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March 7-8, 2019

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SENTENCING ADVOCACY IN CRIMINAL TRIALS: PERSPECTIVES FROM BOTH SIDES OF THE AISLE

- Chad Edgar, U.S. Department of Justice (Moderator)
- Karen Kelly, U.S. Department of Justice
- David Zisseron, U.S. Department of Justice
- Mark Matthews, Caplin & Drysdale, Chartered
- Ross Sharkey, Caplin & Drysdale, Chartered



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OBJECTIVES

- Statistical Overview
- Sentencing Fundamentals
- Sentencing Strategies (Q&A)
 - Government
 - Defense
- Recent Developments
 - New Application Note on non-violent fist offenders
 - Effects of First Step Act on Tax Cases



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Why Devote an Entire Panel to Sentencing Advocacy in Criminal Tax Cases?



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IRS-CI FY Statistics

	FY 2016	FY 2017	FY 2018
Investigations Initiated	3,395	3,019	2,886
Prosecution Recommendations	2,744	2,251	2,130
Informations/Indictments	2,761	2,294	2,011
Conviction Rate	92.1%	91.5%	91.7%
Total Sentenced	2,699	2,549	2,111
Percent to Prison	79.9%	80.1%	82%
Average Months to Serve	41	42	45



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Where in the Process Does Each Side Typically
Start Preparing for Sentencing?



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Important steps in the federal criminal process:

- Investigation
- Charging
- Initial Hearing/Arraignment
- Discovery
- Plea Bargaining
- Preliminary Hearing
- Pre-Trial Motions
- Trial
- Post-Trial Motions
- Sentencing
- Appeal



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IRS-CI Investigations: Overview



- Two types: Administrative and Grand Jury
- IRS-CI will generally attempt to make contact with the taxpayer early in the investigation

What is going on the Government side at this stage:

- Determining the tax loss
- Developing Evidence for Use at Sentencing

What is going on the Defense side at this stage:

- Analyze potential charges and tax loss
- Should the Defendant file/amend past due returns and/or pay taxes?
- Should the Defendant start getting involved in the community?



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Guilty Pleas and Plea Bargains: Overview

- For most federal defendants, the sentencing process begins before the formal sentencing phase of the case.
- In recent years, 97 percent of federal defendants convicted of a felony or Class A misdemeanor offense plead guilty rather than on a verdict at a trial.
- In a typical case involving a guilty plea, some but not all of the facts relevant to sentencing are established at the guilty plea hearing. However, a more complete recitation of the relevant sentencing facts will be contained in a Pre Sentence Report prepared by the U.S. Probation Office.
- At the guilty plea hearing, the court will advise the defendant of the statutory range of punishment and of “the court’s obligation to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).”
- Many defendants who plead guilty do so as the result of plea agreement with the prosecution, and some plea agreements contain the parties’ agreement about the application of the sentencing guidelines in the defendant’s case. Unlike civil cases, where district judges may participate in settlement discussions, a judge in a federal criminal case “must not participate in [plea bargain] discussions” between the parties, although the “parties must disclose the plea agreement in open court when the plea is offered”



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How do the decisions made during plea negotiations affect sentencing?



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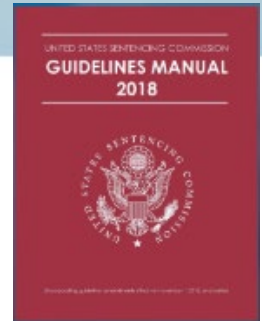
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Presentence Interview

After a defendant is convicted, whether by guilty plea or a verdict at trial, a federal probation officer typically conducts a presentence interview of the defendant.



At the presentence interview, the probation officer may ask questions about a wide variety of matters concerning:

- the defendant's offense or offenses of conviction and related uncharged criminal conduct,
- criminal history
- personal history (including family history and substance abuse history),
- financial circumstances

Counsel for the defendant must be given notice of and the opportunity to attend the presentence interview. See FED. R. CRIM. P. 32(c)(2)

A defendant may invoke his or her constitutional right to remain silent during the interview, although failure to provide truthful information about the offense or offenses of conviction may result in denial of credit for "acceptance of responsibility" at sentencing.



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What Are Some the Strategies for Dealing with
Probation and Pretrial Services?



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Presentence Report and Objections

After conducting the presentence interview, the probation officer prepares a PSR. The PSR contains not only information about the offense and offender but also the statutory range of punishment and a calculation of the relevant sentencing guidelines, as well as any bases that may exist for imposing a sentence outside of the applicable range.

The defense and prosecution must be provided a copy of the PSR at least 35 days before sentencing and must submit any objections within 14 days of the sentencing hearing and otherwise may respond to the PSR (typically in the form of a sentencing memorandum).

The PSR is a confidential document that may not be disclosed to the public. Together with a PSR, a probation officer also submits to the court a confidential sentencing recommendation.



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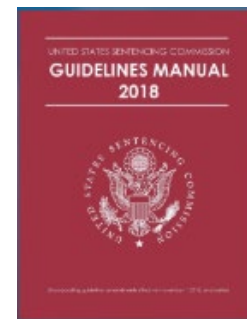
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Presentence Report and Objections (continued)

The Federal Bureau of Prisons uses the PSR, in determining:

- the offender's classification as an inmate,
- choosing an appropriate treatment program,
- and deciding eligibility for various programs.



The PSR is used to inform the conditions and methods of supervision of an offender on probation or supervised release.



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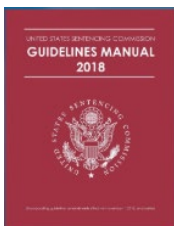
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SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

§2T4.1. Tax Table

	Tax Loss (Apply the Greatest)	Offense Level
(A)	\$2,500 or less	6
(B)	More than \$2,500	8
(C)	More than \$6,500	10
(D)	More than \$15,000	12
(E)	More than \$40,000	14
(F)	More than \$100,000	16
(G)	More than \$250,000	18
(H)	More than \$550,000	20
(I)	More than \$1,500,000	22
(J)	More than \$3,500,000	24
(K)	More than \$9,500,000	26
(L)	More than \$25,000,000	28
(M)	More than \$65,000,000	30
(N)	More than \$150,000,000	32
(O)	More than \$250,000,000	34
(P)	More than \$550,000,000	36.



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Once the PSR is issued, what considerations are made in deciding whether to file objections?



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Sentencing Hearing

Although not as formal as trial proceedings, federal sentencing hearings are adversarial proceedings governed by procedural rules contained primarily in Rule 32 of the Federal Rules of Criminal Procedure and Chapter Six of the Guidelines Manual.

A district court must allow the defendant and counsel for both parties to provide input before a sentence is imposed.

At the court's discretion, parties may call witnesses and present evidence about disputed facts or other matters (e.g., mitigating or aggravating factors).

Neither the Federal Rules of Evidence nor constitutional provisions related to evidentiary matters (e.g., the Confrontation Clause of the Sixth Amendment) apply at sentencing.

Court may consider hearsay and other types of information that would not be admissible during a trial.

In resolving factual disputes, the preponderance of the evidence standard ordinarily applies .



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- Selection of an appropriate sentence requires judges to have “the fullest information possible concerning the defendant’s life and characteristics.” *Williams v. State of New York*, 337 U.S. 241, 247 (1949).
- 18 U.S.C. § 3661: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”



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18 U.S.C. § 3553(a) Factors

(a) Factors To Be Considered in Imposing a Sentence.—The court **shall** impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, **shall** consider—

(1) the **nature and circumstances of the offense** and the **history and characteristics of the defendant**;

(2) the need for the sentence imposed—

(A) to **reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment** for the offense;

(B) to **afford adequate deterrence** to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to **provide the defendant with needed educational or vocational training, medical care**, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for— (by the Guidelines)

(5) any pertinent policy statement— issued by the Sentencing Commission; and

(6) **the need to avoid unwarranted sentence disparities among defendants with similar records** who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.



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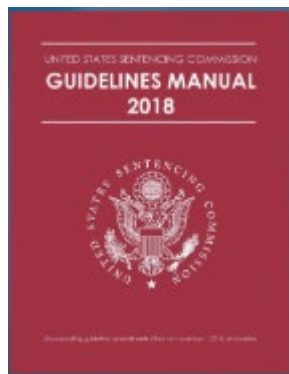
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Booker Three-Step Process

The Court calculates
the sentencing range
provided in the
Guidelines Manual.

The Court considers
policy statements or
commentary in the
Guidelines Manual
about departures.

The Court considers
18 U.S.C. § 3553(a)
factors in deciding what
sentence to impose.



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How do you highlight the sentencing factors and other pertinent information to the Court?



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The Sentencing Memo: General Structure

For the Government

1. Discussion of Offense Conduct
2. Discussion of Relevant Conduct
3. Discussion of Other Misconduct
4. Why a Guidelines Sentence is Warranted
5. Response to Defendant's Good Character, Health, Charity, and other Arguments

For the Defendant

1. Defendant's Devotion to Family and Humanity
2. Defendant's Other Good Characteristics and Deeds
3. Defendant's Health Issues
4. Acceptance of responsibility and substantial assistance
5. Discussion of offense conduct and sentences in similar cases



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Arguments for Government

1. Sentencing Policy in Tax Cases
2. Seriousness of the Crime
3. Specific Deterrence
4. General Deterrence



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Government's Policy Argument: Quote from U.S.S.G. §2T1.1 Background

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately \$90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.



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Government's Policy Argument: U.S.S.G. Ch. 2 Pt. T Introductory comment

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

- Tax Gap (IRS's most recent official estimate of the net Tax Gap, for 2008-2010, was \$406 billion, or about 18% of the total annual tax liability)
- Relative Lack of Audit and other Compliance Resources (cuts at IRS!).



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Arguments for Defense

1. Lack of Criminal History
2. Good Character
3. Avoid Unwarranted Sentencing Disparities
4. Health Conditions
5. Low Recidivism
6. Taxes eventually paid



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Sentencing Arguments Good Character

- Letters or testimony regarding good character
- Video presentation?
- Charitable Endeavors



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He paid his girlfriend's plastic surgeon. But he didn't pay Uncle Sam — for 13 years

BY DAVID J. NEAL

DNEAL@MIAMIHERALD.COM

JUNE 04, 2017 11:32 AM, UPDATED JUNE 04, 2017 10:33 AM



But be careful.....



A Fort Lauderdale businessman pleaded guilty to tax evasion after avoiding \$351,241 in taxes on \$1.5 million income from 2002-15 **JOE RAEDLE** GETTY IMAGES FILE/2010

Thomas Daly made over \$1.5 million from 2002-15 as a salesman of several products, including hurricane-resistant windows. On this approximately \$107,150 per year, the Fort Lauderdale man rented an apartment, owned a boat, traveled internationally and paid for his girlfriend's cosmetic surgery.



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Sentencing Arguments Unwarranted Sentencing Disparities

- Comparison to other tax sentences in the district and nationwide
 - Select cases to fit your position and offense conduct
 - Consider the particular Judge
- Comparison to voluntary disclosure program or other civil programs
- Use of sentencing statistics to indicate that anything above (fill in the blank) months would create a disparity



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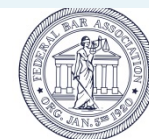
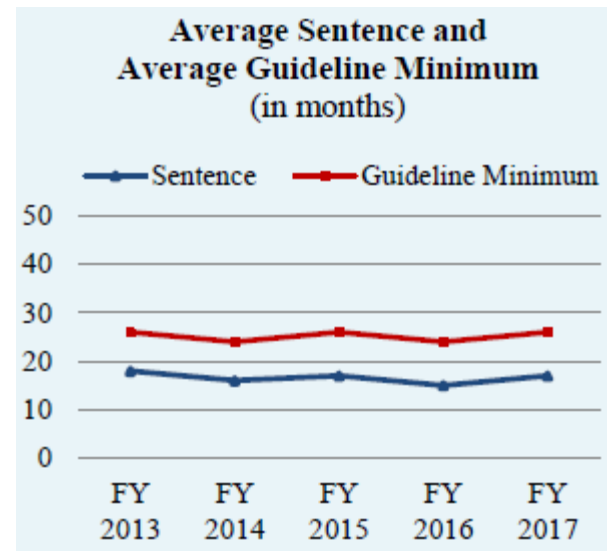
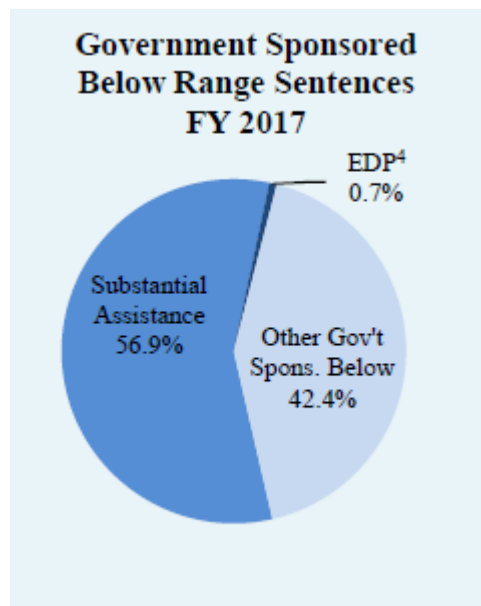
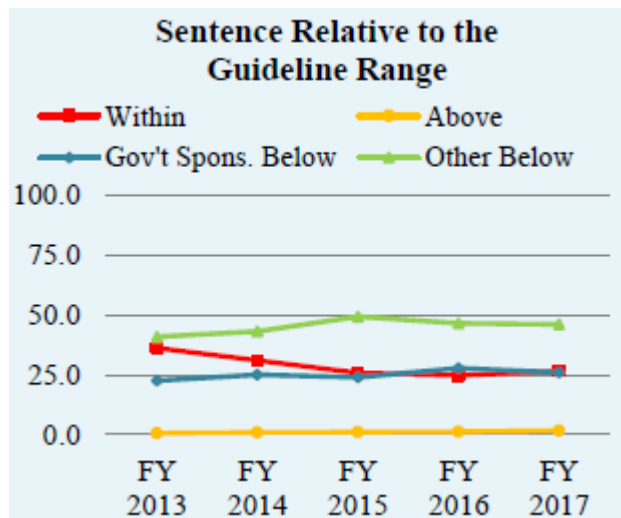
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FY 2017 Tax Sentencing Statistics



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Sentencing Arguments Health

- Old Age
- Poor Health
 - BOP has resources in place to handle a myriad of health issues

The screenshot shows the Federal Bureau of Prisons website. The header includes the BOP logo, the text "Federal Bureau of Prisons", and the tagline "Correctional Excellence. Respect. Integrity." Below the header is a navigation menu with links for Home, About Us, Inmates, Locations, Jobs, Business, Resources, and Contact Us. The main content area is titled "About Our Agency" and features a sidebar with a "Central Office" menu. The "Health Services Division" is highlighted, with a leadership link for Dr. Deborah G. Schult. The main text describes the division's responsibilities for medical, dental, and mental health services, as well as the BOP's Safety Program. It also mentions that the BOP has over 3,000 health care positions, including approximately 750 Public Health Service (PHS) Commissioned Officers.



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Sentencing Arguments Money and Collateral Consequences

- Defendant paid his taxes prior to sentencing and is now tax compliant
- Defendant will lose his professional license if sent to jail
- Penalties paid such as foreign asset reporting penalties
- Sentencing for criminal FBAR violations under chapter 2 part S instead of chapter 2 part T?



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Recent Developments



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Potential Impact of New Application Note to USSG §5C1.1

4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a “*nonviolent first offender*” is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase “comparable judicial dispositions of any kind” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.



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First Step Act Impact on Tax Crimes

- Advocacy for your client does not end after sentencing and can continue while they are in custody.
- First Step Act
 - Expanded good time credits for low-risk defendants
 - Maximize home confinement for lower risk defendants
 - Changed definition of “elderly” to 60 for purposes of home detention program
 - Additional argument at sentencing for no jail time?



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THANK YOU!



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