

Four Steps Towards Better Advocacy: Approaching Your Client's Sentencing After *Booker, Rita, Gall, and Kimbrough*

Molly Lizbeth Roth

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Now that the federal sentencing guidelines are advisory, representing your client at his or her sentencing hearing entails both greater freedom and greater responsibility. No longer are judges and lawyers bound to make decisions and base arguments on guideline factors. Instead, judges and attorneys are required to consider and raise arguments concerning **all** factors in 18 U.S.C. § 3553(a). This means that lawyers are free to raise arguments and present evidence about their clients' personal and family history, individual characteristics, and a far broader range of mitigating factors than was previously permitted under the guidelines. This freedom renews and increases the responsibility defense lawyers have to present mitigating evidence on behalf of their clients in creative, informative, and persuasive ways. Below are four steps you can take in approaching each case in order to 1) use this freedom to benefit your clients and 2) meet your responsibilities to your clients as you prepare for their sentencing hearings.

First Step: *Examine the statutory provisions applicable to the charged offense.*

Each federal offense carries a penalty set forth by the statutory section that defines the charged offense. For example, if your client is charged with drug trafficking under 21 U.S.C. § 841, his or her statutory range of punishment will be set forth in 21 U.S.C. § 841(b), which calls for differing minimum and maximum sentences depending on the type and quantity of drug involved in the offense. It is important to determine and understand the parameters of this broad statutory range of punishment before reviewing the guidelines.

Second Step: *Examine the statutory factors applicable to sentencing. What are the mitigating and aggravating facts relevant to 18 U.S.C. §3553(a)?*

Every sentence imposed in federal court must be "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). This directive is often called the "parsimony principle" and applies to every client who faces sentencing. Along with the broad statutory range of punishment called for in the code section under which your client is convicted, 18 U.S.C. § 3553(a) is the starting point for every sentencing decision. This statutory provision requires judges to consider a number of factors in determining the appropriate punishment. These factors include a person's history and characteristics; the seriousness of the offense committed and its nature and circumstances; the need (or lack of need) to protect the public; an individual defendant's need for education, vocational training, or medical care; and the need to avoid unwarranted disparity. Asserting factors applicable to your client helps ensure that the judge will fully consider them; most will not be addressed (adequately or at all) in the Presentence Investigation Report.

Third Step: Determine the applicable advisory guideline provisions and calculate the range.

The advisory sentencing guidelines are one factor among several that must be considered by the sentencing court. 18 U.S.C. § 3553(a)(4)–(5).

Prior to *United States v. Booker*, the federal sentencing guidelines were mandatory, and imposition of sentences under their framework over the past twenty years has led in many cases to sentences harsher than necessary. *Booker* held that the guidelines are advisory, and every Supreme Court case since *Booker* has further solidified this holding. *Booker*, 125 S. Ct. 738, 750–51, 756 (2005).

Nevertheless, since the guidelines are one factor of many which must be considered by courts, lawyers must be able to navigate through them. Below are steps to take when analyzing the guidelines in preparation for your client’s sentencing hearing:

1. Determine which guideline provision applies to the offense of conviction. To do this, look at **Appendix A** of the United States Sentencing Commission’s Guideline Manual (cite to the manual, or “the guidelines,” as U.S.S.G. § ____). Appendix A will refer to one or more guidelines sections in **Chapter 2**, which is the part of the guidelines that describes and assigns an level (called the “base offense level”) to your client’s offense of conviction. See U.S.S.G. §1B1.1(a)–(b). Chapter 2 also takes in to account certain types of specific offense conduct, such as amount of loss in a fraud case set forth in §2B1.1(b)(1).
2. Review **Chapter 3** of the guidelines to determine what types of “adjustments” your client may face in addition to the punishment described in Chapter 2. These “adjustments” focus on a person’s offense conduct, and may increase or decrease his or her recommended sentence. For instance, Chapter 3 contains adjustments calling for an increase in the sentence if your client committed a crime against a vulnerable victim (§3A1.1), held a leadership role (§3B1.1), or abused a position of trust (§3B1.3). Chapter 3 also calls for a decrease in sentence in circumstances such as if your client accepts responsibility for his or her actions (§3E1.1) or held a minor role in the commission of the crime (§3B1.2). See U.S.S.G. §1B1.1(c)–(e). After all Chapter 2 and Chapter 3 sections are considered, your client’s “adjusted offense level” and “total offense level” will be determined.
3. Determine what aggravating and mitigating departures might apply to your client under **Chapter 5**. See U.S.S.G. §1B1.1(i). These departure grounds do not trump all the factors that must be considered pursuant to 18 U.S.C. § 3553(a), so take care not to limit your arguments by what continue to be called “prohibited” considerations under the advisory guidelines. No mitigating considerations are prohibited, and lawyers should raise all such arguments on behalf of their clients. Within Chapter 5, there are aggravating and mitigating departure grounds. Examples of mitigating grounds are voluntary disclosure of

the offense (§5K2.16), diminished capacity (§5K2.13), and coercion or duress (§5K2.12). Most departures do not define their weight by specific numbers of levels, and departures are not taken in to account when determining your client’s “total offense level.”

4. Determine your client’s criminal history using **Chapter 4**. See U.S.S.G. §1B1.1(f). This chapter assigns points to your client’s prior conviction based on sentence length, age, and type of conviction (§4A1.1-§4A1.2). The number of points assessed determines your client’s criminal history category. Some people with certain types of criminal convictions are exposed to “career offender” (§4B1.1), “armed career criminal” (§4B1.4), or other enhanced penalty adjustments which call for an increase in their base offense level and criminal history category.
5. Look at the **Sentencing Table** (Chapter 5, Part A) to discern your client’s advisory guideline range by finding the intersection of his or her total offense level and criminal history category.
6. Familiarize yourself with **Chapter 1**, which discusses general principles concerning the guidelines and their application (e.g., §1A1.1-§1B1.2, §1B1.5, §1B1.9), as well as relevant conduct (§1B1.3), use of information obtained through cooperation (§1B1.8), and post-amendment reduction in sentences (§1B1.10).

Again, however, the guidelines are now advisory rather than mandatory. Since *Booker*, the Supreme Court has clearly stated that 18 U.S.C. § 3553(a) governs sentencing decisions, and that the guidelines are advisory. Sentencing judges may now consider arguments that specific guideline provisions fail to properly reflect § 3553(a) considerations, reflect unsound judgment, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Although courts must give consideration to the guidelines as one of the § 3553(a) factors, they cannot simply defer to policy decisions of the United States Sentencing Commission. *Rita*, 127 S. Ct. at 2463, 2465, 2468; *Gall v. United States*, 128 S. Ct. 586, 594–95 (2007). Sentencing courts may disagree with a particular guideline on policy grounds, and may impose a non-guideline sentence because the guideline provision itself lacks basis in empirical data or study. *Kimbrough v. United States*, 128 S. Ct. 558, 566–69, 574–75 (2007).

Defense attorneys should use *Booker*, *Rita*, *Gall*, and *Kimbrough* to challenge guidelines that lack firm basis in empirical data, academic study, and sound policy in the course of defending an individual client. In a sense, this type of challenge is roughly analogous to raising a constitutional challenge to a statute *on its face* in addition to raising an *as-applied* challenge. To launch such a challenge to a specific guideline provision, it is important to understand how that provision is inadequately grounded (employing the type of analysis *Kimbrough* made of §2D1.1, see below), and to perform what is tantamount to “legislative history” of the guideline.

Kimbrough held that the guidelines are the “staring point and the initial benchmark” because the Commission “has the capacity courts lack to ‘base its determinations on empirical data and

national experience, guided by a professional staff with appropriate expertise.”*Id.* at 574-75. Where a particular guideline “do[es] not exemplify the Commission’s exercise of its characteristic expertise,” a court does not abuse its discretion in rejecting it. *Id.* In *Kimbrough*, the Court analyzed the development of §2D1.1, and found that “[t]he Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act’s weight-driven scheme. The Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug trafficking offenses.” *Id.* at 567.

Using *Kimbrough* as a guide, ask the following questions when analyzing a guideline provision:

- (1) Was this guideline provision created or amended based on past practice study, empirical data, or national experience? (§2D1.1 was not; see *Kimbrough* at 566–67.)
- (2) Was this guideline provision created or amended based on study or research done by the Commission? (The Commission did many studies criticizing the disparity between crack and powder cocaine sentencing under §2D1.1, and based its amendment on these studies; see *Kimbrough* at 568.)
- (3) Was this guideline provision created or amended only on the basis of a Congressional directive, and if so, how specific was the directive? (For an example of a general directive to the Commission regarding crack cocaine, see *Kimbrough* at 569; for examples of more specific Congressional directives to the Commission, see *Kimbrough* at 558.)

If a guideline provision was not based on any stated reason, or if it was not based on independent study or data analysis, or if the reasoning behind a provision is unsound, it is open to criticism. To perform this analysis, you will need to reconstruct the history of the guideline provision. The sentencing guidelines do not have legislative history in the same way laws enacted by Congress do. However, there are several places to turn to in order to decipher a guideline provision’s history, starting with the language in the Commission’s “reason for amendment,” which is in Appendix C of the guidelines. Check www.fed.org for upcoming information by Amy Baron-Evans on detailed instructions about how to perform this analysis, and in-depth critique of certain guidelines provisions.

For an in-depth analysis of the guidelines and their history, *Booker* and its progeny, and many other issues relating to federal sentencing, read *Introduction to Federal Sentencing* (Tenth Edition, March 2008) by Henry J. Bemporad, Federal Public Defender for the Western District of Texas. This guide is available at http://fd.org/odstb_SentencingResource3.htm.

Fourth Step: Revisit the other 3553(a) factors.

Since the guidelines prohibited consideration of several of the factors listed in 18 U.S.C. § 3553(a), lawyers labored under a system that effectively precluded or stifled presentation of evidence about many aspects important to a full understanding of their clients and the reasons

behind their conduct. This is no longer the case. Facts about your client and the impact of those facts on his or her conduct—such as his bipolar disorder affecting his decision to use and then later distribute methamphetamine, or her age and immaturity affecting her decision to jeopardize her new teller job by embezzling money she thought she could pay back—now can be fully presented. This requires thorough investigation on your part, including obtaining school, employment and mental health records, interviewing non-family and family witnesses about your client’s characteristics and personal history, and retaining expert witnesses such as psychologists or psychiatrists. It also requires presenting this information in a way that is persuasive to the judge, which may include submitting information about your client’s situation or condition in addition to information about your client individually. For example, if you are explaining to the sentencing judge that your client’s mental retardation negatively impacted his decision to sell drugs, you will want to consider submitting to the judge both an evaluation of your client showing his mental impairment, and independent (perhaps an academic article, or perhaps a government study) source explaining mental retardation’s impact on culpability. For detailed tips about effective investigation, *see* [http://www.fd.org/pdf lib/SAW08Development%20of%20Effective.pdf](http://www.fd.org/pdf_lib/SAW08Development%20of%20Effective.pdf). For a guide to help you find appropriate independent source documents, *see* <http://www.fd.org/pdf lib/Sentencing Resource Manual March 2008.pdf>, which is periodically updated.