

Sentencing Commission Data Tool Is Deeply Flawed

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This past month, federal sentencing statistics became even more important for defense lawyers. The U.S. Sentencing Commission released the Judiciary Sentencing INformation platform, or JSIN — a new data tool that provides judges and the public with online access to limited sentencing data for similarly situated defendants.

The problem is that JSIN has deep flaws that create a misleading picture of sentencing.

JSIN provides averages and medians for federal sentences in the last five years, but it deliberately omits almost all lower sentences and it deliberately retains all higher sentences. Most notably, its averages and medians are only for sentences of imprisonment.

In other words, JSIN deliberately excludes all sentences of probation, fines or home confinement. It takes all sentences of zero prison time out of the dataset before the math is done. It also excludes all Section 5K1.1 departures, known as cooperators. At the same time, JSIN retains all above-guidelines sentences and all mandatory minimum sentences.

In this way, JSIN pushes up the average and median sentences it reports, and issues data that encourages judges to impose higher sentences.

But defense lawyers can address these flaws by giving judges the rest of the story: a full distribution of the cases in the relevant box on the federal sentencing table. They can accomplish that by examining the U.S. Sentencing Commission's full dataset outside of JSIN.

JSIN provides data on national sentences in the last five years for defendants with the same primary guideline, final offense level and criminal history category. In other words, it allows comparisons between defendants with the same guideline and position on the sentencing table.

In some respects, that's an improvement from the Sentencing Commission's annual reports and past data tools. For example, past annual reports have provided an average of all fraud sentences; that method lumps all frauds together, whether they involve \$1 million or \$100 million.

JSIN is more focused than that and thus closer to the guidelines calculation that judges must actually perform at sentencing. But the most important numbers that JSIN reports — the average and median sentences for a particular position on the sentencing table — are inflated by a series of choices to exclude large chunks of the commission's own dataset.

First, JSIN excludes all sentences for cooperating witnesses, meaning cases in which the government filed and the court granted a Section 5K1.1 motion for a substantial assistance departure. That exclusion is itself a choice, and not necessarily one demanded by federal sentencing after the 2005 U.S. Supreme Court ruling in *U.S. v. Booker*.

It assumes that cooperating witnesses are not at all comparable to other defendants in the same position on the sentencing table. But that choice to frustrate comparisons to cooperators may not make sense in particular cases. For example, it may be less defensible where a defendant pleaded guilty and wanted to cooperate but simply lacked the information needed to provide the "substantial assistance in the prosecution of another" under Section 5K1.1.

Second, JSIN includes mandatory minimum sentences, which by definition are not examples of how judges have exercised discretion. In fact, they're the opposite.

If the goal is to provide judges with information on how other judges have exercised their discretion when faced with similarly situated defendants, the inclusion of mandatory sentences defeats that goal. But, if the goal is to keep reported averages and median sentences higher, then the choice to leave in mandatory sentencing makes sense.

Third, and most important, JSIN excludes all nonimprisonment sentences: not just nonimprisonment sentences due to a Section 5K1.1 motion, or application of Section 5K3.1's safety valve, but rather all nonimprisonment. That is, all sentences that are probation only, fine only, alternative confinement only (such as home confinement) or any combination of those options that doesn't also include prison time.

At positions on the sentencing table where the range is zero to six months, that means that JSIN is excluding

sentences within the advisory range. And even at many higher positions on the sentencing table, a substantial portion of cases are nonimprisonment. Yet, JSIN excludes all of them from its averages and medians.

The effect of these choices can be dramatic.

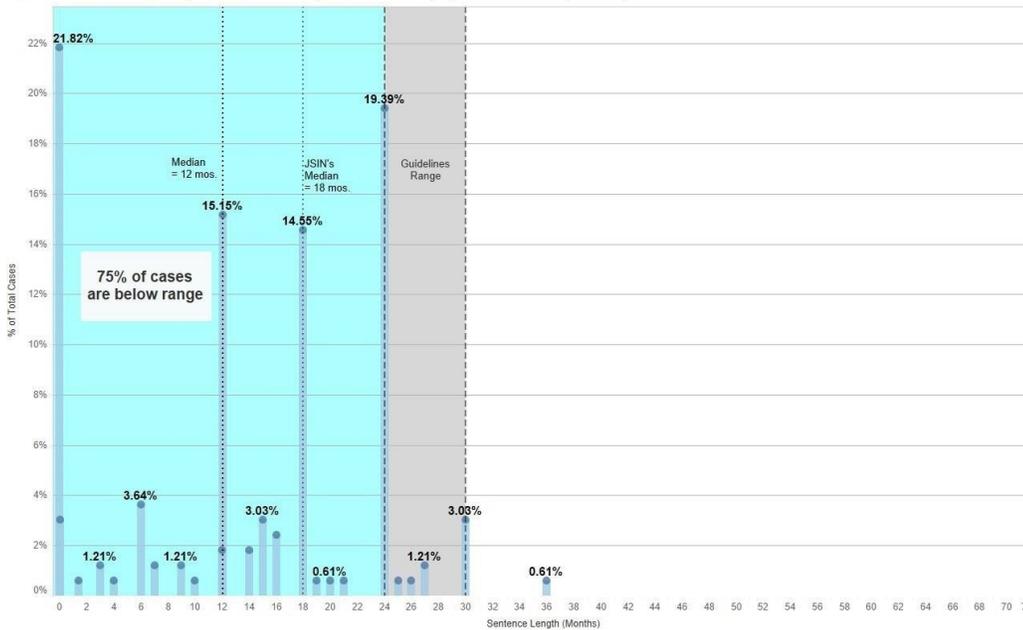
When JSIN is queried for stats on the position of the sentencing table for U.S. Sentencing Commission Section 2T1.1 – tax evasion, offense level 17 and criminal history I – JSIN reports the median sentence as 18 months.

But when one uses the commission's full dataset to calculate the median on that same cohort (Section 2T1.1, level 17, history I, no 5K1.1) and includes sentences of probation, the median is significantly lower. Instead of JSIN's 18 months, the median is just 12 months. That's a whole six months lower – and a 33% decrease.

One way to counter the misimpression that JSIN creates is by providing the judge with more accurate and complete numbers and graphs than JSIN does. The graph below shows a simple distribution of all sentences for a particular box on the sentencing table.

Again, like JSIN's calculation, it excludes Section 5K1.1 sentences, but it includes nonimprisonment sentences:

2016-2020: USSG 2T1.1, Offense Level 17, Criminal History I, Without 5K1.1 (n = 165)



The full distribution also makes clear how little weight the guidelines have at this particular position on the sentencing table: 75% of sentences are below the guidelines range; the most common sentence – almost 23% of cases – is actually probation. Of those few cases that are inside the guidelines range, most are at the precise bottom of the range.

Moreover, by conducting a more complete study of the Sentencing Commission's data than the JSIN provides, the defense could also examine particular aspects of a guidelines calculation, such as loss or drug weight. The defense could strip out mandatory minimum sentences or do an analysis of 10 or 15 years of cases, not just five. They could also break down cases by circuit or district, not just nationally.

Now that JSIN is available, defense attorneys should consider all the above. It was already a good idea to use accurate and complete data analysis of similarly situated defendants. But now the need has increased. The defense now has to counter JSIN and the false impression it creates.

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