

Sample Career Offender/Crack De-Construction (Post Fair Sentencing Act)

C. Nature of the Offense

Possession of a large quantity of narcotics is a serious offense. Mr. Smith recognizes that his criminal conduct in this instance is no different.

The suggested U.S.S.G. sentencing range does not reflect the actual seriousness of either *this* offense or *this* offender in any way. Instead the career offender guideline, here a draconian 188-235 months, is based solely on certain characteristics of Mr. Smith's record -- not the particulars of the defendant, his overall record, or his particular offense. In other words, the career offender guideline suggests that the court *ignore* the very § 3553(a) factors the court is *required* to consider in sentencing the defendant.

Although the court's sentencing calculation must begin with reference to the guidelines, the guidelines are not to be presumed by the court to suggest a reasonable sentence. *Rita*. In fact, those guidelines created by the Sentencing Commission which are not based on the "exercise of its characteristic institutional role" - the study of past sentencing practice and use of updated empirical data - are due less respect and the Court cannot fairly assume that the sentencing range represents a rough approximation of a sentence which achieves the purposes of sentencing under 18 U.S.C. § 3553(a). See *Kimbrough*, 128 S. Ct. At 575-76.

The career offender guideline is such a guideline that was not a result of an exercise of the Commission's characteristic institutional role. Neither past sentencing practice nor study of empirical evidence were used in developing the guideline. The career offender guideline is not based on any study. It is driven solely by statute. The Commission was instructed to provide for enhanced sentences for individuals convicted of a crime of violence or drug trafficking crime who already have two like convictions on their record. 28 U.S.C. § 994(h). The Commission attempted to implement this instruction into the guidelines by tying certain enhancements to the maximum penalties for a defendant's present conviction. See U.S.S.G. § 4B1.1 & 1.2. The guideline raises both the offense level and the criminal history category. Congress placed drug trafficking crimes in this statute, § 994(h), to *target repeat drug traffickers believing it was a very lucrative business carried on by career criminals with significant ties to other traffickers outside the United States*. See generally, S. Rep No. 98-225 (1983).

Prior to Booker the Court was mandated to impose a career offender sentence when

calculated absent any of the very narrow bases for departure. Now, however, in light of Booker and Kimbrough, etc., the Court can look at not only the fact of prior conviction, but may also look at the seriousness of the conduct underlying those convictions. To put it plainly, under a Kimbrough analysis, because the career offender guideline is the direct result of congressional mandate and not the result of careful study or empirical evidence, this court **should not give the career offender guideline *any significant weight or consideration in its sentencing determination in this case.***

The advisory guideline range here fails to adequately consider Mr. Smith as an individual as required under 18 U.S.C. §3553. The advisory range fails to consider the actual offense conduct present in this case – simply possession of a large amount of cocaine. The advisory range treats Mr. Smith as if he were the international drug trafficker involved in a highly lucrative business meant to be targeted by Congress in passing 28 U.S.C. §994(h) -- not a depressed and poor man struggling to get by. Based on this flawed guideline Mr. Smith faces an advisory guideline range of more than 15 to almost 20 years - 4 to 5 times his previous longest sentence of four years. PSR § 41.

Even worse, the advisory guideline fails to make any attempt to reflect the various statutory purposes of sentences. What is the appropriate punishment? How much protection does society need from Mr. Smith? What period of incarceration best balances deterrence with the need for rehabilitation? By altogether ignoring the actual considerations this court *must* consider under § 3553(a), the advisory range is plainly at odds with the purposes of sentencing and is no reflection of the actual seriousness of the offense or the offender in this case.

D. Sentencing Guidelines - “Powder” vs. “Crack” Cocaine

Absent the career offender designation, the advisory offense level for possession of 227 grams of crack cocaine and 99 grams of powder cocaine is 30. PSR ¶ 16. A three level reduction for acceptance of responsibility results in an offense level of 27, which for Mr. Smith’s criminal history of VI results in a recommended guideline sentencing range of 130-162 months.

It is worth further noting that the advisory offense level if the powder and base cocaine were treated equally, for a total of 326 grams of cocaine, is 22 (See U.S.S.G. § 2D1.1(c)(9)), which, less three points for acceptance of responsibility, would place the advisory guideline range at 63-78 months of incarceration.

The powder cocaine guideline is just as reliable an indication of the seriousness and societal harm caused by Mr. Smith's offense as the cocaine base guideline. Courts throughout the country, the United States Attorney, and members of Congress have each recognized that empirical study of the societal effects of powder and crack cocaine demonstrate that they are roughly equivalent and that there is no empirical basis for the difference in statutory sentencing schemes or the advisory guideline ranges for equivalent amounts of powder or crack cocaine.¹

Prior to the passage of the Fair Sentencing Act, when courts were faced with a 100:1 ratio, Kimbrough reiterated generally prior holdings that the guidelines are advisory only, and that Courts are free to disagree with the sentencing guidelines. Kimbrough itself, however, dealt specifically with the crack cocaine guidelines as compared to the powder cocaine guidelines. The district court's non-guideline sentence in Kimbrough, based in part on the court's judgment that the 100:1 ratio was flawed, was approved specifically because drug trafficking guidelines are not based on the empirical approach the Sentencing Commission is instructed to use in developing guidelines. Kimbrough, at 491. "The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guideline *do not exemplify* the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges

¹On the lack of evidentiary basis for the then 100:1 crack:powder sentencing ratio: Senator Durbin, quoting Vice President Joe Biden, acknowledged, "the myths upon which we based the disparity have since been dispelled or altered." *See also* 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009); 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel Lungren) ("[w]e didn't really have an evidentiary basis for it"); 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Robert C. "Bobby" Scott) ("there is no justification for the 100-to-1 ratio"); 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) ("This disparity made no sense when it was initially enacted, and makes absolutely no sense today[.]"); 156 Cong. Rec. H6200 (daily ed. July 28, 2010) (Finding No. 9, H.R. 265) ("Most of the assumptions on which the current penalty structure was based have turned out to be unfounded.").

[The disparity] "is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine." Statement of Lanny A. Breuer, Ass't Attorney General, Criminal Division, U.S. Dep't of Justice, *Restoring Fairness to Federal Sentencing: Addressing the Crack Powder Disparity*, at 10 (April 29, 2009). "Indeed, over the past 15 years, our understanding of crack and powder cocaine, their effects on the community, and the public safety imperatives surrounding all drug trafficking has evolved. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitates a change."

for crack cocaine offense, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of ‘empirical data and national experience.’” *Id.*, 500. Based on the lack of empirical basis for the then 100:1 crack to powder cocaine ratio, a non-guideline sentence was deemed reasonable.

In August of 2010 after much debate the Fair Sentencing Act was passed, eliminating the statutory 100:1 ratio and imposing a roughly 18:1 ratio. The Sentencing Commission was instructed to and did promulgate advisory guidelines that comported with this ratio. These guidelines were approved and are utilized by courts today.

These newer guidelines, based on the statutory 18:1 ratio, suffer from the same flaws identified in *Kimbrough*. They are based not on empirical evidence, but on simply matching statutory mandatory minimum sentences to offense level ranges. Just as before no consideration was given to the 18 U.S.C. §3553a factors, the empirical differences or similarities between powder and crack cocaine, or any other exercise of the Sentencing Commission’s characteristic institutional role.

Far from being the result of careful study, the drug trafficking guidelines of § 2D1.1 are the result of political compromise, mandated to mirror the 18:1 ratio that resulted from hearings in which the most enlightened speakers purported to call for a 1:1 crack to powder ratio.

Because the career offender guideline drastically overstates Mr. Smith’s criminal culpability, Mr. Smith is seeking a sentence of imprisonment of 84 months, nearly double his previous highest sentence of four years.