clients to zealously protect their clients' interests.[9] As a result of this asymmetry in the rate of appeals, appellate courts review almost exclusively issues decided against the defendant in the court below.[10] In part due to the deferential standard of review,[11] the appellate court affirms the lower court in the overwhelming majority of cases.[12]

Stated a different way, when a district court imposes a sentence, four scenarios are possible: (1) the decision is pro-defense and the government appeals, (2) the decision is pro-defense and no one appeals, (3) the decision is pro-prosecution and no one appeals, or (4) the decision is pro-prosecution and the defendant appeals.[13] Regarding the first scenario, prosecutors are not obligated to appeal sentencing decisions[14] and rarely do so.[15] Prosecutors have the luxury of cherry-picking only the cases where they are likely to win,[16] and, consequently, in the majority of cases (65%)

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[9] MODEL RULES OF PROF'L CONDUCT pmbl. and Scope 2 (AM. BAR ASS'N 2016) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). As discussed below, defense attorneys are sometimes obligated to appeal even where the claims are frivolous. *See infra* text accompanying notes 132–37.

[10] Over 99% of all sentencing appeals are defense appeals. *See* 2014 SOURCEBOOK, *supra* note 8, at tbls.56A, 56.

[11] Pure questions of law are reviewed de novo and all other conclusions are reviewed under a "clear error," "plain error," or "deferential abuse-of-discretion" standard of review. *See, e.g.*, Gall v. United States, 552 U.S. 38, 41 (2007) (overturning an appellate court's reversal of a district court's sentencing decision and holding that the standard of review that applies to a lower court's weighing of § 3553(a) factors is a "deferential abuse-of-discretion standard"); United States v. Miggins, 302 F.3d 384, 390 (6th Cir. 2002) (reviewing the district court's factual findings as to the sentence enhancement for "clear error," and reviewing the district court's legal conclusions regarding the application of the Guidelines de novo); United States v. Starks, 309 F.3d 1017, 1026 (7th Cir. 2002) (finding that where the defendant fails to object to the enhancement at sentencing, the appellate court reviews the district court's decision for "plain error").

[12] *See* 2014 SOURCEBOOK, *supra* note 8, at fig.M, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureM.pdf [https://perma.cc/FS2W-YMNH]. In 2014, federal appellate courts reversed only 10.2% of all sentencing decisions and affirmed in part and reversed in part in only 2.3% of sentencing decisions. *Id.*

[13] A fifth category of outcomes may include cases where the defense and prosecution come to an agreement, which they present to the judge and the judge accepts. I have omitted this category above for the sake of simplicity. For a discussion of plea agreements, see *infra* text accompanying note 187.

[14] OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS' MANUAL 9-2.170(2)(3)(a) (2015) [hereinafter U.S. ATTORNEYS' MANUAL], https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.170 [https://perma.cc/8N2X-U4K4].

[15] 2014 SOURCEBOOK, *supra* note 8, at tbl.56A.

[16] U.S. ATTORNEYS' MANUAL, *supra* note 14, at 9-2.170(2)(3)(a) ("Authorization to appeal should be sought only if: the sentencing decision is not supported by the law or the evidence, or the sentence is unreasonable in light of 18 U.S.C. § 3553(a), *and* the appeal holds a reasonable prospect of a favorable result under the applicable standards of review." (emphasis added)). That being said, prosecutors may be inclined to bring appeals where a favorable outcome is not likely if the crime is particularly egregious and the public has expressed outrage. DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 72 (1966) (observing that even where the

where the government appeals a sentencing decision, it is reversed.[17] In the second scenario, where the decision is pro-defense and no one appeals, if the court imposes the sentence by oral pronouncement,[18] the court's pro-defense legal reasoning becomes silent law that exists only in a transcript on PACER[19] never to be cited as persuasive authority.[20] The cases that fall into the third category are those where the lower court's sentencing decision was pro-prosecution, but the defendant would have no viable argument for reversal. The pro-prosecution reasoning of these decisions also becomes silent law. Regarding the fourth outcome, when the defense appeals, by contrast, the majority of sentences (74.4%) are affirmed, resulting in a written appellate court opinion endorsing a pro-prosecution decision.[21] In short, few written sentencing opinions searchable on LexisNexis and Westlaw present pro-defense reasoning, and most are pro-prosecution appellate court opinions affirming lower court decisions.

Consequently, when writing sentencing memoranda at the district court level, defense attorneys confront a dearth of written opinions decided in the defense's favor. These defense attorneys are left to distinguish their

probability of conviction is low, a prosecutor may prefer to try the case if it is a serious offense and has been highly publicized); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); *infra* text accompanying notes 36–41.

[17] Of the forty-three sentencing decisions that the government appealed, 65.1% were reversed, 7.0% were affirmed in part and reversed in part, and 20.9% were affirmed. 2014 SOURCEBOOK, *supra* note 8, at tbl.56A.

[18] In rare cases, judges produce written sentencing opinions. Here the focus is on the typical case, where the judge explains the reasons for the sentence by oral pronouncement at the sentencing hearing.

[19] Public Access to Court Electronic Records (PACER) is an online archive where transcripts and other documents from federal court proceedings from 1996 to the present are made available to view, print, or download. JENNIFER J. BEHRENS, DUKE UNIVERSITY SCHOOL OF LAW J. MICHAEL GOODSON LAW LIBRARY RESEARCH GUIDES, COURT RECORDS & BRIEFS 4 (2016), https://law.duke.edu/sites/default/files/lib/recordsbriefs.pdf [https://perma.cc/H9MP-H3HF]; *Transcripts of Federal Court Proceedings Nationwide to Be Available Online*, U.S. COURTS (Sept. 18, 2007), http://www.uscourts.gov/news/2007/09/18/transcripts-federal-court-proceedings-nationwide-be-available-online [https://perma.cc/QN45-PX8J]; PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, PACER USER MANUAL FOR ECF COURTS 4 (2014), https://www.pacer.gov/documents/pacermanual.pdf [https://perma.cc/8QER-HPHZ].

[20] Scott, *supra* note 5, at 363 ("Often cluttered with irrelevant material, jarred by interruptions, and disorganized, a sentencing transcript is a poor substitute for a written opinion explaining the reasons for a sentence.").

[21] Among the sentencing decisions appealed by the defense, 9.8% were reversed, 2.3% were affirmed in part and reversed in part, and 74.4% were affirmed. 2014 SOURCEBOOK, *supra* note 8, at tbl.56. By contrast, among government appeals, 65.1% were reversed, 7.0% were affirmed in part and reversed in part, and 20.9% were affirmed. *Id.* tbl.56A. However, just looking at the percentages can be misleading. A comparison of the raw numbers reveals that defendants won 480 appeals in 2014, whereas the government won only 28. *Id.* tbls.56, 56A. Thus, although prosecutors won a much higher percentage of appeals, defendants won a significantly higher number of appeals. This suggests that the government is strategically selecting the cases in which it has high odds of winning.

cases from the binding precedent.[22] By contrast, prosecution sentencing memoranda, with an abundance of favorable appellate court precedent in support of their arguments, are likely to be more persuasive.[23] When judges (or their clerks) turn to Westlaw or LexisNexis to determine whether a certain sentence enhancement applies, they discover a mountain of pro-prosecution precedent.[24] Judges may be inclined to decide the legal issue in the government's favor because most appellate court precedent supports the government's position.[25] As that decision is unlikely to be reversed, each subsequent round of appeals contributes to an increasingly prosecution-friendly body of binding precedent.

Part I of this Note defines and provides examples of doctrinal drift. It also explains how the Guidelines function and describes the role of the Guidelines after the Supreme Court rendered the Guidelines advisory in *United States v. Booker*.[26] Further, it provides examples of doctrinal drift by demonstrating how particular lines of doctrine have become more favorable to the prosecution over time. Part II identifies the causes of the one-sided body of law favoring the prosecution, namely (1) the lack of written district court sentencing decisions and (2) the disparate rate of appeals between the prosecution and the defense. Part III explains how this one-sided body of law leads to doctrinal drift with each subsequent round of appeals. Part IV acknowledges other factors that influence the development of case law and addresses the counterargument that the law is instead growing increasingly friendly to the defense. Finally, Part V proposes and evaluates possible solutions to the problem of pro-prosecution doctrinal drift in sentencing.

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[22] *See infra* text accompanying notes 175–83.

[23] *See* Eric Voigt, *Choosing the Best Cases: Five Reminders for New Lawyers*, LEGAL WRITING EDITOR (Dec. 4, 2013), http://legalwritingeditor.com/2013/12/04/choosing-best-cases-five-rules-new-lawyers/ [https://perma.cc/QC58-YDEG] (advising lawyers to avoid making assertions without citations to precedent because "without citations, judges might think that the stated rules and arguments are merely *your* opinions—which are irrelevant").

[24] *See infra* Part II.

[25] *See* Kristen Konrad Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257, 264 (2002) (finding, based on survey of 355 federal judges, that citation to "relevant, controlling authority" is a key component of good legal writing); *see also* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 683 (2015) (reasoning that when appellate courts have affirmed the admission of latent fingerprint evidence in 24 of 25 cases, a district court "faced with this one-sided body of appellate fingerprint precedent might erroneously conclude that it has no discretion to exclude such evidence").

[26] 543 U.S. 220, 245 (2005) (severing and excising the provision making the Guidelines mandatory because it violated the Sixth Amendment).

I. DOCTRINAL DRIFT AND THE FEDERAL SENTENCING GUIDELINES

A. What Is Doctrinal Drift?

For the purposes of this Note, doctrinal drift[27] refers to systematic shifts in doctrine over time as a result of extrajudicial factors. This drift is not to be confused with the highly valued evolution of the common law. Indeed, scholars have posited that "case law is a continuous, never-ending process of evolution of legal rules that is characterized by probabilistic convergence toward greater efficiency and predictability."[28] Instead, this Note identifies the asymmetric rate of appeals between the parties and the courts' practice of issuing some types of decisions by oral pronouncement as distorting the otherwise salutary development of the common law.[29] Even if one believes that the doctrine in a particular field of law is moving in a desirable direction, the development of the law in a well-functioning legal system should not be based on extrajudicial factors.[30]

This Note is the first piece of scholarship to identify pro-prosecution doctrinal drift in criminal sentencing. However, it falls within a larger tradition of scholarship identifying extrajudicial factors that produce systematic shifts in doctrine over time.[31] Scholars have identified doctrinal

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[27] Thank you to Professor James Pfander for suggesting this term to describe the phenomenon this Note identifies.

[28] Ponzetto & Fernandez, *supra* note 3, at 381; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (9th ed. 2014) (arguing that efficiency, or wealth maximization, can explain the development of the case law).

[29] Masur & Ouellette, *supra* note 25, at 725 ("Regardless of one's normative view of an area of law, issues like which party appeals more frequently, whether a lower court is biased, or whether courts are more likely to make one type of error than another should play no role in that doctrine's development.").

[30] *Id.*

[31] *Id.* at 643–44 (presenting a "theoretical model of how deference mistakes, coupled with particular asymmetries in adjudication, can generate systematic shifts in legal doctrine"); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1913 (2014) (presenting the theory that private qui tam enforcement, as opposed to public enforcement, can systematically shift the doctrine over time); Galanter, *supra* note 16, at 97, 102 (positing that the body of law is skewed to favor the "repeat players" who have strategized to maximize favorable rulemaking); Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012) (arguing that employment discrimination law has systematically shifted in a pro-defense direction due to extrajudicial factors); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (presenting the view that when courts refuse to reach the merits of constitutional tort claims and dispose of cases on qualified immunity grounds, constitutional rights will degrade over time); Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 470 (2011) (suggesting that patent law has shifted in a pro-patent direction due to the asymmetry in parties' rights to appeal to adverse decisions); Melissa F. Wasserman, *Deference Asymmetries: Distortion in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 625 (2015) (arguing that deference asymmetries in regulatory law may push the development of the doctrine in a pro-regulated-entity direction).

drift in various areas, including employment discrimination,[32] patent law,[33] regulatory law,[34] and constitutional torts.[35]

In the 1970s, Professor Marc Galanter upended the usual analysis of how the legal system affects the parties, arguing that, in fact, it was differences between the parties that shaped the legal system and its rules.[36] He divided the parties into two categories: "repeat players," who are involved in many similar cases over the years, and "one-shotters," whose involvement in litigation is only occasional.[37] One-shotters include a spouse in a divorce, an auto injury claimant, and a criminal defendant, whereas repeat players include an insurance company, a finance company, and a prosecutor.[38] Because repeat players anticipate repeat litigation, their litigation strategy focuses on favorable rulemaking that protects their long-term interests.[39] For instance, a repeat player may settle a case if it anticipates an unfavorable rule outcome, or it may adjudicate or appeal those issues where it expects to generate favorable precedent.[40] The logical consequence, Galanter suggests, is a body of precedent skewed to favor the repeat players.[41]

Legal scholar and former U.S. District Court Judge Nancy Gertner built on Galanter's insight in the context of employment discrimination, arguing that extrajudicial factors have produced a pro-employer shift in the doctrine.[42] Gertner explains that most often it is the defendant–employers, and not plaintiff–employees, that move for summary judgment because plaintiff–employees bear the burden of proof.[43] She further explains that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, judges should state on the record the reasons for granting or denying a motion for summary judgment.[44] In practice, however, judges write full opinions when granting a motion, but when denying a motion, judges facing staggering caseloads usually find that one word suffices: "denied."[45] Gertner argues

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[32] Gertner, *supra* note 31.
[33] Masur, *supra* note 31.
[34] Wasserman, *supra* note 31.
[35] Jeffries, Jr., *supra* note 31.
[36] Galanter, *supra* note 16, at 97.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 98–101.
[40] *Id.* at 101.
[41] *Id.* at 102.
[42] Gertner, *supra* note 31, at 109–10.
[43] *Id.* at 114–15.
[44] *Id.* at 113; FED. R. CIV. P. 56(a).
[45] Gertner, *supra* note 31, at 113.

that "[t]he result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law."[46] If the plaintiff–employee appeals, the appellate court will most likely affirm the lower court's pro-defense decision, thereby contributing to the mountain of pro-employer precedent.[47] As the doctrine has drifted, defendant–employers have become increasingly likely to succeed at the summary judgment phase, despite persuasive evidence of discrimination.[48] This Note addresses a doctrinal drift phenomenon similar to those that Galanter and Gertner identified, but focuses on the unique characteristics of the criminal sentencing context.

B. How Do the Federal Sentencing Guidelines Work?

The Federal Sentencing Guidelines provide a recommended sentencing range based on characteristics of the defendant and the offense.[49] It is necessary to first understand how the Guidelines operate to lay the foundation for the claim that the interpretation of these Guidelines is drifting in a pro-prosecution direction. The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission ("Commission") and authorized the Commission to promulgate sentencing guidelines.[50] The Commission completed the initial Guidelines in April 1987, which took effect on November 1, 1987, and have been revised from time to time in the intervening years.[51] The Act delegated authority to the Commission to specify an appropriate sentencing range for each class of convicted persons based on the offense behavior and offender characteristics.[52] For each

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[46] *Id.* at 114.

[47] *Id.* (citing Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 553 (2003) (examining appellate court data from 1987 to 2000, where parties in employment discrimination cases appealed unfavorable pretrial rulings, and finding that defendants obtained reversals in 42.28% of cases, whereas plaintiffs obtained reversals in only 10.66% of cases)).

[48] *Id.* at 121. More specifically, Gertner identifies several doctrines that have developed which serve to dispose of more cases at the summary judgment phase. *Id.* at 118–21. Under one such doctrine, courts have held that explicit statements of bias are sometimes mere "stray remarks" unrelated to the employer's motivations for terminating an employee. *Id.* at 118–20. For instance, in one case, the employer directed a racial slur at the employee, and the court found that this was a mere stray remark, unconnected to the decision to terminate the employee. *Id.* at 120–21 (citing Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999), *overruled in part by* Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1226 n.6 (10th Cir. 2008)).

[49] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf [https://perma.cc/3JF7-AX5R].

[50] *Id.*

[51] *Id.*

[52] *Id.*

offense, the Guidelines set a "base offense level" and then provide for increases to that level based on "specific offense characteristics."[53] The Guidelines also provide for adjustments downward if, for instance, the defendant played a minor role[54] in the offense or accepted responsibility for the offense by pleading guilty.[55] Once the applicable increases are added to the base offense level and the applicable reductions are subtracted, the resulting figure is the "Offense Level," located on the vertical axis of the Sentencing Table (Table 1).[56] A criminal defendant receives "Criminal History Points" for prior sentences of imprisonment, and that point total determines the "Criminal History Category," which is located on the horizontal axis of the Sentencing Table.[57] To calculate the sentence range, one would locate the intersection of the "Offense Level" and the "Criminal History Category."[58] For instance, the base offense level for "extortion by force or threat of injury or serious damage" is eighteen.[59] A defendant who pleaded guilty to this offense would be eligible for up to a three-level decrease for acceptance of responsibility.[60] If a firearm was discharged in connection with the offense, the Guidelines would call for an increase of seven levels.[61] The resulting offense level would be twenty-two. Assuming the defendant had no criminal history, he would fall in Criminal History Category I, and his sentencing range would be forty-one to fifty-one months.[62]

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[53] *See, e.g.*, *id.* § 2B3.2(b)(1) (allowing for an increase of two levels when extortion involved "express or implied threat of death, bodily injury, or kidnapping").

[54] *Id.* § 3B1.2.

[55] *Id.* § 3E1.1.

[56] *Id.* ch. 5, pt. A.

[57] *Id.*

[58] *Id.*

[59] *Id.* § 2B3.2(a).

[60] *Id.* § 3E1.1.

[61] *Id.* § 2B3.2(b)(3).

[62] *Id.* ch. 5, pt. A.

TABLE 1: SENTENCING TABLE FROM THE 2015 U.S. SENTENCING MANUAL

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
Zone A	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
Zone B	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
Zone C	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
Zone D	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

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Before the Supreme Court decided *United States v. Booker* in 2005,[63] the Guidelines were mandatory.[64] That meant that courts were bound to impose a sentence within the maximum and minimum sentences of the Guidelines range.[65] In *Booker*, the Court held that the mandatory nature of the Guidelines denied defendants their Sixth Amendment right to a jury trial because they called on the judge to make factual determinations to reach the appropriate sentence.[66] As a remedy, the Court elected to sever and excise the provision of the federal sentencing statute that made the

[63] 543 U.S. 220 (2005).

[64] *Id.* at 233.

[65] *Id.* at 235.

[66] *Id.* at 243–45.

Guidelines mandatory, 18 U.S.C. § 3553(b)(1).[67] This rendered the Guidelines advisory.[68] Courts are now required to consider the Guidelines range, but can impose a sentence outside the range based on factors listed in § 3553(a), which include general categories of considerations such as the "nature and circumstances of the offense and the history and characteristics of the defendant," "the need for the sentence imposed," and the "need to provide restitution to any victims."[69]

C. Doctrinal Drift in the Interpretation of the Guidelines After Booker

Though *Booker* has rendered the Guidelines advisory, doctrinal drift in the interpretation of their enhancement and reduction provisions still impacts sentencing outcomes. While courts can use their discretion in imposing a sentence below (or above) the Guidelines range, they must first correctly calculate the Guidelines range.[70] Failure to correctly calculate the Guidelines range could result in reversal.[71] This requirement ensures that the Guidelines continue to function as the "framework" for sentencing and serve as a "starting point" for all sentencing decisions.[72] What is more, sentencing data indicate that judges continue to rely heavily on the calculated Guidelines range in sentencing decisions. Of all sentences imposed in 2014, 76.3% either fell within the calculated range or fell below the range due to a government-sponsored departure.[73] Specifically, 46% of sentences were within the calculated Guidelines range.[74] The government sponsored a downward departure in 30.3% of cases either because the defendant cooperated with law enforcement or because some other

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[67] *Id.* at 245.

[68] *Id.*

[69] *Id.* at 245–46; 18 U.S.C. § 3353(a) (2012).

[70] Peugh v. United States, 133 S. Ct. 2072, 2083 (2013) (citing Gall v. United States, 552 U.S. 38, 50 n.6 (2007)).

[71] *Id.* (citing *Gall*, 552 U.S. at 51).

[72] *Id.*; *see also* Nelson v. United States, 555 U.S. 350, 351 (2009) (per curiam) ("[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.").

[73] 2014 SOURCEBOOK, *supra* note 8, at fig.G., http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureG.pdf [https://perma.cc/N35C-72RN]; *id.* at tbl.N, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf [https://perma.cc/2269-XN7F].

[74] 2014 SOURCEBOOK, *supra* note 8, at fig.G. Compare the 2014 figures with those from 2004, before *Booker* came down. In 2004, 72.2% of sentences fell within the Guideline range. U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2004/table26pre_0.pdf [https://perma.cc/7S55-CDTM].

mitigating factor was present.[75] In 21.4% of cases, courts imposed a below-Guidelines sentence although it was not government sponsored, and in 2.2% of cases, courts imposed an above-Guidelines sentence.[76] Therefore, only 23.6% of sentences fell outside of the Guidelines range without government sponsorship.[77] Even for the cases falling outside the Guidelines range, if courts stray too far from the range, they risk reversal.[78] In sum, district courts' interpretations of the various Guidelines provisions remain relevant to the ultimate sentence they decide to impose, and thus any doctrinal drift affecting their interpretations would likewise impact the length of the sentences.

D. Examples of Pro-Prosecution Doctrinal Drift

The following Section provides two examples of pro-prosecution doctrinal drift in sentencing. They illustrate how the law has grown friendlier to the prosecution with respect to (1) the interpretation of the § 3B1.1 aggravating role enhancement and (2) the interpretation of the § 3B1.2 mitigating role reduction and the role of getaway drivers.

1. Section 3B1.1 "Otherwise Extensive" Criminal Activity Enhancement.—According to the text of § 3B1.1(a), the four-level enhancement applies if the defendant is an "organizer or leader of a criminal activity" that either "involved five or more participants" or was "otherwise extensive."[79] This last provision generated litigation as courts wrestled with what is required for criminal activity to be considered otherwise extensive. The Commission added Note 3 to § 3B1.1 to explain

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[75] 2014 SOURCEBOOK, *supra* note 8, at tbl.N.

[76] *Id.* fig.G.

[77] *Id.*

[78] *See, e.g.*, United States v. Manzella, 475 F.3d 152, 162 (3d Cir. 2007) (holding that a sentence nearly four-times as long as the Guidelines sentence was unreasonable); United States v. Trupin, 475 F.3d 71 (2d Cir. 2007), *cert. granted and judgment vacated*, 552 U.S. 1089 (2008) (holding that a seven-month sentence for tax evasion that was thirty-four months below the bottom of the Guidelines range was unreasonably lenient). *But see* Spears v. United States, 555 U.S. 261, 265–66 (2009) (holding that district courts are entitled to vary from the crack cocaine Guidelines based on a policy disagreement with the crack cocaine and powder cocaine sentencing disparity). In 2014, courts sentenced below the Guidelines range in 12,495 cases based on *Booker* and the 18 U.S.C. § 3553(a) factors. 2014 SOURCEBOOK, *supra* note 8, at tbl.31C, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table31c.pdf [https://perma.cc/AR64-Q9SB]. In these cases the median sentence imposed was twenty-seven months, and the median decrease in months from the bottom end of the Guideline range was fifteen months—a median decrease of 35.7%. *Id.*

[79] U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf [https://perma.cc/3JF7-AX5R].

that the court should look to all persons involved in the offense—not just participants—to determine whether criminal activity is otherwise extensive.[80] Note 3 offers an example of a case where the criminal activity could be considered otherwise extensive: where the criminal activity involved only three participants but used the services of "many outsiders."[81]

In *United States v. Tai*, the Seventh Circuit held that if the number of participants and outsiders was the sole basis for the otherwise extensive enhancement, a total of more than five participants and outsiders was necessary, but the court did not state that it would in every case be sufficient for the application of the enhancement.[82] The court reversed the district court's ruling that the enhancement applied where the total number of participants and outsiders was five.[83] In *United States v. Shearer*, a Seventh Circuit opinion issued in 2007, the court misstated the rule from *Tai*, holding instead that "criminal activity is 'otherwise extensive' if it involves some combination of participants and unknowing outsiders totaling more than five."[84] What was a necessary condition in *Tai* became a sufficient condition in *Shearer*.

In *United States v. Caputo*, decided in 2010, a district court in the Seventh Circuit spotted the *Shearer* court's mischaracterization of *Tai* and emphasized that longstanding precedent dictated that a total of more than five participants and outsiders meant only that the court was *permitted* to find the scheme otherwise extensive—not that is was *required* to do so.[85] However, *Caputo* is an unpublished district court opinion that the prosecution did not appeal, and is cited in only one brief on Westlaw, which did not ultimately persuade the court.[86] The district court's attempt to

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[80] *Id.* § 3B1.1 n.3.

[81] *Id.* For instance, in *United States v. Olive*, the defendant ran a fraudulent scheme in which he paid financial advisors a high commission to supply him with new clients. 804 F.3d 747, 751 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016), *reh'g denied*, 137 S. Ct. 329 (2016). The Sixth Circuit concluded that the otherwise extensive prong was satisfied because the defendant's scheme involved many financial advisors. *Id.* at 759.

[82] 41 F.3d 1170, 1174–75 (7th Cir. 1994).

[83] *Id.* at 1175.

[84] 479 F.3d 478, 483 (7th Cir. 2007).

[85] 2010 WL 1032621, at *1–2 (N.D. Ill. Mar. 17, 2010) ("Though *Shearer* states that 'criminal activity is "otherwise extensive" if it involves some combination of participants and unknowing outsiders totaling more than five,' the opinion relies on cases that hold only that a district court *may* find that a scheme is otherwise extensive based solely on the number of participants and innocent outsiders involved in the scheme if they number more than five." (citing *Tai*, 41 F.3d at 1174–75)). The court held that even though the offense involved more than seven participants and outsiders, other factors, such as the relatively small amount of money collected, counseled against a finding that the scheme was otherwise extensive. *Id.*

[86] Brief for Defendant-Appellant at 36, United States v. Sullivan, 765 F.3d 712 (7th Cir. 2014) (Nos. 12-3631, 12-3670), 2013 WL 5885573, at *35; *Sullivan*, 765 F.3d at 719.

correct the pro-prosecution shift in the circuit's precedent in *Shearer* was fruitless. In *United States v. Pabey*, the Seventh Circuit applied the altered standard: that the involvement of more than five participants and outsiders is sufficient to render criminal activity otherwise extensive.[87] The evolution of the interpretation of the otherwise extensive prong of § 3B1.1(a) demonstrates how the current of extrajudicial factors pulls the law in a pro-prosecution direction, and even a well-meaning district court cannot steer the doctrine back on course.

2. Section 3B1.2(b) Minor Role Reduction.—The change in the Sixth Circuit's interpretation of § 3B1.2(b) also lends support to the position that the law evolves in a pro-prosecution direction over time. Section 3B1.2(b) provides that a defendant is eligible for a two-level reduction if he was a "minor participant" in the criminal activity.[88] In its 1995 decision, *United States v. Lowery*, the Sixth Circuit upheld the district court's refusal to grant the minor role reduction under § 3B1.2(b).[89] The appellate court reasoned that the defendant, in addition to serving as the getaway driver, had actively participated in the planning of the robbery by choosing the date and helping to make the masks.[90] In *United States v. Cottrell* and *United States v. Dale* in 1999, and *United States v. Magliocca* in 2000, the Sixth Circuit echoed its *Lowery* holding, concluding that the district court did not clearly err in refusing to apply the minor role reduction where the defendant drove the getaway car *and* actively participated in the planning of the bank robbery.[91]

Then in *United States v. Patton* in 2001, the Sixth Circuit shifted its understanding of the minor role reduction in a pro-prosecution direction.[92] In *Patton*, the Sixth Circuit held that even though the defendant learned of his codefendants' criminal plot only a few hours before the robbery, his role as getaway driver was sufficient for the district court to find that he was not a minor participant.[93] By 2003, when the Sixth Circuit decided

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[87] 664 F.3d 1084, 1097 (7th Cir. 2011).

[88] U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(b) (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf [https://perma.cc/3JF7-AX5R].

[89] 60 F.3d 1199, 1202 (6th Cir. 1995).

[90] *Id.* at 1201–02.

[91] United States v. Magliocca, No. 99-3916, 2000 U.S. App. LEXIS 33874, at *4–5 (6th Cir. Dec. 19, 2000); United States v. Cottrell, No. 97-6477, 1999 U.S. App. LEXIS 2224, at *3–4 (6th Cir. Feb. 9, 1999); United States v. Dale, No. 98-3687, 1999 U.S. App. LEXIS 18317, at *12 (6th Cir. Aug. 2, 1999).

[92] 14 F. App'x 450, 455 (6th Cir. 2001).

[93] *Id.*

United States v. Brown,[94] it appeared well settled that serving the "pivotal" role of getaway driver rendered the defendant ineligible for a minor participant reduction.[95] The *Brown* decision does not cite a single case in the *Lowery* line of cases, and, even more telling, the *Brown* decision was a response to an *Anders* brief,[96] meaning that the defendant's attorney felt that any challenge to the refusal of a minor role reduction for a getaway driver was frivolous.[97] This pro-prosecution change in the doctrine raises the question: What would justify the application of the minor role reduction if merely serving as a getaway driver without any involvement in the criminal plot renders a defendant ineligible?[98] This line of doctrine seems to have slipped through the judges' fingers, making it ever more challenging to prove that a minor role reduction *does* apply and ever easier to prove that it does not. In conclusion, the changes in the Seventh Circuit's interpretation of § 3B1.1 and the Sixth Circuit's interpretation of § 3B1.2(b) suggest that criminal sentencing doctrine is drifting in a pro-prosecution direction. The next Part will examine factors that contribute to this drift.

II. CONTRIBUTORS TO THE ONE-SIDED BODY OF PRECEDENT

This Part will identify two contributors to the skewed body of case law. First, judges rarely issue written sentencing decisions.[99] Second, 99% of all appeals of sentencing decisions are defense appeals.[100] Prosecutors can shape the legal landscape by foregoing appeal to eliminate the risk that an appellate court will affirm a pro-defense decision. Thus, appellate courts are confronted almost exclusively with defense appeals of pro-prosecution decisions, and, in part due to deference to the lower courts, appellate courts usually affirm. These factors contribute to a body of sentencing law composed primarily of appellate court opinions that affirm pro-prosecution decisions and employ reasoning that bolsters pro-prosecution arguments.

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[94] 55 F. App'x 753 (6th Cir. 2003).

[95] *Id.* at 754 ("Brown was not entitled to a reduction for being a minimal or a minor participant in the offenses . . . Brown's role as the getaway driver can be said to have been pivotal or necessary to the success of the robberies.").

[96] A so-called *Anders* brief is the brief a criminal defense attorney files if his or her client insists on appealing even though the attorney believes an appeal would be frivolous. *See infra* text accompanying notes 134–37.

[97] *Brown*, 55 F. App'x at 753–54; *see* Anders v. California, 386 U.S. 738, 744 (1967).

[98] *See* Gertner, *supra* note 31, at 115 (providing the parallel example of decisionmakers struggling to envision facts that would constitute discrimination where "case after case recites the facts that do not amount to discrimination").

[99] *See infra* Section II.A.

[100] *See infra* note 112 and accompanying text.

A. Few Written District Court Opinions

Because most appellate court sentencing opinions affirm pro-prosecution decisions, the decisions that provide persuasive pro-defense reasoning are primarily the district court sentencing decisions. But written district court sentencing decisions are rare. Federal judges in the U.S. are under no general mandate to issue decisions by formal, written opinion.[101] In the sentencing context, instead of producing written opinions, judges normally announce the reasons for the sentence in open court pursuant to 18 U.S.C. § 3553(c).[102] An empirical study examining all of the sentencing decisions issued in fiscal year 2006 by the U.S. District Court for the District of Massachusetts revealed that judges wrote a formal sentencing opinion in less than 1.1% of cases.[103] It is neither obstinacy nor lack of interest, but rather the high volume of sentencing decisions that compels judges to forego a formal written sentencing opinion in most cases.[104]

Searches for district court sentencing opinions on Westlaw corroborate the Massachusetts study and suggest that the scarcity of such opinions is widespread. An example using decisions that deal with the § 3B1.1 aggravating role enhancement illustrates that written district court decisions are rare. A Westlaw query for federal court cases containing "3B1.1" with a filter for criminal cases only, produces 7,936 results. Of these results, only 21.86% are district court opinions, versus 78.07% appellate court opinions.[105] Thus, even though district courts issue many

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[101] Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 490–91 (2015) (contrasting the civil law countries of continental Europe, where judges are mandated to write opinions for all cases, with the United States, where no such mandate exists); *see also* United States v. Marquez, 506 F.2d 620, 622 (2d Cir. 1974) ("It is the oral sentence which constitutes the judgment of the court, and which is authority for the execution of the court's sentence. The written commitment is 'mere evidence of such authority.'" (quoting Sobell v. United States, 407 F.2d 180, 184 (2d Cir. 1969))).

[102] Scott, *supra* note 5, at 362–63; *see* 18 U.S.C. § 3553(c) (2012) ("The court, at the time of sentencing shall state in open court the reasons for its imposition of the particular sentence."); FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 128–37 (6th ed. 2013) (providing a suggested outline for the oral sentencing hearing); *see also* United States v. Cooper, 394 F.3d 172, 176 (3d Cir. 2005) (holding that the sentencing court's oral explanation of reasons was adequate).

[103] Scott, *supra* note 5, at 379 (analyzing sentencing decisions from fiscal year 2006, which was October 1, 2005 to September 30, 2006). Judges are required to fill out a form called a Statement of Reasons when issuing a sentencing decision. § 3553(c)(2). The 1.1% figure from the study included not only written opinions, but also decisions where the judge attached a hearing transcript to the Statement of Reasons that included more than fifty sentences of explanation. Scott, *supra* note 5, at 379.

[104] Scott, *supra* note 5, at 363; *see also* Judge Nancy Gertner (Ret.), *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 428 (2016) (arguing that federal judges feel pressure to issue oral pronouncements instead of producing written opinions for efficiency's sake).

[105] Of the 7,936 criminal cases that mention § 3B1.1, 0.06% are Supreme Court opinions. As stated above, 21.86% of all opinions citing § 3B1.1 are district court opinions. I filtered for reported decisions and discovered that an even smaller fraction of *published* decisions are district court decisions

more sentencing decisions than appellate courts review, district court decisions represent a small fraction of all *written* sentencing decisions. From fiscal years 2006 to 2015, district courts ruled that the § 3B1.1 enhancement applied in 31,166 cases.[106] It seems quite reasonable to assume that the government requested the application of § 3B1.1 in many more cases where the district courts elected not to apply it. Despite this, district courts only issued a written opinion mentioning this enhancement 1,151 times from during the relevant time period,[107] around 3.7% of the total applications of the rule (far less if we take into account the cases where the government requested a § 3B1.1 enhancement but it was found *not* to apply). In the less than 4% of cases where the district court produced

(12.93%). However, under the modern approach, the precedential weight of published district court opinions may not be greater than that of unpublished district court opinions. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 804 (2012) (concluding that published and unpublished district court opinions are treated alike); *see also* FED. R. APP. P. 32.1 (establishing the rule that courts may not prohibit citation to unpublished opinions issued after January 1, 2007).

[106] UNITED STATES SENTENCING COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table18.pdf [https://perma.cc/4ZRZ-PNGV] (reporting that courts found § 3B1.1 to apply in 3,260 cases in 2015); 2014 SOURCEBOOK, *supra* note 8, at tbl.18, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table18.pdf [https://perma.cc/2KCT-HC84] (3,293 cases in 2014); UNITED STATES SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table18.pdf [https://perma.cc/88TT-4EWJ] (3,366 cases in 2013); UNITED STATES SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table18.pdf [https://perma.cc/7UVU-UJM9] (3,377 cases in 2012); UNITED STATES SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2011), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table18.pdf [https://perma.cc/9JBN-VGHG] (3,142 cases in 2011); UNITED STATES SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table18.pdf [https://perma.cc/NJ3E-DYAC] (3,006 cases in 2010); UNITED STATES SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2009), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table18.pdf [https://perma.cc/68Z8-YYMB] (2,985 cases in 2009); UNITED STATES SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2008), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/Table18.pdf [https://perma.cc/A2JQ-AMMU] (2,981 cases in 2008); UNITED STATES SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2007), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2007/Table18.pdf [https://perma.cc/J22Y-VE77] (2,865 cases in 2007); UNITED STATES SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2006) [hereinafter 2006 SOURCEBOOK], http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2006/table18_0.pdf [https://perma.cc/E62A-BVLA] (2,892 cases in 2006).

[107] Note that the U.S. Sentencing Commission data is gathered by fiscal year. Therefore, the exact date range examined on Westlaw was October 1, 2005 to September 30, 2015.

a written opinion, only some include reasoning favorable to the defense and many others provide pro-prosecution reasoning. The lack of written district court sentencing opinions translates into a dearth of case law favorable to the defense eclipsed by an abundance of pro-prosecution precedent, because most appellate court precedent favors the prosecution. The next Section will address why appellate court precedent consists mainly of pro-prosecution affirmances.

B. Asymmetric Rate of Appeals and Appellate Court Affirmances

Double jeopardy bars prosecutors from appealing criminal convictions, but even in the sentencing arena, where prosecutors have the option to appeal,[108] they almost never do. Of the total 75,836 sentencing decisions in 2014,[109] the government appealed only 43.[110] Defendants, by contrast, appealed in 4,900 cases—that is, over 100 times as many cases.[111] Of all the sentencing appeals reviewed by the courts of appeals in 2014, over 99% of them were defense appeals of pro-prosecution district court decisions.[112] In sum, defendants appeal much more frequently than the government, and, as demonstrated below, courts usually affirm when the defense appeals.

In 2014, the courts of appeal reversed only 9.8% of defense appeals and affirmed 74.4% of the decisions that the defense appealed.[113] This is due in part to the deference paid to lower courts in sentencing. With the exception of legal conclusions by the district court, which are reviewed de novo,[114] all other sentencing decisions are reviewed under a deferential standard.[115] In *Gall v. United States*, the Supreme Court stated that appellate courts are to review decisions to impose a particular sentence under a "deferential abuse-of-discretion" standard, taking into account that district court judges have more experience sentencing criminal defendants than appellate court judges.[116] Although the deference afforded to district

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[108] U.S. ATTORNEYS' MANUAL, *supra* note 14, at 9-2.170(2)(3)(a).

[109] In 2014, appellate courts reversed in part and affirmed in part in 2.3% of defense appeals. 2014 SOURCEBOOK, *supra* note 8, at tbl.56.

[110] *Id.* tbl.56A.

[111] *Id.* tbl.56.

[112] *Id.* tbls.56A, 56 (showing that 4,900 out of 4,943 appeals were defense appeals of pro-prosecution district court decisions).

[113] *Id.* tbl.56.

[114] United States v. Miggins, 302 F.3d 384, 390 (6th Cir. 2002) (citing United States v. Saikaly, 297 F.3d 363, 367 (6th Cir. 2000)).

[115] Gall v. United States, 552 U.S. 38, 41 (2007); *Miggins*, 302 F.3d at 390; United States v. Starks, 309 F.3d 1017, 1026 (7th Cir. 2002).

[116] 552 U.S. at 52 n.7.

courts in sentencing is "not unlimited, it is substantial."[117] Factual findings with regards to the application of an enhancement are reviewed for clear error,[118] and the appellate court reviews for plain error where the defendant failed to object at the trial court level.[119]

The appellate court decisions that serve as pro-defense precedent include only the reversals of pro-prosecution decisions and the affirmances of pro-defense decisions. In 2014, there were 480 reversals of pro-prosecution decisions and 9 affirmances of pro-defense decisions.[120] Therefore, out of the 4,154[121] appellate sentencing decisions, only 489 serve as pro-defense precedent—that is 11.8% of the total. By this calculation, 88.2% of all appellate court sentencing decisions from 2014 would be pro-prosecution precedent, resulting in a clearly one-sided body of case law.

The one-sided body of case law is, of course, a result of the extrajudicial factors identified—not careful judicial decisionmaking. The federal appellate courts see government appeals of pro-defense decisions very rarely.[122] For instance, in 2014, federal appellate courts reviewed 158 district court decisions imposing an aggravating role enhancement under § 3B1.1.[123] By contrast, the federal appellate courts reviewed a district court's decision not to impose an aggravating role enhancement only once.[124] As discussed above, the appellate court will usually find that the district court did not clearly err in imposing the enhancement.[125] What the appellate court has to say about the district courts' decision *not* to impose the enhancement is relatively unknown, but, in all likelihood, the appellate courts would affirm the pro-defense outcome with the same frequency.[126]

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[117] United States v. Rosales-Bruno, 789 F.3d 1249, 1255 (11th Cir. 2015).

[118] *Miggins*, 302 F.3d at 390.

[119] *Starks*, 309 F.3d at 1026. See *infra* text accompanying notes 192–201 for a discussion of the impact of the standard of review on successive rounds of appeals.

[120] 2014 SOURCEBOOK, *supra* note 8, at tbls.56A, 56.

[121] This figure represents the sum of 3,649 affirmances and 505 reversals. *Id.* fig.M. For the sake of simplicity, it excludes the appeals that were dismissed (602) or remanded (62), as well as those that were affirmed in part and reversed in part (112). *Id.*

[122] In fact, the number of government appeals of sentencing decisions has decreased in recent years. In 2006, the government appealed 212 sentencing decisions and by 2014 the number of government sentencing appeals had dropped to 43. 2006 SOURCEBOOK, *supra* note 106, at tbl.56A; 2014 SOURCEBOOK, *supra* note 8, at tbl.56A.

[123] 2014 SOURCEBOOK, *supra* note 8, at tbl.57, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table57.pdf [https://perma.cc/8BE9-RFEX].

[124] *Id.* tbl.58, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table58_revised.pdf [https://perma.cc/WKR5-SPUN].

[125] Appellate courts affirmed 74.4% of defense sentencing appeals in 2014. *Id.* tbl.56; *see supra* text accompanying notes 113–19.

[126] D. Michael Risinger, *Goodbye to All That, or a Fool's Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and "Forensic Science" in*

Although hypothetically those pro-defense appellate court cases might exist if the appellate courts had the opportunity to review more pro-defense district court opinions, in the current system, they do not. This leaves little precedent favorable to the defense and a wealth of pro-prosecution precedent.

C. Asymmetric Rules and Incentives

The disparate rate of appeals between the prosecution and defense raises the question: Why do prosecutors choose not to appeal adverse sentencing decisions? Are they simply saving their scarce resources, or is this a strategic move aimed at producing precisely the one-sided body of case law described? This Note contends that the latter is more likely. In fact, this Note confirms Galanter's categorization of prosecutors as "repeat players": they anticipate repeat litigation over time and forego appeal to avoid unfavorable precedent that will pose challenges down the road.[127] Where a district court issues a pro-defense sentencing decision by oral pronouncement, if prosecutors decide not to appeal, the judge's reasoning will become silent law, and they can thereby avoid the risk that the decision will haunt them as unfavorable circuit precedent in future cases.

The U.S. Attorneys' Manual provides that Assistant U.S. Attorneys should seek authorization for appeal *only* if: (1) "the sentencing decision is not supported by the law or the evidence" or (2) "the sentence is unreasonable in light of 18 U.S.C. § 3553(a)."[128] Even if one of these prongs is met, the Assistant U.S. Attorney is not to seek authorization to appeal unless "the appeal holds a reasonable prospect of a *favorable result* under the applicable standards of review."[129] Furthermore, the Department

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General) and Learned to Love Misinterpretations of Kumho Tire v. Carmichael, 43 TULSA L. REV. 447, 468 (2007). Professor Risinger describes a similar phenomenon with regards to the admissibility of the testimony of the prosecution's handwriting identification experts. *Id.* Handwriting expert testimony is offered as evidence of guilt where handwriting samples recovered by law enforcement match a criminal defendant's handwriting exemplars. *Id.* at 469. Risinger laments that appellate courts only see cases where the incriminating testimony was admitted and the defendant was convicted. *Id.* Therefore, "[w]hat appellate courts would have to say about the exclusion or limitation under an abuse of discretion standard is unknown, but it seems likely that, given appropriate hearing and findings, that result would be most likely be [sic] affirmed also." *Id.*

[127] Galanter, *supra* note 16, at 101 ("Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules.").

[128] U.S. ATTORNEYS' MANUAL, *supra* note 14, at 9-2.170(2)(3)(a).

[129] *Id.* (emphasis added). To illustrate when the government might seek an appeal, in *United States v. Nazerzadeh*, the defendant was convicted of possession and distribution of child pornography. 280 F. Appx 432, 433 (5th Cir. 2008). The district court calculated a Guidelines range of 210–262 months (17.5 years to nearly 22 years), but imposed a term of imprisonment of only 5 years (less than one-third of the lowest recommended term), as well as lifetime supervised release. *Id.* The government appealed

of Justice constrains individual prosecutors' discretion by prohibiting them from appealing unless the Solicitor General authorizes the appeal.[130] While the government's procedures maximize its ability to shape the law to its advantage, defense attorneys' ethical responsibilities, by contrast, promote even ill-fated litigation.

Defense attorneys are ethically required to zealously protect their client's interests.[131] The Supreme Court has held that defense attorneys' "role as advocate requires that [they] support [their] client's appeal to the best of [their] ability."[132] Criminal defense attorneys are required to file a notice of appeal whenever their client requests it[133] even if the appeal would be "wholly frivolous."[134] In the event that defense counsel believes that an appeal would be frivolous, she must prepare an *Anders* brief, where she points to anything in the record that could support the appeal.[135] Defense counsel must then provide this brief to the client to raise any additional points the client wishes.[136] At that point, the court reviews the brief and makes a determination as to whether the appeal is "wholly frivolous."[137] Thus, where U.S. Attorney policy dissuades prosecutors from appealing, defense attorneys are required to appeal when their client requests it.

In addition to the contrasting rules that govern the attorneys' decisions to appeal, individual criminal defendants and the government have dramatically different incentives driving their decisions to appeal. Individual criminal defendants are concerned only with their own sentence: Will they face imprisonment or probation? If they will go to prison, how long will they be deprived of their freedom? Accordingly, the stakes for criminal defendants in a single case are high.[138] The government, by contrast, has the luxury of taking a macro approach, strategizing to shape

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the sentence, but the Fifth Circuit affirmed reasoning that the district court had explained its downward departure on the grounds that the defendant suffered from psychological problems. *Id.* at 433–34.

[130] U.S. ATTORNEYS' MANUAL, *supra* note 14, at 2-2.121.

[131] MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (AM. BAR ASS'N 2016).

[132] Anders v. California, 386 U.S. 738, 744 (1967).

[133] Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) ("We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.").

[134] *Anders*, 386 U.S. at 744.

[135] *Id.*

[136] *Id.*

[137] *Id.* In 2014, defense attorneys filed 1,646 *Anders* briefs in federal appellate courts. 2014 SOURCEBOOK, *supra* note 8, at tbl.56.

[138] Galanter, *supra* note 16, at 98.

the landscape of the law in the long term.[139] The government can carefully select the cases where an appeal would move the law in a favorable direction for the prosecution.[140] It is therefore no surprise that of the forty-three cases that the government appealed in 2014, the government won twenty-eight, or 65.1%, of them.[141] The government is willing to make a trade-off, sacrificing the opportunity to appeal an adverse sentencing decision in an individual case to avoid the risk that the appellate court will affirm that pro-defense decision. In this way, where the district court's reasoning would help the defense, the government can avoid having that reasoning enshrined in an appellate court decision.[142] This results in a body of doctrine overwhelmingly composed of appellate court affirmances of pro-prosecution decisions.

By contrast, criminal defense attorneys' zealous advocacy on appeal can have the perverse effect of contributing to the pro-prosecution skew of the case law. As discussed above, in 74.4% of all defense-initiated appeals in 2014, the appellate court affirmed the lower court's pro-prosecution decision.[143] Therefore, in 2014 alone, defense appeals generated 3,645 pro-prosecution appellate court decisions.[144] In this way, when defense attorneys advocate for the interests of one individual client, they may actually contribute to a body of precedent that disadvantages criminal defendants generally.

This Part has outlined the contributors to the one-sided body of precedent: the lack of written district court opinions and disparate rates of appeal between the prosecution and defense due to their divergent incentives. Part III will discuss how the one-sided body of precedent results in pro-prosecution doctrinal drift over time.

III. CONTRIBUTORS TO DOCTRINAL DRIFT OVER TIME

Not only does the body of law interpreting the Federal Sentencing Guidelines consist primarily of pro-prosecution appellate court affirmances of district court decisions, but the doctrine itself actually drifts in a pro-prosecution direction with each subsequent round of appeals. When

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[139] *See* Masur, *supra* note 25, at 717 (reasoning that if a party is able to carefully appeal to produce more favorable precedents, that party "might be capable, over time, of shifting the law in a direction favorable to its interests").

[140] Galanter, *supra* note 16, at 101.

[141] 2014 SOURCEBOOK, *supra* note 8, at tbl.56A. The government's success rate of 65.1% must be viewed in contrast to the average rate of reversal, 10.2%, as well as the rate of reversal on defense appeal, 9.8%. *Id.* fig.M; *id.* tbl.56.

[142] Galanter, *supra* note 16, at 101.

[143] 2014 SOURCEBOOK, *supra* note 8, at tbl.56.

[144] *Id.*

defense attorneys write sentencing memoranda, their research turns up little pro-defense case law,[145] and this lack of favorable precedent may discourage defense attorneys from even raising objections to sentence enhancements. By contrast, when U.S. Attorneys prepare their sentencing memoranda, a cursory search on Westlaw or LexisNexis produces a wealth of pro-prosecution binding appellate court precedent to support their arguments.[146] A prosecution memorandum complete with citations to binding authority is likely to be more persuasive to a district court judge than a defense memorandum making unsupported assertions. When the judge sides with the prosecution and the appellate court affirms the district court decision based on deferential review, the cycle repeats itself *ad infinitum* and the law grows increasingly favorable to the prosecution.

A. The Defense Attorney's Tools and Their Limitations

A survey of persuasive authorities available to a defense attorney drafting a sentencing memorandum reveals the shortcomings of each type of authority. As demonstrated in the previous Section, the overwhelming majority of appellate court precedent reflects pro-prosecution reasoning. This Section will show that written district court opinions are rare, nonbinding, and more likely to reflect exceptional rather than run-of-the-mill cases,[147] and neither transcripts on PACER nor Statement of Reasons forms provide a clear picture of the district court judge's reasoning.[148]

In contrast to federal appellate precedent, which is binding on all of the lower courts in the circuit,[149] district court precedent is to be considered only to the extent that its reasoning is persuasive.[150] In other words, district courts are free to diverge from intra-district precedent, and do so with little hesitation.[151] Another limitation of district court opinions is that they are not representative of the various judicial points of view or the variety of cases. Because judges are not required to issue their sentencing decisions in writing, some judges write many criminal sentencing opinions, whereas other judges write few.[152] Furthermore, written criminal sentencing

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[145] *See supra* Part II.

[146] *See supra* Part II.

[147] Scott, *supra* note 5, at 363.

[148] *Id.*

[149] *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) (holding that circuit law binds all courts within a circuit, including all of the inferior courts in the circuit as well as future circuit panels).

[150] Mead, *supra* note 105, at 802.

[151] *Id.*

[152] Scott, *supra* note 5, at 366–67. According to a Westlaw query, Judge Lynn Adelman of the Eastern District of Wisconsin has mentioned aggravating role enhancement § 3B1.1 in fifteen

opinions may reflect outlier points of view, because judges have a special motivation to produce a written opinion when they suspect that other judges might disagree with their reasoning.[153] Furthermore, due to time constraints, judges must be selective in choosing the cases for which they will issue a written sentencing opinion.[154] Judges are more likely to select outlier cases that are extraordinary or groundbreaking, and the result is that written district court sentencing opinions provide model reasoning for exceptional sentencing questions, but little guidance for garden-variety sentencing issues.[155] Lastly, because written district court sentencing opinions are rare, finding a closely analogous case is unlikely.

Most district court sentencing decisions are issued by oral pronouncements,[156] which are recorded in transcripts and uploaded to PACER, but these have drawbacks of their own. Obtaining transcripts of analogous cases on PACER is inefficient and can be costly,[157] and, because the judge's reasoning is not clearly presented in oral hearing transcripts, their value as persuasive authority is doubtful.[158] The search feature on PACER is designed for those who know exactly what case they are looking for, not for browsing by topic or key word. In fact, a search on PACER for criminal matters only has the following fields: region, case number, case title, date filed, date closed, party name, and party role.[159] It does not permit plain language or Boolean searches.[160] Fortunately, federal defenders and private attorneys appointed under the Criminal Justice Act have free PACER access.[161] For privately retained defense attorneys,[162] however, the

sentencing decisions. *See, e.g.*, United States v. Tesillos, 965 F. Supp. 2d 1037, 1040 (E.D. Wis. 2013). By contrast, a more senior judge in the same district, Judge J.P. Stadtmueller, has authored only three opinions mentioning § 3B1.1. *See* Culbert v. United States, No. 07-CV-046, 2008 WL 2062324 (E.D. Wis. May 13, 2008); Payan v. United States, No. 07-CV-806, 2008 WL 582797 (E.D. Wis. Feb. 29, 2008); Kruppstadt v. United States, No. 04-CV-443, 2007 WL 2042251 (E.D. Wis. July 11, 2007); *see also* Gertner, *supra* note 104, at 438 (commending Judges Mark Bennett, Lynn Adelman, John Gleason, and Jack Weinstein for consistently authoring written sentencing opinions).

153 Scott, *supra* note 5, at 367.

154 *Id.* at 366.

155 *Id.*

156 *Id.* at 362–63.

157 For instance, a 300-page transcript would cost $30. PACER, ELECTRONIC ACCESS FEE SCHEDULE (1), (2) (2013), https://www.pacer.gov/documents/epa_feesched.pdf [https://perma.cc/K952-F7E7].

158 *See* Scott, *supra* note 5, at 363.

159 PACER USER MANUAL, *supra* note 19, at 16, 19.

160 A Boolean search uses key words or phrases and connectors like: AND, OR, and /s.

161 FEE SCHEDULE, *supra* note 157, at (10). The federal defenders are exempt from PACER fees because they are authorized by the Criminal Justice Act. *Id.*; 18 U.S.C. § 3006A(g)(2) (2012).

162 In 1998, criminal defendants retained private representation in 33.4% of felony cases and 18.7% of misdemeanor cases. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE

cost of browsing for analogous cases may be prohibitive. PACER users cannot see the document until they pay for it.[163] It is impractical to pay for a document—at $0.10 a page—before knowing whether it will be helpful.[164]

Given the structure of the PACER system, it is unlikely that a criminal defense attorney will find a transcript of an oral sentencing decision on PACER that is both factually analogous to his case and has a defense-favorable outcome. On the off chance that she does, it is unclear what, if any, persuasive effect a citation to this transcript would have on a district court judge. Professor Ryan Scott, who has published several articles on criminal sentencing, argues that hearing transcripts "do a poor job of capturing the judge's reasoning."[165] A judge's oral pronouncement, Scott points out, is intended for the people in the courtroom: mainly the defendant, the lawyers, the witnesses, and those observing from the gallery.[166] The judge issuing an oral ruling does not express his or her reasoning in a methodical manner so that future judges facing similar issues might apply the same reasoning. Instead, Scott asserts, because oral hearings are "often cluttered with irrelevant material, jarred by interruption, and disorganized," they are a "poor substitute for a written opinion explaining the reasons for a sentence."[167]

Likewise, judges are required to complete a Statement of Reasons form in accordance with § 3553(c)(2), but these forms are not useful as persuasive authority.[168] The Statement of Reasons is a four-page form where the judge can check boxes to indicate whether the sentence is above, below, or within the Guidelines range, and to indicate the reasons for the sentence using categories like "Victim Impact" or "Remorse/Lack of Remorse."[169] The form also includes a space for the judge to provide a

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COUNSEL IN CRIMINAL CASES 1 (2000), http://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/7N9G-QAS6].

[163] FEE SCHEDULE, *supra* note 157, at (1). The fee for most case documents is capped at $3.00, even if they exceed 30 pages, but there is no price cap for transcripts of federal proceedings. *Id.* at (1), (2).

[164] *Id.*

[165] Scott, *supra* note 5, at 363.

[166] *Id.*

[167] *Id.*

[168] 18 U.S.C. § 3553(c)(2) (2012) ("The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.").

[169] UNITED STATES DISTRICT COURTS, AO 245B JUDGMENT IN A CRIMINAL CASE, STATEMENT OF REASONS (2016), http://www.uscourts.gov/file/706/download [https://perma.cc/5HHC-BRCQ]; Scott, *supra* note 5, at 378.

narrative description of the reasons for the sentence.[170] A written narrative description is required in two types of cases: (1) cases where the sentence imposed falls outside the Guidelines range and (2) cases where the sentence carries a term of imprisonment greater than twenty-four months.[171] Judges sometimes meet this requirement by attaching a transcript of the sentencing hearing or, in rare cases,[172] a written sentencing opinion.[173] The Statement of Reasons forms are generally not disclosed to the public.[174] Therefore, they are not made available on Westlaw or LexisNexis, and attorneys cannot cite them as persuasive authority. Even if Statements of Reasons forms were publicly available, checked boxes on a form do not provide deep insights into the judge's reasoning. In short, district court opinions, transcripts on PACER, and Statement of Reasons forms do not compensate for the lack of pro-defense appellate court precedent.

B. Attorneys' Reactions to the Lack of Pro-Defense Precedent

This Section will demonstrate that the lack of pro-defense case law can weaken defense sentencing memoranda, give prosecutors greater leverage in plea negotiations, and cause defense attorneys to abandon potentially meritorious, but unsupported arguments. When faced with a landscape of pro-prosecution precedent, defense attorneys' best strategy may be to distinguish their case from cases with pro-prosecution outcomes. However, this is not as persuasive as citing analogous binding circuit court authority.[175] Suppose a defense attorney plans to challenge the application of a § 2D1.1(b)(1) dangerous weapon enhancement to her client's drug offense. To succeed she will have to show that "it is clearly improbable that the weapon was connected with the offense."[176] Imagine that in her client's case, police found the gun in the bedroom closet and recovered distribution

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[170] Scott, *supra* note 5, at 378.

[171] § 3553(c)(1)–(2); *see also* Scott, *supra* note 5, at 378 (noting that judges sometimes write on the back of the form or attach additional documents, such as transcripts or a sentencing opinion, to fulfill this requirement).

[172] *See supra* Section II.A.

[173] Scott, *supra* note 5, at 378.

[174] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (2001) ("[T]he forms entitled 'Statement of Reasons' . . . will not be disclosed to the public."); Scott, *supra* note 5, at 378.

[175] In the employment discrimination context, Gertner discusses the effect of a one-sided body of law on the way judges view cases. Gertner, *supra* note 31, at 115. She argues, "If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination." *Id.*

[176] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.11(A) (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf [https://perma.cc/3JF7-AX5R].

quantities of illegal drugs in the garage.[177] There are a few cases where the appellate courts found that the district court clearly erred in applying the § 2D1.1(b)(1) enhancement, but the facts of those cases are so exceptional that, if anything, they make the defense attorney's challenge look weaker by comparison, rather than stronger.[178] For instance, the defense attorney would be hard pressed to persuasively analogize her case to *United States v. Franklin*.[179] There, the Seventh Circuit found that the district court's application of the enhancement was clear error because the defendant's weapon was a "little pocket knife" he used to strip wires in his job as an electrician and the police did not find it necessary to confiscate the weapon.[180]

The defense attorney's tools may, therefore, be limited to distinguishing her case from more egregious cases where the appellate courts affirmed the application of the enhancement. She could argue that unlike the Seventh Circuit case *United States v. Booker*, where the government's informant saw an AK-47 on the couch next to the defendant during controlled crack buys,[181] her client's weapon was merely a handgun stowed in the closet where it did not pose an immediate threat of violence. However, *Booker* provides no guidance as to what set of facts might present too tenuous a connection between a gun and drugs. Therefore, this comparison merely demonstrates that this defendant's case is not quite as bad as *Booker*. However, it does not logically follow that the enhancement is inapplicable to this defendant's offense.[182] Thus, the lack of analogous pro-defense case law can affect the relative strength of defense sentencing memoranda.

Defense attorneys are at a further disadvantage when preparing sentencing memoranda because they are forced to reinvent the wheel every time they present an argument. When the government makes a novel argument as to the interpretation of the Guidelines that succeeds at the district court level, the defense will often appeal, and, in the majority of cases, the appellate court will endorse the government's argument,

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[177] Facts taken from *United States v. Perez*, 581 F.3d 539 (7th Cir. 2009), and modified slightly.

[178] *See, e.g.*, United States v. Franklin, 484 F.3d 912, 913–16 (7th Cir. 2007).

[179] *Id.*

[180] *Id.*

[181] United States v. Booker, 248 F.3d 683, 686 (7th Cir. 2001).

[182] *See, e.g.*, United States v. Johns, 686 F.3d 438, 460 (7th Cir. 2012). In *Johns*, the defendant argued that the § 3A1.1 vulnerable victims enhancement did not apply. *Id.* He attempted to distinguish his case from other more severe cases by pointing out that his victims only experienced financial distress, whereas in other cases where the enhancement applied the victims experienced financial distress in addition to other vulnerabilities (e.g., age and alcoholism). *Id.* The court rejected this argument, and concluded that the enhancement applied. *Id.*

permanently entrenching it in a written opinion.[183] When a defense attorney suggests a novel interpretation of the Guidelines and manages to persuade the district court, that is usually the end of the story. In most cases the district court will issue an oral ruling, the government will not appeal,[184] and the defense attorney's innovative argument will be forgotten, existing only in a transcript. As a consequence, every time a defense attorney wants to present this argument, it will be novel to the judge even if her colleagues down the hall or across the country have already endorsed it in an oral ruling.[185] Unlike the government attorneys who can support their arguments with a citation to circuit authority sanctioning them,[186] defense attorneys have to expend effort persuading the judge of the argument's validity as if it were the first time every time.

The one-sided body of precedent may give prosecutors greater leverage in plea negotiations as well. Prosecutors can be more confident that the courts will accept their interpretations of the Guidelines because they have appellate court precedent to support their assertions, whereas defense attorneys cannot be as convinced that their arguments will succeed. This confidence disparity may give prosecutors the upper hand in plea negotiations with defense attorneys. For instance, in exchange for a guilty plea, a prosecutor may agree that a certain "sentencing factor does or does not apply," and once the court accepts the plea agreement, that recommendation binds the court.[187] The defense attorney may be somewhat hopeful that he can persuade the court that an enhancement does not apply without the prosecutor's agreement. However, because the defense attorney has no assurance that his argument will succeed, accepting the plea agreement may be worth avoiding the risk of failure.

Finally, defense attorneys faced with a dearth of favorable precedent may be discouraged from even challenging the applicability of sentence enhancements. Lawyers are trained not to make an assertion unless they have case law to back it up.[188] In this vein, a survey of federal judges revealed that their principal complaint about attorneys' writing was their failure to effectively use "relevant, controlling authority" to support their

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[183] *See supra* Section II.B.

[184] *See supra* Part II.

[185] Criminal defense attorneys can combat this by sharing successful arguments with one another at federal criminal defense conferences, for instance.

[186] Risinger, *supra* note 126, at 467, 473 (observing that prosecutors tend to bolster their arguments with string cites to appellate court decisions).

[187] FED. R. CRIM. P. 11(c)(1)(C).

[188] Voigt, *supra* note 23 (advising lawyers to avoid making assertions without citations to precedent because "without citations, judges might think that the stated rules and arguments are merely your opinions—which are irrelevant").

position.[189] Many federal districts' local rules even *require* that arguments be supported by "citations of authority."[190] Therefore, defense attorneys who cannot find case law to support their arguments may not make them at all. Over time, defense attorneys may become discouraged by the ever-growing heap of pro-prosecution circuit court precedent.[191]

C. Whose Brief Is More Likely to Persuade the Judge?

District court judges are more likely to decide a case in accordance with appellate court precedent than to go against the grain, and because the majority of appellate court precedent favors the prosecution, pro-defense arguments are at a great disadvantage. To understand how district courts interpret appellate court holdings, it is crucial to first understand the impact of the standard of review applied by the appellate courts. Professor Jonathan Masur argues that judges tend to ignore the deference paid by the prior reviewing court and are prone to view all precedent through "non-deferential prisms."[192] For example, suppose an appellate court issues an opinion holding that the district court did not "clearly err" in applying the § 2D1.1(b)(1) dangerous weapon enhancement[193] when the gun is in the closet and the drugs are in the garage.[194] Masur's argument suggests that a future judge deciding a similar case is likely to misinterpret the holding as expressing the rule that when the gun is in the closet and the drugs are in the garage, the § 2D1.1(b)(1) enhancement applies.[195] Of course, the appellate court is not declaring the district court's holding as the rule,

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[189] Robbins, *supra* note 25, at 264 (presenting the results of a survey of federal judges, which reveal that "first and foremost, judges are critical of lawyers' inability to use relevant controlling authority to their advantage").

[190] *See, e.g.*, N.D. ILL. CRIM. R. 1(b) ("A contested motion shall be accompanied by a short, concise brief in support of the motion, together with *citations of authority*." (emphasis added)); E.D. VA. CRIM. R. 12(A) ("All motions, unless otherwise directed by the Court, shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a *citation of the authorities* upon which the movant relied." (emphasis added)).

[191] Risinger, *supra* note 126, at 469 (noting that from 2003 to 2007 all courts affirmed the admission of handwriting identification expert testimony and the number of decisions where the admissibility of handwriting testimony was contested decreased rapidly—from eighteen between 2002 and 2003 to only one in 2007). *Contra* Gertner, *supra* note 31, at 115 (indicating that although one might expect litigants to realize that their chances of success are low and stop filing employment discrimination suits, the record reveals that litigants continue filing their claims regardless).

[192] Masur, *supra* note 25, at 706–07.

[193] *See, e.g.*, United States v. Pompey, 264 F.3d 1176, 1180 (10th Cir. 2001) ("We review factual findings under U.S.S.G. § 2D1.1(b)(1) for clear error; we give due deference to the application of the Guidelines to the facts; we review purely legal questions de novo." (quoting United States v. Vaziri, 164 F.3d 556, 568 (10th Cir. 1999))).

[194] *See supra* text accompanying note 177.

[195] Masur, *supra* note 25, at 706–07.

because if the appellate court had the opportunity to make a determination in the first instance, it may have found that the enhancement did not apply. There are several reasons why this type of mistake is commonplace: (1) judges tend to focus on the holding of a case, as opposed to the standard of review under which it was decided, (2) judges may—correctly or incorrectly—believe that the standard of review did not factor into the appellate court's decision, and (3) evaluating precedent as nondeferential is less "cognitively taxing" than evaluating precedent in light of the standard of review applied.[196]

Masur provides an example of twenty-five cases discussing the admissibility of latent fingerprint evidence.[197] In twenty-four out of twenty-five cases, the defendant had appealed the admission of the evidence and the appellate court held that the lower court did not abuse its discretion in admitting the evidence.[198] Of course, if the appellate court reviewed an instance where the district court *excluded* the evidence, it may have also found that the court did not abuse its discretion. Despite this, a district court may not feel free to disregard these twenty-four cases and use its discretion to exclude the evidence.[199]

Furthermore, when a judge issues a decision diverging from precedent, she must expend additional effort and make a strong case to support the departure. When judges rely on precedent, they can use the information and reasoning that courts have produced in previous cases.[200] By contrast, a decision diverging from precedent requires more intellectual effort and a greater time investment by the judge, because the judge must start from square one investigating the innovative aspects of the case and the legal arguments presented.[201] Departing from precedent has another important cost: a judge who deviates from appellate case law may face criticism by colleagues, extrajudicial institutions, and the public at large.[202] Consequently, a judge issuing an opinion that does not coincide with the pattern of appellate court cases will find it necessary to make strong

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[196] *Id.*

[197] *Id.* at 683.

[198] *Id.* In the twenty-fifth case, the government sought a writ of mandamus directing the district court to admit the latent fingerprint evidence, which the court granted. *Id.* at 683 & n.202 (citing *In re* United States, 614 F.3d 661, 662 (7th Cir. 2010)).

[199] Masur, *supra* note 25, at 683. Risinger provides another example in the area of handwriting identification expertise. Risinger, *supra* note 126, at 469. He notes that courts deciding whether to admit handwriting identification evidence produced "highly authority driven" opinions supported by string cites to appellate court precedent. *Id.*

[200] Ponzetto, *supra* note 3, at 384.

[201] *Id.*

[202] *Id.*

arguments for why this case should come out differently—a labor-intensive task.[203] Moreover, judges may be particularly inclined to conform to existing practice in criminal sentencing because 18 U.S.C. § 3553(a)(6) calls on them to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[204] Thus, when judges are confronted with a prosecution brief citing to an abundance of favorable binding appellate court precedent and a defense brief with sparse citations to persuasive authority, they will likely tend to conform their decisions to the binding precedent and side with the prosecution.[205] The result is that with each subsequent round of appeals, the law inches further and further in a pro-prosecution direction.

IV. OTHER FACTORS THAT MAY INFLUENCE JUDICIAL DECISIONMAKING AND CONCERNS

This Note contends that two extrajudicial factors—lack of written district court opinions and disparate rate of appeals—contribute to doctrinal drift in a pro-prosecution direction. However, a confluence of other factors may influence sentencing decisions, including judges' political and ideological leanings,[206] their desire to avoid reversal,[207] and their aim to

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[203] *Id.*

[204] 18 U.S.C. § 3553(a)(6) (2012).

[205] *See, e.g.*, United States v. Pacheco, No. CR 13–2643 JB, 2014 WL 34211063, at *6 (D.N.M. July 8, 2014) (rejecting the argument that the § 2K2.1(b)(6) firearm enhancement does not apply when the defendant possesses only a small amount of drugs and citing four appellate court cases that also rejected that position).

[206] *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.8 (2010) (survey of federal district court judges revealing that for certain offenses—child pornography possession and receipt and drug trafficking of crack cocaine—a *majority* of judges believe the sentencing range is too high); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 431 (2011) (concluding that judges appointed by Democrats are more likely than their Republican counterparts to depart downward in criminal sentencing); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 52–53 (2007) (analyzing data and concluding that Democratic judges, as compared to Republican judges, are more likely to impose lower sentences for street crimes, and that Democratic judges are particularly lenient when the appellate panel is composed mostly of Democratic appointees); Scott, *supra* note 5, at 373–74 (asserting that judges have "deep disagreements about sentencing values and priorities"); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 48 (1990) (suggesting that appellate courts may be prejudiced against defendants because they have been found guilty of a crime).

[207] *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 984 (1995) (stating that judicial reversal "reflects professional criticism by other professionals"); Fischman & Schanzenbach, *supra* note 206, at 431 (analyzing data of district court sentencing decisions and concluding that, in some instances, district court judges may adjust their decisions in order to avoid reversal).

preserve the reviewability of their rulings,[208] among others.[209] At least some of these factors may either exacerbate or curb the effects of the extrajudicial factors discussed above that produce pro-prosecution doctrinal drift, but none appears to cancel them out.

Professor Kate Stith has argued that appellate court criminal precedent evolves in a pro-defendant direction—not a pro-prosecution direction—because double jeopardy prevents the government from appealing.[210] Stith argues that appellate courts will commit errors in some percentage of cases.[211] For instance, they will affirm the admission of a confession when they should reverse ("pro-government error") and they will reverse the admission of a confession when they should affirm ("pro-defendant error").[212] Because the government does not appeal, it bears the burden of error at the district court level.[213] Further, because the appellate court reviews primarily defense appeals, Stith argues that the number of pro-defendant errors will be much greater than the number of pro-government errors, thereby causing the law to shift in a pro-defendant direction.[214]

Stith's argument rests on the assumption that appellate courts are equally likely to erroneously reverse a decision as they are to erroneously affirm a decision. Her argument fails to take into account the deference paid to lower courts and does not address the unique characteristics of the sentencing context. An appellate court often reviews the lower court's sentencing decisions for clear error.[215] As a result, the appellate court is likely to affirm in many cases where, if the appellate court were deciding the issue in the first instance, it would issue the opposite ruling. In fact, the rate of reversal is very low at only 10.2%.[216] Therefore, appellate courts are much more likely to affirm a decision that departs from the legal standard

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[208] Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 n.22 (1973).

[209] Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 389–90 (2002) (asserting that an advantage to ruling in favor of the defense is that the decision will not be appealed and that finality reduces the caseload of the courts).

[210] Stith, *supra* note 206, at 7, 17; *see also* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND. L. REV. 353, 382 (1998) (arguing that the double jeopardy prohibition on government appeals causes the doctrine to shift in a pro-defendant direction and recommending that the government be permitted to appeal erroneous acquittals).

[211] Stith, *supra* note 206, at 17.

[212] *Id.*

[213] *Id.* at 18.

[214] *Id.* at 17.

[215] *See supra* text accompanying notes 114–19.

[216] In 2014, the appellate courts reversed criminal sentencing decisions in 10.2% of cases and affirmed in part and reversed in part in 2.3% of cases. 2014 SOURCEBOOK, *supra* note 8, at fig.M.

than they are to reverse such a decision, meaning that, in fact, the asymmetric rate of appeals favors the government.

Further, as discussed above, unlike in decisions to acquit or convict, where the government cannot appeal because of double jeopardy prohibitions, the government can appeal adverse sentencing decisions.[217] Therefore, Stith's assertion that the government bears the burden of error in the lower court is inapplicable in the sentencing context. As written district court sentencing opinions are rare, the government bears little risk of unfavorable precedent that will affect future cases.[218] Because the government *can choose* not to appeal criminal sentencing rulings, it can make a strategic decision to leave district court pro-defense errors unchallenged.

V. POSSIBLE SOLUTIONS

This Part will survey potential solutions to doctrinal drift to prevent the law from morphing into an unrecognizable body of pro-prosecution precedent. Ultimately, judicial skepticism of doctrinal developments may be the only workable solution. One option is to require judges to generate more written opinions, but this alternative does not seem feasible. Scholars have been urging judges to write full sentencing opinions for years.[219] However, judges must issue a high volume of sentencing decisions and producing a written opinion is time-consuming.[220] Therefore, requiring written opinions could hamper the speedy resolution of disputes or cause judges to give short shrift to other written opinions.[221]

Another alternative is for judges to keep an open mind as to what constitutes persuasive authority and give weight to citations to Statements of Reasons or oral hearing transcripts, but due to the limitations of these sources, this potential solution seems unworkable. As discussed above, the Statement of Reasons provides little guidance to future jurists facing similar factual scenarios because judges simply check boxes on a standard

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[217] United States v. DiFrancesco, 449 U.S. 117, 132 (1980) ("From this it follows that the Government's taking a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence.").

[218] *See supra* text accompanying notes 101–07.

[219] Scott, *supra* note 5, at 362 ("For years scholars have been urging sentencing judges to issue full-fledged published sentencing decisions more frequently." (first citing Lynn Adelman & Jon Deitrich, Rita*, District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 54–55 (2007); then citing Robert W. Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 FORDHAM L. REV. 927, 940 (1996); and then citing Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147 (2006))).

[220] Scott, *supra* note 5, at 363.

[221] Cohen, *supra* note 101, at 523.

form to indicate the reasons for a sentence.[222] Oral hearing transcripts are similarly unsuitable because they do not clearly articulate a judge's reasoning and are intended more for the parties in the courtroom than for future judges.[223]

Professor Ryan Scott analyzed the feasibility of an "open access approach" where defense attorneys and judges would enjoy open access to a database of past sentencing information.[224] Under this approach, defense attorneys and prosecutors could include citations to sentencing outcomes in the database in briefs and at sentencing hearings.[225] By presenting judges with similar cases in which below-Guidelines sentences were imposed, defense attorneys could persuade judges they would not be going out on a limb if they imposed the requested sentence.[226] However, the open access approach is useful primarily to promote inter-judge consistency in the length of sentences. Its utility is limited in addressing the problem identified in this Note because it does nothing to preserve district court judges' reasoning for electing not to impose a particular enhancement or opting to grant a reduction.

The best solution may simply be for courts to be aware of the pro-prosecution skew of the precedent and to view the doctrine with skepticism.[227] The two examples of pro-prosecution shifts in the doctrine identified here could have been avoided if judges and their clerks carefully researched not only the most recent precedent but older precedent as well.[228] Likewise, the risk of pro-prosecution doctrinal drift is reduced if courts are wary of string cites in prosecution briefs and do not take for granted the "rule" that they present. Lastly, thoroughly examining the text of the Guidelines before reviewing the case law interpreting it could serve to reign in doctrinal drift.

CONCLUSION

This Note demonstrates that pro-prosecution doctrinal drift is the result not of careful judicial reasoning, but of extrajudicial factors, principally (1) the disparate rate of appeals between the defense and

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[222] Scott, *supra* note 5, at 378.

[223] *See supra* text accompanying notes 156–66.

[224] Scott, *supra* note 5, at 349, 399–400.

[225] *Id.* at 399.

[226] *Id.* at 399–400.

[227] *See* Masur, *supra* note 25, at 730 ("[I]t may simply be appropriate for courts . . . to view particular doctrines with greater skepticism because of the possibility that those doctrines have evolved in a biased fashion due to deference mistakes.").

[228] *See supra* text accompanying notes 79–97.

prosecution and (2) the lack of written decisions at the district court level. Because 99% of appeals are defense appeals, appellate courts almost exclusively review pro-prosecution district court decisions. In part due to deference, appellate courts affirm the majority of these decisions. As a result, the body of appellate court sentencing precedent is composed primarily of pro-prosecution appellate court opinions affirming district court decisions. This problem is further exacerbated in the sentencing context because district courts usually issue sentencing decisions by oral pronouncement. The opinions that are most likely to present pro-defense reasoning are district court decisions, but written sentencing decisions at this level are rare. If a district court judge interprets a subsection of the Guidelines in a manner that is favorable to the defense, that reasoning will most likely become silent law that serves the particular defendant but has no generative force.

When writing sentencing memoranda aimed at persuading the court that a sentence reduction should apply or that an enhancement should not apply, defense attorneys have little authority to support their arguments. Prosecutors, on the other hand, have a plethora of case law to choose from to bolster their position, and because of this, judges reviewing these briefs are likely to find the prosecution's more persuasive. As a result, circuit doctrine will grow increasingly prosecution-friendly with each subsequent round of appeals. The best response to prevent the law from surreptitiously slipping through judges' fingers may simply be to draw judges' attention to the fact that sentencing doctrine has a tendency to drift in a pro-prosecution direction and call on them to view the doctrine with a skeptical eye.