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Off Paper Podcast Episode 11
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Mark Sherman: From the FJC in Washington, D.C., I'm Mark Sherman and this is *Off Paper*.

In 2007, the U.S. Supreme Court decided the case of *Gall v. the United States*. The case involved the review of a Court of Appeals' decision that had reversed the district court's sentence of probation for the defendant. On the bottom of the U.S. sentencing guidelines range at that time was a term of 30 months' imprisonment.

Brian Gall, the defendant who was in his early 20s at the time of his offense conduct had been involved in a drug trafficking conspiracy. However, about four years before his indictment, Gall voluntarily withdrew from the conspiracy and began to lead a law-abiding life, graduating from college and pursuing a career in construction. After his indictment, Gall voluntarily surrendered to authorities. He was released in his own recognizance pending trial and continued to lead a law-abiding and productive life. Gall admitted to his earlier involvement in the conspiracy and pled guilty.

In his presentence report, the U.S. Probation Office recommended that the district court impose a prison sentence of between 30 and 37 months pursuant to the advisory U.S. Sentencing Guidelines. But instead the district court sentenced Gall to 36 months' probation and issued a detailed sentencing memorandum along with the statement of reasons

discussing multiple mitigating factors including Gall's withdrawal from the conspiracy, his multiple pro-social, post-defense activities, his lack of criminal history and his relatively young age at the time of the offense conduct.

The government appealed the probation sentence and the Court of Appeals reversed on the ground that a sentence outside the U.S. Sentencing Guidelines range must be supported by extraordinary circumstances. However, the U.S. Supreme Court in turn reversed the Court of Appeals' decision, essentially reinstating the probation sentence. The Supreme Court majority held that review of the district court sentencing decision must adhere to an abuse of discretion standard, that variances below the advisory guideline range are not presumptively unreasonable and that the district court in Gall's case hadn't abused its discretion. In its opinion, the Supreme Court majority articulated the multistep process district courts must engage in when sentencing a defendant. It said that the district court in this case had correctly followed that process and therefore the sentence was reasonable.

In the 12 years since the Supreme Court's decision in *Gall*, district courts have grappled with how best to employ their broad sentencing discretion. To what degree should they adhere to the advisory sentencing guidelines? When should they vary from them, on what basis and to what degree? How can they avoid unwarranted sentencing disparities while at the

same time individualizing sentences? In sum, what does it mean to render a sentence that is according to the governing federal statue sufficient but not greater than necessary to serve the purposes of sentencing? Also, and importantly, what is the role of the probation office in conducting presentence investigations and developing presentence reports that can assist district courts in answering these questions?

In this episode of *Off Paper,* we take on these tough questions by talking with Chief U.S. Probation Officer Connie Smith and Chief U.S. District Judge Ricardo Martinez both of the Western District of Washington.

Chief Smith has been with U.S. Probation for 27 years. She's currently a member of the chief's advisory group of the Administrative Office of the U.S. Courts. Chief Judge Martinez was a state court judge in Washington for eight years and has served on the federal bench as both the magistrate judge and district judge for 21 years. He also serves as chair of the Judicial Conference's Criminal Law Committee.

Chief Smith and Chief Judge Martinez have worked together for several years and have over time developed substantial wisdom about the presentence process and sentencing. Suffice it to say, they both know a lot about the subject. So listen up people because we're sentencing you right now to about an hour of fascinating conversation.

Chief Connie Smith and Chief Judge Martinez, welcome to *Off Paper*.

Connie Smith: Thank you.

Ricardo Martinez: Thank you, it's a pleasure to be here.

Mark Sherman: It's really an honor to have you both on the program. I know our time is short so I just want to get right to it. Connie, why don't I begin with you and ask you to basically just start from the beginning, and if you would, describe the role of the probation officer in conducting the presentence investigation and developing the presentence report in terms of the report's purpose and its implications.

Connie Smith: Sure. Thanks for having us, Mark. In addressing that question, the role of the presentence officer is to lead and conduct a fair and impartial investigation of the defendant, and to compile and verify the information in the report, and to remember really who the primary audience is, which is the judge. The judge is making an extremely difficult decision and is relying on the presentence report. There are other members that benefit from the presentence report. Of course, the post-conviction supervision officer if the defendant is sentenced to a term of probation or imprisonment or supervised release, and the U.S. Attorney's Office, the Bureau of Prisons and defense counsel, but the primary audience really is the judge. That said, it's a delicate dance between the probation officer and the sentencing judge.

Mark Sherman: Thank you. So Judge Martinez, a similar question sort of starting from square one, if you could simply

describe the role of the district judge at sentencing and what district judges like yourself most need from the presentence report to assist you in determining a sentence.

Ricardo Martinez: Certainly, Mark. I think you probably said it best when you quoted the Supreme Court decision of *Gall*. I mean ultimately the court's primary responsibility is to impose a sentence that is sufficient but not greater than necessary to carry out the statutory purposes or objectives of sentencing. The rub is what the heck does all that mean?

Ultimately, you know in terms of imposing a sentence, I guess one way of looking at it is that the court's duty is to impose the most minimally sufficient sentence and no more. You know another way I've heard defense attorneys point out to the court is that no sentence can be lawfully imposed if a lesser sentence would be sufficient to meet the purposes of criminal punishment.

But then when we look at that in terms of okay, what exactly does that mean? You know, your intro on *Gall* was perfect. *Gall* is one of those critical points that we look at in terms of sentencing, in terms of what the court's discretion may be, and how the court's discretion is to be exercised. So when I'm looking at a particular sentencing coming up, the presentence report is an absolutely critical aspect of my thinking process and how I formulate what I believe that ultimate sentence is going to be.

From a logistical standpoint, there are really three steps to imposing a federal sentence. Number one is to calculate the guideline range itself because that is one of the primary factors that we consider. We have to be accurate on that. If we're not accurate on that, in all likelihood, the sentence is going to be reversed and sent back to us. Secondly, we look back at whether or not there are any variances or departures that might come into play. We'd look at all of the information that's in that presentence report as well as the memos that come from both the government and the defense. And then finally, we have to consider all very specific factors that are set out in 3553(a). There are a lot of them. All of that goes into play in trying to determine what that minimally sufficient sentence for any particular unique individual should be.

Mark Sherman: Yeah, so that is a complicated process. I appreciate your kind of parsing it out for us. I want to ask you, Judge Martinez, though, when you are receiving a presentence report, especially in a more complex case, I mean, what is it that you, and just sort of from your experience and perspective as a district judge, what is it that you most need from that report?

Ricardo Martinez: As Connie indicated at the very beginning, what I need is the most accurate reporting I can have in terms of background information on that particular individual. Obviously, prior criminal history is pretty

important, and the current situation of the offender and his family, all of that is important. But ultimately, what I really need is I need a probation officer that is courageous enough to indicate, to look at all of those factors just as the court would and to say in this unique situation, judge, this is the sentence that I think should be imposed. Whether or not that falls within the guidelines, outside the guidelines, whether it's up or down, doesn't matter. I want that probation officer's judgment in terms of why they believe that particular sentence should be imposed on this individual. Given the fact, obviously, that we sentence many, many people so we have a baseline, if you will, available as to what a typical sentence should be for a typical offender given that same or similar background.

But I want that officer to not think about what do I expect the judge to do and why and should I cater to that. No, I don't want that. I want the probation officer to really think about it carefully and say what is the best sentence, in my opinion, for this particular offender, and then leave it up to the judge to balance all those things out with the government's recommendation and defense recommendation.

Mark Sherman: Thank you so much. So Connie, hearing that because there's now such broad judicial discretion in sentencing and the advisory guidelines as Judge Martinez just said are merely one factor among several for the court to consider. Do you have any concerns in terms of how officers

who conduct presentence investigations and develop the reports are approaching their work?

Connie Smith: Yes, I think it's a really interesting time for sentencing. We're post-Booker now, 14 years, 12 years after *Gall*, and I think it's a time of intersections. The guidelines challenge us in many ways. We're at the crossroad now of really trying to move independently, to think analytically, to serve as the voice for the judge. As Judge Martinez indicated the sentencing guidelines are but one factor that we consider.

I also think it's a time for us to reflect where are we as a district, as a nation in regards to sentencing. The guidelines are advisory. Are we serving the needs of the court? Are we asking for feedback from our judges on what they're looking for in the presentence process during this time of intersection between the guidelines, between thinking independently, between looking at alternatives to detention courts? It's a very interesting, thought provoking and I frankly think a very exciting time. If I was a line officer, I without a doubt would want to work in the presentence unit.

When I was looking at presentence, it was mandatory guidelines and it felt like I was just writing prescriptions. Here's the recommendation based on this range and this range. I think the honor and the freedom of being able to write a report and more importantly the recommendation, to think independently, analytically, critically, holistically about

this defendant and to provide that recommendation to the judge is truly an honor. I think it's a time of reflection of where we're at. This privilege of giving this independent recommendation that you don't work for the defense attorney, you don't work for the prosecutor, and you are there supporting the judge with your independent opinion so that the judge absolutely understands your thought process on how you came up with the recommendation is truly an honor.

Mark Sherman: Yeah, that makes sense. It sounds like also though that you are observing some struggle among officers just sort of from your perspective as a chief and as somebody who's done presentence work in your past as an officer. There's some struggle happening among officers about how to do that effectively.

Connie Smith: There is. There truly is. It isn't just our district. I experienced that in conversations with other chiefs around the nation. It's a time of I think a bit of confusion. I think working in a guidelines world, in one sense was detrimental on our critical thinking and critical analysis skills. And the most important piece of writing that we're providing to the judge is the sentencing rec. Of course, the reports are a great value. But hearing that voice and thinking courageously and independently is very different when we were working under a mandatory guidelines world. I do believe there are growing pains and a lot of opportunities to have some philosophical discussions around this in a district

or as a nation, but to not have those conversations I think would be negligent in a post-Booker world.

Mark Sherman: Yeah, framing it as growing pains I think makes a lot of sense. Judge Martinez, I kind of want to come back to you on this as well. It seems to me that sometimes there could be disconnect between what the officer thinks the court wants from a report and what the court really wants from it. I wonder if you've observed that phenomenon, Judge Martinez, and if you have, how you've dealt with it. I guess I'm also asking for your view of what in an ideal world the professional relationship between the officer and the judge would look like.

Ricardo Martinez: I have observed it, Mark, and I think back on my career as well. When the guidelines became mandatory, I was actually working as a cross-designated Special Assistant United States Attorney with the U.S. Attorney's Office right here in Seattle. So I had experience with, as Connie just mentioned, with the prescription formula of trying to figure out -- it's fairly easy. You can figure out the priors, you can look at the ranges and say, Your Honor, this is what the court should impose. It's fairly simple.

In fact, the problem with that is when we have mandatory guidelines for so long, is that the older or more experienced or the line people that have been even with the U.S. Attorney's Office as the same thing applies to probation and

pretrial, they got so used to doing that that it becomes very difficult to step away from that and to use your judgment, to use your independent judgment, and the critical analysis that Connie just mentioned and be courageous enough to come up with something that's unique to that individual.

Some of the challenges that can arise aside from that, even with some of the younger probation officers that maybe weren't as steeped in the mandatory guidelines as some of the other people, is that they really aren't sure exactly what it is that a judge may want. They think to themselves, all right, you know the very first lesson that any attorney, any trial lawyer ever gets is know your judge. Know who that is you're going to in that particular courtroom.

Well, the same thing applies to, I think, the probation officers. They think about this and they look at it, and they go, I'm trying to please this judge in a way, if you will. I think it's up to us and it's up to the chief judge in the district to make sure that everyone understands that that's not the role that we expect of them. We want, yes, the experience. Yes, we want the judgment that they've built up over the years. We want that critical analysis. But we want them to be able to step up and step out. Be courageous enough to say in this particular case, for these very specific reasons, just like the *Gall* court did, I believe that even though the range calls for 40, 50, 60 months whatever that this in particular merits probation or to the other side if

necessary. Your Honor, in this case the court to protect public safety or whatever other reasons are there really should impose a sentence that's above the guidelines.

One of the problems I think that arises and one of the challenges is I remember as a judge, you would meet with the probation officer before a particular sentencing is coming up especially when a complex matter was scheduled. And then I remember thinking at the same time is we had discussions among ourselves, other judges - is that really a good thing to do or is that not a good thing to do? Should you really be having those kinds of discussions in chambers that then might later impact the defendant without the government and the defense attorney knowing it?

So I think a lot of us get away from having those conversations with the probation that we could have independently in chambers, not on the record. So we put it out there more to be more transparent which makes a lot of sense. But then I think that what it really takes is perhaps a little bit more trust on the part of both parties. Not only in the probation officer to know that, look, I can make a recommendation. Ultimately, the judge that I'm appearing at I know may disagree with it completely. But at least I'm doing what is expected of me to do in this particular case, and then leave it up to the judge who, of course, ultimately decides what the appropriate punishment should be.

Mark Sherman: Well that last part of it is really critical. I mean ultimately it is the judge who is the final decision maker. So Connie, just very briefly, reactions to what Judge Martinez just said.

Connie Smith: I completely agree. I think when we, the court looks at ex parte communication, I certainly understood that from a legal analysis and honor that. The downtime was I think a bit of a loss in the relationship between the presentence officer and the judge. That the two didn't quite know one another as well resulting in some hesitation or curiosity or nervousness about what the judge may feel about a particular sentencing recommendation. I have really tried to instill in my supervisors and management and officers in the unit that you are not going to offend the judge with your sentencing recommendation if he or she understands exactly how you came up with that sentencing recommendation.

Now I'm speaking for my judges here in the Western District of Washington. I know that could be different in the rest of the nation. But in a truly independent and healthy relationship between an officer writing presentence reports and a judge, it's a delicate dance as I mentioned before because those officers, all of us are working for the judges. There is that power differential but it's also a very independent role in assistance to one another, in support of one another.

Ricardo Martinez: Mark, if I can just add something to what Connie just said.

Mark Sherman: Sure, Judge Martinez, go ahead.

Ricardo Martinez: It's actually something I think is important. Part of what I do personally in every sentencing is at some point along the way, I ask the probation officer who's present in the courtroom, because usually he's the one who wrote the presentence investigation report, if they have anything else they want to say or anything else they want to add. I'd read every single word for every single sentencing. I think it's the most minimal thing I can do. It's part of my own responsibility. But I ask that officer at the very end, is there anything else you would like to say?

I actually try to encourage the rest of our judges to do the same thing. Because here's what happens and I've been asked this question by other people in other settings. Do you know what sentence you are going to impose when you go out into the courtroom, or does the presentation change your mind? Now obviously, I've looked at it, I've calculated all the things I need to calculate, the guideline range, thinking about variances, departures. I thought about all of the other factors that come into play. But that in some cases, that actual presentation in the courtroom - who speaks, what they say - may actually sway you one way or the other. I think there is no more courageous aspect on behalf of a probation officer who's written the presentence report and made a

recommendation to stand up and say at that moment, at that last moment, Your Honor, I'm going to change my recommendation to the court because of A, B, C and D. That doesn't happen very often but that's exactly the kind of courage and independence that we want from all our probation officers.

Connie Smith: I completely agree and that courage extends to the officer's relationship with the defense counsel and the assistant U.S. Attorney because one of those parties may be very unhappy with that U.S. probation officer in that sentencing recommendation. That is the courage that is required by the officer to remember that independent, neutral role that you're working for the judge. You're serving the judge, not the executive branch with U.S. Attorney nor defense counsel.

Mark Sherman: My guests are Chief U.S. Probation Officer Connie Smith and Chief U.S. District Judge Ricardo Martinez both of the Western District of Washington. When we come back, I'll ask Chief Smith and Chief Judge Martinez about the challenge for both probation officers and district judges in individualizing sentences while at the same time avoiding unwarranted sentencing disparities. You're listening to *Off Paper*.

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Mark Sherman: Welcome back. So we know the law requires district courts to avoid unwarranted sentencing disparities in similar types of cases. But going back to *Gall v. United*

States as an example, the district court noted that there were significant factual differences between Brian Gall's situation and those of his co-defendants each of whom were sentenced to prison terms that were of similar length while Gall was sentenced to probation. In that case, the Court of Appeals didn't agree with the district court that the different facts among the defendants warranted such disparate sentences but the Supreme Court disagreed with the Court of Appeals.

So, Judge Martinez, in the year's since *Gall* I'm sure you've faced similar types of cases. So I'm wondering how you reconcile individualizing a sentence while at the same time ensuring that a disparity isn't unwarranted, and does the breadth of discretion that judges have concern you in terms of for example, different judges in the same district court taking much different approaches to sentencing in similar types of cases?

Ricardo Martinez: Mark, that's actually a wonderful question. I think that all judges - every judge - is concerned with unwarranted disparity, and the key is unwarranted. I mean what exactly does that mean? The Sentencing Commission defines that as -- they basically say it's eliminated when sentencing decisions are based only on the offense and the offender characteristics related to the seriousness of the offense, the offender's potential risk of recidivism in the future or some other legitimate purposes of sentencing.

But there's the rub, how do you decide which of all those myriad characteristics may be found by a particular judge in a particular jurisdiction to be relevant to those legitimate goals of sentencing? I've got to tell you. I've been a sentencing judge -- well, I just started my 30th year. I've sentenced thousands of people. Every single individual that I look at, I look at as an individual because they are unique. I've never seen two people situated exactly alike.

Now I understand that the guidelines when it came into play in both the state system here in the State of Washington which coincidentally was also 1984 when the guidelines sentences came into play as well as the federal sentencing. I understand that they were intended to reflect sort of the average sentence that the average judge would impose on the average defendant with all things similar around the country. What you didn't want was someone in the Western District of Washington being sentenced to A when someone in Georgia might be sentenced to Z and there are no differences between those two individuals. You're trying to eliminate or reduce that disparity, but one of the problems is how do you define disparity?

You know, again looking at what the U.S. Sentencing Commission said in their report – Fifteen Years of Guideline Sentencing. They stated that the appropriate measure of disparity may depend on how disparity is defined. Of course, it does. Because depending on that definition, then it's

impossible to tell whether the disparity that is occurring in terms of the ultimate sentence imposed on a particular individual to be unwarranted disparity.

Let me just give you one example. Given the current opioid epidemic that we've got going on and now with all the sentinel stuff that's coming into play, the 70,000-plus deaths as a result of overdoses around the country, what if a particular area is hard hit with those kinds of cases? And the judges in that area, as a reflection of that, start imposing maybe longer sentences, more extensive sentences that are trying to deal with what is happening with that particular community.

What if I don't have that same problem in the Western District of Washington - which we don't – comparatively to many other states that are out there? So the guys that I sentenced on the same sort of charges, with the same sort of background, may not get the same sort of sentencing because he may not need it in terms of, again, the ultimate goal of the sentencing. So is that unwarranted disparity at that point in time?

I think this is one of the most difficult aspects of the job that we do. Again, from my perspective, if you ask anyone who's been on the bench, the hardest job that they do if they say anything other than sentencing, they're not telling you the truth.

Mark Sherman: Yeah, I mean that's definitely what I've heard from district judges. So, Connie, kind of from the officer's perspective, do you have any concerns about how presentence officers who might feel more comfortable varying from the advisory guidelines might diverge in their sentencing recommendations in terms of similar types of cases and whether that might result in a lack of consistency that could jeopardize the legitimacy of the sentencing process?

Connie Smith: Definitely. This is a big challenge area for the officers. An area that is there an unnecessary amount of worry and the disparity, is it warranted? Is it unwarranted? I think those are all of the challenging aspects that Judge Martinez is referring to because of the complexity of one individual. How is that individual exactly like the next defendant that's going to be sentenced or the co-defendants?

I really think that one of our judges here in Western Washington said it best. Judge Coughenour, I was listening to him in a meeting and he said sentencing is really part science and part art. There is the very individual nature to the sentencing process just as the defendant is an individual.

So I am trying to impart officers being cautious about thinking that this case is very similar to this case. Well, the case, the charges itself may be similar. It may be a conspiracy. But how are the defendants identical? I really believe that somebody cannot be identical to the next

defendant. And I do question are we the guardians of unwanted disparity? The complexity of disparity is a very difficult one, not only for a district and judges having different sentencing, but as a nation.

Ricardo Martinez: To piggyback, just one other thing in terms of similar treatment for similar offenders and different treatment for different offenders, I think anyone would tell you that that's probably the hallmark of fair sentencing. But that definition is incomplete because it doesn't tell us how to classify offenders as similar or different. Just as Connie was saying, everybody is unique. If we don't know how to identify which characteristics of offenses and offenders are relevant to our sentencing goals, to know how to classify offenders, it makes it very difficult to say this is unwarranted disparity that's creeping in.

I will be the first to tell you because, as chair of the Criminal Law Committee now for the last three years and having been in the committee now six plus years, we kind of get into little tiffs with the United States Sentencing Commission in terms of some of the studies that they're putting out. Not only from a methodological perspective. That's way above me. I became a judge because I couldn't do that kind of statistical math. But in looking at that, we look at what they come up with and we go, and now, wait a minute, part of it is also the way you put the message out.

One of the latest studies that they did is they looked at 30 cities around the United States. And they looked at judges sentencing within each district. They looked from the *Booker* period to *Gall*, from *Gall* until now. So they got like those little segments that they can focus on. Their ultimate conclusion, they had four. But one of the ultimate conclusions was that disparity in sentencing is growing, even within the same districts for the majority of districts. Twenty-seven, I believe, of those 30 cities, they found that disparity, even amongst the judges in a certain district, was growing.

Now, the other conclusion I came up with is that the length of a sentence that an offender receives is impacted tremendously by the judge that does the sentencing. So to us, from the Criminal Law Committee, that's basically saying you guys - judges - are exercising your discretion in a way that you shouldn't be, unwarranted disparity. But the other way of looking at that, when you look at their statistics, the ones that they themselves have put out, even though we don't agree with their methodology, you know, in effect is the same thing can be looked at. You can come up with the conclusion that, you know what, but for a few outlier judges here and there in districts, the majority of United States district judges are fairly consistent in what they're doing in terms of sentencing. So, again, the message and how it's delivered may be key.

Mark Sherman: Yeah. And, you know, Judge Martinez, you used a word earlier when you were describing the process. And the word was fairness. I think this is something that we really want to try to drill down on. What does fairness mean? And I want to turn our attention a bit more now to the idea of looking at the sentencing process in the context of a system that includes a pretrial component, a presentencing and sentencing component, and a post-conviction component and the fact that all of these components are related.

So, Connie, we know that in the federal system, individuals who are released at the pretrial stage and do well on pretrial supervision often benefit at the sentencing stage, and also fare better on probation or supervised release. We also know that the goal of post-conviction supervision is to reduce recidivism through behavior change. So when things are framed in that way, how do you, as a chief probation officer who's done it all - pretrial, presentence, and post-conviction - think about the role of sentencing and helping to facilitate recidivism reduction down the line?

Connie Smith: Thanks, Mark. It can be viewed as three independent disciplines - pretrial, presentence, and post-conviction supervision. But it really should be a fluid process that the defendant who is given a privilege of release at the pretrial stage, has the opportunity to demonstrate to the court if they are capable so that the judge consider how they performed on pretrial supervision. I believe that

impacts the sentencing judge when the judge is looking at a pretrial release status report on the successes of this defendant, the steps that they have taken to improve their lives, and conversely, if they really struggled on supervision and if they were revoked at the pretrial stage. That impacts how the judge views the defendant, I believe, and what an appropriate sentence is.

And then, at the post-conviction stage, we know statistically through research that how a defendant performs on pretrial release is the strongest indicator of how they're going to perform on post-conviction supervision. The ultimate goal for pretrial release, for post-conviction supervision is reducing recidivism. So, it really starts at the beginning with the defendant, who is appropriate for release, demonstrating that they are capable and able to be out on pretrial supervision, impacting the sentencing judge, and hopefully, ultimately, how they perform on post-conviction supervision and remaining crime free.

Mark Sherman: Yeah. So, Judge Martinez, along the same lines, when viewing sentencing as merely one component in the criminal justice process where the goal of post-conviction supervision is reduced recidivism through behavior change, I'm really interested to know how, if at all, from your perspective, how that affects your thinking about sentencing?

Ricardo Martinez: You know, I agree a lot with what Connie just said. It should be a fluid process from the very

beginning to the very end. As you indicated, we know from many studies and I know from experience that the initial decision, usually by our magistrate judges who see these individuals the very first time, that decision to detain or release is critical to the ultimate sentence. Especially by the time we came up for sentencing, if several months have gone by, I can't tell you how many times. My focus is how has this individual done from the moment they were brought into the courtroom and told what they were facing until now. What have they done to prove to me that, yes, they merit that second, third opportunity, whatever it is that they're requesting? So it is part of a fluid process.

Ultimately, as I said I agree with Connie. The ultimate goal, when you put someone back into the community, you want to integrate them into the community in the best way possible, obviously, for them to succeed. Because success on their part, getting the job, reconnecting with their family, is reducing the chances that they will come back into the courtroom in the future to reducing recidivism on their part. That is exactly what we want to do. But all of these different phases play a very important part in that entire process.

Mark Sherman: I want to take it back to that conversation earlier about disparity and fairness and what it means in the context of this entire process. Because, you know, thinking back about sort of how the district court

approached the sentencing of Brian Gall, I think, is very instructive. Because this was a situation where clearly the district court felt that sentencing the defendant in that case to a prison sentence would actually detract from his post-conviction success. And that keeping him in the community where he was already doing very well and was leading a law-abiding life, had connections in the community, was making a good living. What purpose would it serve to take him out of the community to serve a 30 to 37 month prison sentence?

So this is why I asked the question. That was a number of years ago before our system really got so deeply into sort of focusing on recidivism reduction through behavior change. So, that's kind of what prompted the question. I wonder if either of you have any reaction to that.

Ricardo Martinez: Well, I do, Mark. I can tell you this, all right? I believe sincerely that part of the problem with district judges, perhaps getting reversed by the courts of appeal -- and, you know, between you and me, obviously, there are some very unique cases sometimes that come up that make it very, very difficult. But for the average case, part of the problem is, I think district judges -- and this is part of the training process that we engage into from the Administrative Office of the U.S. Courts and the Federal Judicial Center and even things like my Criminal Law Committee. Part of the process is making sure that judges understand what it is that an appellate court is going to be

reviewing and looking at. And along that is the record that you make.

If you look at the myriad 3553(a) factors, you can focus on those different factors just like the court in *Gall* did in terms of why am I imposing this particular sentence? You know? I need to protect the public from further crimes and the defendant. Of course, in this case, I'm satisfied. This person has demonstrated to me that they will not be committing other crimes. Well, to afford an adequate deterrence to criminal conduct, general deterrence, we always take that into effect. You know? And take that in mind.

What's going to happen here if this story is going to hit the press and people are going to be looking at this and go, that's the best that judge could do with that? That guy got a slap on the wrist. Of course, that's part of it. But then, we're looking at this particular individual and we're saying, wait, in this particular case, reflecting on the seriousness of his offense, promoting respect for the law, providing just punishment for the offense, all within the 3553(a) factors. In this case, it would be unfair, to go back to the main critical words that you were just talking about a few minutes ago, to send this particular guy to prison for this amount of time, which is - once again - why we have human beings on the bench and not just computers spitting out a potential range of a sentence.

Mark Sherman: Connie, any reactions briefly?

Connie Smith: I completely agree with His Honor. This is the complexity of sentencing. It's really deep analysis of 3553 factors, which I think greatly assist a judge to understand this defendant in a very holistic manner, in going back to someone's childhood, trying to put the pieces to a puzzle together. Sometimes, we miss pieces. Sometimes, we find ourselves at sentencing saying do I really understand this defendant's story completely? If the officer doesn't understand it completely, then the judge isn't going to understand this defendant completely. That's the privilege and the responsibility that we have as officers in figuring out this complex puzzle of someone's life, in addition to, of course, accurately calculating the guidelines.

I frequently hear, well, we start with the guidelines. What does that mean? That's a really big question. We start with the guidelines in calculating them correctly. That's our responsibility. But is that influencing our decision-making that we start with, meaning the low end or somewhere mid or high range in the way that we calculate the guidelines and come up with an ultimate sentencing recommendation? The guidelines are just one piece of that complicated puzzle.

Mark Sherman: Chief U.S. Probation Officer Connie Smith and Chief U.S. District Judge Ricardo Martinez are my guests. After a short break, we'll conclude our conversation with an exploration of how taking a science-informed approach to presentencing and sentencing work might provide both probation

officers and district court judges with some additional guidance. This is *Off Paper*.

[Commercial from 0:44:06 - 0:45:20]

Mark Sherman: Connie Smith, you've been involved now for several years as a subject matter expert and faculty member with the FJC Science-Informed Decision-Making Initiative. As you know, the initiative is basically a series of training programs that bring together district judges, magistrate judges, pretrial and probation officers, clinical mental health professionals, and behavioral health researchers and neuroscientists for the purpose of exploring whether insights from the clinical and research worlds can help practitioners like you and Judge Martinez make decisions that more precisely take into account the driving forces behind the criminal behavior engaged in by defendants.

I wanted to ask you, Connie, what you've learned from your experience in the project and how you hoped to see it translate to the work of presentence officers in your district and more generally, across the federal system.

Connie Smith: Thanks, Mark. My work with the Federal Judicial Center in this area has been nothing short of astounding. What haven't I learned would actually be more the question for myself.

Mark Sherman: That's music to my ears, Connie, just to let you know.

Connie Smith: It's so engaging and exciting and thought-provoking in the areas that we can all learn more about. A defendant who has trauma as a child, how does that impact our cognitive abilities? What does sexual abuse of a child, a teenager, how does that manifest in the defendant's decision-making and emotional immaturity or maturity? Other topics such as the aging brain, when the court and the officers are looking at defendants who are older, how does that impact their cognitive abilities? How about a defendant who has experienced severe domestic violence and suffered likely mini-concussions and blows to the head in that process? What does that look like? How do we ask questions around adverse childhood experiences? Should we be following the model of the 10 questions around adverse childhood experiences? Learning more about the defendant so that when this defendant appears in front of the judge, the judge and the officer, and of course, the other party, have a comprehensive understanding of this defendant and all the variables that have impacted their life. That has contributed to the decisions that they have made around criminal behaviors, engagement in criminal activities. All of this is complex, it's interesting, and we need to grow more in this area.

Mark Sherman: So, Connie, do you think that what we're learning from the Science-Informed Decision-Making Initiative, do you think that that information and that knowledge can be helpful at a very practical level to the presentence officer

as he or she, not only collects the information on the background of the defendant but sort of considers and develops the sentencing recommendations?

Connie Smith: Absolutely. I think it really should be ingrained in the interview process. I think we have a lot of growth in this area. We follow a script in some ways in using our form and deviating off the interview process and following avenues that we can learn more about. I could give you an example of. I don't think I've ever asked a defendant either at the presentence and post-conviction stage on how a parent's incarceration impacted them. What does that look like in their life? What was it like to have your parent gone for X number of years and how do you think that impacted you?

There are questions that we might be dancing around. We might still are too invasive or too delicate. But, I think we're missing the mark and we have areas to really grow and challenge ourselves. So that we can understand this defendant better and to help support the judge in making the best decision for this defendant.

Mark Sherman: So, Judge Martinez, because you and Connie work so closely together, I have a feeling that the two of you have spent some time talking about the potential value of science-informed decision-making especially at the presentence and sentencing stage. And I know that the court and the probation office in the Western District of Washington have done some training in this area fairly recently. So I'm

really curious about what you've taken away from that experience so far. And whether you see any potential for it to help the court improve the consistency of its decision-making and perhaps reinforce the work happening at the post-conviction side in terms of evidence-based practice and recidivism reduction.

Ricardo Martinez: Well, Mark, not only from my many years of working with Connie, but also from all the years I've spent on the Criminal Law Committee. We just completed our 10th anniversary of evidence-based practices. What else can I say? I can tell you this. There are many judges, especially some of the older, more experienced judges that have been on the bench for many years. When you talk to them about things like this in terms of sentencing and what is important, they'll look at you and they'll say, you know, in all the years I've done this, for this category of cases, this is what I've done and it's worked. Well, that's not evidence-based practice. That's anecdotal information. We all have it. We all use it. We all look back in terms of what's happened in our courtrooms over all these years and think, well, I did that and that worked. I did that and it didn't work. That's not evidence-based practices.

What you want is you want the best evidence currently available with measurable results. They can be replicated, that will inform decisions about the best way, not only to sentence individuals, but the supervision of them afterwards.

How do you design, how do you deliver the policies and practices to achieve, basically, the maximum measurable reduction in recidivism, which again, is our number one goal.

Here's another category of areas. For the longest time, I think if you talk to almost any particular judge, no matter where they sit, what do we do to revoke someone? How do we handle revocations when someone is out, say, post-conviction, supervised release, and they violate one of the conditions?

Let's say, for example, that they're opioid users and they violated a condition of supervised release. Either have a positive UA or they do something and we bring them back in. And it's like the third or fourth time. Now we're tired of what they've been doing. In the past, again, looking back in your own experiences, you go, you know what, you're like my three-year-old grandchild. You need a timeout. Well, I'm going to put you in custody for a week, ten days, just to give you that little bit of a timeout. And then, let you think about this and put you back out there again and you get another shot. Well, we're finding out from now, talking about medically-assisted treatment and getting scientific evidence from doctors and people that know what they're doing that that is actually putting that particular individual at a much higher risk of overdosing and dying. Putting a man without giving them that sort of medically-assisted treatment, whatever medication blocks those opioid receptors in the brain, all you're doing is setting them up so that their

tolerance level drops. They go back out there. You haven't cured them. You haven't fixed them. But now you put them in a situation where they could easily overdose and die. That's the kind of scientific informed approach that we need as judges to try to understand how best do we handle this particular unique case in front of me.

Mark Sherman: So, Connie, I'm really interested to hear your reaction to that. Especially again, sort of harking back to something we talked about in a previous segment which is kind of putting together these three different components of our process - pretrial, presentence, and sentencing, and then, post-conviction. I'm very interested to hear your reaction to that.

Connie Smith: As I stated earlier, Mark, we see these as a fluid process. An example would be starting at the pretrial stage. I would love to incorporate using what's called the ACEs, the Adverse Childhood Experiences at the pretrial stage. So, right at the beginning, the officer and the judge understand how the childhood experiences have impacted the defendant. It doesn't mean that the officer is a clinician and is administering therapy, but it enhances understanding with the defendant's background so that the judge and the officer can make an appropriate decision. Then that carries into the presentence stage and is built upon more in the post-conviction stage.

An example that Judge Martinez shared on medicated-assisted treatment would be how can we make an impact here in the community with our federal partners, the Bureau of Prisons, that is making some advancements around the use of medicated-assisted treatment, which is very encouraging. But our local partners, state partners are very advanced in this area. There is a lot to learn beyond our federal silos, from our state and local partners who are dealing with these topics on actually a much greater level, and moving beyond our federal circles and learning from our partners on how science is impacting in the areas of substance use disorders, mental health treatment. There's interesting research around evidence-based sentencing. We can't ignore science. We can't remain static on how we approach any stage of the case.

Mark Sherman: You know, I really liked --

Ricardo Martinez: Mark. Mark, I'd like to chime in on something there.

Mark Sherman: Sure, go ahead, Judge Martinez. Of course, yeah, please do.

Ricardo Martinez: There is one area of concern. I think judges are as concerned as probation officers as anyone else in the system. We, again, from the Criminal Law Committee perspective, totally believe in evidence-based practices. We have hitched our wagon to that particular star no matter where it takes us. One of the tools that we have to make assessments of individuals when they go on post-conviction

supervision is the PCRA, the Post-Conviction Risk Assessment tool. One of the concerns is, wait a minute, how far back in the process do you want to have this type of risk assessment done? What if the judge finds it handy, to have it prior to sentencing? What if you knew that this particular defendant, because of all the risk factors, dynamic or static or whatever you're looking at, had a higher proclivity to commit a crime of violence? Would you want to know that before you sentence someone? That's the risk. I mean, I may be thinking about my own childhood here, but I grew up a huge fan of sci-fi. One my favorite authors was Philip K. Dick who, you know, he wrote a bunch of short stories. He wrote a short story called *Do Androids Dream of Electric Sheep?*

Mark Sherman: Which I believe became *Blade Runner*, if I'm not mistaken.

Ricardo Martinez: Correct, exactly.

Mark Sherman: You're a man after my own heart.

Ricardo Martinez: He also wrote *Total Recall, t*he story that became *Total Recall.* He called that one *We'll Remember It For You Wholesale*. And he wrote *Minority Report*. That's another one of my favorite movies. Now, from our perspective, think about it, is that something that, again, plays into that fairness and justice decision? If you have that kind of information, how far back should a judge be able to get that? So that scenario we've got to be a little bit careful with.

Mark Sherman: Sure, absolutely. Go ahead, Connie.

Connie Smith: I would agree. At the sentencing stage, there isn't a tool adopted yet to really address that stage of the case. The Post-Conviction Risk Assessment tool is designed for that dynamic process on supervision. Nor is there a tool at the pretrial supervision stage that is dynamic. So addressing the criminogenic risk factors, level of violence, potential level of violence for a defendant right now is an area that is not fulfilled yet. This is not complete. My hope is that sometime in the system that those tools will be developed. Excuse me. There is work being done in this area. But right now, we fall short in this area. Just as a reminder, those are one tool that isn't the complete deciding factor for an officer. It's one piece of information. That doesn't mean that that officer's experience and perspective is thrown out the window because of one tool.

Ricardo Martinez: But I also would point out, Mark, that it's interesting to talk about them and think about them as tools. Because that's the way we think about them also from the Criminal Law Committee. But one of the concerns about providing tools to people is teaching them how to use them, and then, making sure that that works. That they learn how to use that tool and then, they are comfortable using that tool.

One example is the DROP Program, the detention and release [sic] program. We looked at districts around the country that have higher detention rates. We know detention is ten times as expensive as releasing someone back into the

community. Plus, it has all those other effects down the line. Well, the DROP Program, we can measure that if we go in, basically, with a team of experienced probation officers or pretrial services officers that look at these are all the characteristics that you look at in making the decision to release the moderate and maybe higher risk offenders. We train the pretrial officers in that district. And we train the judges, usually the magistrate judges in that district. We can see the results. What are the results? The results are very positive. Their detention rate drops while the revocation rate or the failure to appear rate stays the same. It doesn't change.

But then, what happens? Six to nine months down the line, they go right back to where they were before. We don't understand, what does that regression to me means? Is there a gravitational pull to whatever they were doing previously that pulls them right back in? I just challenged my staff on the Criminal Law Committee to take a deeper look at that and say, what is happening here from a science-based perspective? What is causing this regression back to that even though we've shown them that this particular tool works? Why aren't they using it the way it was designed to be used?

Connie Smith: I would agree, Your Honor. I believe there are a lot of cultural aspects. There's interesting work by the FJC in addressing the cultural issues and working with judges, working with officers, and having in depth

conversations on what is holding them back from looking at release as the option. Those systemic issues run deep and there are many years of history and ingrained thinking process that can't be addressed by a tool, but can certainly help support one another in utilizing the tool and looking at the cultural practices to sustain the thinking process of looking at release.

Mark Sherman: Chief Connie Smith and Chief Judge Martinez, I want to thank you both so much for talking with me about this really important and interesting subject.

Connie Smith: Thank you, Mark.

Ricardo Martinez: My pleasure, Mark. Yes, thank you.

Mark Sherman: Connie Smith is Chief U.S. Probation Officer and Ricardo Martinez is Chief U.S. District Judge, both from the Western District of Washington. Chief Judge Martinez also serves as chair of the Criminal Law Committee of the Judicial Conference of the United States.

Off Paper is produced by Jennifer Richter. The program is directed by Craig Bowden. And don't forget, folks, you can subscribed to *Off Paper* wherever you get your podcast. I'm Mark Sherman. Thanks for listening. See you next time.

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