"A Frontal Assault" on the White-Collar Sentencing Guidelines
by Ellen C. Brotman and Bryan M. Shay[1]

I. Introduction

The Supreme Court's recent sentencing decisions, *Kimbrough v. United States*,[2] *Gall v. United States*,[3] and *Rita v. United States*,[4] have created the opportunity for a number of compelling and novel arguments in favor of downward variances in white-collar cases. One of these arguments is the "Guidelines Deconstruction" argument.[5] "Deconstruction" is a shorthand term for a process that uncovers and describes the decision-making behind the promulgation of an individual guideline or set of guidelines.

This paper argues that the Guidelines for white-collar offenses are based on flawed research, policy, and logic. In contravention of Congress's clearly expressed intent, the Guidelines fail to adequately provide the courts with a way to determine whether and when to impose a term of probation. Therefore, district courts should exercise their discretion to vary downward from the Guidelines and, in appropriate white-collar cases, impose a term of probation.

II. Background

After the Supreme Court's decision in *Kimbrough*, judges are free, based on the facts of an individual case, to "vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[6] According to the Court, the Guidelines are only

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[2] 128 S. Ct. 558 (2007).

[3] 128 S. Ct. 586 (2007).

[4] 127 S. Ct. 2456 (2007).

[5] The Federal Defender's Office has written extensively about the deconstruction argument as applied to various portions of the Guidelines. Excellent and helpful articles on this subject are available at http://www.fd.org/odstb_SentencingResource3.htm under the heading "Deconstructing the Guidelines." For an analysis of the deconstruction argument and an application in context, see *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wisc. 2008), in which a federal defender's study was cited in support of the court's decision to grant a first-time offender a downward variance from a Guidelines range of 210-262 months to a sentence of 72 months. *See also* Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (July 3, 2008), *available at* http://www.fd.org/odstb_SentencingResource3.htm#DECONS.

[6] *Kimbrough*, 128 S. Ct. at 570.

entitled to a measure of deference when the Commission, in developing the particular range or factor at issue, acted in "the exercise of its characteristic institutional role."[7] This role has two basic components: (1) a reliance on empirical evidence of pre-Guidelines sentencing practice in arriving at the prescribed sentencing ranges, and (2) further review and revision of the Guidelines in light of judicial decisions, sentencing data, and comments from participants and experts in the field.[8] *Kimbrough* opened the door to the deconstruction argument when the Court stated that a sentencing court may permissibly conclude that the lack of supporting "empirical data" renders the particular Guidelines provision at issue incapable of achieving § 3553(a)'s purposes, even in "a mine-run case."[9]

III. The Sentencing Commission Ignored Congress's Intent and Failed to Adequately Treat Probation as a Viable Sentencing Option

A deconstruction of the Guidelines' treatment of probation reveals fundamental flaws in the Commission's development of the Guidelines. Specifically, the Commission failed to adhere to the intent of Congress and used flawed data in setting the sentencing ranges.

A. *The Intent of Congress*

Congress, through its passage of the Sentencing Reform Act ("SRA"),[10] purposely did not state a preference for incarceration over probation[11] and expressed its belief that probation is a distinct type of sentence that has its own independent value.[12] In fact, Congress contemplated that probation sentences would be the generally appropriate sentence in cases involving non-violent, first offenders.[13] Further, Congress intended that the Commission would create a system

[7] *Id.* at 575.

[8] *See Rita*, 127 S. Ct. at 2464-65.

[9] *Kimbrough*, 128 S. Ct. at 575.

[10] 28 U.S.C. § 994.

[11] *See* S. Rep. 98-225, at 39, 91, 1984 U.S.C.C.A.N. 3182, 3274 (1983) [hereinafter "Senate Report"]; *id.* at 114, 1984 U.S.C.C.A.N. at 3297 ("[T]he bill avoids the highly emotional past debate over whether or not there should be a general sentencing presumption either in favor of incarceration or in favor of probation. The approach taken in the bill is to avoid any general reference to either presumption.").

[12] The Senate Report accompanying the SRA states that probation is an important component of any sentencing scheme. *See id*. at 50, 1984 U.S.C.C.A.N. at 3222-23 ("[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment."); s*ee also* 28 U.S.C. § 994(a)(1)(A) (directing the promulgation of "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination *whether* to impose a sentence of probation, a fine, *or* a term of imprisonment") (emphasis added). The Commission, however, viewed probation as merely a "very lenient sentence[]," and thus outside the "broad range of sentences that may be . . . imposed." *See* United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 17 (June 18, 1987) [hereinafter "Supplementary Report"].

[13] *See* 28 U.S.C. § 994(j).

in which options could be creatively combined to meet all of the purposes of sentencing implicated in the case,[14] including alternatives to imprisonment[15] such as requiring "a high fine and weekends in prison for several months instead of a longer period of incarceration."[16] Additionally, Congress directed the Commission to avoid the use of prison for the purpose of rehabilitation, if the other purposes of sentencing did not require incarceration.[17] In short, Congress intended for the Commission to create a system that required judges to consider *whether* to imprison the defendant - in light of his individual characteristics, the nature of the offense, and the purposes of sentencing.[18]

The Commission failed to adhere to the intent of Congress expressed in the SRA. Although Congress intended probation to be an accepted and frequently used sentencing option, the Guidelines provide no guidance as to when to impose probation in lieu of imprisonment.

B. *Lack of Supporting Empirical Data*

In addition to failing to adhere to Congress's direction that probation be considered as an acceptable alternative to imprisonment in specific cases, the Commission created sentencing ranges that are unduly harsh and skewed in favor of imprisonment. This harshness is the result of the Commission's use of incomplete data in setting the original guidelines ranges. As the Commission noted, it adopted an "empirical approach that use[d] data estimating the existing sentencing system as a starting point" in developing the sentencing tables. However, in creating these tables, the Commission only examined pre-Guidelines cases that resulted in sentences of imprisonment; thus, they ignored or disregarded approximately 40% of all sentences imposed during the relevant time period and used only the most serious offenses as a benchmark.[19]

The development of the tax guidelines, Chapter 2.T, demonstrates how the Commission's selective use of data resulted in ranges that diverged dramatically from past practice. Table 1(a) of the United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987) [hereinafter "Supplementary Report"] compiles average past sentences for first-time offenders convicted at trial of various offenses. The Supplementary Report explains that the "'sentence level' is the offense level that is closest

[14] *See* Senate Report at 107, 1984 U.S.C.C.A.N. at 3290 (fines can provide a "clear form of punishment and deterrence"); *id*. at 55, 1984 U.S.C.C.A.N. at 3238 (rejecting the assumption that "a term of imprisonment … is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine").

[15] *See id*. at 50, 1984 U.S.C.C.A.N. at 3222-23.

[16] *Id*. at 77, 1984 U.S.C.C.A.N. at 3260.

[17] *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a).

[18] *See* 18 U.S.C. § 3582(a) (directing sentencing judges, "in determining whether to impose a term of imprisonment," to "consider the factors set forth in § 3553(a) to the extent that they are applicable").

[19] *See* Supplementary Report at 21-24 (revealing that when the Commission considered past practices in order to set sentencing levels for such offenses, it inappropriately omitted any consideration of probationary sentences).

to the average time currently served by first-time offenders who are sentenced to a term of imprisonment."[20] Thus an average pre-Guidelines sentence of approximately 18 months would translate to a sentence level of 14 (15-21 months).[21]

The comparison is misleading, however, because the pre-Guidelines "averages" were based only on cases involving terms of imprisonment. For example, the past practice sentence level for an unsophisticated embezzlement of less than $1,500 was calculated as 8, reflecting an average length of a sentence of incarceration of about 5 months and a range of 2-8 months.[22] The Commission, however, excluded from consideration all non-prison sentences, which accounted for about 76% of embezzlement cases. The Commission acknowledged that, when these non-prison sentences were included, "the average time served by all first-time embezzlers convicted at trial of stealing $1,500 is actually about 1 month (rather than 2-8 months)."[23]

The tax guideline is similarly skewed. Before the Guideline, only 30% of first-time offenders convicted after trial in tax cases involving loss of $5,000 or less were sentenced to prison. The Commission's estimate of "average" time served – equivalent to a level 9 (4-10 months), a range with a midpoint of 7 months – was based only on this subset of 30% of offenders.[24] Inclusion of the vast majority of such offenders who did not receive sentences of incarceration would have reduced the average sentence length to a little over two months.

The Commission's decision to consider only imprisonment sentences in setting the Guidelines ranges resulted in a sentencing scheme that is biased in favor of imprisonment and casts serious doubt on the reasonableness of many of the ranges, especially the white-collar guidelines.[25]

IV. *United States v. Tomko*: Deconstruction of the Tax Guidelines is Raised for the First Time

The National Association of Criminal Defense Lawyers ("NACDL") and the Federal Public and Community Defenders of the Third Circuit jointly filed an amicus brief in the recent

[20] *Id*. at 23.

[21] *Id*.

[22] See *id*. at 24.

[23] *Id*.

[24] *See id*. at 34 (Table 1(a)).

[25] *See* U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 47 (2004) ("Fifteen Year Report"), *available at* http://www.ussc.gov/15_year/15year.htm (noting that the Commission implemented sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," especially white-collar offenses and drug trafficking offenses, and citing the Supplementary Report).

Third Circuit case *United States v. Tomko*,[26] in which they made the argument outlined in the foregoing sections. The defendant, William Tomko, pled guilty to one count of tax evasion with a stipulated tax deficiency of $228,557. Although Tomko's Sentencing Guidelines range was twelve to eighteen months imprisonment, he was sentenced to three years of probation with one year of home confinement, 250 hours of community service, twenty-eight days of alcohol treatment, and a fine of $250,000. The sentencing court based its decision to vary downward to probation and home confinement on Tomko's status in the community, his history of charitable service, the community support for him, his negligible criminal history, and his record of employment.[27] The Government appealed the sentence, arguing that the District Court abused its discretion when it granted a downward variance from the Guidelines range to probation.

The NACDL and the Federal Defenders (collectively, "the *amici*") filed their brief as *amici curiae* after the Third Circuit granted *en banc* consideration of the Government's appeal. In this brief, the *amici* argued, *inter alia*, that the Commission's failure to adhere to Congress's intent and to properly rely on empirical data when formulating the Guidelines undermined the reliability and rationality of the Guideline range assigned to Tomko's conduct. Unfortunately, the *amici* were denied oral argument on these issues and the court focused solely on the question of the sentencing court's discretion after *Gall*. Notwithstanding the court's focus, the arguments raised by the *amici* can be a powerful weapon in the white-collar practitioner's arsenal; in fact, the Government characterized the *amici*'s brief as a "frontal assault on the Guidelines."[28]

V. Conclusion

In *Gall* the Supreme Court recognized that probation constitutes a meaningful sentencing tool that is worthy of substantial consideration. The *Gall* Court disapproved of the Eighth Circuit's characterization of Gall's probationary sentence as a 100% downward variance in part because that characterization failed to recognize the "substantial restriction" of liberty involved in even standard conditions of probation.[29]

The Commission, which misunderstood its charge from Congress, failed to define *any* class of offenders for whom probation met all of the purposes of sentencing, and for whom imprisonment should be the exception, not the norm. The Commission's policy of marginalizing probation contravenes Congress's intent and is not based on accurate empirical evidence. After

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[26] 498 F.3d 157 (3d Cir. 2007). On November 19, 2008, the United States Court of Appeals for the Third Circuit heard oral argument *en banc* in this case; a decision is pending. This *en banc* review followed a 2-1 panel decision holding that the District Court erred in not imposing a sentence of imprisonment. The panel's disagreement was largely over the level of review to be exercised; the majority argued that closer scrutiny was required, while the dissent argued that there was no indication that the court abused its discretion, even if the sentence was not what the judges on the appellate panel might have done were they in the District Court's shoes.

[27] *Id*. at 162.

[28] *See* Government's Response in Opposition to Amici Curiae's Request to Participate in Oral Argument, No. 05-4997, at 1 (Oct. 9, 2008).

[29] *Gall*, 128 S. Ct. at 595-96 & n.4 (noting in part that "[p]robation is not granted out of a spirit of leniency").

Kimbrough, *Gall*, and *Rita*, these arguments provide powerful and compelling support for a downward variance to probation because the Guidelines provisions governing white-collar offenses are incapable of achieving § 3553(a)'s sentencing purposes, even in "a mine-run case."[30]

[30] *Kimbrough*, 128 S. Ct. at 575.