

Selected Sentencing Issues from Recent Appellate Case Law: Extreme Variances, Policy Disagreements, and Child Pornography

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September 24, 2012

This paper, prepared for use at the National Sentencing Policy Institute (Memphis, Tenn., October 1–3, 2012), examines a selection of significant issues concerning the United States Sentencing Guidelines that federal courts currently face. It is designed not to give a general overview of guidelines case law, but to provide a more in-depth examination that may facilitate discussion of ways to handle these particular issues. A basic familiarity with the Sentencing Guidelines and case law on the part of the reader is assumed.

I. Justifying a Substantial Variance

A. General Standard

In *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court outlined the findings a district court should make to support a variance. “A district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.” *Id.* at 46. And the court “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.” *Id.* at 50.

The Court added that appellate courts, when reviewing a variance for reasonableness, may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires “extraordinary” circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.

Id. at 47.

Under this standard, a district court’s explanation for a large variance is crucial, both to adequately justify the sentence and to provide the appellate court with adequate information for its review. The Seventh Circuit recently stated that “[t]he greater the departure, the more searching our review will be.” *U.S. v. Bradley*, 675 F.3d 1021, 1025 (7th Cir. 2012). In that case, where defendant pled guilty to a sex offense with a minor, the guideline range was 57–71 months but the court imposed a 240-month sentence. The court remanded for resentencing because the facts did not justify such a large upward variance. The district court focused on the “nature and circumstances of the offense,” and mentioned but found irrelevant many of the factors under 18 U.S.C. § 3553(a).

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The Seventh Circuit pointed out that

[t]he problem with this rationale is that it provides little more than what is implicit in the instant offense. . . . And the district court did not articulate either at sentencing or in its addendum why Bradley’s journey required more thought than any other person crossing a state border with intent to commit the instant offense. “An above-guidelines sentence is more likely to be reasonable if it is based on factors [that are] sufficiently particularized to the individual circumstances of the case rather than factors common to offenders with like crimes.”

Id. at 1025–26. As a result, “what the court seemed to rely upon for the sentence it imposed was already factored into the properly calculated guidelines range. It is not clear from the sentencing record how any individual circumstances of the commission of the sex act in this case were used in arriving at the chosen sentence.” *Id.* at 1026.

In the same vein, the Third Circuit found inadequate a sentencing court’s justification for imposing a sentence of 60 months’ probation and 9 months’ home confinement instead of the guideline sentence of 70–80 months in prison. Although the district court “thoroughly discussed some of the § 3553(a) factors, particularly the nature of the offense and of the defendant, at no point did it describe how those factors justified a deviation from the recommended range down to probation and in-home confinement.” When there is “such a substantial variance, it is not enough to note mitigating factors and then impose sentence. Rather, the chain of reasoning must be complete, explaining how the mitigating factors warrant the sentence imposed.” *U.S. v. Negroni*, 638 F.3d 434, 446 (3d Cir. 2011).

Noting that “the degree that a sentence varies from the recommendation given in the Guidelines matters,” the court stated that, “while we eschew any strict proportionality test requiring that unusual variations from the Guidelines be based on equally unusual circumstances, we do require that a substantial variation be accompanied by a more complete explanation than would be required for a sentence within or only modestly outside the Guidelines range.” *Id.* at 445–46. The variance in this case “is genuinely extraordinary and should have been accompanied by a thorough justification of the sentence.” *Id.* at 446.

An additional issue for the appellate court was that the defendant was convicted for his role in a multimillion-dollar fraud scheme, and the Sentencing Commission has expressed its concern that such “white-collar” defendants were too often sentenced to probation even when their crimes were serious. *See* U.S.S.G. § 1A1.4(d). “[I]f a district court seeks to vary from the Guidelines recommendation of incarceration for persons who have committed serious white-collar crimes, it must provide a thorough and persuasive explanation for why the congressionally-approved policy of putting white-collar criminals in jail does not apply.” *Id.*

A similar situation occurred in the Sixth Circuit, where a defendant convicted of possession of child pornography was sentenced to one day in prison, a variance from his guideline range of 78–87 months. The court focused “primarily on the characteristics of the offender,” putting great weight on psychological evaluations and reports regarding whether the defendant was a pedophile and in danger of recidivism.

While the district court thoroughly considered the “history and characteristics of the defendant[,]” *see* § 3553(a)(1), and “the need for the sentence imposed . . . to protect the public from further crimes of the defendant[,]” *see* § 3553(a)(2)(C), the sentence imposed must do more. . . . The district court also may not disregard the other § 3553(a) factors.

The § 3553(a) factors also require the district court to consider “the need for the sentence imposed—to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[,]” *see* § 3553(a)(2)(A), “to afford adequate deterrence to criminal conduct[,]” *see* § 3553(a)(2)(B), and “to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[,]” *see* § 3553(a)(6). The lack of weight given to these other factors renders the sentence in this case substantively unreasonable.

U.S. v. Robinson, 669 F.3d 767, 775 (6th Cir. 2012). The district court also focused on the defendant’s employment history, age, and physical health problems. While these factors may be considered in deciding whether a variance is warranted, they are “discouraged” factors under the guidelines and the court “should take into account” that status. *Id.*

“Ultimately, the factors that the district court relied on, as articulated in the record, do not justify a variance of this size. Accordingly, we find the variance here to be substantively unreasonable based on the current record.” Although “extraordinary circumstances may justify extraordinary variances or departures,” the appellate court held that “[n]o such circumstances were identified by the district court” in this case. *Id.* at 779–80.

The Fourth Circuit also had to review a large downward departure for a defendant who was convicted of possession of child pornography. He faced a guideline range of 41–51 months imprisonment, but the district court sentenced him to five years’ probation plus a fine, focusing almost exclusively on the defendant’s personal characteristics and opportunities to continue his education and receive mental health treatment. The court did state that it had considered the § 3553(a) factors. *U.S. v. Morace*, 594 F.3d 340, 343–44 (4th Cir. 2010).

The appellate court found that the justification given for the sentence was not sufficiently compelling in light of the large downward variance. The sentencing court’s reasons were “fairly commonplace,” such as the defendant’s lack of prior criminal history, honorable discharge from the military, efforts at rehabilitation, and enrollment in college. “Although each of these circumstances is commendable, there is nothing unusual about them. Given the seemingly common circumstances of this case, we hold that the court erred by failing to provide an adequate explanation of why a term of imprisonment is not warranted in light of applicable policy statements.” *Id.* at 350. Furthermore, while the sentencing court “stated that it had considered the various § 3553(a) factors, . . . it offered no specific explanation as to how this sentence comports with those factors.” *Id.* at 351.

The court also stated that it had previously “instructed that ‘district courts, in the course of selecting an appropriate sentence, ought to give respectful attention to Congress’ view that [child pornography crimes] are serious offenses deserving serious sanctions.’ . . . However, we find no indication in the record that the district court followed our instruction and considered this statement of congressional policy in choosing to sentence Morace to probation.” *Id.* at 350 (internal citation omitted). Likewise, a sentence of probation “also runs counter to the Sentencing Commission’s policy statement, expressed in U.S.S.G. § 5D1.2(b), that recommends a lifetime term of supervised release for sex offenders. . . . Because Morace was sentenced to probation rather than a term of imprisonment, he is not eligible for *any* supervised release, much less a lifetime term. *See* 18 U.S.C. § 3583(a). Again, the district court failed to explain Morace’s probation sentence in light of this policy statement.” *Id.* at 351.

Lastly, the sentencing of two codefendants in the Eighth Circuit illustrates the importance of referencing all relevant facts when determining the sentence. Both defendants faced a guideline range of 37–46 months imprisonment and were sentenced to three years’ probation. The appellate court noted that although “the reasonableness of the sentence is reviewed under a deferential abuse-of-discretion standard,” it must also “take the degree of variance into account and consider the extent of a deviation from the Guidelines.” In imposing a variance sentence, “a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.” *U.S. v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008).

The court affirmed one of the sentences, finding that “the district court presented persuasive reasons for the variance in this case. . . . Even though [the defendant]’s rehabilitation only came after an encounter with law enforcement, her rehabilitation appears genuine, and she is a positive contributor to society through her extraordinary work with persons with disabilities.” *Id.* at 938. The other defendant, however, had been caught with methamphetamine when she was finally arrested approximately two years after the actual offense of conviction, and the district court did not address that issue when giving reasons for the sentence. That omission “undercuts the district court’s conclusion that . . . [the defendant] was no longer the same person who committed the crime two years earlier and was capable of cleaning up her act and avoiding criminal conduct in the future.” *Id.* at 937. The court stated that, at resentencing, all of the defendant’s conduct should be considered when fashioning the sentence.

Some common themes emerge from the preceding cases. An appellate court is more likely to affirm large variances or departures when they are accurately and fully explained, with emphasis on the § 3553(a) factors and how a defendant’s sentence reflects the statutory goals of sentencing. Courts should also be aware of other policy goals, such as a congressional preference for imprisonment for certain offenders. Also, even though the Sentencing Guidelines are now advisory, if the sentence to be imposed goes against stated policy, there should be some explanation of why that is justified under the circumstances.

B. Further examples of Substantial Variances

Affirmed:

U.S. v. Thurston, 544 F.3d 22, 25–26 (1st Cir. 2008): Affirming three-month sentence for defendant who was convicted of conspiring to defraud Medicare of over \$5 million and faced 60-month guideline sentence. The district court “relied on a host of § 3553(a) factors,” including defendant’s “charitable work, community service, generosity with time, and spiritual support and assistance to others.” The appellate court concluded that the sentence was reasonable in light of the “totality of the circumstances” and the deference required by *Gall*.

U.S. v. Martinucci, 561 F.3d 533, 535 (2d Cir. 2009): Affirmed departure to 360 months from guideline range of 135–168 months for defendant who pled guilty to one count of producing child pornography. There was evidence that defendant raped the 10-year-old victim and abused numerous other young girl, and the court departed upward for the harm defendant did to the victims under § 5K2.8, deterrence, the need to protect potential

victims, and defendant's complete lack of remorse. The Second Circuit upheld the sentence as reasonable, finding no error in the court's consideration of the depositions of defendant's other victims. There was no reason to doubt the reliability of the deponents, and defendant did not ask to be allowed to cross-examine them. In light of the evidence and the court's discussion of the § 3553(a) factors, the appellate court concluded that "the sentence was altogether appropriate."

U.S. v. Diosdado-Star, 630 F.3d 359, 367 (4th Cir. 2011): Affirmed variance to 84-month sentence from 4–10-month range for defendant who pled guilty to immigration offenses. Court based variance on defendant's four prior convictions for obtaining property by false pretenses, the extent and seriousness of defendant's conduct, including impersonating a Border Patrol agent, his substantial financial profit from the offenses, and his high risk of recidivism. The appellate court held that the district court "properly considered and fully explained its decision pursuant to the factors set forth in 18 U.S.C. § 3553(a)."

U.S. v. Evans, 526 F.3d 155, 163 (4th Cir. 2008): Affirmed 125-month sentence for identity fraud, which was a substantial variance from the guideline range of 24-30 months. The instant offenses had a serious impact on the victims, defendant had "repeatedly perpetrated fraud and theft crimes" (43 convictions between 1991 and 2001) but served relatively little time in jail, and had also received 46-month sentence for various federal frauds but engaged in additional fraud while on supervised release. District court "issued a fifteen-page written opinion detailing its reasons for concluding that this sentence presented no conflict with the Guidelines and best furthered the factors set forth in 18 U.S.C. § 3553(a). . . . The district court carefully and thoroughly applied the prescribed sentencing factors to the facts of the case, and . . . we can only conclude that the chosen sentence is reasonable even though it does represent a significant upward deviation from the Guidelines range."

U.S. v. Snodgrass, 635 F.3d 324, 330 (7th Cir. 2011): Affirming 360 month-sentence for defendant, convicted of possessing child pornography and knowingly attempting to receive it, who faced a 240-month guideline maximum. Although the district court's comments at the sentencing hearing were too brief and inadequate to support the variance standing alone, it filed a written "fact-intensive analysis of the § 3553(a) sentencing factors" that documented defendant's sexual abuse of relatives, a very large number of images of child pornography, "a lifelong pattern of abusive behavior against minors," and refusal to admit his behavior. "Given these facts and the district court's well-reasoned written analysis of the § 3553(a) factors, we cannot say that the court abused its discretion in sentencing Snodgrass to 360 months in prison."

U.S. v. Gantt, 679 F.3d 1240, 1250–51 (10th Cir. 2012): Affirming 20-year sentence instead of 7-year guideline term for defendant convicted of brandishing a weapon. The weapon was brandished during a bank robbery, defendant had a prior gun-related conviction, and he had not been deterred by prior sentences. In light of other sentences for similar conduct, "the seriousness of the offense, Defendant's recidivism in using firearms, and the need to protect the public . . . , the 20-year sentence was within the range of reasonableness."

U.S. v. Munoz-Nava, 524 F.3d 1137, 1142–49 (10th Cir. 2008): Affirming sentence of a year and a day in prison and twelve months home confinement, instead of guideline range

of 46–57 months, for defendant convicted of distributing heroin. The court “provided a lengthy statement on the record,” considering defendant’s “long and consistent work history, community support, and lack of a felony criminal record,” the “large number of letters from community members, family members, and from defendant’s employers, in support of the defendant, and attesting to his responsibility, his work ethic.” Defendant was also “the primary caretaker and sole supporter of his eight-year-old son [and] the sole supporter of his ailing and elderly parents.” The court also concluded that defendant was “unlikely to reoffend” and had “an exemplary record on pretrial release. . . . The district court’s decision was reasoned and reasonable and [it] did not abuse its discretion.”

Remanded:

Ofray-Campos, 534 F.3d 1, 42–44 (1st Cir. 2008): Remanding upward variance that more than doubled the guideline range to the 480-month statutory maximum for defendant involved with gang and convicted of drug offenses. “While the factors identified by the court may have justified a substantial upward variance, they simply do not support the imposition of a statutory maximum sentence of forty years, that is so far above the guidelines range.” Some of defendant’s conduct was already accounted for in the guidelines and the PSR referred only to acts of violence by the gang, not by defendant specifically. “[T]he statutory maximum forty-year (480–month) sentence simply does not stem from a plausible explanation, does not constitute a defensible result, and therefore cannot survive our review for reasonableness.”

U.S. v. Carter, 564 F.3d 325, 328–29 (4th Cir. 2009): Defendant, who pled guilty to being a felon in possession of a firearm and had a guidelines range was 37–46 months, was sentenced to five years of probation. Remanded because “the district court did not justify Carter’s sentence with an *individualized* rationale. . . . The district court . . . stated that it was ‘deliberating on and integrating the seven factors that the reviewing court wants to know that the trial court used and considered and reflected on and were the foundation of the sentencing basis,’ and then summarized those factors. But . . . the district court did not explain how those factors related to Carter. Finally, although the district court stated that it took ‘into account all of the pertinent policy statements issued by the Sentencing Commission,’ it did not explain which policy statements it found relevant to Carter.”

U.S. v. Aleo, 681 F.3d 290, 300–02 (6th Cir. 2012): Remanding statutory maximum 720-month sentence for defendant convicted of one count each of producing, possessing, and transporting and shipping child pornography, up from guideline range of 262–327 months and government recommendation of 300 months. District court had largely based increase on fact that defendant’s five-year-old granddaughter was involved and that defendant was “remorseless,” but appellate court held that guideline enhancements addressed most aspects of defendant’s crimes, “similar offenders have received significantly lighter sentences,” and “defendants who received sentences of the statutory maximum committed significantly worse crimes.”

II. Variance Based on Policy Disagreement with Guideline

In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Supreme Court held that, because the cocaine guidelines are “only advisory” like all other Guidelines, including the 100:1 ratio of powder to crack cocaine, “it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.” *Id.* at 110.

Kimbrough was read by many courts to be limited to situations where following the guideline would be unfair to “a particular defendant,” so the Court later clarified that “the point of *Kimbrough* [was] a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.” *Spears v. United States*, 555 U.S. 261, 264 (2009) (emphasis in original).

After *Spears*, and to a lesser extent even before that clarification of *Kimbrough*, most of the appellate courts have held that district courts may also vary from other guidelines because of “policy disagreements.” Courts may be more likely to uphold such a disagreement when the guideline in question was not based on empirical research, which was part of the reasoning in *Kimbrough*. See 552 U.S. at 109–10. Below are some of the appellate decisions regarding policy disagreements. Cases involving the child pornography guidelines are discussed separately in section III below.

A. Generally

Several circuits have recognized that district courts have the discretion to disagree with a guideline on policy grounds, but not with a statutorily mandated policy. “We understand *Kimbrough* and *Spears* to mean that district judges are at liberty to reject *any* Guideline on policy grounds—though they must act reasonably when using that power. . . . No judge is *required* to sentence at variance with a Guideline, but every judge is at liberty to do so.” *U.S. v. Corner*, 598 F.3d 411, 413–16 (7th Cir. 2010) (also reminding judges that “*Kimbrough* authorizes district judges to disagree with the Sentencing Commission but not with statutes”). *Accord U.S. v. Lopez-Macias*, 661 F.3d 485, 490 (10th Cir. 2011) (“Absent a statutorily-mandated sentencing policy, *Kimbrough* authorized district judges to vary from the guidelines based on policy disagreements with those guidelines and not simply based on an individualized determination.”).

See also *U.S. v. Rivera-Santana*, 668 F.3d 95, 101 (4th Cir. 2012) (“Although a sentencing court may be entitled to consider policy decisions underlying the Guidelines, including the presence or absence of empirical data, . . . it is under no obligation to do so.”); *U.S. v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010) (“sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable”); *U.S. v. Stone*, 575 F.3d 83, 89–90 (1st Cir. 2009) (“after *Kimbrough*, a district court makes a procedural error when it fails to recognize its discretion to vary from the guideline range based on a categorical policy disagreement with a guideline,” but “the district court’s broad discretion obviously includes the power to agree with the guidelines”); *U.S. v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009) (“We read *Kimbrough* to allow district courts, in their discretion, to consider the policy decisions behind the Guidelines, including the presence or absence of empirical data, as part of their § 3553(a) analyses.”); *U.S. v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc) (“one of the central points of

Booker, highlighted by *Kimbrough* . . . , is that a district court judge may disagree with the application of the Guidelines to a particular defendant because the Guidelines range is too high or too low to accomplish the purposes set forth in § 3553(a)"); *U.S. v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc) ("a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses").

The Third Circuit added: "As a matter of best practices, of course, a district judge who sentences a defendant pursuant to a policy disagreement with the Guidelines should clearly state that he is doing so. This will minimize the risk that he will be misunderstood by a reviewing court." *U.S. v. Merced*, 603 F.3d 203, 218–19 & n.7 (3d Cir. 2010) (remanded: "if the District Court intends to vary downward based on a policy disagreement with § 4B1.1, it must better explain and justify that decision. The freedom to vary from the career offender Guidelines, assuming it exists, is not free. Its price is a reasoned, coherent, and 'sufficiently compelling' explanation of the basis for the court's disagreement.>").

B. Career Offender Guideline

Several circuits have specifically held that sentencing judges may vary from the career offender guideline if they disagree with policies underlying § 4B1.1. As the Sixth Circuit noted, "all of the sentencing guidelines are advisory. . . . That holds true for the career-offender provisions just as it does any other provisions of the Guidelines" and courts may disagree with § 4B1.1's policies. *U.S. v. Michael*, 576 F.3d 323, 327–28 (6th Cir. 2009) (emphasis in original, internal quotes omitted). See also *Mitchell*, 624 F.3d at 1029–30 (affirming downward variance where district court "disagreed with the Sentencing Commission's Guideline that a career offender's sentence must be at or near the statutory maximum sentence pursuant to 28 U.S.C. § 994(h)" and "carefully considered and explained his downward adjustment"); *Corner*, 598 F.3d at 414–16 (in light of *Kimbrough* and *Spears*, overruling earlier cases that prohibited disagreement with § 4B1.1: "Because § 4B1.1 is just a Guideline, judges are as free to disagree with it as they are with § 2D1.1(c) (which sets the crack/powder ratio)."). *U.S. v. Clay*, 577 F.3d 947, 950 (8th Cir. 2009) (recognizing district court authority "to vary from the career offender guideline" on the basis of "policy considerations"); *U.S. v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (remanding case, in part, to give district court opportunity to exercise "broader freedom" after *Kimbrough* to "disagree[] with the Commission's policy judgment" in § 4B1.1). Cf. *U.S. v. Sanchez*, 517 F.3d 651, 663–66 (2d Cir. 2008) (remanding because district court incorrectly thought authority to vary from § 4B1.1 was limited by 28 U.S.C. § 994(h)).

In the Third Circuit, the government conceded that "a sentencing court may vary downward from the Guidelines range generated by the career offender provision based solely on a policy disagreement with the scope of that provision." *Merced*, 603 F.3d at 218. The appellate court cautioned, however, that

the Guidelines reflect the Sentencing Commission's "rough approximation of sentences that might achieve § 3553(a)'s objectives." . . . If a district court concludes that those objectives are not achieved by a sentence within the career offender Guideline range, and that belief is driven by a policy disagreement with the career offender provision, then the court must explain why its policy judgment would serve the § 3553(a) sentencing goals

better than the Sentencing Commission’s judgments. In doing so, he should take into account all of the sentencing factors, not just one or two of them in isolation. We require this explanation “so that, on appeal, we can determine whether the [court’s] disagreement is valid in terms of the § 3553 factors, the Sentencing Guidelines, and the perception of fair sentencing.”

Id. at 221 (internal citations omitted).

C. Fast-Track Disparity

The circuits are split over whether the availability of fast-track programs in some districts but not others is the type of disparity that may be considered by a sentencing court. Half of the circuits have held that it may, with most of them overruling earlier holdings to the contrary in light of *Kimbrough*. As the Seventh Circuit noted, because of “the new paradigm established by *Kimbrough* and *Spears*, . . . we are compelled now to reconsider our prior interpretation of the fast-track guideline § 5K3.1. We now hold . . . that a district court may consider a fast-track argument when evaluating the applicable § 3553(a) factors.” *U.S. v. Reyes-Hernandez*, 624 F.3d 405, 417–18 (7th Cir. 2010). The court also added “a word of caution that a departure from the guidelines premised solely on a fast-track disparity may still be unreasonable. To withstand scrutiny, a departure should result from a holistic and meaningful review of all relevant § 3553(a) factors.” *Id.* at 421.

The Third Circuit also had to “reinterpret” an earlier holding that prohibited consideration of fast-track disparity. “That interpretation is no longer the view of our Court in light of *Kimbrough*’s analytic reasoning. . . . [W]e hold that a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant’s fast-track argument, and that such a variance would be reasonable in an appropriate case.” *U.S. v. Arrelucea-Zamudio*, 581 F.3d 142, 149 (3d Cir. 2009). *See also U.S. v. Lopez-Macias*, 661 F.3d 485, 487 (10th Cir. 2011) (overruling earlier case in holding that “where the circumstances warrant, a district court in a non-fast-track district has the discretion to vary from a defendant’s applicable guideline range based on fast-track sentence disparities”); *U.S. v. Jimenez-Perez*, 659 F.3d 704, 708–11 (8th Cir. 2011) (“we hold that *Kimbrough* undermines the rationale of our prior decisions that disallowed variances based on the unavailability of Fast-Track in a particular judicial district,” and that sentencing courts may “consider a facially obvious disparity created by [F]ast-[T]rack programs among the totality of § 3553(a) factors considered”) (internal quotes and citations omitted); *U.S. v. Camacho-Arellano*, 614 F.3d 244, 250 (6th Cir. 2010) (“*Kimbrough* requires that we repudiate any prior hint that district judges could not grant variances based on the fast-track disparity”); *U.S. v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008) (“consideration of fast-track disparity is not categorically barred as a sentence-evaluating datum within the overall ambit of 18 U.S.C. § 3553(a)”).

Some of these circuits added that, to receive a variance, a defendant would have to make a showing that he or she would be eligible for an actual fast-track reduction were that available. The Seventh Circuit is particularly rigorous:

[A] defendant claiming entitlement to a lower sentence because of a perceived fast-track “disparity” must promptly plead guilty, agree to the factual basis proffered by the government, execute an enforceable waiver of specific rights before or during the plea colloquy, establish that he would be eligible to receive a fast-track sentence in at least one dis-

district offering the program, and submit the likely imprisonment range in that district. Unless the defendant complies with each of these steps, the sentencing court will be free to reject the argument without comment. Of course, district courts have the discretion to ask both the defendant and the government for additional relevant information and such information may be made an additional prerequisite to consideration of the defendant's argument.

U.S. v. Ramirez, 675 F.3d 634, 644–45 (7th Cir. 2011).

The Third Circuit has a similar, though less demanding test:

To justify a reasonable variance by the district court, a defendant must show at the outset that he would qualify for fast-track disposition in a fast-track district. For example, a defendant's serious criminal history may disqualify him in most fast-track districts. This type of showing would also be an instrumental factor for a district court in determining under § 3553(a) whether a Guidelines range sentence is greater than necessary to meet the sentencing objectives. The Government, obviously, would be free to contend to the contrary—that the defendant would not qualify in a fast-track district or that the adjusted range would be different than that suggested by the defendant.

...

Additionally, a defendant must demonstrate that he would have taken the fast-track guilty plea if offered (and, in so doing, waived his appellate rights, including his habeas rights but for ineffective assistance of counsel).

Arrelucea-Zamudio, 581 F.3d at 156–57.

Three circuits have maintained their pre-*Kimbrough* policies against allowing a variance based on the unavailability of fast-track programs, holding that any disparity is not unwarranted because it is the result of intentional congressional policy. “Congress authorized downward departures for fast-track programs in the PROTECT Act. ‘By authorizing fast-track programs without revising the terms of § 3553(a)(6), Congress was necessarily providing that the sentencing disparities that result from these programs are warranted and, as such, do not violate § 3553(a)(6).’ . . . While *Kimbrough* permits a district court to consider its policy disagreements with the Guidelines, it does not authorize a district judge to take into account his disagreements with congressional policy. . . . [T]he district court should not have considered fast-track disparities to be ‘unwarranted’ so as to permit a departure under § 3553(a)(6).” *U.S. v. Gonzalez-Zotelo*, 556 F.3d 736, 740–41 (9th Cir. 2009) (internal citation omitted). *Accord U.S. v. Vega-Castillo*, 540 F.3d 1235, 1238–39 (11th Cir. 2008) (“We agree with the Government that *Kimbrough* did not overrule [our earlier cases]. . . . *Kimbrough* addressed only a district court’s discretion to vary from the Guidelines based on a disagreement with *Guideline*, not Congressional, policy.”) (internal quotes and citations omitted); *U.S. v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008) (*Kimbrough* did not change facts that “any sentencing disparity resulting from fast track disposition programs is not unwarranted as the disparity was also intended by Congress” and that “a district court may not vary from the Guidelines on the basis of sentencing disparity intended by Congress”).

III. Child Pornography Issues

A. Variance from Section 2G2.2 Based on Policy Disagreement

A circuit split has also arisen over whether district courts, following the *Kimbrough/Spears* analysis, may vary from the child pornography guideline at § 2G2.2 based on a disagreement with the policies behind the guideline. Courts that allow variance reasoned that

Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. . . . However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties.

U.S. v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010). As a result of the many amendments, some of which added enhancements for factors that are already present in nearly all cases of possession or distribution,

[a]n ordinary first-time offender is . . . likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction. Consequently, adherence to the Guidelines results in virtually no distinction between the sentences for defendants like *Dorvee*, and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories. This result is fundamentally incompatible with § 3553(a).

Id. at 186–87. The Second Circuit encouraged district courts “to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2—ones that can range from non-custodial sentences to the statutory maximum—bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.” *Id.* at 185–88 (also noting that “[t]he Commission has often openly opposed these Congressionally directed changes”).

The Ninth Circuit followed a similar analysis, stating that

the history and the Commission’s own reports and assessments of these Guidelines demonstrate [that] the child pornography Guidelines are, to a large extent, not the result of the Commission’s “exercise of its characteristic institutional role,” which requires that it base its determinations on “empirical data and national experience,” but of frequent mandatory minimum legislation and specific congressional directives to the Commission to amend the Guidelines. . . . We therefore hold that, similar to the crack cocaine Guidelines, district courts may vary from the child pornography Guidelines, § 2G2.2, based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.

The court emphasized, however,

that we do not hold that application of § 2G2.2 will always result in an unreasonable sentence and that sentencing courts must continue to consider the applicable Guidelines range as “the starting point and the initial benchmark,” . . . continue to consider all of the § 3553(a) factors in deciding upon the sentence . . . [and] continue to adequately explain their choice of the sentence, including their policy disagreement with § 2G2.2, to allow for meaningful appellate review and to promote the perception of fair sentencing.

U.S. v. Henderson, 649 F.3d 955, 962–64 (9th Cir. 2011). *See also U.S. v. Grober*, 624 F.3d 592, 601–09 (3d Cir. 2010) (citing *Dorvee* and Sentencing Commission reports, among other sources, rejecting government’s claim of “procedural unreasonableness,” and affirming downward variance from 235–293-month range to the five-year mandatory minimum sentence, finding that in varying from § 2G2.2 the district court “adequately considered the government’s arguments and set forth a sufficiently compelling justification for the sentence it imposed”).

Other circuits have disagreed. The Fifth Circuit specifically rejected the reasoning of *Dorvee*:

Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them. The Supreme Court made clear in *Kimbrough v. United States* that “[a] district judge must include the Guidelines range in the array of factors warranting consideration,” even if the Commission did not use an empirical approach in developing sentences for the particular offense. Accordingly, we will not reject a Guidelines provision as “unreasonable” or “irrational” simply because it is not based on empirical data and even if it leads to some disparities in sentencing. The advisory Guidelines sentencing range remains a factor for district courts to consider in arriving upon a sentence.

U.S. v. Miller, 665 F.3d 114, 119–21 (5th Cir. 2011) (affirming 220-month sentence that was within guideline range). *Cf. U.S. v. Pugh*, 515 F.3d 1179, 1201 at n.15 (11th Cir. 2008) (in dicta, stating that § 2G2.2 does “not exhibit the deficiencies the Supreme Court identified in *Kimbrough*” and that “there is no indication that either the Guidelines range or the policy statement involved in Pugh’s sentence suffers from any criticisms like those *Kimbrough* identified for the crack cocaine Guidelines”).

The Sixth Circuit reaffirmed earlier holdings that “a district court may disagree with § 2G2.2 on policy grounds, just as it may any other” guideline, but reversed a large downward variance based on the district court’s concern that § 2G2.2 had been influenced by “congressional mandate” and “political considerations” rather than by empirical studies and data:

Congress delegated to the Commission a limited measure of its power to set sentencing policy, and retained for itself the remainder. It is not the judiciary’s province to say that Congress should have delegated still more—especially to another body within the judicial branch. We think it follows that a district court cannot reasonably reject § 2G2.2—or any other guidelines provision—merely on the ground that Congress exercised, rather than delegated, its power to set the policies reflected therein. That is not to say that a district court must *agree* with a guideline in which Congress has played a direct role. It is only to say that the fact of Congress’s role in amending a guideline is not itself a valid reason to disagree with the guideline.

U.S. v. Bistline, 665 F.3d 758, 761–64 (6th Cir. 2012). *See also U.S. v. Cunningham*, 669 F.3d 723, 733 (6th Cir. 2012) (affirming sentence at low end of guideline range, rejecting defendant’s request for downward variance and his argument “that § 2G2.2’s purported lack of empirical grounding makes it unfit for deference,” holding that “a district court is entitled to rely on the § 2G2.2 enhancements unless it has a reasonable policy basis for not doing so”).

Some circuits have recognized that, even assuming judges are free to disagree with § 2G2.2 and sentence below the recommended guideline range, they are not required to do so. *See, e.g., U.S. v. Stone*, 575 F.3d 83, 90 (1st Cir. 2009) (while recognizing that the

district court has discretion to disagree with § 2G2.2 on policy grounds, noting that “the district court’s broad discretion obviously includes the power to agree with the guidelines”); *U.S. v. Huffstatler*, 571 F.3d 620, 623–24 (7th Cir. 2009) (rejecting defendant’s argument “that the methodological flaws that supposedly run through the child-pornography guidelines invalidate them entirely,” and that “not only may a district court sentence below the child-exploitation guidelines based on policy disagreements with them, it must”; the court also noted that “while district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines, as with the crack guidelines, they are certainly not required to do so”).

B. Restitution for Victims

The Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259, entitles victims to restitution for “the full amount of the victim’s losses.” § 2259(b)(1).

Several circuits have recently held that identifiable victims of child pornography are entitled to restitution under § 2259 from defendants who distributed or possessed their images, and that restitution is limited to losses “proximately caused” by the defendant’s conduct.¹ See *U.S. v. Burgess*, 684 F.3d 445, 456–60 (4th Cir. 2012); *U.S. v. Kearney*, 672 F.3d 81, 95–98 (1st Cir. 2012); *U.S. v. Evers*, 669 F.3d 645, 657–60 (6th Cir. 2012); *U.S. v. Aumais*, 656 F.3d 147, 153–54 (2d Cir. 2011); *U.S. v. Kennedy*, 643 F.3d 1251, 1260–62 (9th Cir. 2011); *U.S. v. Monzel*, 641 F.3d 528, 535–37 (D.C. Cir. 2011); *U.S. v. McDaniel*, 631 F.3d 1204, 1208–09 (11th Cir. 2011). See also *U.S. v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (without discussion, stating that § 2259(b)(3) “requires awarding the full amount of the victim’s losses suffered as a proximate result of the offense”).

The Fifth Circuit, on the other hand, held that joint and several liability was the appropriate standard for most harms under § 2259(b)(3). *In re Amy Unknown*, 636 F.3d 190, 198–201 (5th Cir. 2011) (holding that proximate causation only applied to “catch-all” provision in § 2259(b)(3)(F) for “any other losses” and that defendant may be held liable for “the full amount of the victim’s losses”), *reh’g en banc granted*, 668 F.3d 776 (5th Cir. 2012). However, that opinion is scheduled for rehearing en banc and was strongly criticized by another Fifth Circuit panel. See *U.S. v. Wright*, 639 F.3d 679, 686–92 (5th Cir. 2011) (per curiam) (although constrained to follow *In re Amy* as precedent, all three members of panel joined in special concurring opinion stating circuit should follow other circuits on proximate cause and urging consolidation of cases for rehearing en banc).

The circuits that do agree on proximate cause differ somewhat, however, on how to calculate the actual amount of restitution that any one defendant is responsible for when many others have also viewed or distributed the victim’s images. Under § 2259(b)(2), an order of restitution “shall be issued and enforced in accordance with [18 U.S.C. §] 3664.” That section puts the burden of proving the victim’s losses on the government, although it is still the district court’s responsibility to determine whether the amount is justified. In a case involving the victim identified as “Vicky,” the First Circuit found that,

taken as a whole, the viewers and distributors of the child pornography depicting Vicky caused the losses she has suffered, as outlined in the expert report. Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. . . . [T]he proximate cause requirement was satisfied here, because Kearney’s

1. Note: Many of the federal restitution cases involve “Amy” and/or “Vicky,” pseudonyms for two victims of child pornography whose images were widely disseminated.

actions resulted in identifiable losses as outlined in the expert reports and Vicky’s victim impact statements.

Kearney, 672 F.3d at 98–100 (citations omitted). The court upheld an award of \$3,800, “which was arrived at by averaging the awards Vicky had received in thirty-three other restitution cases, after discarding the highest and lowest values awarded. It considered this sum against the total losses. The court then found that this number was ‘proportionate and reasonable and tied to the facts of this case.’” Furthermore, a district court “need only make a ‘reasonable determination of appropriate restitution’ [and] has leeway to ‘resolve uncertainties ‘with a view towards achieving fairness to the victim.’”” *Id.* (internal citations omitted). *See also U.S. v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (“We will uphold an award of restitution under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of [the] victim’s loss with some reasonable certainty.”). *Cf. McDaniel*, 631 F.3d at 1209 (finding that victim “suffers ‘each time an individual views an image depicting her abuse’” and affirming—using clear error standard—award of \$12,700 without discussion of how that sum was calculated) (internal citation omitted).

The Fourth Circuit followed similar reasoning, but ended up remanding an award of restitution because it was not adequately justified:

The establishment of proximate causation, however, is not the true challenge of the restitution statute. The primary difficulty that will face the district court on remand will be the determination, if the court finds that proximate causation has been established, of the quantum of loss attributable to Burgess for his participation in Vicky’s exploitation. Vicky is entitled to the “full amount” of restitution for such loss, and we leave the calculation of such an amount to the district court in the first instance. While the district court is not required to justify any award with absolute precision, the amount of the award must have a sufficient factual predicate. Vicky’s loss is an aggregation of the acts of the person who committed and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability of any one defendant regarding Vicky’s loss is dependent at least in part on the role that defendant played with respect to her exploitation.

Burgess, 684 F.3d at 460 (remanding award of \$305,219.86 “for an individualized determination of proximate causation”). *See also Monzel*, 641 F.3d at 537–40 (vacating “nominal” award of \$5,000 that was admittedly less than the amount of harm caused by defendant; government has burden of proving amount of victim’s losses, and “the district court is free to order the government to submit evidence regarding what losses were caused by Monzel’s possession of Amy’s image or to order the government to suggest a formula for determining the proper amount of restitution . . . , but . . . in fixing the amount the district court must rely upon some principled method for determining the harm Monzel proximately caused”). *Cf. U.S. v. Evers*, 669 F.3d 645, 657–60 (6th Cir. 2012) (affirming award of \$1,500 for lost wages incurred by legal guardian of 13-year-old victim, but vacating award of \$140 for child care expenses, previously provided by defendant for free, because “the link between the child care costs and Evers’ crimes is too attenuated”).

While also finding that proximate cause is the appropriate standard, the Second and Ninth Circuits have vacated restitution awards where there was insufficient evidence in

the record that the defendant's conduct actually caused harm to the victim. The Ninth Circuit stated that

a court must identify a causal connection between the defendant's offense conduct and the victim's specific losses. . . . The government has not carried its burden here, because it has not introduced *any* evidence establishing a causal chain between Kennedy's conduct and the specific losses incurred by Amy and Vicky. The government did not show how Kennedy's actions in transporting the images caused Amy's lost income and loss of enjoyment of life or Amy and Vicky's future counseling costs. Nor did the government introduce evidence that Amy and Vicky could have avoided certain losses had Kennedy not transported the images. Indeed, the government introduced no evidence that Amy and Vicky were even aware of Kennedy's conduct. . . . [T]he government's evidence showed only that Kennedy participated in the audience of persons who viewed the images of Amy and Vicky. While this may be sufficient to establish that Kennedy's actions were one cause of the generalized harm Amy and Vicky suffered due to the circulation of their images on the internet, it is not sufficient to show that they were a proximate cause of any particular losses.

Kennedy, 643 F.3d at 1262–65 (in vacating \$65,000 restitution order—computed at \$1,000 per image as requested by the government, which had “provided no basis for such an award”—holding that the government failed to provide any evidence of actual loss and that the court cannot “pick[] a ‘reasonable’ number without any explanation Section 2259 does not authorize such arbitrary awards.”).

Citing *Kennedy*, the Second Circuit recognized that “Amy suffers from knowing that people possess her images,” but concluded that the government did not present evidence of “the impact on Amy caused by *this defendant*. . . . [I]n the absence of evidence linking Aumais' possession to any loss suffered by Amy, we cannot agree with the magistrate judge's conclusion that ‘Aumais’ conduct remains a substantial cause of [Amy's] harm.’” The court added that its holding

does not categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images. We have no basis for rejecting [the psychiatrist's] findings that Amy has suffered greatly and will require counseling well into the future. But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested—or might as well have been—we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image.

Aumais, 656 F.3d at 154–55 (reversing award of \$48,483 to cover victim's future counseling costs). *See also U.S. v. McGarity*, 669 F.3d 1218, 1269–70 (11th Cir. 2012) (re-manding award of over \$3 million to “Amy” because there was no evidence in the record that this defendant's possession of images actually caused any injury to the victim: “for proximate cause to exist, there must be a causal connection between the actions of the end-user and the harm suffered by the victim,” but “[n]ot one of the witnesses called by the Government at the restitution hearing testified to the actual harm caused by” this defendant).