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# FOR THE RECORD

BY CRAIG SANDBERG

## U.S. Supreme Court Permits Departure from U.S. Sentencing Guidelines Regarding Crack/Powder Cocaine Amounts

On December 10, the U.S. Supreme Court, in *Kimbrough v. United States*, No. 06-6330, gave federal judges new authority to set sentences for crack cocaine crimes below the range of punishment set by federal guidelines, which is a major restoration of flexibility for trial judges in drug cases.

The Court held that, under *United States v. Booker*, 543 U.S. 220 (2005), the U.S. sentencing Guidelines (the guidelines), like all other guidelines, are advisory only and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the guidelines range in the array of factors warranting consideration. The judge may determine, however, under appropriate circumstances, that a within-guidelines sentence is "greater than necessary" to serve the objectives of sentencing. 18 U.S.C. §3553(a). In making that determination, the judge may consider the disparity between the guidelines' treatment of crack offenses and powder cocaine offenses.

The Court's 7-2 ruling validates the view of the U.S. Sentencing Commission that the 100-to-1 crack/powder disparity may exaggerate the seriousness of crack cocaine crimes. Under the statute criminalizing the manufacture and distribution of crack cocaine (21 U.S.C. §841 and the relevant guidelines prescription, §2D1.1), a drug trafficker dealing in crack cocaine is subject to the same sentence as a drug trafficker dealing in 100 times more powder cocaine. The Court's decision rejected the government's argument that, because Congress had written the ratio into federal law, federal judges could not depart from it. The law, the Court concluded, sets only maximum and minimum sentences. "The statute says nothing about appropriate sentences within these brackets, and this Court

declines to read any implicit directive into the congressional silence."

The decision does not mean that crack cocaine crimes must be punished in the same way that powder cocaine crimes are, but it does allow trial judges to disagree with the guidelines' much more severe recommendations for punishment of crack crimes. The decision also does not disturb the 100-to-1 ratio spelled out in federal law; that ratio still applies at the minimum level of quantities of drugs involved in a given crime. Some 70 percent of those convicted of crack cocaine get the minimum sentence, many as a result of plea bargains. Above that level, however, the new ruling gives trial judges considerable range of choice.

The *Kimbrough* ruling on punishing crack cocaine offenses marks a major shift in the debate that has raged for 21 years over the much more severe sentencing required for those whose crimes involve crack cocaine. The Sentencing Commission for years asked Congress to ease the 100-to-1 ratio, but only recently gained some flexibility to vary the guideline range outside that ratio. The disparity in punishment has often been challenged as being racially oriented, because African-American offenders more often are involved in possessing or distributing crack than they are powder. The Commission stated that the crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system" because of a "widely-held perception" that it "promotes unwarranted disparity based on race." Justice Ginsburg noted that 85 percent of those punished for crack crimes in federal court are African-American; thus, the severe sentences required by the 100-to-1 ratio are imposed "primarily upon black offenders."

The 100-to-1 ratio is keyed to the quantity of cocaine involved in the crime. Although chemically similar, crack and

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powder cocaine are handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. As Justice Ginsburg explained, “[A] dealer in crack cocaine was subject to the same sentence range as a dealer in 100 times more powder cocaine.” One effect of this, Ginsburg noted, is “that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.”

### U.S. Supreme Holds That Imposition of Sentences Below the Specified Range May Still Be Regarded as Reasonable

In another guidelines ruling from the U.S. Supreme Court on December 10 (*Gall v. United States*, No. 06-7949), the Court—also by a 7-2 vote—held that while the extent of the difference between a particular sentence and the recommended guidelines range is relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the guidelines range—under a deferential abuse-of-discretion standard. This decision has cleared the way for judges to impose sentences below the specified range and still have such punishment regarded as “reasonable.”

Brian Michael Gall joined an ongoing enterprise distributing the controlled substance ecstasy while he was in college, but withdrew from the conspiracy after seven months, has neither sold nor used illegal drugs since then, and has worked steadily since graduation. Three-and-a-half years after withdrawing from the conspiracy, Gall pleaded guilty to his participation. A pre-sentence report recommended a sentence of 30 to 37 months in prison, but the district court sentenced Gall to 36 months’ of probation, finding that probation reflected the seriousness of his offense and that imprisonment was unnecessary because his voluntary withdrawal from the conspiracy and post-offense conduct showed that he would not return to criminal behavior and was not a danger to society.

The Eighth Circuit reversed on the ground that a sentence outside the Federal Sentencing Guidelines range must be—and was not in this case—supported by extraordinary circumstances.

The issue there was whether *any* federal sentence that fell below a Guideline floor was valid if it was not supported by “extraordinary circumstances.”

### Illinois Supreme Court Finds That the Targeted Tender Rule Does Not Preempt Horizontal Exhaustion

On November 29th, the Illinois Supreme Court affirmed the judgment of the appellate court in the case of *Kajima Const. Serv., Inc. v. St. Paul Fire and Marine Ins. Co.* (Docket No. 103588) by holding that the selective or targeted tender rule does not preempt horizontal exhaustion of primary insurance coverage before proceeding against an excess insurer.

In December 1997, Kajima Construction Services, Inc. (Kajima) entered into a subcontract with Midwestern Steel Fabricators, Inc. (Midwestern), in connection with a construction project. Pursuant to the subcontract, Midwestern was required to maintain commercial general liability (CGL) coverage for Kajima as an additional insured. Midwestern provided Kajima with a certificate of insurance from St. Paul Fire and Marine Insurance Company (St. Paul), naming Kajima as an additional insured and providing Kajima with \$2 million in general liability coverage and \$5 million in umbrella coverage. Kajima also had its own primary CGL insurance policy with Tokio with limits of \$1 million per occurrence.

During the construction project, an employee of Midwestern’s subcontractor was injured and later sued Kajima and Midwestern. Kajima made a targeted tender to St. Paul. Before trial in the underlying case, Tokio demanded that St. Paul settle the suit for \$3 million, without contribution from Tokio. St. Paul refused. The case later settled for \$3 million, with St. Paul paying its \$2 million primary limits and Tokio paying its \$1 million primary limits.

On appeal to the Appellate Court of Illinois for the First District, the court rejected Kajima’s and Tokio’s argument that because Kajima selectively tendered its defense and

indemnification to St. Paul, St. Paul was required to respond with both its primary and excess coverage before Tokio’s primary limits were invoked.

On appeal to the Illinois Supreme Court, Kajima argued that “horizontal exhaustion” cannot coexist with “targeted tender” in circumstances such as those present in this case and that since targeted tender is the more recent of the two doctrines, the Supreme Court should hold that targeted tender prevails over horizontal exhaustion. St. Paul, on the other hand, argued that the court did not need to resolve the alleged conflict between horizontal exhaustion and targeted tender because horizontal exhaustion is limited to those cases involving bodily injury or property damage spanning multiple policy periods over several years of coverage. The Court specifically rejected St. Paul’s argument that horizontal exhaustion does not apply in this instance.

In arriving at its conclusion, the court provided an in-depth review of the history of horizontal exhaustion (whether an insured must exhaust all available primary insurance before seeking coverage from any excess policy) from its beginnings in *United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598 (1994). Additionally, the court reviewed Illinois’ appellate decisions regarding the targeted or selective tender doctrine (allowing an insured covered by multiple insurance policies to select or target which insurer will defend and indemnify it with regard to a specific claim) from *Institute of London Underwriters v. Hartford Fire Insurance Co.*, 234 Ill. App. 3d 70 (1992) to *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570 (2000). In *Burns Construction*, the court directly addressed the targeted tender doctrine.

Finally, the court, in analyzing the differences between primary and excess insurance, relied heavily on Justice Freeman’s separate writing in *Roberts v. Northland Ins. Co.*, 185 Ill. 2d 262, 275 (1998). The Court determined that the St. Paul umbrella policy was a “true” excess policy and stated that “[e]xtending the targeted tender rule to require an excess policy to

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ibility of juries,” wanted to have the charges against his wife dropped and assumed that he would be sentenced to probation. Instead, however, then – U.S. District Judge Ann C. Williams sentenced Walker to seven years in prison, and five years of probation. Walker notes that, after all of the disastrous savings and loan failures of the 1980s, only the notorious Charles Keating – whose “bondholders and depositors lost millions” – and he were “ever indicted and punished.” Walker writes that he never dreamed that the “law that I loved so much would turn around and bite me in the ass.”

Each chapter of *The Maverick and the Machine* begins with Walker’s searing memories of the 18 months that he eventually served at the minimum security federal prison in Duluth, Minnesota. He experienced a warden and guards who seemed to delight in humiliating him precisely because of his once high station. The warden himself gave Walker a nail-tipped “governor stick” to pick up cigarette butts on the prison grounds.

Walker recalls repeated strip searches, witnessing the gang sodomization of a young man who shared his prison room, being physically threatened by other prisoners and, at one point, contemplating suicide by stepping off the top of the prison water tower.

This book is both well written and fascinating, but not without its faults. Persons’ names are misspelled (“Ron” instead of “Rod” Blagojevich) or misstated (former Chicago Alderman “Dick” Kelley instead of “Cliff”). There are factual errors as well, some of which are a bit startling, such as mistaking the year in which Walker reported to prison, or his first words in claiming victory on the night of the 1972 primary (they were “We have won. The people have won.”). Walker’s memory and his fact checker let him down.

While acknowledging some of his own failings, including often neglecting his children as they grew up and walking out on the mother of those children, as well as his own pride, pretentiousness and cockiness, Walker too often brands others’ political or professional choices as personal betrayals or vendettas. Perhaps it’s his way of coping with the mix of anger and pain he feels because of his fall from grace. ■

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pay before a primary policy would eviscerate the distinction between primary and excess insurance.” Consequently, the court stated that the “better rule is that set forth by the appellate court—that targeted tender can be applied to circumstances where concurrent primary insurance coverage exists for additional insureds, but to the extent

that defense and indemnity costs exceed the primary limits of the targeted insurer, the deselected insurer or insurers’ primary policy must answer for the loss before the insured can seek coverage under an excess policy.” The court found that its holding “preserves the distinction between primary and excess insurance policies.” ■

## Judge’s Tips continued from page 37

- **Know how to read an evidence deposition to the jury.** Many attorneys read evidence depositions in a monotone. When you read the important parts of an evidence deposition, you must do something to get the attention of the jurors. Change your tone of voice, change the inflection in your voice or move from behind the podium.
- **Know how to deal with the issue of damages.** If you represent the plaintiff, spend just as much time on damages as you do on liability. If you represent the defendant, don’t treat damages as an afterthought.
- **Know how to use *voir dire* effectively.** *Voir dire* is the only time you can speak directly to an individual juror. Use this time to make a positive impression on each juror. Make eye contact and if you do not ask a question of every juror, at least speak to each juror.
- **Instruct your witnesses about orders *in limine*.** Make sure your witness does not cause a mistrial by violating an order *in limine* based on your opponent’s motion. You should also be sure that your witness does not discuss evidence that was precluded by an order based on one of your own motions.
- **Be yourself.** There is no such thing as “the” personality of a litigator. If you are methodical, be methodical. If you are outgoing, be outgoing. Do not risk making a mistake by trying to emulate the style of someone else. ■

### LUNCH’N LEARN WITH A JUDGE

You’re invited to have lunch with Judge **Mary Ann Mason**, Chancery Division, and US District Court Magistrate Judge **Michael T. Mason** on Thursday Feb. 14 at 12 noon at CBA Headquarters. This members-only event is complementary, and is limited to the first 100 responders. To save your space, e-mail your name and member number to [yls@chicagobar.org](mailto:yls@chicagobar.org).



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