

# Kimbrough, White Collar Sentencing, and the New Primacy of the Sentencing Commission

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It might seem, in the wake of *Booker*<sup>1</sup> and its progeny, as though the U.S. Sentencing Commission's days of influence are past. Indeed, after three major follow-ups to *Booker*—*Rita*,<sup>2</sup> *Gall*,<sup>3</sup> and *Kimbrough*<sup>4</sup>—we now know with certainty that the Sentencing Guidelines are merely “advisory.” We also know that district court discretion in sentencing is seen as paramount. As one court recently put it, “One theme runs through all three [of these] cases: *Booker* empowered district courts, not appellate courts and not the

Sentencing Commission.”<sup>5</sup> Yet, *Kimbrough* and subsequent lower court decisions tell a somewhat different story. These cases demonstrate that there is real meaning behind the “key role” the Court claimed to have left the Sentencing Commission in these recent cases. They show that, rather than slowly dying, today's Sentencing Commission may be more influential than ever before.

As this article will explain, the commission appears to have entered a new era of power, where its judgment is valued over all

others’—including Congress's. What that means, on a practical level, is that the best way to achieve a below-guidelines sentence in a post-*Booker* world may be to argue that the applicable guideline is not the product of the commission's informed, expert judgment, but rather of Congress's meddling. This line of attack has already been used to obtain lower sentences for a broad range of offenses, from weapons possession to child pornography. And, as this article outlines, it is primed for use against white collar

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sentencing guidelines, which, at Congress's direction and notwithstanding the commission's concerns, have produced notoriously harsh sentences over the past decade.

### Background

The oft-told story of the sentencing revolution began with *Apprendi*,<sup>6</sup> which prohibited judges from increasing criminal penalties above statutory maximums on facts not found by a jury beyond a reasonable doubt. Five years later, *Booker* addressed the intersection of *Apprendi* and the then-mandatory Federal Sentencing Guidelines. And 124 pages after that, the previously mandatory guidelines had become "advisory." Citing the principles underlying *Apprendi*, the Court took away the guidelines' mandatory status, explaining that that status denied defendants their right to have dispositive sentencing factors decided by a jury.

The question after *Booker* was how much deference to pay the guidelines. Those who saw *Booker* as a victory for individualized sentencing, free from the influence of the guidelines, quickly found their hopes dashed. District courts continued to treat the guidelines as effectively mandatory. Appellate courts likewise required something akin to "extraordinary circumstances" to justify non-guidelines sentences, applying a presumption that guidelines sentences were reasonable.<sup>7</sup> The Supreme Court sanctioned that presumption in *Rita v. United States*,<sup>8</sup> indicating that deviation from the guidelines would be a gamble for district courts, and that conformity was a much safer bet.

Yet, while *Rita* permitted a reasonableness presumption for guidelines sentences, it also introduced the possibility of real change. For one, it did not mandate the presumption. Moreover, it stressed that no presumption of unreasonableness could attach to non-guidelines sentences. Rather, *Rita* made clear that all reasonableness review actually requires is that the appellate court ask "whether the trial court abused its discretion."<sup>9</sup>

That point was further clarified in *Gall v. United States*. *Gall* emphasized that appellate courts must give due deference to

district court decisions. It also made clear that, unlike appellate courts, district courts cannot apply a presumption of reasonableness to the guidelines. Rather, *Gall* held that for all sentencing determinations, a district court must apply the following procedure: First, it must calculate the applicable guidelines range. Second, it must consider whether the guidelines sentence comports with the sentencing factors and goals laid out in 18 U.S.C. § 3553(a)—a task requiring individualized assessments. Finally, it must adequately justify its chosen sentence, providing greater justification the more the sentence deviates from what the applicable guidelines recommend.

*Kimbrough v. United States* brought an additional and important nuance to this procedure. Handed down the same day as *Gall*, *Kimbrough* upheld a sentence that was based upon a judge's "policy disagreement" with the 100:1 ratio for crack and powder cocaine quantities.<sup>10</sup> *Kimbrough* confirmed the judge's prerogative to find this ratio to be in conflict with § 3553(a), and stated explicitly that district courts can vary from the guidelines based on policy disagreements.

Despite this expansive language, however, *Kimbrough* did not give district courts license to disregard the commission's policy judgments across the board. Examined more closely, *Kimbrough* indicates a far more limited result. While the Court reaffirmed that discretion rests with the sentencing judge, it was careful to stress, "We have nevertheless preserved a key role for the Sentencing Commission."<sup>11</sup> The commission, the Court reminded, has an "important institutional role": to "formulate and constantly refine national sentencing standards."<sup>12</sup> It "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."<sup>13</sup> And, the Court explained, because the commission created the guidelines, they tend to reflect the commission's institutional expertise and should therefore be afforded substantial weight during sentencing.

For the crack cocaine guidelines, however, this was not the case. Instead of fulfilling its institutional role by taking into account "empirical data and national experience," the commission promulgated

these guidelines shackled by the mandatory minimums set by Congress. In fact, long before the district court rejected the guidelines in *Kimbrough*, the commission itself had criticized that ratio in its own reports, and had even proposed a 1:1 ratio that was explicitly rejected by Congress. In other words, the crack Guideline was not really the commission's Guideline; it was a creature of Congress. And, for that reason, the ratio became vulnerable.

### The Meaning of *Kimbrough*

Consider what *Kimbrough*'s result might have been had the commission wholeheartedly approved the 100:1 ratio after careful empirically based consideration. Under *Kimbrough*, a trial judge could still theoretically have found § 3553(a)'s goals at odds with the ratio. But, given that *Kimbrough*'s result depended so heavily upon Congress's influence in formulating the crack Guideline, and the commission's disdain for the ratio, it is reasonable to speculate that an entirely different result might have followed if the Guideline were the commission's own brainchild (or at least had the commission's blessing).

What this means is that even after *Kimbrough*, the prospect remains daunting that a district court could oppose a Guideline that is the product of the commission's expertise, based simply on a policy disagreement. Judges may have the theoretical power to deviate from the guidelines, but that does not say much for their practical power to disagree with the commission's policy judgments. So what is the best course for judges who wish to vary from the guidelines? Rather than fight a potentially futile policy battle against the commission, they would be better advised to explain that the applicable Guideline actually reflects congressional directive and not the commission's informed judgment.

We see this happening in lower court cases following *Kimbrough*. In one district alone, we see guidelines for weapons crimes<sup>14</sup> and for possession of precursor chemicals (for making drugs)<sup>15</sup> not being followed because they were "promulgated pursuant to congressional directive." In one case, the court imposed a sentence that it felt "would more closely approximate

the sentencing range that would have been imposed on this defendant had the guideline been empirically determined and not driven by statutory minimum sentences."<sup>16</sup> Likewise with possession of child pornography, courts have noticed that the relevant guidelines "are statutorily driven, as opposed to empirically grounded."<sup>17</sup> Because of this, one court imposed a sentence that would "more closely approximate the sentencing range that was in effect" before the commission changed its rules based on congressional directive.<sup>18</sup>

This trend is observable in other courts as well. In the Southern District of New York, the court used the § 3553(a) factors to justify a below-guidelines sentence for possession of child pornography only after noting that the guidelines "for sex offenses [have] been driven by frequent mandatory minimum legislation and specific directives to the commission."<sup>19</sup> And at the appellate level, in *United States v. Rodriguez*, the Commission's mere hesitancy toward its guidelines for fast-track departure programs (meant to speed illegal immigrants accused of crimes through the judicial process) was enough to compel the First Circuit to uphold a variance.<sup>20</sup>

Of course, these examples do not mean that the commission's role is the single dispositive factor in all sentencing cases. Simply citing a commission study that may raise a concern about a Guideline will not necessarily inoculate a district court from substantive reasonableness review at the appellate level. A study on the impact of age upon recidivism, for instance, did not excuse a terrorist's lenient sentence in *United States v. Abu Ali*.<sup>21</sup> Nor is the same level of attention always paid to the commission's opinions. Even after *Kimbrough*, variances are sometimes granted with little exploration into the commission's intent.<sup>22</sup>

Still, it is difficult to point to any more significant factor in the assessment of a sentence's reasonableness than the judgment of the commission. Compare, for example, the First Circuit's use of the commission's concerns to allow a variance in *Rodriguez*, with *United States v. Cutler*,<sup>23</sup> where the Second Circuit stressed the commission's policy judgments regarding tax fraud to deny a variance based on other

intangibles such as old age and poor health. The results in these two cases were different, but the decisive factor was the same.

Taken together, what these cases seem to show is the following: (1) that after *Kimbrough*, trial judges do have discretion, but only to the degree that they can adequately justify the sentences they impose; and (2) that a major factor that both district and appellate courts have looked to for that justification is the Sentencing Commission's judgment. Courts are following the commission's expert view of its own guidelines. And, remarkably, the more clear it is that the commission's role in setting the guidelines was somehow usurped by Congress, the more likely it is that the district court will deviate from the guideline, and that the deviation will be upheld on appeal.

This is the new primacy of the Sentencing Commission, as introduced by *Kimbrough*. *Booker* may not have empowered the Sentencing Commission, but *Kimbrough* did.<sup>24</sup> It effectively insulated the commission from Congress, elevating the commission's influence while casting Congress's input as essentially poisonous—the definition of uninformed policy. Now, anytime the commission's judgment is not really its own, but instead can be traced to Congress, the underlying guideline is ripe for attack.

### The White Collar Context

What all this means for practical purposes is that one factor (perhaps above all others) should be focused on in sentencing advocacy: the commission's attitude toward the offense and punishment at issue. Prosecutors will want to show that the applicable Guideline is, in fact, the commission's own—the product of professional empirically based judgment. Defense counsel, on the other hand, will want to prove that the Guideline is the result of congressional meddling—through mandatory minimums and congressional directives—and not the commission's institutional expertise.

These arguments are primed for use in white collar sentencing. The white collar arena has seen some famously draconian sentencing in the past decade, largely because the guidelines for white collar

crimes are so heavily tied to loss calculations. In one remarkable pre-*Kimbrough* example, the guidelines called for such a harsh prison sentence (85 years for fleeting participation in a securities fraud conspiracy) that it actually drove the presiding judge to defy the guidelines.<sup>25</sup> In a true must-read opinion, Judge Rakoff attacked “the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic,” before departing downward dramatically.<sup>26</sup>

Because of massive loss-driven sentences, and the courts' growing frustration with the perceived unfairness that they often cause, many speculated that *Kimbrough* might open the door to greater guidelines variances in white collar cases, where defendants often possess compelling

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§ 3553(a)-type characteristics, including backgrounds filled with achievement, histories of charitable work, and large numbers of friends to vouch for their good nature. Early evidence indicates, however, that simply highlighting these characteristics is not working as a means to achieve lower sentences. What may be more effective is to emphasize Congress's influence on white collar guidelines.

One source for these views is a two-paragraph section of the Sentencing Commission's 2003 Report to Congress.<sup>27</sup> Prosecutors could no doubt seize upon the commission's opinion, cited in the report, that economic crimes are “serious” and that prison, not probation, is required to ensure the law's deterrent effect. But for defense

attorneys, the report offers the commission's view that these prison sentences should be short in duration because “the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes.”

Of even greater use to defense attorneys is what the commission said in its Fifteen Year Report.<sup>28</sup> There, the commission stated: “Over the years, additional aggravating adjustments were added to the theft and fraud guidelines, often in response to congressional directives.”<sup>29</sup> It quoted a former commissioner as warning “that the [Sentencing Reform Act's] promise of policy development through expert research was being supplanted by signal sending by Congress.”<sup>30</sup> And it noted that in the wake of the corporate scandals of 2002, the guidelines were again amended “at the direction of Congress,” most famously with Sarbanes-Oxley.<sup>31</sup>

These statements strongly support the argument that extended white collar sentences are not the product of the commission's independent expert judgment, but rather have been, at least to some degree, forced upon the commission by Congress. They are strikingly similar to other statements, from the same report, that trial judges are using to justify sentencing variances for weapons charges, child pornography, and other crimes. And they seem to give trial judges precisely the same license to vary from the loss-driven guidelines for many white collar offenses. In our view, an argument that such license exists, based on these statements, should appear at the outset of every white collar sentencing memorandum.

That is not to say that the kind of defendant-specific § 3553(a) argument that currently dominates sentencing memorandums should be eliminated. To the contrary, any argument based on statements taken from the Fifteen Year Report will probably only be as good as the § 3553(a) discussion that follows. Why? Because once convinced of their ability to vary, trial judges will still want to know what it is about a defendant's particular characteristics or circumstances justifies a variance.

Here, we offer one additional point of

advice: In crafting § 3553(a) arguments, defense counsel should resist the temptation to focus on factors like restitution or collateral losses (e.g., loss of a high-paying job) or the support of prominent friends and associates. Recent cases show that arguments like those are not necessarily effective.<sup>32</sup> Again, here, it may come back to the judgment of the commission. Early on, that body expressed a goal of reducing class inequality at sentencing.<sup>33</sup> Accordingly, in this new era of commission primacy, defendants may not make much headway focusing on sentencing factors available only to the wealthy, white collar offenders. Rather, they are probably better served by highlighting factors available to all—factors like age, health, lack of criminal history, commitment to family, or community service.<sup>34</sup>

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Ultimately, the commission's apparent disapproval of severe white collar sentences will not, by itself, justify a variance. What it may do, however, is give judges the protection they need to grant such variances, should they be so persuaded by other § 3553(a) arguments. The fact is that it takes more than simple inclination in most cases to convince a judge to vary from even the now-advisory guidelines. It takes the security of knowing that the variance is likely to be upheld as reasonable. And in the wake of *Kimbrough*, that question seemingly comes down largely to the judgment of the commission. ■

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## Endnotes

1. United States v. Booker, 543 U.S. 220 (2005).
2. Rita v. United States, 127 S. Ct. 2456 (2007).
3. Gall v. United States, 128 S. Ct. 586 (2007).
4. Kimbrough v. United States, 128 S. Ct. 558 (2007).
5. United States v. Vonner, 516 F.3d 382, 392 (6th Cir. 2008).
6. Apprendi v. United States, 530 U.S. 466 (2000).
7. Alexandra A.E. Shapiro & Nathan H. Seltzer, *Guidelines or Higher: NYCDDL's Study of Reasonableness Review Patterns Reveals the Court of Appeals' Aversion to Parsimony*, 19 FED. SEN'G REP. 177, 177 n.4 (2007).
8. *Rita*, 127 S. Ct. at 2462–63.
9. *Id.* at 2465.
10. 128 S. Ct. at 570.
11. *Id.* at 574.

12. *Id.*
13. *Id.*
14. United States v. Bennett, No. 8:07CR235, 2008 WL 2276940, at \*4 (D. Neb. 2008).
15. United States v. Goodman, No. 8:03CR566, 2008 WL 1766759, at \*7 (D. Neb. 2008).
16. United States v. McCormick, No. 8:04CR218, 2008 WL 268441, at \*10 (D. Neb. 2008) (emphasis added).
17. United States v. Sudyka, No. 8:07CR383, 2008 WL 1766765, at \*8 (D. Neb. 2008).
18. United States v. Baird, No. 8:07CR204, 2008 WL 151258, at \*7 (D. Neb. 2008).
19. United States v. Taylor, No. 8:04CR218, 2008 WL 268441, at \*8 (S.D.N.Y. 2008).
20. No. 06-2656, 2008 WL 2265898, at \*5 (1st Cir. 2008).
21. Nos. 06-4334, 06-4521, 2008 WL 2315664, at \*51 (4th Cir. 2008) (Motz, J., dissenting).
22. See United States v. Coughlin, No. 06-20005, 2008 WL 313099, at \*7 (W.D. Ark. 2008) (granting a variance despite the “laborious compilation and assimilation of empirical data that informs the Guidelines,” while never exploring the commission's views on the crime at hand (fraud)).
23. 520 F.3d 136, 163 (2d Cir. 2008).
24. For prescient commentary on this point, see Posting of Michael O'Hear to PrawfsBlawg, <http://prawfsblawg.blogspot.com/prawfsblawg/2007/12/another-sentenc.html> (Dec. 10, 2007).
25. United States v. Adelson, 441 F. Supp. 2d 506, 513 (S.D.N.Y. 2006).

26. *Id.*
27. United States Sentencing Commission, Report to the Congress, Downward Departures from the Federal Sentencing Guidelines at A-32 (2003).
28. United States Sentencing Commission, Fifteen Years of Guidelines Sentencing (2003).
29. *Id.* at 56 (emphasis added).
30. *Id.* (quotations omitted) (emphasis added).
31. *Id.* (emphasis added).
32. See, e.g., United States v. D'Amico, 496 F.3d 95, 107 (1st Cir. 2007) (rejecting collateral losses as justification for an 88 percent downward variance).
33. See U.S.S.G. ch. 1, pt. A, § 3 (stating that a goal of the commission was to eliminate “punishing economic crime less severely than other apparently equivalent behavior”).
34. Compare United States v. Carlson, 498 F.3d 761, 766, 766 n.4 (8th Cir. 2007) (rejecting repayment of unpaid taxes as a basis for a lower sentence because it “plac[es] too much weight on [the] defendant's ability to make restitution . . . [which] works to differentiate criminal defendants on the basis of their economic resources, which is clearly contrary to the intent of the sentencing Guidelines”) with United States v. Coughlin, No. 06-20005, 2008 WL 313099, at \*4 (W.D. Ark. 2008) (departing downward mainly because the defendant's poor health made it unlikely that he would survive incarceration, but also because the defendant had no prior criminal history, numerous letters of support, and a record of charitable giving and participation with charitable boards before being criminally charged).