosecutors could be seeking to impose severe penalties on defendants who refuse to plead guilty, while judges reject the so-called trial penalty. A third theory could be that prosecutors were ahead of judges in recognizing the opioid crisis and thus sought much tougher sentences than judges agreed with in early years of the crisis. While there is some truth to some of these theories, the data examined below indicate that none of them are particularly persuasive. Let us start with prosecutors' adherence to the guidelines' ranges.

C. Judges' Refusal to Follow the Guidelines Partly Explains the Lack of Prosecutorial Success

One initial reaction to prosecutors losing at sentencing might be that prosecutors were unsuccessful because they were advocating guidelines sentences and judges were often sentencing below the guidelines. This theory has some explanatory power, but not much.

Prior to the Supreme Court's decision in *United States v. Booker*,⁴³ it was challenging for judges to depart below the guidelines.⁴⁴ In *Booker*, however, the Court severed the mandatory nature of the guidelines and made it easier for judges to sentence outside the guidelines range.⁴⁵ In the post-*Booker* era,

⁴³ *United States v. Booker*, 543 U.S. 220, 244 (2005).

⁴⁴ See Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 140 (2019) ("Sentencing judges for the most part have treated *Booker* as a general loosening of the constraints of the previous departure standard, rather than as a basis for reviewing the policies underlying the guidelines."); Simons, *supra* note 9, at 354; *Kimbrough v. United States*, 552 U.S. 85, 101–02 (2007) (permitting district judges to reject guidelines ranges based on policy disagreements with the guidelines).

⁴⁵ See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1482 (2008) (explaining the "recharging" of the sentencing judge); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 410 (2006) ("In the wake of *Booker*, federal judges are continuing to do all the fact-finding that the advisory guidelines recommend with the same lax sentencing procedures that had been used in the federal system over the prior two decades.").

judges now impose sentences within the guidelines range in about 50% of cases.⁴⁶

By contrast, the U.S. Department of Justice strongly encourages Assistant United States Attorneys to seek sentences within the guidelines range. The Justice Manual (formerly the U.S. Attorney's Manual) which provides policy guidance to federal prosecutors seemingly provides federal prosecutors with less freedom to recommend a sentence outside the guidelines range. The manual indicates that prosecutors should first consider whether a sentence in the guidelines range is appropriate and that "[i]n the typical case" a guidelines recommendation "will be appropriate."⁴⁷ Moreover, to recommend a sentence above or below the guidelines range, a prosecutor must obtain permission from a supervisor.⁴⁸ In short, Department of Justice policy seems to push prosecutors to make sentencing recommendations within the guidelines range.

One theory would, therefore, be that if prosecutors are institutionally pressured to hold more closely to the guidelines⁴⁹ than judges are willing to tolerate, then that might explain why prosecutors' sentencing recommendations are being rejected. This theory has some explanatory power, but not much.

Of the 130 cases, I was able to find the guidelines range in 117 cases. As Table 3 indicates, prosecutors sought a within guidelines

⁴⁶ See U.S. SENTENCING COMM'N, SENTENCE IMPOSED RELATIVE TO THE GUIDELINES RANGE OVER TIME: FISCAL YEARS 2010-2019 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Figure09.pdf> [https://perma.cc/ZZW8-KDP4]. By contrast, prior to Booker, judges sentenced within the guidelines range in nearly 70% of cases. See U.S. SENTENCING COMM'N, GUIDELINE DEPARTURE RATE BY CIRCUIT AND DISTRICT, FISCAL YEAR 2003 (2003), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/table26_0.pdf [https://perma.cc/R89J-K2SD].

⁴⁷ See U.S. Dep't of Just., Just. Manual § 9-27.730 (2018), available at <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.730> [https://perma.cc/G3TB-WT8D].

⁴⁸ See *id.*

⁴⁹ For instance, following the *Booker* decision, Deputy Attorney General James Comey issued a memorandum to all federal prosecutors instructing that federal prosecutors "must take all steps necessary to ensure adherence to the Sentencing Guidelines" and explaining that they "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases." James B. Comey, Memorandum to Fed. Prosecutors from U.S. Dep't of Just., Off. of the Deputy Att'y Gen. (Jan. 28, 2005), in 17 FED. SENT'G REP. 282, 282-83 (2005).

sentence in eighty-two cases, or 70% of the sample.⁵⁰ Prosecutors sought a below guidelines sentence in twenty-seven cases (23%), and an above guidelines sentence in nine cases (8%).

Table 3: Prosecutors Recommendations Relative to Guidelines Range

Prosecutors Recommend Guidelines	Within	82 of 117 cases	70% of cases
Prosecutors Recommend Guidelines	Below	27 of 117 cases	23% of cases
Prosecutors Recommend Guidelines	Above	9 of 117 cases	8% of cases

Not surprisingly, as Table 4 demonstrates below, prosecutors fared poorly when they recommended a guidelines sentence or an above guidelines sentence. When prosecutors sought a within guidelines sentence, the judge followed their recommendation in only 26% of cases. Prosecutors fared even worse when they requested above guidelines sentences, with judges agreeing only 11% of the time. For below guidelines recommendations, prosecutors fared better—though not much better—with judges following the recommendation in 44% of cases.

Table 4: Prosecutorial Persuasiveness Relative to the Sentencing Guidelines

Prosecutor Recommends Guidelines Sentence		
82 Total cases	Judge Agrees in 22 cases	Prosecutor Success: 26%
Prosecutor Recommends Below Guidelines Sentence		
27 total cases	Judge Agrees in 12 cases	Prosecutor Success: 44%
Prosecutor Recommends Above Guidelines Sentence		
9 total cases	Judge Agrees in 1 case	Prosecutor Success: 11%

⁵⁰ The adherence to the guidelines should not be surprising, even after *Booker*. See Simons, *supra* note 9, at 347. (“During the past two decades, prosecutors have grown accustomed to the certainty—and the severity—of the sentencing Guidelines.”).

While prosecutors were more likely to be successful if they sought below guidelines sentences, even that approach left them out of step with judges a majority of the time. The reason was that the prosecutors' recommendations were not far enough below the guidelines to satisfy the judges. Put differently, while judges thought the prosecutors were correct to recommend a below guidelines sentence, the judges did not believe the prosecutors went far enough in departing from the guidelines. Table 5, below, documents how far beneath prosecutors' recommendations judges sentenced even when prosecutors sought below guidelines sentences.

In a few cases—for instance, Dr. William Richardson—judges imposed sentences that were relatively close to the prosecutors' below guidelines recommendations. In most cases, however, judges sentenced the doctors far below the prosecutors' recommendations. Table 5 below lists the fifteen cases in which prosecutors recommended a below guidelines sentence and the judge imposed an even lower sentence. In six of the fifteen cases, the judge ultimately imposed a sentence that was 50% or more below the prosecutor's recommendation. This divergence happened in cases where prosecutors recommended very long sentences (for instance, Dr. Henri Wetselaar) more modest sentences (for instance, Dr. Carlos Godoy) and cases where prosecutors recommended relatively short sentences (for instance, Dr. Francisco Huidor-Figueroa.).

Table 5: Prosecutors Recommend Below Guidelines Sentences, But Judges Sentenced Even Lower

Doctor	Guideline Range	Government's Below Guidelines Recommendation	Judge's Sentence	Difference from Gov't Rec.
Hussein Awada	135-168 months	108-134 months	84 months	-22%
Gavin Awerbuch	70-87 months	52 months	32 months	-38%
Fanny Dela Cruz	168-186 months	117 months	96 months	-18%
Madhu Garg	46-57 months	36 months	18 months	-50%
Carlos Godoy	70-87 months	49 months	12 months	-76%
Francisco	46-57	8-14 months	Probation	-100%

Huidor-Figueroa	months			
Ernesto Lopez	188-235 months	96 months	60 months	-38%
Gracia Maynard	70-87 months	60 months	54 months	-10%
William Richardson	108-130 months	60 months	54 months	-10%
Robert Ritchea	108-135 months	No more than 70 months	120 months	+71%
Romie Earl Roland	235-293 months	199 months	130 months	-35%
Xiulu Ruan	Life	480 months	252 months	-48%
Russell Sachs	87-108 months	30-37 months	24 months	-20%
James Stein-Sheridan Shelby	63-78 months	36 months	15 months home confinement	-100%
Henri Wetselaar	360 months to Life	240 months	120 months	-50%
Richard Williams	108-135 months	87-108 months	60 months	-31%

Finally, prosecutors seemed to be most out-of-step with judges when they recommended above guidelines sentences. Although recommendations to exceed the guidelines were rare—only 9 times in the 117 cases for which I have guidelines data—the prosecutors lost in 8 of those 9 cases. Notably, prosecutors lost big in these cases. Judges sentenced these nine defendants across the spectrum—three below the guidelines, two at the bottom end of the guidelines, two in the middle to top end of the guidelines, and two above the guidelines. Yet, as Table 6 demonstrates, in most of these cases judges imposed sentences that were in the neighborhood of 70% less than what prosecutors requested.

Table 6: Judges Emphatically Reject Prosecutors' Recommendations for Above Guidelines Sentences

Doctor	Guidelines Range	Government's Above Guidelines Recommendation	Judge's Sentence	Difference from Gov't Rec.
Sathish Babu	46-57 months	57-71 months	18 months	-68%
Dwight L. Bailey	151-188 months	240 months	151 months	-37%
Daniel Chan	151-188 months	168-210 months	160 months	-4.76%
Richard Evans	70-87 months	At least 180 months	60 months	-67%
Horace Paul Guerra	10-13 months	13 months	12 months	-7.69%
Brian Heim	57-71 months	70-87 months	63 months	-10%
Jay K. Joshi	18-24 months	78 months	15 months	-81%
Andres Mencia	60-78 months	240 months	78 months	-67%
Joel Miller	33-41 months	240 months	60 months	-75%
Robert Rand	78-97 months	120 months	120 months	0%
Andrew Sun	63-78 months	235 months	63 months	-73%

In sum, there is reason to think that Department of Justice policy that pushes prosecutors to recommend guidelines sentences may contribute to prosecutors' sentencing recommendations being rejected. Judges, quite simply, seem to be inclined to sentence below the guidelines more often than prosecutors are willing, or able, to recommend sentences below the guidelines.

But the story is more complex than prosecutors recommending guidelines sentences and judges rejecting guidelines sentences. Prosecutors did recommend below guidelines sentences in nearly a quarter of cases—27 out of 117 cases. And even in those cases, prosecutors' recommendations were rejected more than half the time. Put simply, when prosecutors recommended below the guidelines, judges did not think they went far enough. On top of that, prosecutors sought above guidelines sentences in 8% of cases and judges almost always rejected the above guidelines recommendations. In the end, no matter whether they came in above, below, or within the

guidelines, prosecutors' recommendations were frequently rejected.

D. No Evidence that Judges Reject Recommendations Because Prosecutors Sought to Impose a Penalty on Defendants Who Went to Trial

Another hypothesis for why judges reject prosecutors' recommendations is that prosecutors are trying to impose a penalty on defendants who went to trial and judges are resisting that penalty. This theory is similar to—although not exactly the same as—the much-discussed trial penalty. The conventional wisdom is that defendants who refuse plea bargains, and instead go to trial and lose, will end up with longer sentences than if they had plea bargained.⁵¹ It is difficult to truly study the trial penalty because we need to know what plea deals the defendants rejected.⁵² That information is almost never publicly available and was certainly not present in the filings and docket entries for doctors sentenced for illegal opioid distribution.

It is possible, however, to study a related phenomenon. For defendants who went to trial, rather than pleading guilty, we can explore whether prosecutors sought a sentence on the high end of

⁵¹ See, e.g., Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019); Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407, 449 (2011) ("There is ample support for the existence of such a penalty . . ."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 419 (2008) ("[I]t is well recognized that judges routinely impose substantial penalties at sentencing on those defendants with the temerity to go to trial, sometimes doubling the punishment, or worse.").

⁵² NAT'L ASS'N OF CRIM. DEF. LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/X2KK-RKAK], as reprinted in John Gleeson, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and how To Save It*, 31 FED. SENT'G REP. 331, 334 (2019) ("Because plea negotiations are off the record and because most cases plead out, data regarding plea offers is largely unavailable, so there is no way to accurately calculate the full extent of the trial penalty."). There are additional reasons why it is difficult to assess the extent of the trial penalty. For instance, when defendants plead guilty in federal court they receive credit for acceptance of responsibility, and most studies do not include this factor. Additionally, "[t]he decision to plead guilty also impacts whether a prosecutor will file various sentencing enhancements," with the result that "empirical studies tend to underestimate the full magnitude of plea-trial differences in federal punishment." Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 257–58 (2019).

the guidelines range or above the guidelines range in order to effectively punish the defendant for insisting on trial. Prosecutors occasionally concede they are requesting a sentence on the high end of the guidelines range because the defendant went to trial.

For instance, consider the case of Dr. John Couch, who was convicted in 2017 of running a pill mill and receiving kickbacks from a drug manufacturer in exchange for prescribing the company's drug.⁵³ Dr. Couch faced a guidelines range of 360 months to life, and the prosecutor candidly pushed for the high end of the guidelines on the ground that Dr. Couch had gone to trial:

Based on the findings so far from the Court that it's an offense level of 42 with criminal history category I, that puts the . . . low end of the guideline . . . at 360 months . . . 360 months, the low end, is what we would have recommended, or any low end is what we recommend in a plea agreement, not after a seven-and-a-half-week trial where we put on all the evidence and prove up each of the counts against the defendants.⁵⁴

The candid statement by the prosecutor in the Couch case raises two questions. First, is it common for prosecutors to seek the high-end of the guidelines range because the defendant went to trial? And second, could that be the reason why judges are rejecting prosecutors' sentencing recommendations? Put differently, if prosecutors recommend a high sentence that is effectively a punishment for going to trial, and if judges reject that version of the trial penalty, does that help to explain why judges typically rejected prosecutors' sentencing recommendations? The answer to both questions appears to be "no." While the trial penalty theory has intuitive appeal, it turns out not to be supported by the data in this study.

Most of the defendants in this study plea bargained, thus there was no possibility of prosecutors' recommending a sentencing penalty simply because the defendant insisted on going to trial. Of the 130 cases in this study, only 36—less than

⁵³ See *Sentencing of John Patrick Couch, M.D.* at 79, *United States v. Couch*, No. CR15-00088 (S.D. Ala. May 25, 2017); See Press Release, Dep't of Just., U.S. Att'y's Off., S.D. Ala. (May 25, 2017), <https://www.justice.gov/usao-sdal/pr/dr-john-patrick-couch-sentenced-240-months> [<https://perma.cc/MCC5-ZUXG>].

⁵⁴ *Sentencing of John Patrick Couch, M.D.* at 79, *United States v. Couch*, No. CR15-00088 (S.D. Ala. May 25, 2017).

28%—went to trial.⁵⁵ I was able to identify the guidelines range for thirty-four of the thirty-six cases that went to trial.

In most of these cases, prosecutors did not seek a sentence on the high end of the guidelines range or above the range. As Table 7 demonstrates below, prosecutors sought a sentence above the guidelines range in only five of the cases where defendants went to trial.⁵⁶ And they only sought a sentence at the top end of the guidelines range in three of the trial cases.⁵⁷ Put differently, of cases that went to trial, prosecutors made aggressive sentencing recommendations that might be construed as a “trial penalty” in only eight cases, 22% of the trial cases.

By contrast, prosecutors sought below-guidelines sentences in eight cases that went to trial,⁵⁸ and sentences at the bottom end of the guidelines range in five additional trial cases.⁵⁹ In other words, following trial prosecutors sought sentences on the low-end of the guidelines range more often than they sought high-end or above the guidelines range. For the remaining thirteen cases, prosecutors recommended a sentence in the middle of the guidelines range or simply agreed that a sentence anywhere in the range was appropriate.⁶⁰ All told, prosecutors recommended a guidelines or below-guidelines sentence in twenty-six of the thirty-six trial cases. The final column of Table 7 shows the distribution.

⁵⁵ Of the forty-two cases in which judges followed prosecutors’ recommendations, nine (or 21%) had gone to trial. Of the eighty-eight cases in which judges rejected prosecutors’ recommendations, twenty-seven (or 31%) had gone to trial.

⁵⁶ The above guidelines cases involved Drs. Bailey, Evans, Mencia, Miller, and Sun. *See supra* Table 2 and *infra* endnotes xlix, xcvi, xcvi & cxi. The five other cases in which prosecutors sought sentences above the guidelines range were guilty plea cases.

⁵⁷ The top-end guidelines cases involved Drs. Dixon, Gayden, and Kohli. *See supra* Table 2 and *infra* endnotes lxxv, lxxviii & lxxxvi.

⁵⁸ The below guidelines cases were Drs. Ashrafkhan, El-Amin, Chapman, Lopez, Pamatmat, Roland, Ruan, and Wetselaar. *See supra* Table 2 and *infra* endnotes vi, xiii, xxviii, lix, xcii, cxiii, cxv & cxxvii.

⁵⁹ The low-end guidelines cases involved Drs. Germeil, Minas, Reynolds, Scranage, Wilcox. *See supra* Tables 1 & 2 and *infra* endnotes xxxiv, lxix, c, cviii & cxxviii.

⁶⁰ The middle or anywhere within the guidelines range cases involved Drs. Aboyvan, Beier, Diaz, Chaney, Couch, Craig, Godofsky, Gowder, Khan, Kudmani, Mbanefo, Ridgill, and Venegas. *See supra* Tables 1 & 2, and *infra* endnotes i, vii, xiii, lix, lxiii, lxiv, lxxi, lxxiv, lxxxv, lxxxviii, xcvi, cx & cxxiv.

Table 7: Prosecutors Did Not Lose at Sentencing Because They Sought a Trial Penalty

Doctor	Trial or Plea	Guidelines Range	Government's Recommendation	Gov't Rec in Relation to Guidelines
Sardar Ashrafkhan	Trial	Life	At least 229 months	Below guidelines
Sundiata El-Amin	Trial	188-235 months	151 months	Below guidelines
James Earl Chapman	Trial	292-365 months	240 months	Below guidelines
Ernesto Lopez	Trial	188-235 months	96 months	Below guidelines
Adelfo Pamatmat	Trial	292-293 months	At least 180 months	Below guidelines
Romie Earl Roland	Trial	235-293 months	199 months	Below guidelines
Xiulu Ruan	Trial	Life	480 months	Below guidelines
Henri Wetselaar	Trial	360 months to Life	240 months	Below guidelines
Jeanne E. Germeil	Trial	262-327 months	262 months	Low end of guidelines
Michael Minas	Trial	151-188 months	160 months	Low end of guidelines
Roy Reynolds	Trial	168-210 months	168 months	Low end of guidelines
Clarence Scranage	Trial	360 months to Life	360 months	Low end of guidelines
Simmon Lee Wilcox	Trial	188-235 months	188 months	Low end of guidelines
James Chaney	Trial	Life	Life	Same as guidelines
Gazelle Craig	Trial	860 months	860 months	Same as guidelines
Timothy Gowder	Trial	480 months	480 months	Same as guidelines
Carlos Luis Venegas	Trial	240 months (pursuant to	240 months	Same as guidelines

		statutory maximum		
John Couch	Trial	360 months to Life	420 months	Middle of guidelines
Edward Ridgill	Trial	87-108 months	97 months	Middle of guidelines
Arman Abovyan	Trial	135-168 months	135-168 months	Anywhere in guidelines
Rafael Beier	Trial	188-235 months	188-235 months	Anywhere in guidelines
Julio Gabriel Diaz	Trial	262-327 months	262-327 months	Anywhere in guidelines
Alan Arnold Godofsky	Trial	121-151 months	121-151 months	Anywhere in guidelines
Azad Khan	Trial	41-51 months	41-51 months	Anywhere in guidelines
George Kudmani	Trial	292-365 months	292-365 months	Anywhere in guidelines
Donatus O. Mbanefo	Trial	188-235 months	No objection to guideline calculation	Anywhere in guidelines
Donovan Dave Dixon	Trial	235-293 months	288 months	Top end of guidelines
John M. Gayden	Trial	235-293 months	293 months	Top end of guidelines
Naeem Kohli	Trial	121-151 months	151 months	Top end of guidelines
Dwight L. Bailey	Trial	151-188 months	240 months	Above guidelines
Richard Evans	Trial	70-87 months	At least 180 months	Above guidelines
Andres Mencia	Trial	60-78 months	240 months	Above guidelines
Joel Miller	Trial	33-41 months	240 months	Above guidelines

Andrew Sun	Trial	63-78 months	235 months	Above guidelines
Richard Rydze	Trial	N/A	120 months	N/A
Tad W. Taylor	Trial	N/A	240 months	N/A

The data in Table 7 indicates that after litigating an entire trial, it was far more common for prosecutors to recommend a guidelines sentence or a below guidelines sentence than to seek a tougher sanction above the guidelines or at the top end of the guidelines range. This data therefore does not support the thesis that prosecutors were out-of-step with judges because the prosecutors were seeking to impose additional punishment on defendants who proceeded to trial.

That said, we should be cautious not to read too much into the lack of evidence for a trial penalty. First, the data set is small. Second, prosecutors might not be seeking above-guideline sentences because they have already “won” by having the court calculate a high guidelines range. The guidelines calculation can be a hard-fought battle between the prosecution and the defense over what factors should count. For instance, was the defendant an organizer or leader?⁶¹ Were there vulnerable victims?⁶² Should the drug quantity be based on all of a doctor’s patients, or should only a fraction of the prescription pills be counted as drug sales?⁶³ If a prosecutor is successful in litigating these or other sentencing factors, the defendants’ base offense level will increase which, in turn, will cause his guidelines range to increase.⁶⁴

An example is illustrative. Let’s imagine that the probation office, as it always does, submitted a pre-sentence report that calculated the guidelines range. The pre-sentence report counted a relatively small percentage of the doctor’s prescriptions toward the drug quantity based on the facts demonstrated at trial and proven to the jury beyond a reasonable doubt. As a result, the pre-sentence report calculated a guidelines range of seventy to eighty-seven months.

⁶¹ See U.S.S.G. 3B1.1 (providing for an increase to the base offense level of between two and four points depending on the size of the defendant’s role and the number of participants).

⁶² See U.S.S.G. 3A.1.1(b) (specifying an increase of two levels if “the defendant knew or should have known “of a vulnerable victim, and providing for an additional two levels in cases involving “a large number of vulnerable victims”).

⁶³ The drug quantity is a very common dispute in cases involving doctors. See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1110–14.

⁶⁴ See *e.g.*, *id.* at 1110.

Subsequently, the prosecutor objected to the report on the ground that it under-counted the quantity of pills illegally distributed by the doctor. The Federal Sentencing Guidelines allow judges to find facts (including drug quantity) by a preponderance of the evidence and to use those factual findings to increase a sentence as long as the judge does not exceed the statutory maximum.⁶⁵ The defense attorney in our hypothetical would obviously oppose the prosecutor's higher drug quantity argument, but imagine that after a hard-fought hearing the judge agreed with the prosecutor. Based on a higher drug quantity, the judge calculated a higher sentencing range of 97 to 121 months, and this became the final guidelines calculation applicable to the defendant.

By winning the drug quantity battle and driving up the guidelines range, the prosecutor may see no need to advocate for a sentence on the higher end of the guidelines range. Indeed, the prosecutor might even have no objection to a sentence below the guidelines range. Put differently, if the prosecutor had lost the drug quantity battle, she might have sought the top end of the seventy to eighty-seven months guidelines range calculated by the Probation office. But now that the guidelines range is 97 to 121 months, she might have no objection to a sentence at the bottom end of the range (ninety-seven months) or even a sentence below the guidelines range (say, ninety months).

Thus, prosecutors winning the guidelines calculation battle may explain why they are not seeking to impose a penalty in the form of a high end or above guidelines sentence on defendants who went to trial. Even if that is correct though, it does not change the fact that the trial penalty is not a convincing explanation for the disparity between prosecutors' recommendations and judges' ultimate sentences. At the end of the day, judges rejected prosecutors' sentencing recommendations in two-thirds of cases, and the trial penalty does not seem to be the reason for those rejections.

E. The Year of Sentencing Probably Did Not Influence Prosecutor Success

Another theory that might explain prosecutors' lack of success at sentencing is that judges were insufficiently aware of the opioid crisis in early cases and thus rejected tough sentencing

⁶⁵ See *United States v. Booker*, 543 U.S. 220, 232–33, 244 (2005).

recommendations in those years. Put differently, prosecutors might have come to understand the devastation caused by the crisis and therefore sought tougher sentences. Judges who did not see as much of the crisis might have been unwilling to impose such tough sentences. There is some intuitive appeal to this theory. The United States Department of Health and Human Services did not declare the opioid crisis to be a public health emergency until late 2017.⁶⁶ Multiple best-selling books about the crisis were published in 2018.⁶⁷ And there is no denying that mainstream media coverage of the opioid crisis exploded in the later years of the 2015 to 2019 period studied in this Article.⁶⁸ Thus, it would not be surprising if the news avalanche about the opioid crisis caused judges to begin showing greater deference to prosecutors' sentencing recommendations in later years.

While the percentage of prosecutorial success at sentencing varied by year, it does not appear to support a theory that prosecutors received more deference from judges in later years. As Table 8 indicates below, prosecutors were in fact more successful in two later years—2017 and 2019—but they were actually least successful in persuading judges to follow their sentencing recommendations in 2018. In short, there is no clear indication that prosecutors' success rate at sentencing improved as time moved forward and the opioid crisis became better known.

⁶⁶ See HHS ACTING SECRETARY DECLARES PUBLIC HEALTH EMERGENCY TO ADDRESS NATIONAL OPIOID CRISIS, Oct. 26, 2017, available at <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> [https://perma.cc/6DGL-LCSA].

⁶⁷ For a few notable examples, see BETH MACY, *DOPE SICK: DEALERS, DOCTORS AND THE DRUG COMPANY THAT ADDICTED AMERICA* (2018); BARRY MEIER, *PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA'S OPIOID EPIDEMIC* (2018); CHRIS MCGREAL, *AMERICAN OVERDOSE: THE OPIOID TRAGEDY IN THREE ACTS* (2018). Of course, there were important works from prior to 2018. Most notably, see SAM QUIONES, *DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC* (2016).

⁶⁸ See Emma E. McGinty et al., *U.S. News Media Coverage of Solutions to the Opioid Crisis, 2013-2017*, 126 *PREVENTIVE MEDICINE* 105771 (Sept. 2019) ("Volume of news media coverage of solutions to the opioid epidemic increased over the study period, from 272 news stories mentioning solutions to the opioid epidemic in 2013 to 2816 news stories in 2017.").

Table 8: Prosecutors' Success in Sentencing Recommendations by Year

Year	Total Number of Defendants Sentenced	Prosecutor Recommendation Accepted	Prosecutors' Success Rate
2015	17	6	35%
2016	18	4	22%
2017	34	14	41%
2018	30	6	20%
2019	31	12	39%

There is a relatively simple explanation why increased news coverage likely did not cause a shift in judicial deference to prosecutor's sentencing recommendations. While the extent of the opioid crisis might not have been very well known to the public in 2015, it was likely very apparent to criminal justice professionals. Judges would have seen not just doctors in their courtrooms, but also numerous "regular" defendants who had been arrested for possession, distribution, and crimes of violence that often accompany opioid addiction. In sentencing these individuals, judges would have seen defendants suffering withdrawal, and heard from both defendants as well as crime victims about the terrible effects of opioid abuse.⁶⁹ When the doctors who illegally peddled those opioids faced sentencing—whether it was in 2015 or 2019—judges would have had a full picture of the harm they had caused.

Moreover, the federal judges in this study do not have to stand for re-election and thus have no need to worry whether failing to follow prosecutorial sentencing recommendations on a hot-button issue would cost them their jobs. Concerning research has indicated that state judges—most of whom must stand for re-election—sometimes allow public opinion to influence their

⁶⁹ For instance, consider Sam Quinones's description of a 2006 nationwide DEA operation:

On the day of Operation Black Gold Rush . . . hundreds of officers fanned out across fifteen U.S. cities gathering up . . . heroin crews: 138 people in all, drivers, telephone operators, suppliers, as well as numerous local addicts. That day, federal court looked like a hospital ward. Junkies were throwing up, sweating, and falling off their benches. . . . Marshalls rushed doctors to court. Several junkies had arraignment postponed because they weren't fit to understand the judge.

QUIONES, *supra* note 67, at 262.

sentencing decisions.⁷⁰ Federal judges with Article III tenure have no such concerns.

In short, there seems to be no basis to conclude that prosecutors' poor level of success at sentencing was due to judges' failure to appreciate the seriousness of the opioid crisis in early years.

This study of doctors sentenced for opioid distribution yields some dramatic results about prosecutors' behavior and influence at sentencing. First, judges typically rejected the prosecutors' sentencing recommendations, and they often rejected the by a wide margin. Second, there was no evidence that prosecutors' recommendations were rejected because they were frequently seeking sentences above the guidelines range or even at the top end of the guidelines. Third, even when prosecutors' sought sentences below the guidelines the judges frequently rejected those recommendations as not going far enough. Fourth, it does not appear that prosecutors' recommendations were rejected because they were seeking to impose sentences on the high-end of the guidelines range simply because the doctors went to trial. And finally, the prosecutors' sentencing recommendations did not become more persuasive to judges in later years of the study period as knowledge of the opioid crisis became more widespread.

III. CAUTIOUSLY APPLYING THESE CONCLUSIONS TO OTHER DEFENDANTS

A key follow-up question is how representative the findings of this study are with respect to the rest of the federal criminal justice system. In other words, did judges reject prosecutors' sentencing recommendations primarily because the defendants were white-collar criminals, thus making the significance of this study limited to a unique type of defendant? As explained below, it would surely be over-claiming to suggest that a study of opioid doctors can explain the rest of the federal criminal justice system. At the same time, we should also not discount the ways in which doctors convicted of peddling opioids are similar to other federal defendants.

This Part considers three factors that might make doctors different than the average defendant: (A) doctors are wealthy

⁷⁰ See Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 334 (2010) ("In the main, elective judges are not boasting that they are 'tough on crime' for the sake of boasting or principle. They are likely doing so because they assume voters want to hear it.").

white-collar defendants who will be treated more sympathetically; (B) pill cases are different and result in judges feeling the need to depart further from the guidelines; and, least obviously, (C) doctors are treated more favorably because they are older. As explained below, the least obvious reason—age—is the most persuasive reason for not automatically applying the conclusions of this paper to other defendants.

A. *The Differences Between Doctors and Other Defendants*

Of course, there is reason to think that doctor prosecutions are not representative of the rest of the federal criminal justice system. Doctors are older, wealthier, more prestigious, and have better access to quality lawyers than the average defendant.⁷¹ Doctors rarely have prior convictions.⁷² Moreover, doctors are typically extremely well-regarded in their communities, often having helped many patients and participated in charitable pro bono work.⁷³ They surely seem like the quintessential white-collar defendants; indeed, they even wear white coats! Moreover, prescription pill sales that happen in sterile offices may seem to be qualitatively different than street drug cases that are often more closely tied to violence.

Because we know that some types of white-collar defendants typically fare better at sentencing than blue-collar defendants,⁷⁴

⁷¹ See Gershowitz, *The Opioid Doctors*, *supra* note 12, at 906.

⁷² In a study of twenty-five doctors charged with running egregious pill mills, only one doctor had prior convictions. See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1100–01.

⁷³ See Gershowitz, *The Opioid Doctors*, *supra* note 12, at 907.

⁷⁴ See Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 371 (2019) (“Many studies reveal disturbing disparities between street criminals and ‘suite’ criminals.”). Early in its tenure, the Sentencing Commission found that “people who were convicted of fraud, a white-collar crime, were treated less harshly than those convicted of theft, a blue-collar crime” and that, therefore, “white-collar penalties should be elevated to ‘mirror the theft penalties.’” Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1274 (2017) (quoting Justice Stephen G. Breyer & Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM. L. BULL. 5, 19 (1990)). Accordingly, some scholars have asserted that white-collar offenders no longer receive lenient sentences as they did in the past. See, e.g., Samuel W. Buell, *Is the White Collar Offender Privileged?* 63 DUKE L.J. 823, 833 (2014). The situation is complex and context dependent though. For instance, it appears that in federal fraud cases that judges are convinced that the guidelines are too harsh and appear extremely reluctant to impose sentences within the guidelines range. See Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939,

we should be cautious about assuming that prosecutors' sentencing recommendations would be so easily rejected for blue collar defendant. Put simply, there are good reasons to believe that doctors may not be representative of other federal defendants.

B. Doctors Are Similar to Other Federal Defendants in Some Important Ways

While we should recognize the differences between doctors and other federal defendants, we should also be aware of their similarities. The doctors in this study were convicted of drug dealing—the same federal offense that has put huge numbers of street offenders behind bars. The doctors were engaged in the outrageous behavior of selling drugs for cash, or sometimes even for sex.⁷⁵ Moreover, the harm they caused was not abstract or solely financial as in many white-collar crimes. Doctors harmed the lives of their “patients,” by worsening their addiction and contributing to job loss, health deterioration, and harming relationships with family members. Some patients died. By 2015—the start of the time period for this study—the devastation caused by the opioid crisis was well-known to prosecutors, judges and the public.⁷⁶ Moreover, judges may have been more outraged by the conduct of highly educated doctors who engaged in drug dealing not because, unlike some street dealers, they had other

943, 944 (2017) (cataloging criticism of the fraud guideline and reporting study in which three-fourths of federal and state judges sentenced hypothetical fraud defendants to the lowest possible sentence). Additionally, when corporations enter into deferred or non-prosecution agreements, it appears that the executives in those companies receive more lenient sentences. See Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1810 (2015) (studying individual defendants associated with deferred or non-prosecutions of companies and finding that the “average sentence among these individuals studied, including those who received probation but no jail time, was eighteen months, which is somewhat lower than the averages for many of the relevant federal crimes”).

⁷⁵ See, e.g., Government's Sentencing Position Regarding Defendant Daniel Cham at 4, *United States v. Cham*, No. CR 14-591-AG, (C.D. Cal. Nov. 16, 2016) (exchanging prescriptions for “thousands of dollars in criminal cash”); Government's Sentencing Memorandum at 6, *United States v. Beier*, No. 2:14-cr-00117-EJL (D. Idaho Nov. 21, 2017) (trading sex for drugs).

⁷⁶ As early as 2007, Purdue Pharma pled guilty to misbranding and deceiving the public. See generally MEIER, *supra* note 67. By 2015, President Obama had given a national address on the opioid crisis. See, e.g., Steven Mufson & Katie Zezima, *Obama Announces New Steps to Combat Heroin, Prescription Drug Abuse*, WASH. POST (Oct. 21, 2015), https://www.washingtonpost.com/politics/white-house-announces-new-steps-to-combat-heroin-prescription-drug-abuse/2015/10/21/e454f8fa-7800-11e5-a958-d889faf561dc_story.html [https://perma.cc/2HYH-CPH9] (describing “a nationwide epidemic of heroin and prescription drug abuse”).

options, but out of simple greed. Judges may well have seen opioid-peddling doctors in just as negative of a light as “regular” defendants who violated federal law.

In addition to being skeptical that drug-dealing doctors are looked upon sympathetically, we should also be careful not to ascribe too much influence to their wealth. Of course, most doctors are far wealthier than the average federal defendant. And wealth enables defendants to hire a team of excellent lawyers. But does that actually put them in a better position than the average federal defendant? Perhaps not.

In federal court, indigent defendants are typically represented by the Federal Public Defender’s office. Unlike public defenders in state court, who are often under-funded and over-worked,⁷⁷ federal public defenders are typically well resourced and considered to perform uniformly excellent work.⁷⁸ Indeed, a few of the doctors in this study were represented by federal public defenders and received very favorable sentences.⁷⁹

Thus, while doctors are more affluent than the typical federal defendant, there is reason to think their wealth would not have had a major effect on sentencing. The traditional explanations for discounting the experience of white-collar defendants likely do not hold.

⁷⁷ See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1096–97 (2013).

⁷⁸ See Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 478 (2004) (“Federal public defenders generally know the intricacies of the Guidelines better than prosecutors and private attorneys.”); Inga L. Parsons, “*Making It A Federal Case*”: A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 839 n.7 (1997) (“In its report, the Committee to Review the Criminal Justice Act (‘CJA’) found that the overall level of representation provided by federal defender organizations—including federal public defenders and community defense organizations—was ‘excellent,’ and that the ‘undisputed testimony received by the Committee indicates that the federal defenders render cost-efficient defender services at the highest level of competence.’”).

⁷⁹ At least five of the doctors were represented by public defenders: Jeanne Germeil, John Alan Littleford, Joel Miller, Constantino Perales, and Richard Williams. Dr. Littleford received a sentence at the bottom of the guidelines range. See *supra* Table 1. Both Dr. Germeil and Dr. Perales received sentences below the guidelines range and about 20% below the prosecutor’s recommendation. Dr. Williams received a below guidelines sentence that was over 30% lower than the prosecution’s recommendation. Finally, Dr. Miller was sentenced to sixty months, which was above the guidelines range but dramatically lower than the 240 months requested by the government. See *supra* Table 2.

C. *Pill Cases Skew Guidelines Ranges, But It Is Difficult for Prosecutors to Fully Count Improper Prescriptions*

Another way in which doctor prosecutions at first glance would seem to be qualitatively different is that they involve pills, which can lead to huge guidelines ranges.⁸⁰ Doctors see a lot of patients and they therefore prescribe a lot of pills. This is particularly true for pain doctors who may be treating hundreds or thousands of patients who consume opioids. If prosecutors can show that all of those pills were illegally distributed, the drug quantity will be enormous and thus create a huge advisory guidelines range.⁸¹ As we have seen, prosecutors often recommend a sentence within the guidelines range. But judges might think these guidelines ranges are too high. As such, it would not be surprising that judges would frequently reject the prosecutors' recommendations for guidelines sentences. If so, prosecutors' success rate in sentencing recommendations might be worse for cases involving prescription pills.

The "pill cases are different" explanation is not likely to hold, however. While pain doctors and other physicians surely do prescribe a lot of pills, all of those prescriptions are not automatically counted in determining the guidelines range. Rather, prosecutors must demonstrate that the prescriptions were improper. And that is very difficult to do. Prosecutors must hire expert witnesses—typically other doctors—to review patient files and testify that there was no legitimate reason for the defendant to prescribe drugs to those patients.⁸² Medical experts are hard to find, and they are expensive.⁸³ Because prosecutors, even federal prosecutors, are busy and must make due with limited resources, they sometimes try to short circuit the quantity question by reaching an agreed drug quantity stipulation with the defense⁸⁴ or

⁸⁰ See Daniel N. Arshack, *Down the Rabbit Hole: The Federal Sentencing Guidelines Oxycodone to Marijuana Equivalency Calculation Is Arbitrary and Without Reason*, 39 CHAMPION 50, 50 (2015); Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1060–61.

⁸¹ See *supra* note 61–63 and accompanying text.

⁸² See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1110.

⁸³ See Gershowitz, *The Opioid Doctors*, *supra* note 12, at 915.

⁸⁴ For example, while there was evidence that Dr. Zongli Chang prescribed more than 2.7 million opioid doses, his plea agreement counted about 10% of that amount, which is only about 330,000 pills. See Transcript of Sentencing Hearing at 6, 27, *United States v. Chang* (E.D. Mich. Apr. 17, 2019) (Case 2:18-cr-20008-SFC-APP); *Livonia Doctor, 7 Others Charged in \$18M Prescription Drug Scheme*, FOX 2 DETROIT, (Jan. 9, 2018), <https://www.fox2detroit.com/news/livonia-doctor-7-others-charged-in-18m-prescription-drug-scheme> [https://perma.cc/P3WA-3A5V].

by asking the court to consider a shortened time period during which the doctor was dealing drugs.⁸⁵ By taking those approaches, the guidelines ranges actually account for much *lower* drug quantities than the defendant actually illegally distributed. Accordingly, for many opioid distribution cases, the doctors' sentencing ranges are in fact much lower than they would be with a full counting of the illegally distributed pills.

D. Doctors Are Older Than Average Defendants And That May Result in Big Sentencing Discounts

There is one way in which doctors are quite different from other federal defendants and which counsels caution before applying the results of this study to other areas of the federal criminal justice system. That area is age of the defendant. On average, doctors charged with opioid distribution are considerably older than the typical defendant. In a previous study of twenty-five doctors who were running some of the most egregious pill mills in the country, I found that sixteen of the twenty-five doctors were over the age of sixty.⁸⁶ The older age of the doctors is certainly true of the 130 doctors in this current study as well. By contrast, most federal criminal defendants are markedly younger, on average about thirty-seven years old.⁸⁷

The doctors' older age is significant because judges appear to give a break to older defendants at sentencing. In 2010, the Federal Sentencing Commission amended the Federal Sentencing Guidelines to allow judges to take advanced age and physical condition into account at sentencing.⁸⁸ And it appears judges are

⁸⁵ See, e.g., Transcript of Sentencing Hearing at 13, 24, *United States v. Ridgill*, No. 2:16-cr-00631-SJO (C.D. Cal. Apr. 23, 2018) (noting that the prosecution relied only on a single year of prescriptions (even though Dr. Edward Ridgill's clinic was open for much longer) and explaining that "[i]f the Government actually covered the entirety of defendant's prescription history . . . the offense level [and thus the guidelines range] would be . . . through the roof.").

⁸⁶ See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1117–18.

⁸⁷ See U.S. SENT'G COMM'N, OVERVIEW OF CRIMINAL CASES, FISCAL YEAR 2016 (2017), at 4 ("The average age of offenders in fiscal year 2016 was 37 years old, only a slight increase from the average age of 36 for offenders sentenced in fiscal year 2012 and the average age of 35 in 2007.").

⁸⁸ See U.S.S.G. § 5H1.1 (2010). The policy statement provides that:

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an *unusual degree* and distinguish the case from the *typical cases* covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home

particularly prone to do this when guidelines sentences would result in individuals spending the rest of their lives in prison.⁸⁹ For example, if a doctor was sixty-five years old at sentencing and faced a guidelines range that would result in the doctor being incarcerated into his late eighties, judges appear to be imposing a below guidelines sentence so that the doctor will be released in his seventies when he would still have some life to live outside of prison.⁹⁰

In sum, when considering whether cases of doctors charged with drug dealing are representative of the rest of the criminal justice system, we should focus more on their age than their wealth and prestige. Further research is needed, however, to fully understand how significant the age of the defendant is in determining how prosecutors make sentencing recommendations and how often judges follow those recommendations.

CONCLUSION

Prosecutors have long been considered to be the most powerful actors in the criminal justice system. Part of that power is prosecutors' ability to dictate tough sentences. The theory goes that prosecutors are extremely influential and that judges will typically follow prosecutors' sentencing recommendations. To date however, there has been no data to support the theory that judges defer to prosecutors' sentencing recommendations.

This study turns the theory of deference to prosecutors on its head. In a study of 130 doctors sentenced for illegally distributing opioids, judges rejected prosecutors' sentencing recommendations in a staggering 66% of cases. Not only did prosecutors usually lose at sentencing, they often lost big. In more than 20% of cases, federal judges sentenced defendants to half or even less than half of what prosecutors recommended. In dozens of other cases, judges imposed sentences that were 30% or 40% less than what prosecutors requested.

Prosecutors' lack of success is not simply because judges are rejecting the Federal Sentencing Guidelines. Prosecutors themselves often sought sentences below the guidelines or on the bottom end of the guidelines range, but their recommendations

confinement might be equally efficient as and less costly than incarceration.

Physical condition, which may be related to age, is addressed at § 5H1.4.

Id. (emphasis added).

⁸⁹ See Gershowitz, *Punishing Pill Mill Doctors*, *supra* note 13, at 1118–21.

⁹⁰ See *id.* at 1120–21.

were rejected anyway. Nor does it appear that prosecutors lost at sentencing because they were seeking to impose a punitive trial penalty. To the contrary, prosecutors were more likely to seek sentences below the guidelines range or at the bottom end of the range after a trial. But they lost anyway. Finally, it does not appear that prosecutors lost at sentencing because they were taking a tough stand on the opioid crisis before judges were aware of the scope of the epidemic. The year of sentencing did not appear to determine whether prosecutors' recommendations were out-of-step with judges' sentences.

What explains prosecutors' poor record at sentencing? The answer simply seems to be that prosecutors are not as powerful as scholars have assumed. Prosecutors may have structural tools to influence defendants' sentences; no one can deny that prosecutors have vast power to seek sentencing enhancements or to decline to file motions for reductions based on the defendant's substantial assistance. But the existence of structural advantages does not change the fact that at the moment of sentencing it is the judges who are making the final decisions. And judges appear not to be showing prosecutors the vast deference we have long assumed.

ⁱ See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Fla., Seven More Defendants Sentenced for Participating in Schemes Related to Defrauding Health Care Benefit Programs, Unlawful Dispensing of Opioids, and Money Laundering (Feb. 13, 2019), <https://www.justice.gov/usao-sdfl/pr/seven-more-defendants-sentenced-participating-schemes-related-defrauding-health-care> [<https://perma.cc/Z5LF-V5HV>]; United States' Response to Defendant's Objections to the Presentence Investigation Report at 2, 17, United States v. Abovyan, No. 9:18-cr-80122-DMM (S.D. Fla. Feb. 11, 2019).

ⁱⁱ See Email from Lia Bantavani, Pub. Info. Officer for the U.S. Att'y's Off., W. Dist. of N.C., to author (Oct. 18, 2019, 10:18 AM EST) (on file with author); Adam Lawson, *Former Mount Holly Doctor Sentenced to Federal Prison*, GASTON GAZETTE (Feb. 22, 2019), <https://www.gastongazette.com/news/20190222/former-mount-holly-doctor-sentenced-to-federal-prison> [<https://perma.cc/ZQA6-DQQG>].

ⁱⁱⁱ See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ga., Two Doctors and Clinic Owners Sentenced for Operating Pill Mills in Metro Atlanta (June 26, 2017), <https://www.justice.gov/usao-ndga/pr/two-doctors-and-clinic-owners-sentenced-operating-pill-mills-metro-atlanta> [<https://perma.cc/PY6T-BR74>]; Government's Motion for Downward Departure Based on Substantial Assistance at 2, United States v. Askari, No. 1:12-cr-00276-SCJ-JKL (N.D. Ga. June 7, 2017).

^{iv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ala., Jasper Pain Clinic Physician Sentenced to Nearly Three Years in Prison for Illegally Dispensing Narcotics (Apr. 8, 2016), <https://www.justice.gov/usao-ndal/pr/jasper-pain-clinic-physician-sentenced-nearly-three-years-prison-illegally-dispensing> [<https://perma.cc/YT5E-5LB6>]; Government's Sentencing Memorandum at 1, United States v. Ali, No. 6:15-cr-00094-LSC-JEO (N.D. Ala. Apr. 7, 2016).

^v See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ala., Huntsville Pill Mill Doctor Sentenced to 15 Years in Prison for Illegal Prescribing and Health Care Fraud (Feb. 7, 2017), <https://www.justice.gov/usao-ndal/pr/huntsville-pill-mill-doctor-sentenced-15-years-prison-illegal-prescribing-and-health> [<https://perma.cc/2FBF-R2NW>]; Government's Sentencing Memorandum at 1, 8, United States v. Aggarwal, No. 5:16-cr-00299-RDP-TMP (N.D. Ala. Feb. 1, 2017).

^{vi} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Mich., Former Doctor Sentenced to 23 Years in Prison for Distributing Prescription Drugs, Health Care Fraud, and Money Laundering, (June 15, 2017), <https://www.justice.gov/usao-edmi/pr/former-doctor-sentenced-23-years-prison-distributing-prescription-drugs-health-care> [<https://perma.cc/2RL8-SJXD>]; Sentencing Memorandum by the United States at 1, U.S. v. Ashrafkhan, No. 2:11-cr-20551-RHC-MKM (E.D. Mich. May 30, 2017); Email from Wayne Pratt, Ass't U.S. Att'y, E. Dist. of Mich., to author (Oct. 23, 2019, 11:04 AM EST) (on file with author).

^{vii} See Sentencing Memorandum, Motion for Downward Departure, Request for Variance, and Reply to the Government's Response to Defendant's PSR Objections at 3, U.S. v. Beier, No. 2:14-cr-00117-EJL (D. Idaho Nov. 21, 2017); Government's Sentencing Memorandum at 1, 3, U.S. v. Beier, No. 2:14-cr-00117-EJL (D. Idaho Nov. 21, 2017); Sentencing Hearing Transcript at 25, 36, 49, U.S. v. Beier, 2:14-cr-00117-EJL (D. Idaho Nov. 29, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Idaho, Doctor Sentenced to 16 Years for Distributing Drugs (Nov. 30, 2017), <https://www.justice.gov/usao-id/pr/doctor-sentenced-16-years-distributing-drugs> [<https://perma.cc/AF9W-44GE>].

^{viii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. La., Local Medical Doctor Sentenced for Illegally Dispensing and Distributing Controlled Substances by Prescriptions and Money Laundering (May 1, 2019), <https://www.justice.gov/usao-edla/pr/local-medical-doctor-sentenced-illegally-dispensing-and-distributing-controlled-0> [<https://perma.cc/WSH5-SGZL>]; Letter to the Court from United States Attorney, U.S. v. Celestine, No. 2:18-cr-00083, (E.D. La. Apr. 23, 2019).

^{ix} See Jeff Sturgeon, *Former Doctor from Roanoke Draws 10 Years for Child Porn, Drug Crimes*, ROANOKE TIMES (June 23, 2015), https://roanoke.com/news/crime/former-doctor-from-roanoke-draws-10-years-for-child-porn-drug-crimes/article_0cf7d5e1-9a2b-5505-9748-f35c8bb1619b.html [<https://perma.cc/QAK4-NKRP>]; Government's Sentencing Memorandum at 1–2, United States v. Collins, No. 7:14-cr-00053-GEC (E.D. Va. June 19, 2015). The Collins case is unusual in that he was also convicted of possessing child pornography.

^x See Transcript of Sentencing at 15–16, 22, United States v. Cowie, No. 1:15-cr-00106-LJV-HBS (W.D.N.Y. June 19, 2017); Phil Fairbanks, *Doctor—And Recovering Addict—Gets Jail Time in Fraud Case*, BUFFALO NEWS (Feb. 2, 2017), https://buffalonews.com/news/local/crime-and-courts/doctor-and-recovering-addict-gets-jail-time-in-fraud-case/article_600ba55c-5be7-574c-b175-a381b57cd2fa.html [<https://perma.cc/5U89-AQ3G>].

^{xi} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Tx., Two North Texas Doctors, One Nurse Sentenced to Prison for Federal Drug Trafficking Violations (May 9, 2019), <https://www.justice.gov/usao-edtx/pr/two-north-texas-doctors-one-nurse-sentenced-prison-federal-drug-trafficking-violations> [<https://perma.cc/L57X-5NXX>]; Transcript of Change of Plea Hearing at 17, United States v. Diamond, No. 4:17-cr-00118-SDJ-KPJ (E.D. Tx. Oct. 5, 2018).

^{xii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., C.D. Cal., Santa Barbara Doctor Sentenced to over 27 Years in Federal Prison for Writing Prescriptions for Huge Quantities of Dangerous Narcotics (Dec. 7, 2015), <https://www.justice.gov/usao-cdca/pr/santa-barbara-doctor-sentenced-over-27-years-federal-prison-writing->

prescriptions-huge [<https://perma.cc/A8ES-D949>]; Reporter's Transcript of Sentencing at 10, 16, U.S. v. Diaz, No. 8:12-cr-000011-CJC (C.D. Cal. Dec. 7, 2015).

^{xiii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Ky., Grant County Doctor Sentenced to 151 Months for Drug Trafficking (July 26, 2018), <https://www.justice.gov/usao-edky/pr/grant-county-doctor-sentenced-151-months-drug-trafficking> [<https://perma.cc/343Y-EB5D>]; Sentencing Memorandum at 3–4, U.S. v. El-Amin, No. 2:15-cr-00057-DLB-MAS (E.D. Ky. July 15, 2018); Sentencing Agreement at 1, U.S. v. El-Amin, No. 2:15-cr-00057-DLB-MAS (E.D. Ky. July 15, 2018).

^{xiv} See Plea Agreement at 2, United States v. Floyd, No. 2:17-cr-00148-CJB-JCW (E.D. La. Sept. 7, 2017); Laura McKnight, *10 Years in Prison for New Orleans East Doctor Guilty of Running 'Pill Mills,'* NOLA.COM, (Feb. 1, 2018), https://www.nola.com/news/crime_police/article_1b56ee60-ff15-5dce-b53f-686341b986b6.html [<https://perma.cc/VDV7-XHH4>].

^{xv} See Telephone Interview with Jim May, Ass't U.S. Att'y, Dist. of S.C. (Oct. 22, 2019); John Monk, *Doctor Gets Prison for Giving Drugs to SC Irish Traveler, Pushing Patients for Sex*, STATE (Jan. 19, 2019).

^{xvi} See Plea Agreement at 8, United States v. Guerrero, No. 3:15-cr-00012-GNS-CHL, (W.D. Ky. Jan. 7, 2016); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Ky., Kentuckiana Anesthesiologist Sentenced to 100 Months for Unlawful Distribution of Controlled Substances, Health Care Fraud, Conspiracy, and Money Laundering (May 12, 2016), <https://www.justice.gov/usao-wdky/pr/kentuckiana-anesthesiologist-sentenced-100-months-unlawful-distribution-controlled> [<https://perma.cc/A8BX-RZNT>].

^{xvii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. W.Va., Ohio Physician Sentenced to Nearly Five Years for Fraudulently Distributing Controlled Substances (Sept. 17, 2018), <https://www.justice.gov/usao-ndwv/pr/ohio-physician-sentenced-nearly-five-years-fraudulently-distributing-controlled> [<https://perma.cc/U6B5-KJQ8>]; E-mail from Sarah Wagner, Assistant U.S. Att'y, N.D.W. Va, to author (Oct. 29, 2019) (on file with author).

^{xviii} See United States Sentencing Memorandum at 2–4, United States v. Heatwole, No. 6:16-cr-00021, (W.D. Va. Feb. 3, 2017); E-mail from Randy Ramseyer, Assistant U.S. Att'y, W.D. Va., to author (Oct. 21, 2019) (on file with author).

^{xix} See Press Release, Dep't of Just., U.S. Att'y's Off., N.D. Ala., Vestavia Hills Cardiologist Sentenced to 87 Months in Prison for Illegally Prescribing Opioids (May 7, 2019), <https://www.justice.gov/usao-ndal/pr/vestavia-hills-cardiologist-sentenced-87-months-prison-illegally-prescribing-opioids> [<https://perma.cc/VAQ8-S7CP>]; E-mail from Mohammad Khatib, Assistant U.S. Att'y, to author (Oct. 17, 2019) (on file with author).

^{xx} See Paige McAtee, *Former Great Neck Doctor Sentenced to Prison for Illegally Dealing Painkillers*, PATCH.COM (Mar. 15, 2016), <https://patch.com/new-york/greatneck/former-great-neck-doctor-sentenced-prison-illegally-dealing-painkillers>; Defendant's Sentencing Memorandum at 1–2, United States v. Jacobson, No. 2:12-cr-00432-JFB-GRB (E.D.N.Y. May. 16, 2016).

^{xxi} See Press Release, Dep't of Just., U.S. Att'y's Off., D.N.M., Former Dona Ana County Doctor Sentenced to 108 Months for Conviction of Unlawful Distribution of Prescription Painkillers and Health Care Fraud Charges (May 9, 2019), <https://www.justice.gov/usao-nm/pr/former-dona-ana-county-doctor-sentenced-108-months-conviction-unlawful-distribution> [<https://perma.cc/9Z47-7DS8>]; United States' Sentencing Memorandum at 2–4, United States v. Jain, No. 2:14-cr-012161-RB (D.N.M. Apr. 15, 2019).

^{xxii} See Transcript of Sentencing Proceeding at 5, 7, 15, 20, United States v. Johns, No. 4:15-cr-00224-BSM (E.D. Ark. Sept. 14, 2017); Linda Satter, *Former Little Rock Doctor*

Sentenced to 9 Years for Writing Fake Prescriptions, ARK. DEMOCRAT GAZETTE (Aug. 31, 2017), <https://www.arkansasonline.com/news/2017/aug/31/former-lr-doctor-sentenced-to-9-years-f/> [<https://perma.cc/Q378-XLCU>].

^{xxiii} See Jamie Satterfield, *Judge Hands Maryville Pain Clinic Doctor 70-Month Sentence*, KNOX NEWS (Nov. 17, 2016), <https://www.knoxnews.com/story/news/crime/2016/11/17/judge-hands-maryville-pain-clinic-doctor-70-month-sentence/94042600/> [<https://perma.cc/3S3Q-FDNY>]; Sentencing Hearing Before Judge Pamela Reeves at 4, 12, 14–15, 236, *United States v. Joyner*, No. 3:14-cr-124-005 (E.D. Tenn. Dec. 5, 2016).

^{xxiv} See Email from Suzanne Kerney-Quillen, Special Ass't U.S. Att'y, W. Dist. of Va., to author (Oct. 24, 2019, 10:42 AM EST) (on file with author); *78-Year-Old Doctor Virginia Doctor Sentenced on Medicaid Fraud, Drug Charges*, WHSV (Mar. 20, 2018), <https://www.whsv.com/content/news/Physician-78-sentenced-on-Medicaid-fraud-drug-charges-477404523.html> [<https://perma.cc/PD7N-PS8U>].

^{xxv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Conn., *Doctor Sentenced to 7 Years in Prison for Illegally Prescribing Narcotics, Defrauding Government Programs* (Nov. 4, 2015), <https://www.justice.gov/usao-ct/pr/doctor-sentenced-7-years-prison-illegally-prescribing-narcotics-defrauding-government> [<http://perma.cc/VN3E-98TE>]; Government's Sentencing Memorandum at 2, 4, *United States v. Katsetos*, No. 3:15-cr-00069-VLB (D. Conn. Oct. 29, 2015).

^{xxvi} See Sentencing Memorandum of the United States at 1, 5, *United States v. Kostenko*, No. 5:16-cr-00221 (S.D. W. Va. Aug. 11, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. W. Va., *Beckley Area Physician Sentenced to 20 Years in Federal Prison for Oxycodone Crime* (Aug. 23, 2017), <https://www.justice.gov/usao-sdww/pr/beckley-area-physician-sentenced-20-years-federal-prison-oxycodone-crime> [<https://perma.cc/97XD-RPQ2>].

^{xxvii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Va., *Stafford Doctor Sentenced to 4 Years in Prison for Distribution of Oxycodone and Health Care Fraud* (June 26, 2015), <https://www.justice.gov/usao-edva/pr/stafford-doctor-sentenced-four-years-prison-distribution-oxycodone-and-health-care> [<https://perma.cc/9ZS7-YZ83>]; Sentencing Position of the United States at 1, 2, *United States v. Mohanty*, No. 1:14-cr-00256-LO (E.D. Va. June 22, 2015).

^{xxviii} See Transcript of Sentencing Hearing at 50, 67, 73, *United States v. Pamatmat*, No. 2:11-cr-20551-RHC-MKM (E.D. Mich. May 18, 2017).

^{xxix} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Nev., *Nevada Cardiologist Sentenced to 3 Years in Prison for Unlawful Distribution of Opioids* (May 8, 2019), <https://www.justice.gov/usao-nv/pr/nevada-cardiologist-sentenced-three-years-prison-unlawful-distribution-opioids> [<https://perma.cc/L48V-FK66>]; Government's Sentencing Memorandum at 1, 4, 11, *United States v. Patel*, No. 3:17-cr-00114-LRH-CBC (D. Nev. Apr. 1, 2019).

^{xxx} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., C.D. Cal. *Orange County Psychiatrist Sentenced to More than Four Years in Federal Prison for Writing Illegal Opioid Prescriptions to Drug Dealer* (June 18, 2019), <https://www.justice.gov/usao-cdca/pr/orange-county-psychiatrist-sentenced-more-four-years-federal-prison-writing-illegal#:~:text=SANTA%20ANA%2C%20California%20%E2%80%93%20A%20psychiatrist,drugs%20would%20be%20sold%20on> [<https://perma.cc/B27E-H89S>]; Government's Sentencing Position for Defendant Robert Perez at 2, 4, *United States v. Perez*, No. 8:18-cr-00123AG (C.D. Cal. May 24, 2019).

^{xxxi} See Press Release, Dep't of Just., U.S. Att'y's Off., E.D. Va., *Former Doctor Sentenced to Prison for Illegal Sale of Opioid* (Apr. 26, 2019), <https://www.justice.gov/usao-edva/pr/former-doctor-sentenced-prison-illegal-sale-opioids> [<https://perma.cc/S5PP-THLX>]; Position of the United States With Respect to

Sentencing at 3, *United States v. Pole*, No. 1:18-cr-00303-CMH (E.D. Va. Apr. 19, 2019); Sentencing Minutes, *United States v. Pole*, No. 1:18-cr-00303-CMH (E.D. Va. Apr. 19, 2019).

^{xxxii} See Transcript of Sentencing at 6, 183, 229, *United States v. Rand*, No. 3:16-cr-00029-MMD-WGC (D. Nev. Nov. 20, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Office, D. Nev., Reno Doctor Sentenced to 10 Years in Prison for Involuntary Manslaughter of Patient and Unlawful Distribution of Large Quantities of Prescription Drugs (Nov. 20, 2017), <https://www.justice.gov/usao-nv/pr/reno-doctor-sentenced-10-years-prison-involuntary-manslaughter-patient-and-unlawful> [<https://perma.cc/BB3U-ZNT5>].

^{xxxiii} See Position of the Government With Respect to Sentencing Factors at 1, *United States v. Rydze*, No. 2:15-cr-00063-JFC, (W.D. P.A. Nov. 1, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ohio, Former Physician Richard Rydze Sentenced to 10 Years in Prison for Illegally Distributing Anabolic Steroids, HGH, Oxycodone, and OxyContin (Mar. 20, 2018), <https://www.justice.gov/usao-ndoh/pr/former-physician-richard-rydze-sentenced-10-years-prison-illegally-distributing> [<https://perma.cc/2TU7-W3PL>].

^{xxxiv} See Sentencing Position of the United States and Response to Defendant's Objections to the Presentence Report at 1, 3, 4, *United States v. Scranage*, No. 3:17-cr-00023-HEH, (E.D. Va. Dec. 10, 2017); Press Release, Dep't of Just., U.S. Att'y's Off., E.D. Va., Doctor Sentenced to 30 Years for Oxycodone Distribution Conspiracy (Dec. 18, 2017), <https://www.justice.gov/usao-edva/pr/doctor-sentenced-30-years-oxycodone-distribution-conspiracy> [<https://perma.cc/37WD-NLXY>].

^{xxxv} See Email from Randy Ramseyer, Ass't U.S. Att'y, W. Dist. of Va., to author, (Oct. 21, 2019, 5:20 PM EST) (on file with author); Press Release, Dep't of Just., U.S. Att'y's Off., W. Dist. of Va., Norton Doctor Sentenced on Federal Drug Charges (Dec. 15, 2017), <https://www.justice.gov/usao-wdva/pr/norton-doctor-sentenced-federal-drug-charge> [<https://perma.cc/KMM2-4CLP>].

^{xxxvi} See Transcript of Sentencing Hearing at 335, 358, 362, *U.S. v. Sinha*, No. 1:14-cr-00009-HSO-JCG, (S.D. Miss. Oct. 27, 2015).

^{xxxvii} See *Cave City Dentist Sentenced in Federal Court*, WBKO.COM (Mar. 20, 2017), <https://www.wbko.com/content/news/Cave-City-dentist-sentenced-in-federal-court-416645193.html> [<https://perma.cc/VRH5-R6FQ>].

^{xxxviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Ala., Former Pain Management Doctor Receives 5 Years in Health Care Fraud Case, Ordered to Pay More than 15 Million Dollars in Restitution (June 8, 2018), <https://www.justice.gov/usao-sdal/pr/former-pain-management-doctor-receives-5-years-health-care-fraud-case-ordered-pay-more> [<https://perma.cc/8yMG-NYW9>]; *United States' Sentencing Memorandum* at 1, 2, 4, *U.S. v. Tarabein*, No. 1:17-cr-00090-KD-B, (S.D. Ala. June 4, 2018).

^{xxxix} See Transcript of Sentencing Hearing at 20, 43, 45, *U.S. v. Taylor*, No. 4:17-cr-00009-SDJ-KPJ, (E.D. Tx. May 3, 2010); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Tx., Two North Texas Doctors, One Nurse Sentenced to Prison for Federal Drug Trafficking Violations (May 9, 2019), <https://www.justice.gov/usao-edtx/pr/two-north-texas-doctors-one-nurse-sentenced-prison-federal-drug-trafficking-violations> [<https://perma.cc/7AW9-257V>].

^{xl} See Transcript of Sentencing Hearing at 8, 31, *U.S. v. Temponeras*, No. 1:15-cr-00065-TSB, (S.D. Ohio Nov. 12, 2019); Government's Sentencing Memorandum at 1, *U.S. v. Temponeras*, No. 1:15-cr-00065-TSB, (S.D. Ohio Nov. 8, 2019); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Ohio, Scioto County Doctor Sentenced to 7 Years in Prison for Role in Pill Mill (Nov. 13, 2019), <https://www.justice.gov/usao-sdoh/pr/scioto-county-doctor-sentenced-7-years-prison-role-pill-mill> [<https://perma.cc/U9MA-PBM5>].

^{xii} See Transcript of Sentencing Hearing at 2, 3, 6, 9, U.S. v. Willems, No. 9:17-cr-80013-DMM (S.D. Fla. Aug. 8, 2017); Tonya Alanez, *Weston doctor gets federal prison sentence in sober homes fraud*, SUN SENTINEL (June 13, 2017), <https://www.sun-sentinel.com/local/broward/weston/fl-reg-sober-homes-doctor-sentenced-20170613-story.html> [<https://perma.cc/GJC4-TKK9>].

^{xiii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Wis., Brookfield Physician Sentenced to Prison for Illegally Distributing Prescription Narcotics (May 18, 2015), <https://www.justice.gov/usao-edwi/pr/brookfield-physician-sentenced-prison-distributing-prescription-narcotics> [<https://perma.cc/92U8-9QMZ>]; Sentencing Minutes at 1, U.S. v. Yee, No. 2:14-cr-00192-RTR (E.D. Wis. May 6, 2015).

^{xiii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Cal., South Bay Doctor Sentenced to Two Years in Prison for Unlawfully Distributing Hydrocodone and Committing Health Care Fraud (Oct. 21, 2019), <https://www.justice.gov/usao-ndca/pr/south-bay-doctor-sentenced-two-years-prison-unlawfully-distributing-hydrocodone-and> [<https://perma.cc/S3GG-L97C>]; Government's Sentencing Mem. at 1, 2, U.S. v. Aachi, No. 5:18-cr-00490-EJD (N.D. Cal. Aug. 5, 2019).

^{xiv} See Shannon Marvel, *Former Aberdeen doctor sentenced to 18 months for distributing opioids*, ABERDEEN NEWS (May 14, 2019), https://www.aberdeennews.com/courtnews/former-aberdeen-doctor-sentenced-to-months-for-distributing-opioids/article_3cdb7660-c265-5dfb-9216-5f8fcfa7a4b5.html [<https://perma.cc/RBE9-K7BK>].

^{xiv} See Transcript of Sentencing Proceedings at 23, U.S. v. Almusa, No. 2:18-cr-00065-AJS (W.D. Pa. May 9, 2019); Torsten Ove, *Ex-UPMC doctor gets prison in opioid diversion scheme to feed addiction*, PITTSBURGH POST-GAZETTE (May 9, 2019), <https://www.post-gazette.com/news/crime-courts/2019/05/09/omar-almusa-upmc-doctor-opioid-prescription-addiction-prison-sentence-pittsburgh-Marios-Papachristou/stories/201905090112> [<https://perma.cc/M4KV-QEAD>].

^{xvi} See Transcript of Sentencing Hearing at 17, 21, United States v. Awada, No. 12-cr-20595 (E.D. Mich. Nov. 16, 2015); Mitch Hotts, *"Pill Mill" Doctor Sentenced to Seven Years in Prison*, OAKLAND PRESS (Nov. 17, 2015), <https://www.theoaklandpress.com/2015/11/17/pill-mill-doctor-sentenced-to-seven-years-in-prison/> [<https://perma.cc/2KJ4-VTYL>].

^{xvi} See Transcript of Sentencing Hearing at 10, 12, 40, United States v. Awerbuch, No. 16-cr-20636 (E.D. Mich. Feb. 26, 2018); Steve Friess, *Doctor Tied to Insys Opioid Kickback Probe Gets Prison Term*, REUTERS (Feb. 26, 2018), <https://www.reuters.com/article/insys-opioids/doctor-tied-to-insys-opioid-kickback-probe-gets-prison-term-idUKL2N1QF08X> [<https://perma.cc/Z2C2-3TJQ>].

^{xviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ill., Suspended Physician Sentenced to 1 1/2 Years for Illegally Dispensing Oxycodone and Falsely Billing Medicare in Undercover Probe (Feb. 24, 2015), <https://www.justice.gov/usao-ndil/pr/suspended-physician-sentenced-1-years-illegally-dispensing-oxycodone-and-falsely> [<https://perma.cc/TA94-PZGF>]; Government's Sentencing Memorandum at 12, 21, United States v. Babu, No. 14-cr-00084 (N.D. Ill. Feb. 17, 2015).

^{xix} See Email from Randy Ramseyer, Ass't U.S. Att'y, W. Dist. of Va., to author (Oct. 21, 2019, 5:20 PM) (on file with author); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Va., Lebanon Doctor Sentenced on Federal Drug Distribution Charges (Feb. 7, 2019), <https://www.justice.gov/usao-wdva/pr/lebanon-doctor-sentenced-federal-drug-distribution-charges> [<https://perma.cc/8HTD-MVEM>].

¹ See Tentative Findings and Rulings Concerning the Applicable Advisory Guidelines Range at 1, 4, United States v. Barnett, No. 2:16-cr-00153-JFC (W.D. Pa. Jan. 10, 2017); Position of the Government with Respect to Sentencing Factors at 1, United States v. Barnett, No. 2:16-cr-00153-JFC (W.D. Pa. Dec. 9, 2016); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Pa., Physician Sentenced for Illegally Distributing

Oxycodone (Jan. 12, 2017), <https://www.justice.gov/usao-wdpa/pr/physician-sentenced-illegally-distributing-oxycodone> [<https://perma.cc/S3WR-GNX8>].

^{li} See Government's Response to Defendant's Sentencing Memorandum at 1, United States v. Bennett, No. 1:12-cr-00279-RJA-HBS (W.D.N.Y. Oct. 28, 2015); Phil Fairbanks, *Former Doctor Gets 3 Years in Prison for Giving Out Illegal Painkillers*, BUFFALO NEWS (Nov. 2, 2015), https://buffalonews.com/news/local/crime-and-courts/former-doctor-gets-3-years-in-prison-for-giving-out-illegal-painkillers/article_55a704b1-2264-5ad6-88b7-14c768ac2f18.html [<https://perma.cc/QP3E-PECM>].

^{lii} See Robert Kessler, *L.I. Pain Doctor Sentenced to 50 Months in Oxycodone Case; Dr. Noel Blackman Must Forfeit \$536,000, Fined \$15,000 Pleaded Guilty to Conspiracy to Distribute 365,000 Pills*, NEWSDAY (May 13, 2017), <https://www.newsday.com/long-island/crime/li-pain-doctor-sentenced-to-50-months-in-oxycodone-case-1.13626691> [<https://perma.cc/CGJ3-T3YM>].

^{liii} See Transcript of Sentencing Proceedings at 159, 163–64, 170, United States v. Burton, No. 1:17-cr-00369-ELR-AJB (N.D. Ga. Aug. 29, 2018); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ga., Former Georgia Medical Examiner Sentenced for Opioid Conspiracy (Aug. 30, 2018), <https://www.justice.gov/usao-ndga/pr/former-georgia-medical-examiner-sentenced-opioid-conspiracy> [<https://perma.cc/LJ4P-VEDP>].

^{liiv} See Government's Sentencing Memorandum at 12, 26, United States v. Buzzard, No. 5:15-cr-20581-JEL-DRG (E.D. Mich. July 17, 2018); Press Release, Drug Enft Admin., Detroit Div., West Bloomfield Doctor Sentenced for Opioid Drug Conspiracy (July 26, 2018), <https://www.dea.gov/press-releases/2018/07/26/west-bloomfield-doctor-sentenced-opioid-drug-conspiracy> [<https://perma.cc/92WV-QR8M>].

^{liv} See Press Release, Dep't of Just., U.S. Att'y's Off., E.D. Cal., Physician Practicing in Grass Valley and Yuba City Sentenced to Over 4 Years in Prison for Illegal Prescription Practice (Feb. 22, 2018), <https://www.justice.gov/usao-edca/pr/physician-practicing-grass-valley-and-yuba-city-indicted-illegal-prescription-practice> [<https://perma.cc/E9VQ-VLRB>]; Defendant's Sentencing Memorandum and Objections to the PSR at 1–2, United States v. Capos, No. 2:14-cr-00020-MCE, (E.D. Cal. Feb. 20, 2018); Plea Agreement at 6, United States v. Capos, No. 2:14-cr-00020-MCE (E.D. Cal. May 5, 2016).

^{livi} See Press Release, Dep't of Just., C.D. Cal., Doctor Who Illegally Distributed Prescription Painkillers and Laundered Proceeds Sentenced to 160 Months in Federal Prison (Mar. 14, 2018), <https://www.justice.gov/usao-cdca/pr/doctor-who-illegally-distributed-prescription-painkillers-and-laundered-proceeds> [<https://perma.cc/R6CT-NURL>]; Reporter's Transcript of Proceedings Sentencing at 6, United States v. Cham, No. 2:14-cr-00591-AG (C.D. Cal. Mar. 8, 2018); Reporter's Transcript of Proceedings Sentencing at 48, 54, United States v. Cham, No. 2:14-cr-00591-AG (C.D. Cal. Mar. 14, 2018).

^{lvii} See Transcript of Sentencing Hearing Proceedings at 70, 87, United States v. Chaney, No. 6:14-cr-0037-GFVT-HAI (E.D. Ky. Oct. 27, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Ky., Hazard Physician and Wife Sentenced for Unlawful Distribution of Prescription Opioids and Health Care Fraud (Sept. 29, 2017), <https://www.justice.gov/usao-edky/pr/hazard-physician-and-wife-sentenced-unlawful-distribution-prescription-opioids-and> [<https://perma.cc/FBE6-ZUFL>].

^{lviii} See Press Release, U.S. Dep't of Just., E.D. Mich., Livonia Doctor Sentenced to More than Twelve Years for Conspiring with Others to Illegally Distribute Prescription Drugs (Apr. 17, 2019), <https://www.justice.gov/usao-edmi/pr/livonia-doctor-sentenced-more-twelve-years-conspiring-others-illegally-distribute> [<https://perma.cc/4KCT-FCYM>]; Government's Sentencing Memorandum at 3–4, United States v. Chang, No. 2:18-cr-200008-SFC-APP, (E.D. Mich. Mar. 20, 2019);

Tresa Baldas, *Livonia Doctor Gets 12 Years in Prison for \$18 Million Opioid Scam*, DETROIT FREE PRESS (Apr. 18, 2019), <https://www.freep.com/story/news/local/michigan/oakland/2019/04/17/michigan-opioid-scam/3500769002/> [https://perma.cc/W2M5-P633].

^{lix} See Transcript of Sentencing Hearing at 42, 52–54, 76, United States v. Chapman, No. 4:11-CR-22-HLM-05 (N.D. Ga. Dec. 8, 2015).

^{lx} See Press Release, U.S. Dep't of Justice, U.S. Att'y's Off., N.D. Cal., *Marin Doctor Sentenced to Three Years in Prison for Prescribing Oxycodone Outside the Usual Course of Professional Practice and Without a Legitimate Medical Purpose* (July 19, 2016), <https://www.justice.gov/usao-ndca/pr/marin-doctor-sentenced-three-years-prison-prescribing-oxycodone-outside-usual-course> [https://perma.cc/3HCJ-SEQ2]; United States' Sentencing Memorandum at 2, 4, United States v. Chiarottino, No. CR 14-00466 JSW, (N.D. Cal. July 12, 2016).

^{lxi} See Transcript of Sentencing at 44, 79, 80, 88, United States v. Couch, No. CR15-00088 (S.D. Ala. May 25, 2017).

^{lxii} See Press Release, U.S. Dep't of Justice, U.S. Att'y's Off., S.D. Tex., *Houston Physician and a Pain Management Clinic Owner Each Sentenced to 35 Years in Prison for Running Pill Mill That Provided Unlawful Prescriptions for Millions of Doses of Opioids and Other Controlled Substances* (Sept. 20, 2018), <https://www.justice.gov/opa/pr/houston-physician-and-pain-management-clinic-owner-each-sentenced-35-years-prison-running> [https://perma.cc/AM49-HQWA]; United States' Memorandum in Aid of Sentencing and Response to Defendant's Motion for Downward Variance at 2, 6, United States v. Craig, No. 17-CR-419, (S.D. Tex. Sept. 18, 2018).

^{lxiii} See Government's Sentencing Memorandum at 1,3, United States v. Dela Cruz, No. 16-CR-20328 (E.D. Mi. Dec. 2, 2016); Judgment in a Criminal Case at 2, United States v. Dela Cruz, No. 16-CR-20328 (E.D. Mi. Dec. 6, 2016); Holly Fournier, *Livonia Doctor Gets 8 Years for Illegal Prescriptions*, DETROIT NEWS (Dec. 7, 2016), <https://www.detroitnews.com/story/news/local/wayne-county/2016/12/07/doctor-gets-8-years-illegal-prescriptions/95101888/> [https://perma.cc/4T75-FA9H].

^{lxiv} See Government's Sentencing Memorandum at 1, United States v. Cummings, No. 1:17-cr-00011-GNS-HBB (W.D. Ky. July 17, 2019); Defendant's Sentencing Memorandum at 10, United States v. Cummings, No. 1:17-cr-00011-GNS-HBB (W.D. Ky. July 17, 2019) (noting Probation determined a base offense level of 25 and a criminal history level of 1, which—although not stated in the brief—would amount to a range of 57 to 71 months pursuant to the 2019 Sentencing Table); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Ky., *Clinton County Doctor Sentenced to 30 Months in Prison for Illegally Prescribing Opioids* (July 29, 2019), <https://www.justice.gov/usao-wdky/pr/clinton-county-doctor-sentenced-30-months-prison-illegally-prescribing-opioids> [https://perma.cc/TL26-PRTN].

^{lxv} See Sentencing Hearing at 3, 35–36, 42, 49, United States v. Dixon, No. 7:16-cr-00030-D (E.D.N.C. Feb. 11, 2019).

^{lxvi} See Transcript of Sentencing at 4, 43, 58, 60, United States v. Evans, No. 4:15-cr-00015 (S.D. Tex. Apr. 13, 2017).

^{lxvii} See Government's Sentencing Position Re Defendant Madhu Garg at 4, 14, United States v. Garg, No. 2:15-cr-00007-JAK (C.D. Cal. May 6, 2016); *Ex-Glendoria Doctor Sentenced to Prison for Selling Pain Pills to Addicts in L.A.*, PATCH (June 1, 2016), <https://patch.com/california/glendoria/ex-glendoria-doctor-sentenced-prison-selling-pain-pills-addicts-la> [https://perma.cc/6FEC-D86A].

^{lxviii} See Transcript of Sentencing at 16, 26, 76, United States v. Gayden, No. 6:16-cr-00187-CEM-TBS (M.D. Fla. Nov. 8, 2018); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., M.D. Fla., *Brevard County Doctor Sentenced to Over Nineteen Years for Illegally Distributing Oxycodone* (Sept. 10, 2018), <https://justice.gov/usao->

mdfl/pr/brevard-county-doctor-sentenced-over-nineteen-years-illegally-distributing-oxycodone [https://perma.cc/HC6S-GUP6].

^{lxxix} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Fla., South Florida Pain Management Doctor Sentenced to 17 ½ Years in Prison for Illegally Dispensing Opioid Drugs and Jumping Bond (Nov. 26, 2019), <https://justice.gov/usao-sdfl/pr/south-florida-pain-management-doctor-sentenced-17-years-prison-illegally-dispensing> [https://perma.cc/9XVS-MBTP]; E-mail from Daniel Ecarius, Defense Attorney, to Karly Newcomb, Rsch. Ass't for author (Jan. 22, 2020) (on file with author).

^{lxxx} See Transcript of Sentencing Hearing Proceedings at 9, 16, 30, 33, *United States v. Godofsky*, No. 5:16-cr-00059-KKC (E.D. Ky. Apr. 25, 2018).

^{lxxxi} See Derick Hutchinson, *Farmington Doctor Sentenced for Illegal Distribution of Prescription Pills*, CLICK ON DETROIT (Oct. 4, 2017), <https://www.clickondetroit.com/news/farmington-doctor-sentenced-for-illegal-distribution-of-prescription-pills> [https://perma.cc/UP5H-R74T]; Government's Motion for Downward Departure at 3–4, *United States v. Godoy*, No. 2:15-cr-20283-GCS-MKM (E.D. Mi. Sept 26, 2017).

^{lxxxii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. W. Va., Beckley Doctor Sentenced to Eight Years in Prison for Federal Drug Crime and Health Care Fraud (Apr. 27, 2016), <https://www.justice.gov/usao-sdww/pr/beckley-doctor-sentenced-eight-years-prison-federal-drug-crime-and-health-care-fraud> [https://perma.cc/VP7H-JJL]; Sentencing Memorandum of the United States at 1, *United States v. Gordinho*, No. 5:16-cr-00007, (S.D. W. Va. Mar. 30, 2016).

^{lxxxiii} See Email from Gregory Rosenberg, Ass't U.S. Att'y, E. Dist. of Ky, to author (Oct. 25, 2019, 4:07 PM EST) (on file with author); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Ky., Oak Ridge, Tennessee Doctor and Boca Raton, Florida Clinic Owner Sentenced for Oxycodone Trafficking Conspiracy (Aug. 9, 2019), <https://www.justice.gov/usao-edky/pr/oak-ridge-tennessee-doctor-and-boca-raton-florida-pain-clinic-owner-sentenced-oxycodone> [https://perma.cc/GJ6B-U4B6].

^{lxxxiv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Nev., Doctor Sentenced to Prison for Role in Conspiracy to Distribute Hydrocodone and Oxycodone Without a Medical Purpose (Oct. 25, 2018), <https://www.justice.gov/usao-nv/pr/doctor-sentenced-prison-role-conspiracy-distribute-hydrocodone-and-oxycodone-without> [https://perma.cc/9BMG-F6AT]; Government's Sentencing Memorandum at 1, 6, *United States v. Guerra*, No. 2:18-cr-00197-JCM-PAL, (D. Nev. Oct. 19, 2018).

^{lxxxv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D.N.Y., Surgeon Receives 78 Months in Prison for Distributing Oxycodone, (Jan. 25, 2016), <https://www.justice.gov/usao-ndny/pr/surgeon-receives-78-months-prison-distributing-oxycodone> [https://perma.cc/76YD-7CRJ]; Government Sentencing Memorandum at 2–3, *United States v. Gundel*, No. 1:14-cr-00426 (N.D.N.Y. Dec. 3, 2016).

^{lxxxvi} See Sentencing Minutes, *United States v. Hartman*, No. 2:19-cr-00048, (E.D. Va. Mar. 22, 2019); Position of the United States With Respect to Sentencing and Motion to Grant Defendant Additional One-Level Decrease for Acceptance of Responsibility at 1, *United States v. Hartman*, No. 2:19-cr-00048, (E.D. Va. Mar. 22, 2019); Nick Boykin, *Virginia Beach Dentist Sentenced to Over 8 Years for Opioid Fraud Scheme*, WTKR.COM, (Oct. 3, 2019), <https://wtkr.com/2019/10/03/virginia-beach-dentist-sentenced-to-over-8-years-for-opioid-fraud-scheme/> [https://perma.cc/5HL9-GLBA].

^{lxxxvii} See *United States v. Hayes*, No. 1:14-cr-00015, (W.D. Ky. June 11, 2014); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Ky, Monroe Cnty. Physician Sentenced to One Year in Prison for Illegally Prescribing Pain Medications, (Apr. 21, 2017), <https://www.justice.gov/usao->

wdky/pr/monroe-county-physician-sentenced-one-year-prison-illegally-prescribing-pain [https://perma.cc/Q5TL-8ZJ4].

^{lxxviii} See Government's Sentencing Memorandum at 2, *United States v. Heim*, No. 5:14-cr-00412, (N.D. Ohio Nov. 14, 2014) (noting that the Presentence Report did not include the two-level enhancement that the Government believed was warranted, therefore giving the defendant an offense level of 25 and a criminal history level of 1, which—although not stated in the brief—would amount to a range of 57 to 71 months pursuant to the 2015 Sentencing Table); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ohio, Akron Physician Sentenced to Five Years in Prison for Illegally Distributing Prescription Painkillers, (Mar. 16, 2015), <https://www.justice.gov/usao-ndoh/pr/akron-physician-sentenced-five-years-prison-illegally-distributing-prescription> [https://perma.cc/S5U9-MMNL].

^{lxxix} Ken Ritter, *Vegas Doctor Gets Federal Prison Time in Fentanyl Death Case*, ASSOCIATED PRESS (July 22, 2019), <https://apnews.com/article/77c64f194e294f488d414fa26bc89f79> [https://perma.cc/44BY-S3Q5]; Government's Amended Response to Defendant's Sentencing Memorandum at 4, 6, *United States v. Holper*, No. 2:18-cr-00037 (D. Nev. July 18, 2019).

^{lxxx} Kelsey David, *"Pill Mill" Doctor Sentenced to Probation*, MONTGOMERY ADVISOR (Apr. 30, 2016), <https://www.montgomeryadvertiser.com/story/news/crime/2016/04/29/pill-mill-doctor-sentenced-probation/83700228/> [https://perma.cc/Z8Y3-6Q7D]; Email from Andrew Skier, Def. Att'y, to Karly Newcomb, Rsch. Ass't for author (Feb. 3, 2020, 12:29 PM EST) (on file with author).

^{lxxxii} Transcript of Sentencing Hearing at 84, 96, 131, *United States v. Joshi*, No. 2:18-cr-00011 (N.D. Ind. Apr. 29, 2019); Becky Jacobs, *Munster Doctor Who Improperly Prescribed Opioids Gets 15 Months*, CHI. TRIB. (Apr. 29, 2019), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-joshi-opioid-sentencing-st-0430-story.html> [https://perma.cc/HK6Y-4WQQ].

^{lxxxiii} Sentencing Hearing, Vol. 3 at 10, 14, 16–17, *United States v. Jones*, No. 1:16-cr-00009 (M.D. Ga. Apr. 10, 2017).

^{lxxxiii} Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Michigan Doctor Sentenced to Prison for His Role in Scheme to Unlawfully Distribute Opioids (June 19, 2019), <https://www.justice.gov/opa/pr/michigan-doctor-sentenced-prison-his-role-scheme-unlawfully-distribute-opioids> [https://perma.cc/HEH4-DLEW]; Email from Michael Rex, Def. Att'y, to Karly Newcomb, Rsch. Ass't for author (Feb. 3, 2020, 11:38 AM EST) (on file with author).

^{lxxxiv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Pa., Doctor Sentenced to 24 Months in Prison for Selling Prescriptions of Suboxone and Klonopin (Apr. 9, 2018), <https://www.justice.gov/usao-edpa/pr/doctor-sentenced-24-months-prison-selling-prescriptions-suboxone-and-klonopin> [https://perma.cc/PBV3-NVT8]; Email from Robert Livermore, *supra* note 28.

^{lxxxv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Ohio, Doctor Sentenced for Running Pill Mill (Aug. 29, 2018), <https://www.justice.gov/usao-sdoh/pr/doctor-sentenced-running-pill-mill>; *United States' Sentencing Memorandum at 8-9, United States v. Kirkwood*, No. 3:14-cr-00168-WHR [https://perma.cc/A9W3-X9BP], (S.D. Ohio, Feb. 16, 2018).

^{lxxxvi} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Ill., Effingham Illinois Doctor Sentenced for Illegal Dispensation of Controlled Substances (Nov. 5, 2015), <https://www.justice.gov/usao-sdil/pr/effingham-illinois-doctor-sentenced-illegal-dispensation-controlled-substances> [https://perma.cc/LY6R-LVHJ]; Government's Sentencing Memorandum at 4, 10, *United States v. Kohli*, No. 4:14-cr-40038-JPG, (S.D. Ill. July 27, 2015).

^{lxxxvii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Ky., Louisville Physician Sentenced to 48 Months in Prison for Unlawful Distribution of Controlled

Substances and Health Care Fraud (June 5, 2017), <https://www.justice.gov/usao-wdky/pr/louisville-physician-sentenced-48-months-prison-unlawful-distribution-controlled> [<https://perma.cc/TX2G-J4MG>]; United States' Sentencing Memorandum at 8, 9, 33, United States v. Kudmani, No. 3:13-cr-00173-JHM, (W.D. Ky. May 26, 2017).^{lxxxviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Nevada Pain Management Doctor Sentenced for Unlawful Distribution of Controlled Substances (Dec. 21, 2015), <https://www.justice.gov/usao-nv/pr/nevada-pain-management-doctor-sentenced-unlawful-distribution-controlled-substances> [<https://perma.cc/8WVN-6NV9>]; Government's Sentencing Memorandum at 1, 2, 5, United States v. Kuthuru, No. 2:14-cr-00338-JAD-PAL, (D. Nev. Dec. 12, 2015).

^{lxxxix} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Nev., Northern Nevada Doctor Sentenced to Prison for Illegally Writing Opioid Prescriptions (Aug. 26, 2019), <https://www.justice.gov/usao-nv/pr/northern-nevada-doctor-sentenced-prison-illegally-writing-opioid-prescriptions> [<https://perma.cc/JM73-64HU>]; Government's Sentencing Memorandum at 3, 10, United States v. Li, No. 3:19-cr-00009-MMD-CBC (D. Nev. Aug. 19, 2019).

^{xc} See Government's Sentencing Memorandum at 9, United States v. Linares, No. 2:13-cr-20368-VAR-DRG (E.D. Mi. July 1, 2016); Ray Kisonas, *Linares Sentenced to 57 Months in Prison*, MONROE NEWS (July 12, 2016), <https://www.monroenews.com/news/20160712/linares-sentenced-to-57-months-in-prison> [<https://perma.cc/5J87-VAM9>].

^{xc1} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., Parker Doctor Sentenced for Illegally Distributing Controlled Substances (Apr. 24, 2019); Email from Peter McNeilly, Deputy Chief of Narcotics, U.S. Att'y's Off., Dist. of Colo., to author (Oct. 31, 2019, 2:56 PM EST) (on file with author).

^{xcii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D.N.Y., Doctor Who Operated Oxycodone and Fentanyl Diversion Scheme Sentenced to 5 Years in Prison (July 2, 2019), <https://www.justice.gov/usao-sdny/pr/doctor-who-operated-oxycodone-and-fentanyl-diversion-scheme-sentenced-5-years-prison> [<https://perma.cc/T25R-XUMT>]; Government's Sentencing Memorandum at 1, United States v. Lopez, No. 1:18-cr-00006 (S.D.N.Y. June 25, 2019); Transcript of Sentencing Hearing at 3, 8, United States v. Lopez, No. 1:18-cr-00006-DLC, (S.D.N.Y. July 2, 2019).

^{xciii} See Transcript of Sentencing at 41, 47–48, United States v. Luzon, No. 1:17-cr-00599-LAK-SLC (S.D.N.Y. Apr. 17, 2018); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D.N.Y., Doctor Sentenced to More than 9 Years in Prison for Selling Fentanyl That Resulted in Manhattan Man's Overdose Death (Mar. 22, 2018), <https://www.justice.gov/usao-sdny/pr/doctor-sentenced-more-9-years-prison-selling-fentanyl-resulted-manhattan-man-s-overdose> [<https://perma.cc/YH5B-E4KT>].

^{xciv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D.N.Y., Queens Doctor Sentenced to 54 Months' Imprisonment for Conspiracy to Distribute Oxycodone (June 17, 2015), <https://www.justice.gov/usao-edny/pr/queens-doctor-sentenced-54-months-imprisonment-conspiracy-distribute-oxycodone> [<https://perma.cc/ZNH3-RZXP>]; Defense Pre-sentence Memorandum at 2, United States v. Mayard, No. 2:13-cr-000227 (E.D.N.Y. June 4, 2015); Government Response to Defendant's Sentencing Memorandum at 1, United States v. Mayard, No. 2:13-cr-000227 (E.D.N.Y. June 11, 2015).

^{xcv} See Sentences Handed Down for Illegal Pill Mills, *supra* note 30; Transcript of Sentencing at 4, 25, United States v. Mbanefo, No. 7:16-cr-00002 (M.D. Ga. Dec. 5, 2018).

^{xcvi} See Phil Fairbanks, *Pravin Mehta, "Dr. Feel Good" Gets Prison for Dealing Opiate Pills*, BUFFALO NEWS (Jan. 25, 2016), https://subscribe.buffalonews.com/limit-reached-bn?returnURL=https://buffalonews.com/news/local/pravin-mehta-dr-feel-good-gets-prison-for-dealing-opiate-pills/article_d2a8824d-1fce-53fc-b393-

718aee962a2b.html; Government's Response to Defendant's Request for a Non-Guidelines Sentence at 2, 10, United States v. Mehta, No. 1:11-cr-00268 (W.D.N.Y. Jan. 22, 2016).

^{xcvii} See Paula McMahon, *Popular Broward Doctor's 'Pill Mill' Punishment is Much Less than Feds Sought*, SUN SENTINEL (Sept. 7, 2018), <https://www.sun-sentinel.com/news/crime/fl-reg-doctor-andres-mencia-sentenced-20180906-story.html> [<https://perma.cc/4CNK-85Z3>].

^{xcviii} Transcript of Sentencing at 60—62, 69, United States v. Miller, No. 1:13-cv-00354 (D. Colo. May 13, 2016); Government's Supplemental Sentencing Statement and Request for Sentence Consistent with 18 U.S.C. 3553 at 17, United States v. Miller, No. 1:13-cr-00354-REB (D. Colo. Apr. 20, 2016).

^{xcix} See Press Release, FBI, U.S. Att'y's Off., E.D. Mich., Ferndale Physician Sentenced to Prison for Unlawfully Prescribing Pain Pills (Jan. 22, 2015), <https://www.fbi.gov/contact-us/field-offices/detroit/news/press-releases/ferndale-physician-sentenced-to-prison-for-unlawfully-prescribing-pain-pills> [<https://perma.cc/7DM4-Q3JY>]; Transcript of Sentencing at 20, United States v. Milliner, No. 2:14-cr-20112-GER-LJM (E.D. Mich. Jan. 22, 2016); Government Sentencing Memorandum at 1, United States v. Milliner, No. 2:14-cr-20112-GER-LJM, Government Sentencing Memorandum (E.D. Mich. Dec. 5, 2014).

^c See Transcript of Sentencing Hearing at 4, 18, 33–34, 49 United States v. Minas, No. 1:14-cr-00109-EJL (D. Idaho Sept. 8, 2016); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Idaho, Boise Doctor Convicted of Controlled Substances Delivery (Sept. 8, 2016), <https://www.justice.gov/usao-id/pr/boise-doctor-convicted-controlled-substance-delivery> [<https://perma.cc/N88P-RW5D>].

^{ci} See Government's Sentencing Memorandum at 4, United States v. Moret, No. 2:15-cr-20723-MFL-APP (E.D. Mich. Oct. 17, 2017); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Mich., Former Doctor Sentenced to 75 Months in Prison for Illegally Prescribing Opiates and Committing Health Care Fraud (Feb. 6, 2018), <https://www.justice.gov/usao-edmi/pr/former-doctor-sentenced-75-months-prison-illegally-prescribing-opiates-and-committing> [<https://perma.cc/2S3A-JTRJ>].

^{cii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., C.D. Ill., Decatur Doctor Sentenced for Illegal Distribution of Hydrocodone (Dec. 12, 2017), <https://www.justice.gov/usao-cdil/pr/decatur-doctor-sentenced-illegal-distribution-hydrocodone> [<https://perma.cc/D3JX-2QPH>]; United States' Response to Defendant's Objection and Sentencing Commentary at 4–5, United States v. Multani, No. 15-cr-20050 (C.D. Ill. Oct. 10, 2017).

^{ciii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Cal., Former Medical Doctor Sentenced to Over Three Years in Prison for Unlawfully Prescribing Oxycodone (Sept. 18, 2018), <https://www.justice.gov/usao-ndca/pr/former-medical-doctor-sentenced-over-three-years-prison-unlawfully-prescribing> [<https://perma.cc/S647-XZ5S>]; Government's Sentencing Memorandum at 3, 9, United States v. Owens, No. 17-cr-00370 (N.D. Cal. Sept. 11, 2018).

^{civ} See Torsten Ove, *Former UPMC Radiologist Headed to Federal Prison for Illegal Prescriptions*, PITTSBURGH POST-GAZETTE (Dec. 13, 2018), <https://www.post-gazette.com/news/crime-courts/2019/05/09/omar-almusa-upmc-doctor-opioid-prescription-addiction-prison-sentence-pittsburgh-Marios-Papachristou/stories/201905090112> [<https://perma.cc/MJ9S-LQ6C>]; Defendant's Sentencing Memorandum at 14, United States v. Papachristou, No. 18-cr-000084 (W.D. Pa. Dec. 3, 2018); Position of the Government With Respect to Sentencing Factors at 1, United States v. Papachristou, No. 18-cr-000084 (W.D. Pa. Nov. 1, 2018).

^{cv} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Conn., Norwalk Doctor Sentenced to 54 Months in Prison for Drug Distribution and Health Care Fraud Offenses (Oct. 12, 2018), <https://www.justice.gov/usao-ct/pr/norwalk-doctor->

sentenced-54-months-prison-drug-distribution-and-health-care-fraud [https://perma.cc/AN4Z-T24X]; Government's Sentencing Memorandum at 12, 24, United States v. Mansourov et al., No. 17-cr-00164 (D. Conn. Oct. 3, 2018).

^{cvi} See Transcript of Sentencing Proceedings at 15, 33, 48, United States v. Perales, No. 13-cr-00888 (N.D. Ill. Oct. 16, 2018); Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ill., LaSalle County Physician Sentenced to 12 Years in Prison for Illegally Dispensing Prescription Opioids (Oct. 16, 2018), <https://www.justice.gov/usao-ndil/pr/lasalle-county-physician-sentenced-12-years-prison-illegally-dispensing-prescription> [https://perma.cc/Q96P-TV7F].

^{cvii} See Letter from AUSA Charles Rose at 6, United States v. Randall, No. 2:15-cr-00122-SJF-SIL, (E.D.N.Y. June 14, 2016); Transcript of Criminal Cause for Pleading at 14, United States v. Randall, No. 2:15-cr-00122-SJF-SIL (E.D.N.Y., Nov. 5, 2015); Robert Kessler, *Pain Pill Doctor Michael Randall Sentenced to 32 Months*, NEWSDAY (June 16, 2016), <https://www.newsday.com/long-island/crime/pain-pill-doctor-richard-randall-sentenced-to-32-months-1.11919801#:~:text=A%20Centereach%20doctor%20was%20sentenced,federal%20court%20in%20Central%20Islip>.

^{cviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., W.D. Ky., Physician Sentenced to Federal Prison for Drug Trafficking (Aug. 10, 2018), <https://www.justice.gov/usao-wdky/pr/physician-sentenced-federal-prison-drug-trafficking> [https://perma.cc/29W9-GSBS]; Government's Sentencing Memorandum at 1, United States v. Reynolds, No. 1:17-cr-00009-GNS (W.D. Ky. Aug. 7, 2018).

^{cix} See Press Release, U.S. Dep't of Just., Two Doctors and Clinic Owners Sentenced, *supra* note iii; Government's Sentencing Memorandum at 7–8, United States v. Richardson, No. 1:12-cr-00276-SCJ-JKL (N.D. Ga. June 12, 2017); Email from Carl Lietz, Def. Att'y, to Karly Newcomb, Rsch. Ass't for author (Jan. 24, 2020, 1:24 PM EST) (on file with author).

^{cx} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., C.D. Cal., Medical Doctor Who Illegally Wrote Prescriptions – including for Highly Addictive Opioids – Sentenced to Five Years in Prison, (Apr. 23, 2018), <https://www.justice.gov/usao-cdca/pr/medical-doctor-who-illegally-wrote-prescriptions-including-highly-addictive-opioids> [https://perma.cc/PK7H-MG4L]; Transcript of Sentencing at 14, 35, 36, United States v. Ridgill, No. 2:16-cr-00631-SJO (C.D. Cal. Apr. 23, 2018).

^{cxii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., M.D. Ala., Phenix City “Pill Mill” Doctor Receives a Ten-Year Sentence for Participating in a Drug Distribution Conspiracy (May 10, 2017), <https://www.justice.gov/usao-mdal/pr/phenix-city-pill-mill-doctor-receives-ten-year-sentence-participating-drug-distribution> [https://perma.cc/24B3-EAVJ]; Plea Agreement at 2–3, United States v. Ritchea, No. 3:16-CR-00136-WKW-SRW (M.D. Ala. Jan. 30, 2017); E-mail from Robert Keith, Def. Att'y, to Karly Newcomb (Jan. 24, 2020, 4:59 PM) (on file with author).

^{cxiii} See Jane Musgrave, *Former Doctor Gets Prison Sentence for Illegally Prescribing Meds*, PALM BEACH POST (Mar. 15, 2019), <https://www.palmbeachpost.com/news/20190315/former-doctor-gets-prison-sentence-for-illegally-prescribing-meds> [https://perma.cc/RDV7-GZXR]; Response In Opposition to Defendant's Sentencing Memorandum and Defendant's Request for Alternative Sentence Pursuant to 18 U.S.C Section 3553(a) at 1, United States v. Rivera-Kolb, No. 18-80121-CR-COHN (S.D. Fla. Mar. 13, 2019).

^{cxiiii} See Transcript of Proceedings at 96, 116, United States v. Roland, No. 1:14-CR-291-SCJ-1 (N.D. Ga. Feb. 22, 2017).

^{cxv} See Supplemental Tentative Findings and Rulings at 5, United States v. Rossi, No. 2:16-cr-00177-NBF (W.D. Pa. Jan. 4, 2017); Position of the Government with Respect to Sentencing Factors at 1, United States v. Rossi, No. 2:16-cr-00177-NBF (W.D. Pa. Nov. 23, 2016); T.L. Miller, *Hermitage Doc Gets Probation for Fraud, Opioid Sales*, HERALD (Jan. 7, 2017), https://www.sharonherald.com/news/local_news/hermitage-

doc-gets-probation-for-fraud-opioid-sales/article_eb92fac8-269c-59d1-bafe-b9f08831e538.html [https://perma.cc/68C7-9MFP].

^{cxv} See Lawrence Specker, *Dr. Xiulu Ruan sentenced to 21 years in Mobile 'pill mill' case*, AL (May 26, 2017), https://www.al.com/news/mobile/2017/05/dr_xiulu_ruan_sentenced_to_21.html [https://perma.cc/X9G3-RW7P]; Transcript of Sentencing at 62–65, *United States v. Ruan*, No. CR15-00088 (S.D. Ala. May 26, 2017).

^{cxvi} See Larry Hannan, *'Pill Mill' Physician Who Had 10 Patients Die of Overdoses and Had Sex With Others Is Sentenced to 2 Years*, JACKSONVILLE.COM (Jan. 4, 2017), <https://www.jacksonville.com/news/2017-01-04/pill-mill-physician-who-had-10-patients-die-overdoses-and-had-sex-others-sentenced-2> [https://perma.cc/N3ZF-LKE7]; United States' Position Regarding Disputed Guideline Issues at 1, 13, *United States v. Sachs*, No. 3:15-cr-30-J-39MCR, (M.D. Fla. Nov. 25, 2016); Sentencing Memorandum for Defendant at 10, *United States v. Sachs*, No. 3:15-cr-30-J-39MCR, (M.D. Fla. Nov. 22, 2016) (noting Probation determined a base offense level of 29, which—although not stated in the brief—would amount to a range of 87 to 108 months pursuant to the 2016 Sentencing Table).

^{cxvii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., M.D. Ala., *Montgomery "Pill Mill" Doctor Receives a 145-Month Sentence for Drug Distribution, Health Care Fraud, and Money Laundering Offenses; "Pill Mill" Mental Health Counselor Pleads Guilty in Related Case* (Aug. 24, 2018), <https://www.justice.gov/usao-mdal/pr/montgomery-pill-mill-doctor-receives-145-month-sentence-drug-distribution-health-care> [https://perma.cc/54VV-2BDD]; Melissa Brown, *Atlanta Highway pill mill doctor sentenced to 12 years in prison*, MONTGOMERY ADVERTISER (Aug. 23, 2018), <https://www.montgomeryadvertiser.com/story/news/crime/2018/08/23/atlanta-highway-pill-mill-gilberto-sanchez-sentenced/1056517002/> [https://perma.cc/8XYJ-Z5CE].

^{cxviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Wa., *Two Spokane Men Sentenced for Their Roles in Unlawfully Distributing Opioids* (July 23, 2019), <https://www.justice.gov/usao-edwa/pr/two-spokane-men-sentenced-their-roles-unlawfully-distributing-opioids> [https://perma.cc/LBE5-AR99]; United States Sentencing Memorandum at 1, 7, *United States v. Shelby*, No. 2:18-CR-00102-LRS-1 (E.D. Wash. June 14, 2019).

^{cxix} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Va., *Arlington Doctor Sentenced to 15 Years in Prison in Oxycodone Conspiracy* (Mar. 6, 2015), <https://www.justice.gov/usao-edva/pr/press-release-6> [https://perma.cc/U5H9-JD8E]; Transcript of Sentencing Hearing at 4, 16, *United States v. Simon*, No. 1:14cr300-1 (E.D. Va. Mar. 6, 2015); Government's Position with Respect to Sentencing at 5, 8, *United States v. Simon*, No. 1:14CR300 (E.D. Va. Mar. 6, 2015).

^{cxx} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., E.D. Pa., *Doctor Sentenced to 48 Months in Prison for Selling Prescriptions of Suboxone and Klonopin* (Feb. 27, 2018), <https://www.justice.gov/usao-edpa/pr/doctor-sentenced-48-months-prison-selling-prescriptions-suboxone-and-klonopin> [https://perma.cc/8B3L-JJCA]; Sentencing Memorandum on Behalf of Alan Summers at 2, *United States v. Summers*, No. 2:16-cr-00201-GEKP (E.D. Pa. Feb. 23, 2018); Email from Robert Livermore, Ass't U.S. Att'y, E. Dist. Pa., to author (Oct. 15, 2019, 12:19 PM EST) (on file with author).

^{cxxi} See Press Release, Dep't of Just., U.S. Att'y's Off., C.D. Cal., *SoCal Doctor Who Distributed Addictive Painkiller Hydrocodone and Laundered More Than \$1 Million in Illegal Proceeds Sentenced to Over Five Years in Federal Prison* (Jan. 5, 2015), <https://www.justice.gov/usao-cdca/pr/socal-doctor-who-distributed-addictive-painkiller-hydrocodone-and-laundered-more-1> [https://perma.cc/8PZJ-FYR4]; Transcript of Sentencing at 5–8, *United States v. Sun*, No. 2:14-cr-00157-R (C.D. Cal. Jan. 5, 2015).

^{cxixii} See Wes Wade, *Maryville Pill Mill Doctor Sentenced to 10 Years in Prison*, DAILY TIMES (Feb. 23, 2017), https://www.thedailytimes.com/news/maryville-pill-mill-doctor-sentenced-to-years-in-prison/article_e7f5783f-57cf-5d0f-9ba1-61343c8e158e.html [<https://perma.cc/2873-2BCF>].

^{cxixiii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Colo., Colorado Doctor Sentenced to Federal Prison for Illegally Distributing Oxycodone, Defrauding Employee Benefits Plans, and Falsifying Patient Files (Oct. 15, 2019), <https://www.justice.gov/usao-co/pr/colorado-doctor-sentenced-federal-prison-illegally-distributing-oxycodone-defrauding> [<https://perma.cc/LXL6-LCKP>]; Email from Bryan Fields, Ass't U.S. Att'y, Dist. of Colo., to author (Oct. 31, 2019, 10:37 AM) (on file with author).

^{cxixiv} See Press Release, Dep't of Just., U.S. Att'y's Off., N.D. Tex., Pill Mill Physician Sentenced to 13 Years for Conspiracy to Distribute Narcotics (May 13, 2019), <https://www.justice.gov/usao-ndtx/pr/pill-mill-physician-sentenced-13-years-conspiracy-distribute-narcotics> [<https://perma.cc/CNH3-CDNW>]; Transcript of Sentencing Proceeding at 46–47, *United States v. Venegas*, No. 3:16-cr-00479-N (N.D. Tex. May 13, 2019).

^{cxixv} See Transcript of Sentencing Hearing at 4, 47, 56–57, *United States v. Walker*, No. 1:16-cr-00001-JMC (D.S.C. Apr. 30, 2018).

^{cxixvi} See Sentencing Submission by USA at 1, 2, *United States v. Weintraub*, No. 7:16-cr-00533-KMK (S.D.N.Y. Nov. 15, 2016); Press Release, U.S. Dep't of Just., U.S. Att'y's Office, S.D.N.Y., Former Doctor Sentenced in White Plains Federal Court to 18 Months in Prison for Selling Oxycodone Prescriptions (Nov. 18, 2016), <https://www.justice.gov/usao-sdny/pr/former-doctor-sentenced-white-plains-federal-court-18-months-prison-selling-oxycodone> [<https://perma.cc/C4Y4-VNJL>].

^{cxixvii} See Transcript of Sentencing and Disposition at 22, 35, and 47, *United States v. Wetselaar*, No. 2:11-CR-00347 (D. Nev. May 18, 2021); Press Release, U.S. Dep't of Justice, U.S. Att'y's Off., D. Nev., Physician Sentenced to 10 Years in Prison for Distribution of Oxycodone (Aug. 1, 2017), <https://www.justice.gov/usao-nv/pr/physician-sentenced-10-years-prison-distribution-oxycodone> [<https://perma.cc/MM5W-YEYF>].

^{cxixviii} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., D. Utah, Dr. Wilcox Sentenced to 100 Months in Federal Prison for Distribution of Oxycodone Convictions (May 10, 2016), <https://www.justice.gov/usao-ut/pr/dr-wilcox-sentenced-100-months-federal-prison-distribution-oxycodone-convictions> [<https://perma.cc/6CYE-VY4K>]; *United States' Sentencing Memorandum Regarding Simmon Lee Wilcox at 12*, *United States v. Wilcox*, No. 2:13-cr-00717 (D. Utah Aug. 11, 2016).

^{cxixix} See Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D. Tx., Doctor, Pharmacists, Recruiter Sentenced in Opioid Diversion Conspiracy (Apr. 3, 2017) <https://www.justice.gov/usao-sdtx/pr/doctor-pharmacist-and-recruiter-sentenced-opioid-diversion-conspiracy>; Email from Brian Warren, Def. Att'y, to Karly Newcomb, Rsch. Ass't for author (Jan. 30, 2020, 10:14 PM EST) (on file with author).

^{cxixxx} See Press Release, U.S. Dep't of Justice, U.S. Att'y's Off., D. Md., Pill Mill Operator Sentenced to Prison for Conspiring to Distribute Oxycodone and Other Drugs in Maryland and New York (June 7, 2016), <https://www.justice.gov/usao-md/pr/pill-mill-operator-sentenced-prison-conspiring-distribute-oxycodone-and-other-drugs> [<https://perma.cc/LL4S-BH99>]; Email from James Gotomer, Def. Att'y, to Karly Newcomb, Rsch. Ass't for author (Jan. 23, 2020, 12:01 PM EST) (on file with author).