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ARTICLE

SLUMPING: THE EIGHTH CIRCUIT'S SUPREME COURT BATTING AVERAGE IN FEDERAL-SENTENCING CASES

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ABSTRACT

This article responds to the increasing interest in scholarly legal publications of empirical studies of federal judges, in general, and their reversal rates, in particular. While there is one prior published empirical study of the Eighth Circuit, it involved the Circuit's reversal rates for district judges. That study found that the Circuit reversed district judges who had prior affiliations with the Democratic party roughly one and a half times as often as those whose prior affiliations were with the Republican party. This article examines the top side of this issue: How well does the Eighth Circuit fare

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Judge Bennett is grateful to Zachary Nielsen, a recent graduate of the University of Colorado Law School, who provided extensive and invaluable research for this article while an intern in his chambers during the summer of 2015. Judge Bennett also wishes to thank Professor Robert Steinbuch of the University of Arkansas at Little Rock William H. Bowen School of Law for his suggestions.

when its decisions and its positions are reviewed by the Supreme Court? The article compares the Eighth Circuit to its sister circuits, with a special emphasis on federal-sentencing decisions. The data indicate that the Eighth Circuit is reversed more often than the infamous Ninth. It may not be surprising that, in every sentencing decision of the Eighth Circuit reviewed by the Supreme Court over the past twelve years, the Eighth Circuit sided with the Department of Justice. What is surprising is that the Supreme Court reversed those decisions 100 percent of the time. The article also argues for greater transparency for reversal and affirmance rates throughout the federal judiciary.

I. INTRODUCTION

Professor Steinbuch's empirical analysis of 2008 reversal rates for district judges in the Eighth Circuit appeared in 2009.[1]

One caveat is in order. Judge Bennett did not make Professor Steinbuch's list of district judges in the Eighth Circuit most reversed for abuse of discretion, no doubt due to Steinbuch's decision to exclude reversals in federal-sentencing cases. *See* Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008*, 43 LOY. L.A. L. REV. 51, 64 (2009) (listing most-reversed judges, but noting that list did not include "judges who were reversed in cases involving sentencing guidelines, given the state of flux of this area of the law during the time period being examined"). In sentencing cases, Judge Bennett likely led the pack. For example, in *Spears v. United States*, 552 U.S. 1090 (2008) (granting certiorari and vacating and remanding for further consideration in light of *Kimbrough v. United States*, 552 U.S. 85 (2007)) and *Pepper v. United States*, 562 U.S. 476 (2011) (vacating in part, affirming in part, and remanding for resentencing), Judge Bennett's sentencing positions were reversed by the Eighth Circuit a whopping five times, twice by that court en banc. However, Judge Bennett's analysis and holdings were ultimately vindicated by the Supreme Court. *See Spears*, 552 U.S. 1090; *Pepper*, 562 U.S. 476; *see also* Mark W. Bennett, *A Slow Motion Lynching? The War On Drugs, Mass Incarceration, Doing* Kimbrough *Justice, And A Response To Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 896–98 & nn. 117, 122, 129 (2014) (discussing *Spears* and *Pepper* and providing relevant case citations).

1. Steinbuch, *supra* note *. Professor Steinbuch also published two follow-up articles. *See* Robert Steinbuch, *An Empirical Analysis of Conservative, Liberal, and Other "Biases" In The United States Courts Of Appeals For The Eighth & Ninth Circuits*, 11 SEATTLE J. SOC. JUST. 217, 255 (2012) ("This study concludes that for the full-year data sets analyzed, the Eighth Circuit has a political-party bias, while the Ninth Circuit does not. To the extent that this phenomenon repeats itself, it is likely reflective of the fact that the Eighth Circuit is almost completely Republican, while the Ninth Circuit is only marginally Democratic."); Robert Steinbuch, *Further Empirical Insights and Findings on the Eighth Circuit*, 44 LOY. L.A. L. REV. 339, 339 (2010) ("[T]his article provides further insights into the correlation

Using logistic regression analysis, he concluded that the heavily Republican Eighth Circuit[2] reversed district judges affiliated with the Democratic Party one and a half times as often as it reversed those affiliated with the Republican Party.[3] This should not be too surprising. As Professor Steinbuch points out, "there is no evidence in this study to suggest that politics was a direct and nefarious cause of the higher reversal rate of Democratic judges."[4] Rather, he found "a latent but discernible correlation between a district court judge's political party affiliation and the propensity of the Eighth Circuit to reverse the judge's decisions."[5] While well beyond the scope of this article, I suggest this is likely due more to differing judicial philosophies than to political affiliation.[6]

Without addressing the political-affiliation issue, I look at the reverse top-side of this: How well does the Eighth Circuit fare when its decisions are reviewed by the Supreme Court, especially in the federal-sentencing area? In other words, what is

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between a district judge's political affiliation and the rate at which the judge is reversed.") [hereinafter Steinbuch, *Further Insights*].

2. At the time Steinbuch's original article was published, the Eighth Circuit had "fourteen Republican and three Democratic . . . judges, and seven of the active judges were all appointed by President George W. Bush." Steinbuch, *supra* note *, at 64.

3. Steinbuch, *supra* note *, at 51; *see also id.* at 56–57 (characterizing each district judge as "identified with a political party . . . based on the political party of the [appointing] president," but acknowledging that "[t]he political designation of the appointing president may not always reflect the individual judge's actual political philosophy," while also pointing out that "many believe that it serves as a fair and objective proxy for the judge's political philosophy and political party affiliation"); *but see* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. REV. 1895, 1919–22 (2009) (recognizing that "[t]his party-of-appointing-president ('PAP') proxy measure has come under criticism," and summarizing a few illustrative critiques).

4. Steinbuch, *supra* note *, at 65.

5. *Id.*

6. Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 769–70 (2005) ("Nonetheless, the growing body of research indicates that political ideology is a significant influence ('significant' in the statistical sense, that is, not being a product of random chance) that recurrently (but not invariably) emerges in studies of judicial decisionmaking and that has a non-negligible effect on the judicial enterprise."); *but see* Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 550 (2012) ("The most basic choices judges on the courts of appeals can make—to dissent, to concur separately, or to reverse the district court judgment—are better predicted and explained by utilizing the measures of partisanship and independence than by utilizing measures of ideology.").

that court's batting average in the Supreme Court? For a macro look, and to set a baseline, I compare the affirmance/reversal record—the batting average—of the Eighth Circuit over the decade from 2005 to 2015 with those of the other circuits on all merits cases decided by the Supreme Court. I then narrow the focus to take a more in-depth look at how the Eighth Circuit fared in its federal-sentencing decisions reviewed by the Supreme Court from 2005 to 2015. I chose this time frame because of the constitutional sea change in federal sentencing created by the Supreme Court's landmark decision declaring the Sentencing Guidelines advisory rather than mandatory in *United States v. Booker*.[7] This sea change generated many federal-sentencing issues for the Supreme Court to decide. For the same decade, I also compare the batting average of the Eighth Circuit in the Supreme Court on federal-sentencing issues decided by the high court in cases arising from circuits excluding the Eighth.[8] Finally, I determined the individual batting averages for each of the Eighth Circuit judges involved in federal-sentencing decisions during the decade both for the Supreme Court's review of those Eighth Circuit sentencing decisions directly—as well as for the Supreme Court's review of sentencing decisions decided from the other circuits—on which the Eighth Circuit had also opined.

Were there a World Series for the federal courts of appeals over the last decade, the Eighth Circuit franchise would not have been in it. They would not have even made the playoffs. Indeed, by every measure, including batting averages of individual Eighth Circuit judges and team batting averages of panels and

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7. 543 U.S. 220 (2015). For a discussion of the *Booker* revolution and post-*Booker* sentencing see Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 513–18 (2014).

8. In order to determine this last comparison, I researched whether the Eighth Circuit had decided a federal-sentencing issue that later came before the Supreme Court from another circuit, which necessarily involved a measure of subjective judgment. I tried to err on the side of giving the Eighth Circuit the benefit of the doubt. I also strove to find the first time the Eighth Circuit had decided the question—so that only those judges on the first panel were scored—because judges writing subsequent opinions are bound by the first panel opinion as circuit precedent. Brock v. Astrue, 674 F.3d 1062, 1065 (8th Cir. 2012) ("'[A] panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc.'" (quoting United States v. Wright, 22 F.3d 787, 788 (8th Cir. 1994))).

the en banc court, the Eighth Circuit most resembled a perennial division cellar dweller—surpassing the infamous Ninth Circuit.[9] Indeed, as discussed in more detail to follow, on the seven at-bats in the Supreme Court on their own federal-sentencing decisions, the Eighth Circuit failed to get on base, striking out seven consecutive times.

A. Citation Studies

Before turning to the data on Team Eighth Circuit, a brief overview of empirical research on federal judges is in order. In recent years, the "most prominent approaches"[10] use databases of citations to reported opinions in an attempt to measure "influence," "prestige," or "quality of judges."[11] For example, one of the first empirical studies of judges, by Professors Landes, Lessig, and Solimine, used the citations to published opinions "to estimate empirically the influence of individual judges."[12] The authors conceded that using the number of citations was "at best a crude and rough proxy for measuring influence,"[13] yet asserted that their quantitative analysis offers significant advantages over other approaches because it is less subjective and relies less on non-quantifiable factors.[14] Frustrated with the appointment process for Supreme Court

9. *See* Table 1, *infra* page 65.

10. Robert Anderson, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315, 317 (2010).

11. *Id.*

12. William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 325 (1998) ("Although citation analysis provides only a proxy for quantifying judicial influence, it offers some significant advantages over more conventional literary and historical approaches to the study of influence. First, citation analysis relies less on subjective and non-quantifiable factors and, instead, employs quantitative measures of influence using well-known statistical techniques. Second, it enables one to compare differences in influence among a large number of judges and to test the statistical significance of these differences.") The authors also used extensive regression analysis to examine a myriad of other factors to explain "differences in the influences of individual judges." *Id.* at 276 (describing analytic approach), 318–25 (including data tables).

13. *Id.* at 271.

14. *Id.* at 325. Professor Steinbuch has also noted that, while empirical research in the context of reversal rates has its own flaws, it "should be understood and embraced as the rigorous and objective method of evaluation that it is." Steinbuch, *Further Insights*, *supra* note 1, at 340.

Justices, Professors Choi and Gulati followed that study with their recommendation for a Tournament of Judges using citation rates as one of several objective measures in a World Series Playoffs-like contest.[15] The "reward to the winner" was not an MVP selection or induction into the Hall of Fame, but "elevation to the Supreme Court."[16] In a follow-up study and article, Professors Choi and Gulati computed their Tournament of Judges to offer to the President and the public their view of the most objectively qualified federal appeals judges to be elevated to the Supreme Court.[17] The Tournament of Judges idea generated significant response, and a lot of Bronx cheers,[18] from the academy, resulting in a law-review symposium on the topic in 2005.[19] Another citation study that used both positive and negative citations to circuit judges' opinions to rank them on judicial quality concluded that a majority of the federal appellate judges "are indistinguishable from one another in terms of the quality of their work product."[20]

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15. Stephen Choi & Mitu Gulati, *A Tournament of Judges?* 92 CAL. L. REV. 299, 299 (2004) ("Among the criteria that could be used are opinion publication rates, citations of opinions by other courts, citations by the Supreme Court, citations by academics, dissent rates, and speed of disposition of cases.").

16. *Id.*

17. Stephen J. Choi & G. Mitu Gulati, *Choosing The Next Supreme Court Justice: An Empirical Ranking Of Judge Performance*, 78 S. CAL. L. REV. 23, 29–30 (2004) ("This Article presents a set of simple and objective measures to evaluate judicial merit, placing judges in a tournament of sorts using criteria correlated (albeit imperfectly) with widely held notions of merit. Our simple measures do not provide a perfect metric for judging skill, but that is not the standard at which we are aiming. The goal is to demonstrate the availability of a set of objective measures for which we can easily collect data and analyze and that would better identify, at the outset, a merit-worthy pool of Supreme Court candidates.").

18. *Bronx cheer*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/Bronx%20cheer (2018) (defining the Bronx cheer as "a rude sound made to show that you dislike something").

19. *See, e.g.*, Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001 (2005). The symposium generated seventeen papers and essays by twenty-two members of the academy, judges, and practicing lawyers; *see generally id.* (summarizing symposium articles).

20. Anderson, *supra* note 10, at 381.

B. Reversal Rate Studies

In addition to citations, reversal rates are commonly used in empirical studies of various aspects of judicial decisionmaking.[21] Scholars have advocated the use of reversal rates as a measure of judicial quality and they are "commonly used to evaluate circuits."[22] Judge O'Scannlain of the Ninth Circuit has published two articles reflecting on how cases from the Ninth Circuit fared in the Supreme Court in the decade following October Term 2000.[23] He concluded about his own circuit that its decade record in the Supreme Court was "strikingly poor."[24] Judge O'Scannlain determined, in his review of Team Ninth Circuit's batting average in the Supreme Court from 2000 to 2010, that the Ninth Circuit was hitting below the Mendoza Line,[25] at a mere .190.[26] One scholar has warned, however, that "commentators agree about what the Ninth Circuit's reversal rate is, but they have sharply differing views about its normative implications."[27]

These quantitative citation studies have revealed empirical information that is not well known in either the legal community or to the public at large, other than the general perception that the reversal record of the Ninth Circuit in the Supreme Court is

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21. Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 139 (2013) (noting also that reversal rates are "widely used to justify normative claims about judges and courts").

22. *Id.*

23. Diarmuid F. O'Scannlain, *A Decade Of Reversal: The Ninth Circuit's Record in the Supreme Court Since October Term 2000*, 14 LEWIS & CLARK L. REV. 1557 (2010) [hereinafter O'Scannlain, *Decade*—Lewis & Clark]; Diarmuid F. O'Scannlain, *A Decade Of Reversal: The Ninth Circuit's Record In The Supreme Court Through the October Term 2010*, 87 NOTRE DAME L. REV. 2165 (2012) (transcribing lecture largely based on O'Scannlain, *Decade*—Lewis & Clark, *supra* this note) [hereinafter O'Scannlain, *Decade*—Notre Dame].

24. O'Scannlain, *Decade*—Lewis & Clark, *supra* note 23, at 1557; O'Scannlain, *Decade*—Notre Dame, *supra* note 23, at 2165.

25. *See, e.g.*, Dave Seminara, *Branded for Life with "The Mendoza Line"*, ST. LOUIS POST-DISPATCH (July 6, 2010), https://www.stltoday.com/sports/baseball/professional/branded-for-life-with-the-mendoza-line/article_cff05af5-032e-5a29-b5a8-ecc9216b0c02.html (noting that "[w]hile the Mendoza Line has come to symbolize the .200 mark in baseball parlance, the phrase has also crossed over into America's pop culture lexicon and is frequently used to describe almost any type of sub-par performance").

26. O'Scannlain, *Decade*—Lewis & Clark, *supra* note 23, at 1558 (pointing out that "the Ninth Circuit got it wrong in 81% of its cases that the Supreme Court agreed to hear").

27. Fischman, *supra* note 21, at 145.

higher than all other circuits (which is no longer true).[28] The individual batting averages of judges and the team batting averages of courts do not seem to be a matter of much public concern, nor are they readily available to the public.[29]

It has been observed that federal circuit judges have an "almost-groupie-like following and a set of statistical enthusiasts who take a back seat only to the zeal of sports statistical buffs."[30] Yet it is important to note that the issue of Supreme Court reversal rates for the circuits is "complex and nuanced."[31] Because the granting of review from the courts of appeals is almost always discretionary, and no reasons for the decision of four Justices to review a lower court decision are generally given, the decision to review a case is clouded in secrecy and not amenable to meaningful quantitative analysis. Thus, Senior Judge Edwards of the D.C. Circuit has warned that quantitative analysis of judicial decisionmaking "must be viewed with great caution."[32] One of Judge Edwards's caveats is that "[r]egression analysis does not do well in capturing the nuances of human personalities and relationships, so empirical studies on judicial decision making that rely solely on this tool are inherently flawed."[33] Yet others defend the use of "reversal rates as performance indicators for circuit judges."[34] Professor Sisk has eloquently described the balance between empirical analysis and the more traditional theoretical and doctrinal approach:

> Empirical study of the courts should remain a mainstay of legal scholarship: it reminds us of the reality of multifarious influences on judges, allows us to identify patterns that are not readily discernable in unsystematic reading of opinions, and offers us significant explanatory

28. *See* Table 1, *infra* page 65; *see also* Stephen J. Wermiel, *Supreme Court Reversals: Exploring the Seventh Circuit*, 32 S. ILL. U. L.J. 641, 645–46 (2008) (explaining that in the October terms 1986, 1987, 1989, 1996, 1998, and 2005 the Seventh Circuit had a worse batting average in the Supreme Court than the Ninth).

29. Although the citation studies have drawn "considerable attention in legal scholarship," not all of it is favorable. Anderson, *supra* note 10 at 317–18.

30. Wermiel, *supra* note 28, at 642 (footnote omitted).

31. *Id.* at 655.

32. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003).

33. *Id.*

34. Fischman, *supra* note 21 at 139 n.112 (citing Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1402–05 (2009), as an example).

> power in certain discrete categories of cases. However, theoretical and doctrinal work will never be supplanted. Judges have long insisted that the tools of the law—the text and structure of legal documents, procedural requirements, legal history, common-law reasoning, and precedent—remain essential elements to fully understanding and deciding a legal controversy. Because of difficulties in quantifying legal elements for empirical study, and the consequent limited explanatory power of quantitative models of judicial decision making, the qualitative forms of legal scholarship, both theoretical and doctrinal, have ample room within which to operate and contribute to a fuller understanding of legal decisions.[35]

In many ways, the judicial branch is the least transparent branch of government. The Justices of the Supreme Court have vehemently resisted broadcasting their oral arguments.[36] Neither the courts of appeals nor the district courts do anything official to post their batting averages.[37] One can easily find the voting record of a state or federal legislator, or the Presidents' veto records, with a simple Google search or a visit to any one of numerous websites.[38] Yet try to find the judicial record of state or federal trial judges or appellate judges not on the Supreme Court! One of the purposes of this article is to promote judicial

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35. Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877–78 (2008) (footnote omitted).

36. *See, e.g.*, Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?* 2012 BYU L. REV. 1989, 2004 (2012) (treating decision about broadcasting district court proceedings as indirect evidence of Supreme Court's disinclination to broadcast oral arguments); Jonathan Sherman, *End the Supreme Court's Ban on Cameras*, N.Y. TIMES (April 24, 2015), http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html (reviewing recent history).

37. E-Government Act of 2002, Pub. L. No. 107–347 Title II § 205(a), 116 Stat. 2899 (2002) (requiring all federal courts to establish and maintain websites, but not requiring batting-average information to appear on circuit websites).

38. *See, e.g.*, *Voting Records*, GOVTRACK (n.d.) https://www.govtrack.us/congress/votes (indicating that site's database "shows the outcome of all recorded votes on the Senate floor and House floor" and including a search filter enabling date-limited searches back to the first session of Congress in 1789); MICHIGAN VOTES (2018), http://www.michiganvotes.org (describing site as "providing concise, non-partisan, plain-English descriptions of every bill and vote in the Michigan House and Senate); *Summary of Bills Vetoed, 1789–Present*, UNITED STATES SENATE (n.d.), https://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm (including table showing all presidential vetoes since 1789 and links to "[a]dditional information about veto power and procedure").

transparency through greater use of empirical data. Just as baseball fans would never let their favorite team get away with failing to publish their team's statistics, the courts should consider and debate doing the same. There are plenty members of the academy and the legal profession who author hundreds, if not thousands, of law review and other articles, and commentary, including blog posts, that comment on and present insights concerning judges in the federal judiciary. Perhaps both the academy the judiciary could take the lead in posting empirical data about their reversal/affirmance rates.

II. THE BATTING AVERAGE OF THE EIGHTH CIRCUIT COMPARED TO THE BATTING AVERAGES OF OTHER CIRCUITS

A. Introduction to Supreme Court Reversal Rates

One not well versed in every nuance of all things Supreme Court might think that over the long run, perhaps many decades, the Supreme Court reversal rate of every federal court of appeals would approximate fifty percent. After all, Supreme Court decisions are for the most part binary, that is, a lower court decision is either affirmed or reversed. However, the fifty-percent notion has not been the case because the Supreme Court reverses more cases than it affirms.[39] For example, the reversal rate for the October Term 2001 was seventy-five percent; for the October Term 2002, seventy-four percent; for the October Term 2003, seventy-six percent; for the October Term 2004, seventy-one percent; for the October Term 2005, seventy percent; and for the October Term 2006, seventy-four percent.[40] In the decade on which I focus for this analysis of the Eighth Circuit's reversal rate at the Supreme Court (2005 through 2015), the reversal rate for all of the circuits averaged 72.9 percent.[41] Some suspect that, given the few cases that the Supreme Court now reviews, the Justices are more inclined to review cases in which they disagree than to place their "imprimatur on cases with

39. *See* Table 1, *infra* page 65.

40. Wermiel, *supra* note 28, at 643–44.

41. *See* Table 1, *infra* page 65.

which they agree."[42] However, this theory is dispelled by the chart below, which contains the total reviewed decisions and the affirmance percentage rates for each circuit from the 1946 through 2001 Terms.[43]

Supreme Court Affirmance Percentages, by Circuit October Terms 1946–2001		
Circuit	**Cases**	**Percent**
First	155	46.5
Second	592	47.8
Third	386	44.8
Fourth	315	42.5
Fifth	601	36.1
Sixth	383	36.6
Seventh	414	37.9
Eighth	290	38.6
Ninth	759	33.3
Tenth	236	41.5
Eleventh	127	41.7
D.C.	597	30.9

No circuit from 1946 to 2001 had an average affirmance rate of fifty percent, although the First, Second, and Third Circuits averaged at least forty-five percent.[44] During this period, the Eighth Circuit's average affirmance rate was a middling 38.6 percent—better than the affirmance rates of five circuits, but not as good as the affirmance rates of the other six.[45]

It makes intuitive sense that, when the Supreme Court grants a petition for certiorari on a circuit split, it is more likely to take the case that was wrongly decided. This would, of course, mean more reversals in Supreme Court cases addressing circuit splits. It is also important, for context, to note that only a

42. Wermiel, *supra* note 28, at 645.

43. *See* Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1347 n.89 (2005) (reproducing data published some time ago by Professor Epstein); *see also* LEE EPSTEIN, ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 697–99 (3d ed. 2003) (table 7-29).

44. EPSTEIN, *supra* note 43, at 697–99.

45. *Id.*

tiny percentage of cases decided by all the federal courts of appeals ever reach the Supreme Court. The reversal rates of any federal court of appeals would be very tiny, about one tenth of one percent, "if calculated as the total number of cases reversed over the total number of appeals terminated by that court."[46]

B. Comparing Batting Averages of the Federal Courts of Appeals on All Issues Reviewed by the Supreme Court 2005–2015

Looking at the decade from 2005 through 2015, Table 1 below shows the affirmance and reversal rates of the federal courts of appeals for all decisions—including federal-sentencing decisions—reviewed by the Supreme Court on the merits.[47] During the last decade, the federal courts of appeals as a whole had a batting average of .271.[48] The Eighth Circuit was affirmed at a significantly lower rate, batting only .176 over that period.[49] This is an even lower rate than that the usually shaky Ninth Circuit, which batted .188 over the same period,[50] and also lower than the Ninth Circuit's batting average over the time period of Judge O'Scannlain's study, which was .190.[51]

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46. Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE 8, 8 (Jan./Feb. 2010) (footnote omitted); *see also* Fischman, *supra* note 21, at 143 ("The proportion of cases that are appealed is especially relevant when the reviewing court is the U.S. Supreme Court, which hears only a tiny fraction of petitioned cases. For example, Judge Jerome Farris observed that the Supreme Court reversed the Ninth Circuit in 28 out of 29 cases it reviewed in 1997. Yet he defended the Ninth Circuit by arguing that the Court let stand more than 99% of all Ninth Circuit decisions from the previous year.").

47. *See Stat Pack Archive*, SCOTUSBLOG (June 26, 2006—June 30, 2015), http://www.scotusblog.com/reference/stat-pack/ [hereinafter SCOTUSBLOG Statistics] (offering links to SCOTUSblog-compiled end-of-Term statistics that include totals of cases affirmed, reversed, or affirmed in part by each of the thirteen circuits for each year). The numbers in Table 1 were derived by comparing decade totals from the SCOTUSblog *Stat Pack Archive* with the total number of cases reviewed by the Supreme Court from each of the thirteen circuits to compute average affirmance, reversal, and affirmance-in-part rates.

48. *Id.* Readers should note that the omnibus affirmance rate of 27.1 percent shown in the "Total" line of Table 1 correlates to a batting average of .271. A similar affirmance-rate-to-batting-average conversion can be made for any circuit using the relevant number from Table 1.

49. *Id*.

50. *Id.*

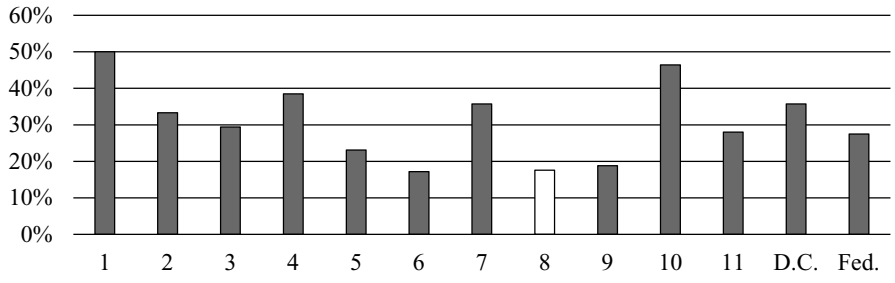
51. O'Scannlain*, Decade*—Notre Dame, *supra* note 23, at 2166 (referring to Ninth Circuit's affirmance rate as a .190 batting average).

The batting average of the Eighth Circuit was lower than that of every other circuit with the exception of the Sixth, which batted .172.[52] With the exceptions of the Sixth, Eighth, and Ninth Circuits, every circuit had a team batting average above .200.[53] The First, Second, Third, Fourth, Seventh, Tenth, and D.C. Circuits all hit better than .300.[54] The First Circuit had the best team batting average over the decade, hitting an impressive .500 and hitting thirty-six points better than the runner-up Tenth Circuit, batting .464.[55] Table 1 shows affirmance and reversal rates, and Chart 1 illustrates the affirmance rates, of each of the circuits on cases reviewed by the Supreme Court over the designated time period.

Table 1
Affirmance Rate by Circuit Since 2005

Circuit	Cases	% of Total	Aff	Aff %	Rev	Rev %	Aff in Part	Aff in Part %
First	20	3.1	10	50	10	50	1	5
Second	7	8.7	19	33.3	38	66.7	0	0
Third	35	5,2	10	29.4	24	70.6	0	0
Fourth	39	6.0	15	38.5	24	61,5	0	0
Fifth	52	8.0	12	23.1	40	76.9	1	1.9
Sixth	58	8.9	10	17.2	48	82.8	0	0
Seventh	42	6.4	15	35.7	27	64.3	0	0
Eighth	34	5.2	6	17.6	28	82.4	1	2.9
Ninth	170	26.1	32	18.8	138	81.2	4	2.4
Tenth	28	4.3	13	46.4	15	53.6	0	0
Eleventh	50	7.7	14	28	36	72	0	0
D.C.	28	4.3	10	35.7	18	64.3	2	7.1
Federal	40	6.1	11	27.5	29	72.5	0	0
TOTAL	652	100	177	27.1	475	72.9	9	1.4

Chart 1
Affirmance Rate by Circuit Since 2005



52. SCOTUSBLOG Statistics, *supra* note 47.
53. *Id.*
54. *Id*.
55. *Id*.

C. Comparing Batting Averages on Non-Sentencing Cases Reviewed by the Supreme Court

When federal-sentencing decisions are removed from the statistics, the circuits, as a whole, fare slightly worse.[56] Table 2 shows the affirmance and reversal rates of all the circuits on non-sentencing issue cases since 2005.[57] Chart 2 displays the affirmance rate of each of the circuits over the same period with the sentencing-issue cases removed.[58] In such non-sentencing cases, the circuits, as a whole, had a slightly lower batting average of .265 from 2005 to 2015. However, when federal-sentencing decisions are removed from the statistics, the Eighth Circuit was affirmed at a higher rate than it was with the sentencing decisions included. In non-sentencing cases, the Eighth Circuit had a batting average of .222 over the designated time period, compared to hitting only .176 when sentencing cases are included. Removing federal-sentencing decisions, however, moves the Eighth Circuit up only one spot from having the second-worst to the third-worst team batting average among the circuits.

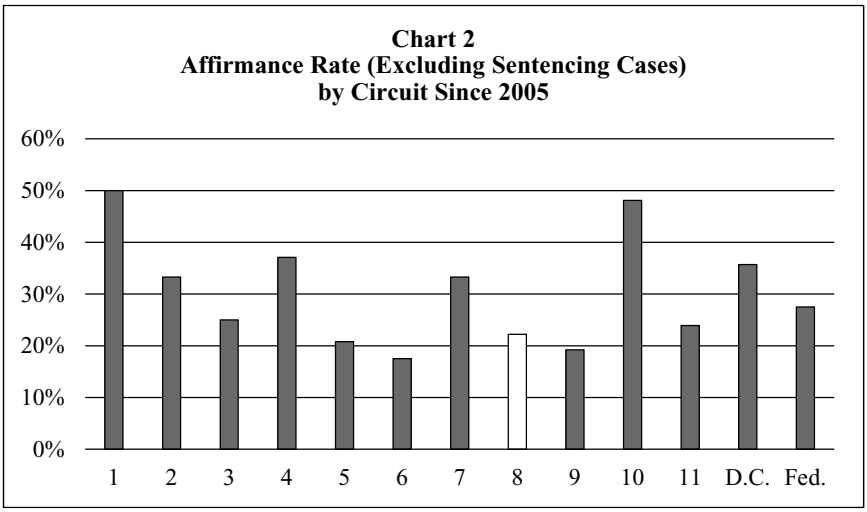
Table 2
Affirmance Rate (Excluding Sentencing Cases)
by Circuit since 2005

Circuit	Cases	Aff	Aff %	Rev	Rev %	Aff in Part	Aff in Part %
First	16	8	50	8	50	1	6.3
Second	57	19	33.3	38	66.7	0	0
Third	32	8	25	24	75	0	0
Fourth	35	13	37.1	22	62.9	0	0
Fifth	48	10	20.8	40	79.2	1	2.1
Sixth	57	10	17.5	38	82.5	0	0
Seventh	36	12	33.3	47	66.7	0	0
Eighth	27	6	22.2	24	77.8	1	3.7
Ninth	167	32	19.2	135	80.8	4	2.4
Tenth	27	13	48.1	14	51.9	0	0
Eleventh	46	11	23.9	35	76.1	0	0
D.C.	28	10	35.7	18	64.3	2	7.1
Federal	40	11	27.5	29	72.5	0	0
TOTAL	616	163	26.5	453	73.5	9	1.5

56. *See* Table 2. To compute the affirmance and reversal rates for non-sentencing cases, I simply determined the number of cases on federal-sentencing issues that the Supreme Court reviewed from each of the circuits (which are not shown in Table 2) and subtracted those cases from the numbers for each of the circuits in Table 1 to determine new rates of affirmance, reversal, and affirmance in part.

57. *Id.*

58. Chart 2, *infra* page 67.



D. Comparing Batting Averages on all Cases Reviewed by the Supreme Court, Eighth Circuit Sentencing Decisions Excluded

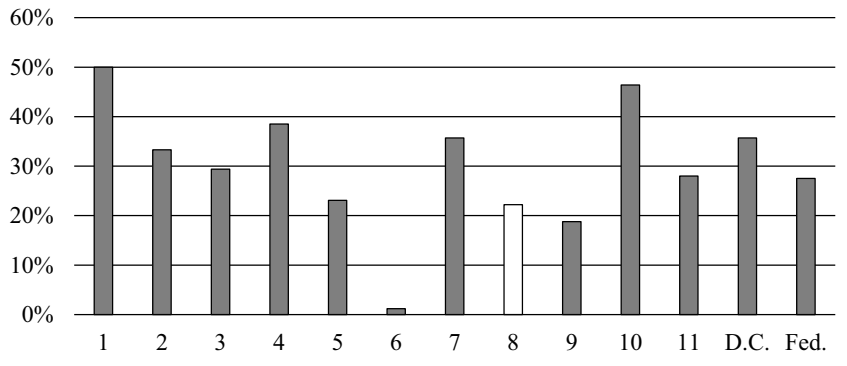
The Eighth Circuit has had an unimpressive record on federal-sentencing issues when reviewed by the Supreme Court. Table 3 shows the affirmance and reversal rates of all decisions reviewed by the Supreme Court since 2005, excluding only the seven cases from the Eighth Circuit on federal-sentencing issues.[59] Table 3 shows the absolute numbers of affirmances, and Chart 3 displays the affirmance rates, for each of the circuits since 2005, excluding only the same seven cases.[60] These numbers were calculated in an attempt to show how the Eighth Circuit would have stacked up against other circuits had it not gone zero for seven on federal-sentencing issues from 2005 through 2015. However, the Eighth Circuit, batting .222, would still be the third-worst hitting team even if those seven reversals were not included. In other words, the Eighth Circuit is among the worst-hitting teams in the league—even without considering the zero-for-seven federal-sentencing-case slump.

59. Details about these seven cases can be found in Table 4, *infra* page 71.
60. *Id.*

Table 3
Affirmance Rate by Circuit (Excluding Eighth Circuit Sentencing Cases) Since 2005

Circuit	Cases	% Total	Aff	% Aff	Rev	% Rev	Aff in Part	%Aff Part
First	20	3.1	10	50.0	10	50.0	1	5
Second	57	8.8	19	33.3	38	66.7	0	0
Third	34	5.3	10	29.4	24	70.6	0	0
Fourth	39	6.0	15	38.5	24	61.5	0	0
Fifth	52	8.1	12	23.1	40	76.9	1	1.9
Sixth	58	9.0	10	1.2	48	82.8	0	0
Seventh	42	6.5	15	35.7	27	64.3	0	0
Eighth	27	4.2	6	22.2	28	77.8	1	3.7
Ninth	170	26.4	32	18.8	138	81.2	4	2.4
Tenth	28	4.3	13	46.4	15	53.6	0	0
Eleventh	50	7.8	14	28.0	36	72.0	0	0
D.C.	28	4.3	10	35.7	18	64.3	2	7.1
Federal	40	6.2	11	27.5	29	72.5	0	0
TOTAL	645	100	177	27.4	475	73.6	9	1.4

Chart 3
Affirmance Rate by Circuit
(Excluding Eighth Circuit Sentencing Cases) Since 2005



II. THERE ARE REVERSALS AND THEN THERE ARE REVERSALS

A. The Eighth Circuit Goes Hitless for a Decade on Federal-Sentencing Cases Reviewed by the Supreme Court

1. The Supreme Court's Voting Record

During the decade of this study, every federal-sentencing decision from the Eighth Circuit reviewed on the merits by the Supreme Court was reversed—without even one being a close decision. Team Eighth Circuit appeared to be overmatched at the plate. Starting with the most recent decision and working backwards in time, here are the results:

- *Johnson* was reversed in an eight-to-one vote.[61]
- In *Burrage,* Team Eighth Circuit struck out looking, reversed by a unanimous vote.[62]
- *Pepper* was reversed by a six-to-two margin.[63]
- *Spears* was reversed in a summary disposition, which is akin to striking out on three straight pitches.[64]

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61. Johnson v. United States, ___ U.S. ___, 135 S Ct. 2551 (2015).

62. Burrage v. United States, 571 U.S. 204 (2014). As Yale Law School's "eminent constitutional scholar Akhil Amar has put it, 'When you're not picking up votes of anyone on the Court, something is screwy.'" O'Scannlain, *Decade*—Notre Dame, *supra* note 23, at 2166 (footnote omitted) (citing Akhil Reed Amar & Vikram David Amar, *Does the Supreme Court Hate the Ninth Circuit? A Dialogue on Why That Appeals Court Fares So Poorly*, FINDLAW (Apr. 19, 2002), http://writ.news.findlaw.com/amar /20020419.html.). Judge O'Scannlain was at that point criticizing his own circuit's record in the Supreme Court as "strikingly poor." *Id.* at 2165.

63. Pepper v. United States, 562 U.S. 476, ___, 121 S. Ct. 1229 (2011). Justice Kagan took no part in the decision. 121 S. Ct. at 1235.

64. Spears v. U.S., 555 U.S. 261 (2009). The case was likely not nearly as close as the five-to-four margin indicates on the surface. The Chief Justice dissented in an opinion joined by Justice Alito, describing the "summary reversal" as "bitter medicine," Spears v. United States, 555 U.S. 261, 268 (2009) (Roberts, C.J., & Alito, J., dissenting), and noting that as explained by "the majority here and the dissenting judges below, there are cogent arguments that the Eighth Circuit's decision was contrary to our decision last Term in *Kimbrough v. United States*," *id.* Justice Kennedy voted to "grant the petition for a writ of certiorari and set the case for oral argument." *Id.*

- *Greenlaw* and *Gall* were both reversed in seven-to-two votes.[65]

- *Lopez* was reversed in an eight-to-one vote.[66]

This is not like the Ninth Circuit where, despite unanimous reversals, there is "no shortage of examples in which the reversal of the Ninth Circuit was made by a deeply divided Supreme Court."[67]

In sum, the Eighth Circuit was outvoted fifty to twelve in the seven federal-sentencing decisions—all reversed by the Supreme Court.[68] Table 4 shows the voting record of the Justices on all seven of the federal-sentencing decisions from the Eighth Circuit since 2005.

Justices Alito and Thomas were the only Justices to consistently vote with the Eighth Circuit. Interestingly, Justice Thomas had been the Eighth Circuit Justice until Justice Alito joined the Court. No stranger to baseball statistics,[69] Justice Alito voted with the Eighth Circuit on five out of seven decisions. Justice Thomas voted with the Eighth Circuit on four out of seven. Chief Justice Roberts and Justices Stevens and Kennedy each voted with the Eighth Circuit only once. None of the other Justices voted with the Eighth Circuit during the designated period—not once.[70] The fact that Chief Justice Roberts and Justices Kennedy and Scalia so seldom voted to affirm the federal-sentencing decisions of the Eighth Circuit (just three votes out of twenty-one) reflects the observation of Judge O'Scannlain, but in reverse, that "the general frequency

65. Greenlaw v. United States, 554 U.S. 237 (2008); Gall v. United States, 552 U.S. 38 (2007).

66. Lopez v. Gonzales, 549 U.S. 47 (2006).

67. Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 360 (2006).

68. This vote count gives the Eighth Circuit the benefit of the votes by Chief Justice Roberts and Justice Alito in *Spears*, assuming that, had the case been briefed and argued on the merits, they would have voted to affirm despite their admission that the majority in the per curiam had cogent arguments. *Id.*

69. Adam Liptak, *This Bench Belongs in a Dugout*, N.Y. TIMES (May 31, 2010) http://www.nytimes.com/2010/06/01/us/01bar.html ("Consider Justice Samuel A. Alito Jr., a Phillies fan, who last year contributed an essay to The Baseball Research Journal.").

70. Over the time period, Justice Sotomayor succeeded Justice Souter in 2009 and Justice Kagan succeeded Justice Stevens in 2010.

with which even "liberal" [substitute "conservative"] Justices vote to reverse, it is safe to say that reversing the Ninth [substitute Eighth] Circuit is much more than just a matter of ideology."[71]

Table 4
Supreme Court Voting on Eighth Circuit Sentencing Cases Since 2005

Case	Voted With Circuit	Voted Against Circuit	Recused
Johnson	Alito	Roberts Scalia Kennedy Thomas Ginsburg Breyer Sotomayor Kagan	
Burrage		Roberts Scalia Kennedy Thomas Ginsburg Breyer Alito Sotomayor Kagan	
Pepper	Thomas Alito	Roberts Scalia Kennedy Ginsburg Breyer Sotomayor	Kagan
Spears	Roberts Kennedy Thomas Alito	Stevens Scalia Souter Ginsburg Breyer	
Greenlaw	Stevens Alito	Roberts Scalia Kennedy Souter Thomas Ginsburg Breyer	
Gall	Thomas Alito	Roberts Stevens Scalia Kennedy Souter Ginsburg Breyer	
Lopez	Thomas	Roberts Stevens Scalia Kennedy, Souter Ginsburg Breyer Alito	

2. Eighth Circuit Judges' Individual Batting Averages

Table 5 illustrates the voting record, much like individual batting averages, of the judges sitting on the Eighth Circuit for the seven federal-sentencing decisions reviewed by the Supreme Court between 2005 and 2015.[72] Judges Bye, Colloton, Lay, Melloy, Smith, and Wollman were the only judges to get a hit in any at-bat. Judges Bye and Lay, who would likely find themselves in the middle of Team Eighth Circuit's batting order,

71. O'Scannlain, *Decade*—Lewis & Clark, *supra* note 23 at 1559.

72. Because all seven of the federal-sentencing-issue cases reviewed by the Supreme Court were reversed, a judge must have dissented in order to be classified in Table 5 as making a "correct" decision. The statistics include en banc decisions, in which all of the non-dissenting judges were scored as getting the decision incorrect. *Spears* was heard twice at the Eighth Circuit, so the judges in each of those decisions are scored accordingly. *Pepper* was heard three times at the Eighth Circuit, so the judges in each of those decisions are scored accordingly.

were the only judges to vote correctly in over half of the cases in which they participated. Judge Lay went one for one in his single at-bat. Judge Bye batted an impressive .670, going two for three.

Table 5
Eighth Circuit Judges' Voting Records in Sentencing Cases Since 2005

Judge	Cases	Correct (includes en banc)	Percentage
Arnold**	2	0	0
Beam	2	0	0
Benton*	3	0	0
Bowman	2	0	0
Bye*	3	2	67
Colloton*	3	1	33
Gruender*	3	0	0
Hansen	1	0	0
Heaney	1	0	0
Lay	1	1	100
Loken*	3	0	0
Melloy*	3	1	33
Murphy*	4	0	0
Riley*†	6	0	0
Shepard*	2	0	0
Smith*	5	1	20
Wollman*	3	1	33
TOTAL	47	7	15

** Participated in *Pepper I* and *Pepper II*

* Participated in *Spears I* (en banc) and *Spears II* (en banc)

† Participated in *Pepper I*, *Pepper II*, and *Pepper III*

B. Other Circuits' Batting Averages in Federal-Sentencing Cases Reviewed by the Supreme Court

Over the same period, several of the other circuits fared much better on federal-sentencing decisions reviewed by the Supreme Court than did the Eighth Circuit. The First, Fourth, Fifth, and Seventh Circuits all had team batting averages above

.500 on federal-sentencing issues. The Eleventh and Third Circuits had batting averages of .750 and 1.00, respectively. Overall, the circuits were affirmed on fourteen out of thirty-six federal-sentencing decisions reviewed by the Supreme Court. This computes to a batting average of .389, a relatively impressive hitting record when compared to the zero hits that Team Eighth Circuit got over the same period. Table 6 shows the affirmance rate of all the circuits on federal-sentencing decisions since 2005.

Table 6
Supreme Court Sentencing Cases by Circuit Since 2005

Circuit	Cases	Correct	Percentage
First	4	2	50
Second	0	0	0
Third	2	2	100
Fourth	4	2	50
Fifth	4	2	50
Sixth	1	0	0
Seventh	6	3	50
Eighth	7	0	0
Ninth	3	0	0
Tenth	1	0	0
Eleventh	4	3	75
D.C.	0	0	0
Federal	0	0	0
TOTAL	36	14	38.9

C. The Eighth Circuit's Projected Batting Average on Sentencing Cases from Other Circuits Reviewed by the Supreme Court

1. Cases Analyzed

Between 2005 and 2015, the Supreme Court has reviewed thirty-five decisions on federal-sentencing issues. Twenty-eight of those decisions came from circuits other than the Eighth. The

Eighth Circuit decided twenty cases involving issues identical or similar to the issues decided later in one of the twenty-eight cases from other circuits.[73] Table 7A shows the Supreme Court cases originating in other circuits and the comparison cases from the Eighth Circuit. Its companion, Table 7B, shows whether the Eighth Circuit would have had its decision upheld had the Supreme Court reviewed it on each issue, and also shows which Eighth Circuit judges sat for each case, whether there were any dissents, and whether the Supreme Court's ultimate holding was pro-government, pro-defendant, or neutral.[74] Table 8 lists the eight cases from other circuits decided by the Supreme Court on sentencing issues that the Eighth Circuit had not yet addressed when the Supreme Court issued its opinions.

Table 7A
Supreme Court Federal-Sentencing Cases Since 2005
and Comparable Eighth Circuit Cases

Supreme Court (Originating Circuit)	Eighth Circuit
U.S. v. Booker, 543 U.S. 220 (2005) (7th)	U.S. v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000)
Shepard v. U.S., 544 U.S. 13 (2005) (1st)	U.S. v. Blahowski, 324 F.3d 592 (8th Cir. 2003)
Salinas v. U.S., 547 U.S. 188 (2006) (5th)	U.S. v. Kenyon, 7 F.3d 783 (8th Cir. 1993)
Kimbrough v. U.S., 52 U.S. 85 (2007) (4th)	U.S. v. Spears, 469 F.3d 1166 (8th Cir. 2006)
Rita v. U.S., 551 U.S. 338 (2007) (4th)	U.S. v. Lincoln, 413 F.3d 716 (8th Cir. 2005)
James v. U.S., 550 U.S. 192 (2007) (11th)	U.S. v. Solomon, 998 F.2d 587 (8th Cir. 1994)
Begay v. U.S., 553 U.S. 137 (2008) (10th)	U.S. v. McCall, 439 F.3d 967 (8th Cir. 2006)
Irizarry v. U.S., 553 U.S. 708 (2008) (11th)	U.S. v. Shaw, 180 F.3d 920 (8th Cir. 1999)
Chambers v. U.S., 555 U.S. 122 (2009) (7th)	U.S. v. Adams, 442 F.3d 645 (8th Cir. 2006)
Dillon v. U.S., 560 U.S. 817 (2010) (3d)	U.S. v. Jones, 325 Fed. App'x 463 (8th Cir. 2009)
Abbott v. U.S., 562 U.S. 8 (2010) (3d, 5th)	U.S. v. Acosta, 333 Fed. App'x 159 (8th Cir. 2009)
Freeman v. U.S., 564 U.S. 522 (2011) (6th)	U.S. v. Scurlark, 530 F.3d 839 (8th Cir. 2009)

73. The decision of the Eighth Circuit in *United States v. Spears* was used as the comparison case for *Kimbrough v. United States*, despite the fact that *Spears* was reviewed by the Supreme Court, because *Kimbrough* was a later Supreme Court decision on the same issue. It should be noted that, because of this, the Eighth Circuit is scored with an incorrect decision for its holding in *Spears* as a comparison case as well as for the holding as its own case.

74. A pro-government decision is simply a holding in which the Court ruled in favor of a position asserted by the government. Contrarily, a pro-defendant decision is a holding in which the Court ruled in favor of a position asserted by the defendant. A neutral holding is one in which the particular facts of a case could lead to an outcome in favor of the government or the defendant.

Table 7A Supreme Court Federal-Sentencing Cases and Comparable Eighth Circuit Cases Since 2005 (continued)	
Supreme Court (Originating Circuit)	**Eighth Circuit**
DePierre v. U.S., 564 U.S. 70 (2011) (1st)	U.S. v. Vesey, 33 F.3d 1070 (8th Cir. 2003)
Tapia v. U.S., 564 U.S. 319 (2011) (9th)	U.S. v. Hawk Wing, 433 F.3d 622 (8th Cir. 2006)
Sykes v. U.S., 564 U.S. 1 (2011) (7th)	U.S. v. Tyler, 580 F.3d 722 (8th Cir. 2009)
Dorsey v. U.S., 567 U.S. 260 (2012) (7th)	U.S. v. Sidney, 648 F.3d 904 (2011)
Setser v. U.S., 566 U.S. 231 (2012) (5th)	U.S. v. Lowe, 312 Fed. App'x 836 (8th Cir. 2009)
Peugh v. U.S., 569 U.S. 530 (2012) (7th)	U.S. v. Braggs, 196 Fed. App'x 442 (8th Cir. 2006)
Alleyne v. U.S., 570 U.S. 99 (2012) (4th)	U.S. v. Keller, 423 F.3d 706 (8th Cir. 2005)
Descamps v. U.S., 570 U.S. 254 (2013) (9th)	U.S. v. Webster, 636 F.3d 916 (8th Cir. 2011)

Table 7B Characteristics of Supreme-Court Comparable Eighth Circuit Federal-Sentencing Cases				
Case	**Correct**	**Judges**	**Dissent**	**Result**
Aguayo-Delgado	No	Bowman Gibson Loken		Pro Defense
Blahowski	Yes	Wollman Bright Gibson	Bright	Neutral
Kenyon	Yes	McMillian Fagg Hansen		Pro Defense
Spears	No	Loken Lay Wollman Murphy Bye Riley Melloy Smith Colloton Gruender Benton Shepard	Bye Lay	Pro Defense
Lincoln	Yes	Arnold* Murphy Benton		Pro Govt
Solomon	Yes	Bowman Wollman Hansen		Pro Govt
McCall	No	Loken Lay Wollman Arnold* Murphy Bye Riley Melloy Smith Colloton Benton	Lay Bye Wollman	Pro Defense
Shaw	Yes	Gruender McMillian Murphy		Pro Govt
Adams	No	Arnold* Beam Riley		Pro Defense
Jones	Yes	Murphy Smith Kays		Pro Govt
Acosta	Yes	Murphy Arnold* Gruender		Pro Govt
Scurlark	No	Loken Melloy Benton		Pro Defense
Vesey	No	Wollman Arnold** Smith		Pro Govt
Hawk Wing	No	Loken Bye Smith		Pro Defense
Tyler	No	Smith Shepard Limbaugh	Limbaugh	Pro Govt
Sidney	No	Riley Gruender Limbaugh		Pro Defense
Lowe	Yes	Murphy Smith Kays		Pro Govt
Braggs	Yes	Melloy Beam Benton		Pro Defense
Keller	No	Wollman Bright Bye	Bright	Pro Defense
Webster	Yes	Riley Melloy Gruender		Neutral
*Morris S. Arnold **Richard S. Arnold				

Table 8 Supreme Court Federal-Sentencing Cases Since 2005 Without Comparable Eighth Circuit Federal-Sentencing Cases	
Case	**Originating Circuit**
Logan v. U.S., 552 U.S. 23 (2007)	Seventh
Watson v. U.S., 552 U.S. 74 (2007)	Fifth
U.S. v. Rodriquez, 553 U.S. 377 (2008)	Ninth
Dean v. U.S., 556 U.S. 568 (2009)	Eleventh
U.S. v. O'Brien, 560 U.S. 218 (2010)	First
Johnson v. U.S., 559 U.S. 133 (2010)	Eleventh
McNeill v. U.S., 563 U.S. 816 (2011)	Fourth
Southern Union Co. v. U.S., 567 U.S. 343 (2012)	Fifth

2. The Eighth Circuit's Team Batting Averages

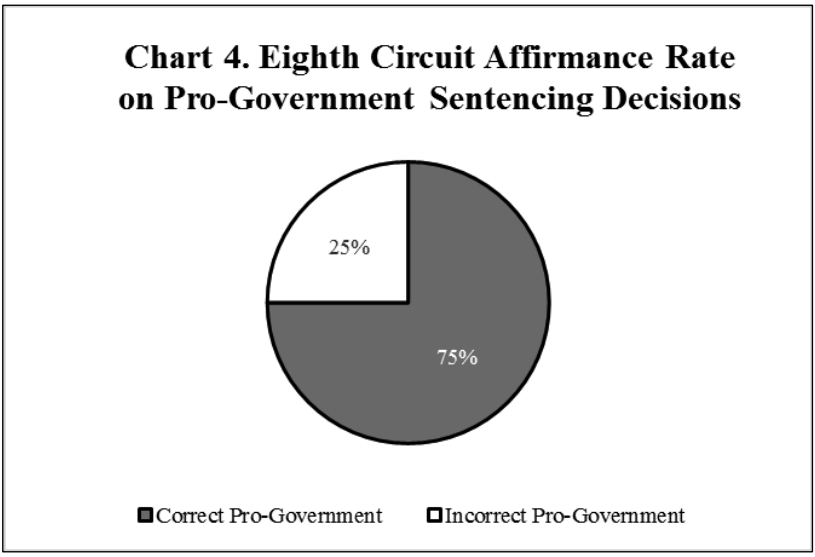
Table 9 shows the projected affirmation rates of the Eighth Circuit in the cases on federal-sentencing issues from circuits other than the Eighth Circuit that are shown above in Table 8. The cases are broken down into three categories: pro-government, pro-defendant, and neutral.[75] Using these twenty cases as predictors of how the Supreme Court would have ruled on the Eighth Circuit's stance on an issue, Team Eighth Circuit would have batted .500 in those cases. The Eighth Circuit batted .750 in pro-government decisions (think of a left-handed batter against a righty pitcher), .200 in pro-defendant decisions, and went two for two in neutral decisions. These statistics are set out in Table 9 and graphed in Charts 4 and 5.

If one were to add the decisions from these twenty projected results with the seven Eighth Circuit decisions on federal-sentencing issues actually reviewed by the Supreme Court shown in Table 4, the Eighth Circuit would have gotten hits in ten out of twenty-seven decisions. This correlates to a team batting average of .370 on sentencing issues. Similarly, if one were to combine the twenty projected federal-sentencing decisions with the thirty-four decisions on sentencing issues decided by the Eighth Circuit that were reviewed by the Supreme Court (six of which Team Eighth Circuit got correct, as shown in Table 1), the Eighth Circuit would have gotten hits in

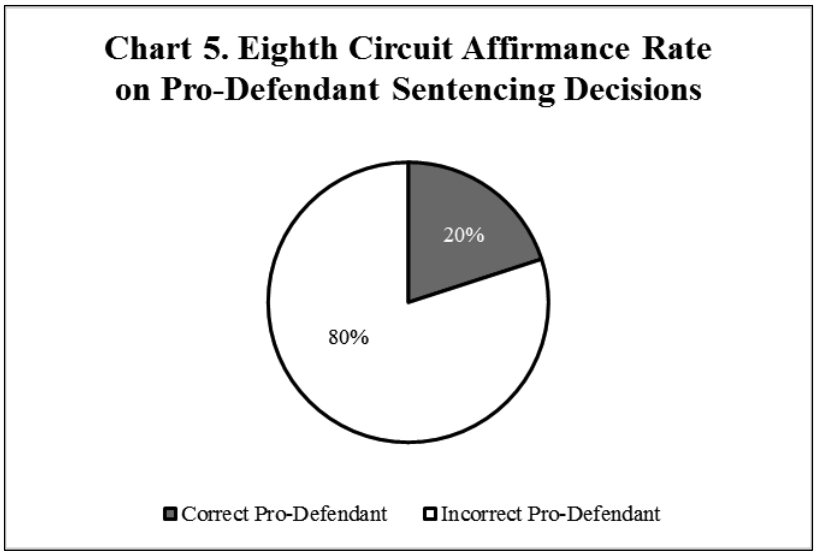
75. *See supra* note 74.

sixteen out of fifty-four decisions. This correlates to a batting average of .296. This projected team batting average would be seventh best among the circuits.[76]

Table 9 Projected Eighth Circuit Results in Cases that Follow Supreme Court Sentencing Decisions Originating in Other Circuits		
ALL CASES		
Number of Cases	**Eighth Circuit Likely Correct**	**Likely Percentage Correct**
20	10	50%
PRO-GOVERNMENT RESULT		
Number of Cases	**Eighth Circuit Likely Correct**	**Likely Percentage Correct**
8	6	75%
PRO-DEFENDANT RESULT		
Number of Cases	**Eighth Circuit Likely Correct**	**Likely Percentage Correct**
10	2	20%
NEUTRAL RESULT		
Number of Cases	**Eighth Circuit Likely Correct**	**Likely Percentage Correct**
2	2	100%



76. Team Eighth Circuit would fall between Team Second Circuit at 33.3 percent and Team Third Circuit at 29.4 percent.



3. Eighth Circuit Judges' Individual Batting Averages

Tables 10A and 10B are breakdowns of the voting records of the Eighth Circuit's judges on the federal-sentencing issues reviewed by the Supreme Court in cases that originated in other circuits.[77] Like the statistics shown in Table 7B, these individual batting averages show the voting record for every judge. Table 10A shows each judge's overall voting record. Table 10B shows those votes broken down into three categories, providing information about each judge's batting average in cases that resulted in pro-government rulings, those that resulted in pro-defendant rulings, and those in which the results can be classified as neutral decisions favoring neither the government nor the defendant.[78]

77. Votes by District Judges Kays and Limbaugh, who sometimes sat by designation during the period of the study, have been omitted from Tables 10A and 10B.

78. *See supra* note 74.

Table 10A Eighth Circuit Judges' Overall Voting Records: Sentencing Issues Decided in Supreme Court Cases Originating in Other Circuits			
Judge	**Cases**	**Number of Correct Votes**	**Percent Correct**
M. Arnold	4	2	50
R. Arnold	1	0	0
Beam	2	1	50
Benton	5	2	40
Bowman	2	1	50
Bright	2	1	50
Bye	4	2	50
Colloton	2	0	0
Fagg	1	1	100
Gibson	2	1	50
Gruender	5	3	60
Hansen	1	1	100
Lay	2	2	100
Loken	5	0	0
McMillian	2	2	100
Melloy	5	2	40
Murphy	7	4	57.1
Riley	5	1	20
Shepard	2	0	0
Smith	7	2	28.6
Wollman	6	2	33.3
TOTAL	72	30	41.7

Table 10B
Eighth Circuit Judges' Voting Records by Result:
Sentencing Issues Decided in Supreme Court Cases
Originating in Other Circuits

Judge	ProGov	Correct	%	ProDef	Correct	%	Neutral	Correct	%
M. Arnold	2	2	100	2	0	0	0	0	0
R Arnold	1	0	0	0	0	0	0	0	0
Beam	0	0	0	2	1	50	0	0	0
Benton	1	1	100	4	1	25	0	0	0
Bowman	1	1	100	1	0	0	0	0	0
Bright	0	0	0	1	1	100	1	0	0
Bye	0	0	0	4	2	50	0	0	0
Colloton	0	0	0	2	0	0	0	0	0
Fagg	0	0	0	1	1	100	0	0	0
Gibson	0	0	0	1	0	0	1	1	100
Gruender	2	2	100	2	0	0	1	1	100
Hansen	0	0	0	1	1	100	0	0	0
Lay	0	0	0	2	2	100	0	0	0
Loken	0	0	0	5	0	0	0	0	0
McMillian	1	1	100	1	1	100	0	0	0
Melloy	0	0	0	4	1	25	1	1	100
Murphy	5	5	100	2	0	0	0	0	0
Riley	0	0	0	4	0	0	1	1	100
Shepard	1	0	0	1	0	0	0	0	0
Smith	4	2	50	3	0	0	0	0	0
Wollman	2	1	50	3	0	0	1	1	100
TOTAL	20	15	75	46	11	23.9	6	5	83.3

VI. CONCLUSION

> "[R]eversal statistics are easy to calculate but can be difficult to interpret.[79]

Between 2005 and 2015, the Eighth Circuit was slumping in its plate appearances with the Supreme Court. On all decisions reviewed by the Supreme Court during those years, Team Eighth Circuit's batting average ranks second worst, only slightly ahead of the Sixth Circuit. Even when omitting the zero-to-seven stretch on federal-sentencing issues, the Eighth Circuit still ranks third worst among all the circuits.

79. Fischman, *supra* note 21, at 139.

The performance of the Eighth Circuit's federal-sentencing jurisprudence in the Supreme Court in recent years has been poor, but perplexing. Whether political affiliation or judicial philosophy explains it is unknown. What is known is that the Eighth Circuit consistently makes sentencing-issue rulings in favor of the government that the Supreme Court ultimately rejects.

Wouldn't it be interesting if each federal court of appeals had a team manager selected by its chief judge—perhaps the circuit executive—to annually post batting averages on each of the courts' websites? Such transparency, by the least transparent branch of government, would be refreshing.

VII. POSTSCRIPT

Since the decade of 2005 to 2015, the Supreme Court decided two additional sentencing cases from the Eighth Circuit. The slump continues. In *Mathis v. United States*[80] the court reversed the Eighth Circuit in a five-to-three decision and held that the terms of an Iowa burglary statute were broader than those of a generic burglary statute and that Mathis's conviction could not support an Armed Career Criminal Act fifteen-year mandatory minimum.

In *Dean v. United States*,[81] a unanimous Supreme Court reversed the Eighth Circuit. I was the sentencing judge.[82] Here's what happened:

Under 18 U.S.C. § 924(c), Dean was convicted of two counts of possessing a firearm in furtherance of a crime of violence that required a thirty-year mandatory minimum on those counts. He was also convicted of four other counts with a Guidelines range of eighty-four to 105 months. Dean asked me to simply add one additional day consecutive to the thirty-year mandatory sentence. I declined, because I was foreclosed by existing Eighth Circuit precedent but stated on the record that I

80. ___ U.S. ___, 136 S. Ct. 2243 (2016).
81. ___ U.S. ___, 137 S. Ct. 1170 (2017).
82. *Id.* at 1170.

would if I could.[83] On remand, I reduced the sentences on the four counts from a Guideline range to one day.[84]

At bottom, every one of the nine Eighth Circuit sentencing decisions reviewed by the Supreme Court over the past thirteen years has been reversed. Assuming for the sake of argument a binary result at the Supreme Court of either affirmed or reversed, and further assuming a fifty percent chance of each, the odds of the Eighth Circuit being wrong nine times in a row are one in 512.[85]

But wait, there is more. On June 4, 2018, on my sixty-eighth birthday, the Supreme Court finally affirmed the Eighth Circuit, and—ironically—me, in *Koons v. United States*.[86] The Court unanimously held that the petitioners did not qualify for additional reductions from their original sentences, where I had granted substantial assistance motions, because under 18 U. S. C. § 3582(c)(2) their sentences were not "based on" their lowered Guidelines ranges but, rather, on their mandatory minimums and their substantial assistance to the government.[87]

83. *Id.* at 1172–75 (discussing sentencing in district court).

84. United States v. Dean, No. CR13-4082-MWB (N.D. Iowa July 17, 2017) (amended judgment).

85. For those keeping score at home, the calculation is $\frac{1}{2^9}$=1 in 512.

86. ___ U.S. ___, 138 S. Ct. 1783 (2018).

87. *Id.* at 1790.

APPENDIX

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005[88]			
Case	**Circuit**	**Decision**	**Overview of Holding**
Lopez v. Gonzales, 549 U.S. 47 (2006)	8	Reversed	A misdemeanor under the Controlled Substance Act is not a "felony punishable under the Controlled Substance Act," when the conduct is made a felony under state law.
Gall v. United States, 552 U.S. 38 (2007)	8	Reversed	Abuse of discretion standard of review applies to all appellate review of sentencing decisions, regardless of whether the sentence is inside or outside the Federal Sentencing Guidelines range.
Greenlaw v. United States, 554 U.S. 237 (2008)	8	Reversed	Appellate courts cannot increase a defendant's sentence when the government did not appeal the sentence.
Spears v. United States, 555 U.S. 261 (2009)	8	Reversed	Under *Kimbrough* and *Booker*, a district court may depart from the Guidelines range based on a policy disagreement with the Guidelines, as well as due to reasoning that the Guidelines yield an inappropriate sentence in a given case.

88. All overviews except those for *Johnson* (2015), *Sykes* (2011), *Dean* (2009), *Lopez* (2006), and *Salinas* (2006), are based on more detailed case summaries prepared by the United States Sentencing Commission. *See generally* Office of General Counsel, U.S. Sentencing Commission, *Selected Supreme Court Cases on Sentencing Issues* (July 2015), *available at* https://www.ussc.gov/sites/default/files/pdf/training/case-law-documents/supreme-court-cases.pdf; Office of General Counsel, U.S. Sentencing Commission, *Supreme Court Cases on Sentencing Issues* (July 2010), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/Supreme_Court_Cases_201007.pdf.

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005 (continued)			
Case	**Circuit**	**Decision**	**Overview of Holding**
Pepper v. United States, 562 U.S. 476 (2011)	8	Reversed	When a sentence has been set aside on appeal, a district court may, at resentencing, consider a defendant's post-sentencing behavior and vary from the Guidelines range accordingly.
Burrage v. United States, 571 U.S. 204 (2014)	8	Reversed	A defendant who distributes drugs cannot receive an enhanced sentence when a victim dies or is seriously injured as a result of using the drugs unless the use of the drugs is a but-for cause of the death or injury, when the drug was not independently sufficient to cause the death or injury.
Johnson v. United States, 135 S. Ct. 2551 (2015)	8	Reversed	Courts may no longer impose an increased sentence under the residual clause of the Armed Career Criminal Act as it violates due process.
United States v. Booker, 543 U.S. 220 (2005)	7	Affirmed	Any fact, other than a prior conviction, that is used to enhance a sentence beyond the maximum established by a guilty plea or jury verdict must be admitted by defendant or proved to a jury beyond a reasonable doubt. The Federal Sentencing Guidelines are to be treated as advisory.
Shepard v. United States, 544 U.S. 13 (2005)	1	Reversed	A sentencing court cannot look outside of the judicial record (such as the charging document, plea agreement, or transcript) in making a determination whether a "generic burglary" qualifies as a violent felony under the Armed Career Criminal Act.

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005 (continued)			
Case	**Circuit**	**Decision**	**Overview of Holding**
Salinas v. United States, 547 U.S. 188 (2006)	5	Reversed	Simple possession offenses are not considered "controlled substance offenses" under the Armed Career Criminal Act.
Kimbrough v. United States, 552 U.S. 85 (2007)	4	Reversed	A sentencing court may consider the disparity between the treatment of crack and cocaine offenses in the Federal Sentencing Guidelines when making a sentencing determination.
Rita v. United States, 551 U.S. 338 (2007)	4	Affirmed	Courts of appeals may apply a presumption of reasonableness when reviewing a district court decision to impose a sentence within the Federal Sentencing Guidelines range.
James v. United States, 550 U.S. 192 (2007)	11	Affirmed	A conviction under Florida law for attempted burglary qualified as a "violent felony" under the Armed Career Criminal Act.
Logan v. United States, 552 U.S. 23 (2007)	7	Affirmed	A violent felony offense under state law, for which a defendant's civil rights were never revoked, does not qualify for the "civil rights restored" exemption under the Armed Career Criminal Act.
Watson v. United States, 552 U.S. 74 (2007)	5	Reversed	A defendant who trades drugs for a firearm does not use the firearm under 18 U.S.C. § 924(c)(1)(A).
Begay v. United States, 553 U.S. 137 (2008)	10	Reversed	A felony conviction for driving under the influence is not a "violent felony" under the Armed Career Criminal Act.
United States v. Rodriquez, 553 U.S. 377 (2008)	9	Reversed	Recidivist enhancements under state law should be used in calculating "maximum term of imprisonment" under the Armed Career Criminal Act.

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005 (continued)			
Case	**Circuit**	**Decision**	**Overview of Holding**
Irizarry v. United States, 553 U.S. 708 (2008)	11	Affirmed	District courts are not required to provide advanced notice to the parties when varying a defendant's sentence outside of the recommended Guidelines range.
Chambers v. United States, 555 U.S. 122 (2009)	7	Reversed	The defendant's prior conviction for failure to report for periodic incarceration does not qualify as a "violent felony" under the Armed Career Criminal Act.
Dean v. United States, 556 U.S. 568 (2009)	11	Affirmed	Discharging a weapon during a violent or drug-trafficking crime, triggering the ten-year mandatory minimum, requires no separate proof of intent to discharge the gun under 18 U.S.C. § 924(c)(1)(A)
Dillon v. United States, 560 U.S. 817 (2010)	3	Affirmed	*Booker* does not apply to sentence-reduction proceedings under 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10 is binding on courts engaging in sentence reductions.
United States v. O'Brien, 560 U.S. 218 (2010)	1	Affirmed	Under 18 U.S.C. § 924, the fact that a firearm is an automatic weapon is an element of the offense and must be proved to a jury.
Johnson v. United States, 559 U.S. 133 (2010)	11	Reversed	Battery, defined under Florida law as "[a]ctually and intentionally touch[ing]" another person, is not considered a "violent felony" under the Armed Career Criminal Act.
Abbott v. United States, 562 U.S. 8 (2010)[89]	3 & 5	Affirmed	Under 18 U.S.C. § 924, a defendant is subject to consecutive mandatory minimum sentences for both a predicate offense and a § 924 offense, even if the predicate offense carries a greater penalty.

89. *Abbott*, a consolidated case that settled a circuit split, originated in the Third and Fifth Circuits. This article counts *Abbott* twice, once for each circuit.

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005 (continued)			
Case	**Circuit**	**Decision**	**Overview of Holding**
Freeman v. United States, 564 U.S. 522 (2011)	6	Reversed	Defendant is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) even when he entered into a Rule 11(c)(1)(C) plea agreement before the Sentencing Commission amended the Guidelines lowering the base level for drug offenses involving crack.
DePierre v. United States, 564 U.S. 70 (2011)	1	Affirmed	Under 21 U.S.C. § 841(b)(1)(A)(iii), the term "cocaine base" should be read to include all forms of cocaine base (or cocaine in its chemically basic form), and should not be limited to "crack cocaine."
Tapia v. United States, 564 U.S. 319 (2011)	9	Reversed	A sentencing court may not impose or lengthen a sentence in an effort to aid a defendant's rehabilitation.
McNeill v. United States, 564 U.S. 319 (2011)	4	Affirmed	Under the Armed Career Criminal Act, a sentencing court should look to the length of the maximum sentence applicable to a state law offense at the time the offense was committed when determining if an offense is a "serious drug offense." This applies when maximum sentence has later been reduced.
Sykes v. United States, 564 U.S. 1 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015)	7	Affirmed	Using the "categorical approach" the Court found a state offense of felony vehicle flight qualifies as a "violent felony" under the "residual clause" of the Armed Career Criminal Act.

Supreme Court Cases Addressing Federal-Sentencing Issues Since 2005 (continued)			
Case	**Circuit**	**Decision**	**Overview of Holding**
Dorsey v. United States, 562 U.S. 260 (2012)	7	Reversed	The Fair Sentencing Act's reduction in the mandatory minimum for crack cocaine offenders applies to offenders sentenced after the reduction was enacted, even if their offense was committed before the enactment.
Setser v. United States, 566 U.S. 231 (2012)	5	Affirmed	District court can order federal sentence to be served consecutive to state sentence not yet imposed.
Southern Union Company v. United States, 567 U.S. 343 (2012)	1	Reversed	The holding in *Apprendi*—that any fact (other than a prior conviction) that increases a defendant's maximum sentence must be proved to a jury—also applies to fines.
Peugh v. United States, 569 U.S. 530 (2013)	7	Reversed	Despite the fact that the Guidelines are advisory, a court may not impose a sentence under a Guidelines range that results in a longer range than the Guidelines range in effect at the time the offense was committed.
Alleyene v. United States, 570 U.S. 99 (2013)	4	Reversed	Any facts that increase a mandatory minimum penalty are elements of an offense and must be proved to a jury beyond a reasonable doubt.
Descamps v. United States, 570 U.S. 254 (2013)	9	Reversed	Under the Armed Career Criminal Act, a sentencing court may not employ the "modified categorical approach" to state convictions under statutes that are not composed of alternative elements.