

## **What Role Should the Guidelines Play in Sentencing White-Collar Offenders?**

**By Jason Freeman**

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In a post-*Booker* world, the Guidelines serve a limited function in the sentencing calculus: They are, in the words of the Supreme Court, nothing more than a “*rough approximation* of sentences that *might* achieve § 3553(a)’s objectives.”<sup>1</sup> Section 3553, not the Guidelines, is the ultimate touchstone; and it provides the following overarching rule: Sentences must be “sufficient, but not greater than necessary,” to fulfill the purposes of sentencing laid out at 18 U.S.C. §3553(a)(2).<sup>2</sup> Accordingly, the Guidelines do not, in theory, even enjoy a presumption of correctness during sentencing.<sup>3</sup>

Nonetheless, despite this theoretical role, the Guidelines do in fact maintain a vaulted status generally and continue to permeate the sentencing process.<sup>4</sup> In large part, their lingering influence is a function of procedure. Under Supreme Court precedent, a sentencing court is required to perform a correct Guideline calculation as the first step in the sentencing process.<sup>5</sup> Therefore, Section 3553’s factors are only applied after the Guideline range has been calculated. Thus, through this procedural framework, judges’ minds are psychologically tethered to the Guidelines.

This psychological “gravitation” towards the Guidelines is strengthened by appellate procedure, which provides that courts of appeal (unlike sentencing courts) may presume that sentences within the Guideline range are reasonable.<sup>6</sup> Such a presumption provides judges with a significant incentive to sentence within the Guidelines. As Justice Souter once aptly summarized it: “[A] presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines [did]. . . . What works on appeal determines what works at trial, and if the Sentencing Commission’s views are [entitled to presumptive reasonableness on appeal], a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox fact-finding necessary to justify a sentence outside the Guidelines range.”<sup>7</sup>

Aside from sentencing and appellate procedure, the Guideline’s also have staying power in large part because “Guideline sentences” carry with them an air of objectivity and the appearance of conforming to historical sentencing norms.<sup>8</sup> To some degree, this perception itself is responsible for the procedural framework that has been grafted onto the sentencing and appellate processes. The notion that the Guidelines are objective and empirical is misleading in some contexts—perhaps most notably when it comes to the sentences prescribed for white-collar crimes.

## A Short History of the Guidelines Governing White-Collar Crimes and Their Impact

Like most political products, the evolution of the Guidelines is a convoluted narrative, but in a broad stroke, the major landmarks are easy enough to identify. In 1984, in large part due to the efforts of Judge Marvin E. Frankel and Senator Edward Kennedy, Congress enacted the Sentencing Reform Act, which provided for the creation of the United States Sentencing Commission. Several years later, in 1987, the Commission promulgated the Sentencing Guidelines, which went into effect in November of that year. The Guidelines were intended to establish a uniform sentencing scheme that would limit disparities across jurisdictions and cabin the almost unfettered discretion that federal judges had exercised in sentencing defendants for nearly two hundred years.<sup>9</sup>

While the Sentencing Commission's approach to drafting the Guidelines was, *in general*, to study and review thousands of past cases and provide Guideline sentences that were "empirical and historical, rather than normative and philosophical"<sup>10</sup>—in effect, to determine and then codify the "federal common law" of sentencing—it specifically disregarded this approach with respect to economic crimes.<sup>11</sup> Instead, the Commission "consciously chose to raise sentencing levels for economic crimes of pre-Guidelines levels."<sup>12</sup> As Judge Frankel (the "father of the Guidelines") noted, "the Commission produced guidelines that . . . increase[d] the overall severity [of sentences] taking particular aim at so-called white-collar offenders."<sup>13</sup>

Over a two-decade period, the already inflated sentences prescribed by the Guidelines for white-collar crimes grew at an exorbitant clip. For example, through amendments in 1989, 2001, and 2003, the Guideline's loss tables "effectively tripled sentences for large-scale fraud offenses."<sup>14</sup> As Professor Frank Bowman aptly illustrates the point, in 1987, after the Guidelines were promulgated, a "hypothetical corporate [defendant who] would have been [sentenced to] less than 6 years" would have received "life plus 14 offense levels" under the Guidelines in 2007.<sup>15</sup> This pointedly illustrates the degree of inflation that the Guidelines have introduced with respect to white-collar sentences.

As a result, prior to *Booker*, the Guidelines prescribed mandatory sentences for white-collar crimes that were often significantly greater than historical norms. And this was roughly the state of affairs until *Booker* sounded the death knell for their mandatory application. The Supreme Court, holding that mandatory Guidelines violated the Sixth Amendment, directed sentencing courts to *consider* the Guidelines, but to conform sentences to the factors laid out in 18 U.S.C. § 3553(a).<sup>16</sup> In subsequent cases, the Court further refined the role of the Guidelines and strengthened the discretion of sentencing courts to fashion sentences that deviate from them.<sup>17</sup>

This revolution left the Guidelines with a clear theoretical role in the sentencing process—they are advisory; therefore, non-binding. But their *de facto* role is not so clear. Earlier in 2013, the Sentencing Commission found in its most recent *Booker* report, "The sentencing guidelines remain the essential starting point for determining all federal sentences and continue to exert significant influence on federal sentencing trends over time."<sup>18</sup> Indeed, Commission statistics indicate that post-*Booker*, across all federal crimes generally, greater than four out of five sentences are within the Guideline range or below that range only at the government's request.<sup>19</sup>

However, while the Guidelines continue to heavily influence sentences for the majority of federal crimes, their influence has diminished significantly in white-collar sentencing.<sup>20</sup> Commentators and judges are beginning to criticize the application of the Guidelines in the white-collar area with more and more frequency, and this criticism may be impacting the application of the Guidelines, though perhaps in non-uniform ways. One commentator recently noted that the “sentences nominally prescribed by the Guidelines for high-loss corporate fraud cases have become so draconian that judges are unwilling to impose them even in the biggest and most publicly notorious cases.”<sup>21</sup> Courts have been vocal too, with one court lamenting that “the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense.”<sup>22</sup>

Indeed, Judge Rakoff, summing up this movement in a recent address to the National Institute on White Collar Crime, commented—with only a slight tinge of jest—that his “modest proposal is that the [Guidelines] should be scrapped in their entirety.”<sup>23</sup>

Given criticisms like this, it is perhaps not surprising that post-*Booker* the degree to which the Guidelines influence sentences varies substantially across circuits, and regional disparities have markedly increased.<sup>24</sup> Even intra-circuit, the role of the Guidelines varies significantly based on the particular sentencing judge any given defendant draws.<sup>25</sup> Interestingly, these inter-circuit and intra-circuit variations are noticeably more pronounced with white-collar sentences than for other crimes.<sup>26</sup>

For instance, in fraud cases<sup>27</sup> in the Second circuit (which includes New York), non-government sponsored sentences below the Guidelines actually occur more frequently than sentences within the Guidelines.<sup>28</sup> The average magnitude of departures and variances below the Guidelines across all circuits in such cases (non-government sponsored downward departures and variances) is fairly staggering: On average, such sentences call for approximately fifty-percent less time than the sentence prescribed by the Guidelines.<sup>29</sup> Much like the dis-uniformity across circuits, this average deviation below the Guidelines is substantially more pronounced for white-collar crimes than for any other category studied by the Sentencing Commission.<sup>30</sup>

Further complicating matters, the reduction in uniformity and degree of deviation from the Guidelines can often be a function not only of circuits and sentencing judges, but also varying prosecutorial practices, such as charging practices and the use of binding plea agreements. Often in white-collar crimes, prosecutors have significant flexibility over the number and nature of charges and can thus have wide discretion, for example they can provide statutory caps on sentences even if the Guidelines would call for higher sentences. White-collar crimes lend themselves to prosecutorial control over Guideline calculations. For instance, prosecutors often exercise some control over the loss and victim figures used for sentencing purposes (as they often vary based on the methodology or theory used to calculate them) and can exercise that control to influence Guideline calculations and thereby influence plea decisions, but these tactics vary from prosecutor to prosecutor and case to case. Differences in these practices can substantially impact the role of the Guidelines in any given sentence.

The question arises: Just what role should the Guidelines play in sentencing white-collar defendants? Answering that question touches on a number of philosophic, as well as practical issues. We can perhaps turn our attention specifically to thinking about what role they *should* play by looking more specifically at what role the Guidelines appear to actually be playing in such sentences. Observing their actual application may provide a

basis for more general inferences about their effects, proper role, and future vitality.

### **Trends in High-Profile White-Collar Cases**

Several high-profile cases shed some anecdotal light on the role that the Guidelines appear to be playing in white-collar sentences. For example, in several of the most high-profile white-collar cases of the last decade, courts drew a sharp divide (even if the Guidelines did not clearly do so) between criminal "masterminds" perpetrating fraudulent schemes and other, lesser defendants, particularly those who cooperated with federal prosecutors.

For example, in the Enron prosecutions, Jeffrey Skilling, Enron's former CEO, received a sentence of 24 years and four months for his part in the scandal—a sentence that fell on the lower end of the prescribed Guideline range.<sup>31</sup> Unlike Skilling, however, many other defendants received sentences far below prescribed Guideline levels. While nearly every defendant that pled and cooperated, if fully prosecuted and sentenced under the Guidelines, would have fallen into Guideline ranges of roughly 20 years to life. The highest sentence imposed against any cooperating defendant was only six years (Andrew Fastow). Other Enron defendants came out even better. The average prison sentence among the cooperators who received time was just over three years.<sup>32</sup>

Similarly, in the WorldCom prosecutions, former WorldCom CEO, Bernard Ebbers, was sentenced to 25 years for his role in WorldCom's fraud. The Guidelines prescribed 30 years.<sup>33</sup> However, cooperator Scott Sullivan, WorldCom's Chief Financial Officer and the man who, according to the Government's own appellate brief, was the "architect" of the fraud, "a leader who managed the details necessary for the commission of the fraud," and "directed the fraud," received a five-year sentence, which was one-fifth of that suggested by the Guidelines.<sup>34</sup> Other cooperating defendants received sentences on the order of a year and a day,<sup>35</sup> five months,<sup>36</sup> and three years of probation,<sup>37</sup> despite the fact that under relevant conduct concepts, the Guidelines generally attribute the entire loss of the fraud—the primary driver of the prescribed sentence under the Guidelines—to each defendant.

The sentence discounts conferred on cooperating defendants in these cases were on the order of 15 to 20-plus years below the Guideline range that would have applied absent cooperation.<sup>38</sup> The degree of the sentence discounts suggests that they were "not merely a reward for effective cooperation," but an implicit acknowledgment that the Guideline ranges prescribed for such defendants are simply not appropriate.<sup>39</sup> While the implication that the Guidelines do not offer an appropriate framework for formulating sentences with respect to lower level co-conspirators or less culpable persons involved in white-collar frauds is fairly obvious, it is perhaps less jaw-droppingly evident than the clumsy manner in which they sometimes handle higher end sentences.

Notably, while the sentences that have been handed down to the Skillings and Ebbers of the world may seem long, they are not record-setting by any means. In 2009, Bernie Madoff, the architect behind the biggest known ponzi-scheme in history, received a "Guideline" sentence of 150 years. But even Madoff's sentence was relatively "short" compared to several other "Guideline" sentences that have been handed down in the past decade. By this author's reckoning, the record holder is former New York businessman Sholam Weiss, who received a hefty "Guideline" sentence of 845 years for his role in a

fraudulent scheme that defrauded an insurance company out of \$450 million.<sup>40</sup> His co-defendant, Keith Pound, received a sentence of 740 years.<sup>41</sup> Other white-collar defendants have also received enormous sentences, such as Norman Schmidt, whose 2008 “Guideline” sentence of 330 years for his role in a fraudulent high-yield investment scheme is nothing to sneeze at.<sup>42</sup>

## The Takeaway

Sentences seem extreme. Indeed, on their face, such sentences appear significantly “greater than necessary,” even if they are the functional equivalent of life sentences. Moreover, it is simply difficult to believe that 300-plus year sentences have any historical or empirical moorings, and that is somewhat troubling if empiricism is supposed to be a justification for Guideline Sentences.

What is more troubling is that the length of such sentences strongly implies that *individualized* analyses (the overarching rule imposed by § 3553) are possibly being sacrificed more systematically in the name of the Guidelines. And this may be most unjustified in more run-of-the-mill white-collar cases. If sentences like those above would not have been handed down or upheld *but for* the Guidelines, then individualized analyses are indeed taking a backseat to Guideline-prescribed sentences in some cases. Anecdotally, at least, this indicates that more systemic problems are in fact present, though they may, as a practical matter, be less detectable where sentences are not the functional equivalent of a life sentence.

Moreover, such sentences also indicate that, instead of creating uniformity, the Guidelines may actually be *increasing* sentence disparities—an outcome entirely at odds with their primary goal. Indeed, the Sentencing Commission recently determined that “disparities in federal sentencing appear to be increasing.”<sup>43</sup> This is probably due in part to the ambiguity and lack of consensus surrounding the Guideline’s proper role. Some judges pay them great deference while others pay them much less. Because the Guidelines call for longer sentences in white-collar cases than has been the historical norm, if we assume that judges, in a Guideline-free world, would impose sentences that more closely follow historic norms (as, by definition, they did before the Guidelines), then the Guidelines are actually increasing sentence disparities in the white-collar context when some judges routinely follow them and others do not.<sup>44</sup>

Finally, sentences like those above could be expected to have at least a marginal impact on the willingness of defendants to enter into plea deals. In a criminal justice system where, at the federal level at least, over 76,000 criminals are sentenced annually<sup>45</sup> and approximately 97-percent of convictions are by plea,<sup>46</sup> prosecutorial resources are at a premium—the system depends on pleas to function efficiently. Defendants who perceive an increased risk of receiving an exorbitant sentence—or even just increased risk with respect to the sentence that might result from a plea—may show less willingness to enter into plea deals, putting increased stress on the criminal justice system.<sup>47</sup> Thus, the Guidelines, a device originally intended to increase certainty in the sentencing process and, thereby, encourage pleas on the margin, may actually have the opposite effect to some degree.

So what does the future hold for the role of the Guidelines in white-collar sentencing? They are likely to come under increasing attack, particularly if they appear to result in

more and more sentences that defy the conventional wisdom on expected human life spans. While they are unlikely to be extricated from the sentencing analysis in any formal manner any time soon, their influence will, probably continue to decline in the white-collar context. Guidelines that have been rendered advisory, and which—in the white-collar context at least—are not based on historical sentencing norms, may not only be failing to address the primary concerns they were intended to remedy, but may actually be exacerbating them.

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- <sup>1</sup> E.g., *United States v. Kimbrough*, 552 U.S. 85, 109 (2007) (emphasis added).
- <sup>2</sup> *Gall v. United States*, 552 U.S. at 38, 49–50 (emphasis added); *Kimbrough*, 552 U.S. at 101; *United States v. Booker*, 543 U.S. 220, 245 (2005); 18 U.S.C. § 3553(a)(2) (provides the following purposes of sentencing: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.).
- <sup>3</sup> *Gall*, 552 U.S. at 50.
- <sup>4</sup> See, e.g., U.S. Sentencing Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, 58, 60 (Jan 2013) [hereinafter *Booker Report*], available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_A.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf).
- <sup>5</sup> See *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall*, 552 U.S. at 49-50.
- <sup>6</sup> *Gall*, 552 U.S. at 49.
- <sup>7</sup> *Rita*, 551 U.S. at 390-91.
- <sup>8</sup> See, e.g., *Gall*, 552 U.S. at 49 ([E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).
- <sup>9</sup> Kate Smith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 (1993).
- <sup>10</sup> Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 1, 20 (2001).
- <sup>11</sup> *Id.* at 20-21.
- <sup>12</sup> *Id.* at 21.
- <sup>13</sup> Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992); *Mistretta v. United States*, 488 U.S. 361 (Justice Scalia long ago noted, the Commission “chose, for example, to prescribe substantial increases over average prior sentences for white-collar crimes. . . .”).
- <sup>14</sup> Ellis, Steer & Allenbaugh, *At a “Loss” for Justice Federal Sentencing for Economical Offenses*, 2011 CRIM. JUST. 34, 37 (emphasis in original).
- <sup>15</sup> Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENTENCING REP. 167, 168 (Feb. 2008).
- <sup>16</sup> See *Booker*, 543 U.S.
- <sup>17</sup> E.g., *Rita*, 551 U.S. 338; *Gall*, 552 U.S.; *Kimbrough*, 552 U.S.; *Irizarry v. United States*, 553 U.S. 708

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(2008); *Spears v. United States*, 555 U.S. 350 (2009); *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

<sup>18</sup> *Booker Report*, *supra* note 7, at 3.

<sup>19</sup> *Id.* at 58, 60.

<sup>20</sup> *Id.* at 3, 67.

<sup>21</sup> *See* Bowman, III, *supra* note 15, at 169.

<sup>22</sup> *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008); *See also United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006), *aff'd* 301 F. App'x 93 (2d Cir. 2008).

<sup>23</sup> Judge Rakoff, Keynote Address at American Bar Association's 27th Annual National Institute on White Collar Crime Conference (March 8, 2013).

<sup>24</sup> *Booker Report*, *supra* note 7, at 3, 75, 87.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> A category that engulfs "white-collar" crimes.

<sup>28</sup> *Booker Report*, *supra* note 7, at 87-88.

<sup>29</sup> *Id.* at 92.

<sup>30</sup> *Id.*

<sup>31</sup> Alexei Barrionuevo, *Enron's Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006.

<sup>32</sup> *See* Bowman, III, *supra* note 15, at 167.

<sup>33</sup> Steve Rosenbush, *The Message in Ebberts' Sentence*, BLOOMBERG BUSINESSWEEK, July 13, 2005 (Treasurer, Ben Glisan (five years); Assistant Treasurer, Lea Fastow (one year); Assistant Treasurer, Timothy Despain (four years' probation); Global Finance Managing Director, Michael Kopper (three years); Head of investor relations, Mark Koenig (eighteen months); Investor relations official, Paula Rieker (two years' probation); and the chair and CEO of Enron Energy Services, Dave Delainey (thirty months)).

<sup>34</sup> Shawn Young, Dione Searcey & Nathan Koppel, *Cooperation Pays: Sullivan Gets Five Years*, WALL. ST. J., Aug. 12, 2005.

<sup>35</sup> *See* Shawn Young, *WorldCom Ex-Controller Myers Gets Year-and-a-Day Jail Term*, WALL. ST. J., Aug. 11, 2005; Shawn Young, *WorldCom's Yates Is Sentenced to a Year and a Day in Prison*, WALL. ST. J., Aug. 10, 2005.

<sup>36</sup> Shawn Young & Dionne Searcey, *Former Executive At WorldCom Gets 5-Month Jail Term*, WALL. ST. J., Aug. 8, 2005.

<sup>37</sup> *See* Bowman, III, *supra* note 15, at 167, 169.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 170.

<sup>40</sup> *Weiss v. Yates*, No. 09-13777 (11th Cir. Apr. 20, 2010) (per curiam) (Weiss was found guilty of 78 counts and sentences for each count were imposed according to the Guidelines); Liz Moyer, *In the Pictures: The Longest White-Collar Prison Sentences*, FORBES, June 29, 2009 (With some 700-plus years of good time, Weiss is looking at a projected release date of November 23, 2754).

<sup>41</sup> *Id.*

<sup>42</sup> *United States v. Schmidt*, No. 08-1171 (10th Cir. Feb. 12, 2010) (“The district court properly calculated Schmidt’s . . . within-guidelines 330-year sentence.”).

<sup>43</sup> *Booker Report*, *supra* note 7, at 3.

<sup>44</sup> This assumption, of course, may be impacted by factors such as changes in statutory sentences or public opinion (which may, itself, have been intractably influenced by the Guidelines) or a number of other factors.

<sup>45</sup> *Booker Report*, *supra* note 7, at 4.

<sup>46</sup> *Id.* at 58.

<sup>47</sup> This logic obviously assumes a degree of defendant rationality and sophistication, but there is anecdotal evidence to suggest that such an assumption is perhaps most warranted in the white-collar context, which notably, involves cases that by their very nature require disproportionate resources to prosecute and therefore may disproportionately impact the efficiency of our criminal justice system.