GOVERNMENT PROPOSES BELOW-GUIDELINES SENTENCE: THIS TIME, FOR THE RIGHT REASONS

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When higher-ups in the Department of Justice intervened in the sentencing phase of the criminal case against Trump campaign worker Roger Stone, the reactions of most Americans depended, at least in part, upon their personal political views. As a white-collar criminal defense lawyer, I viewed the case through a different lens.

Based upon my knowledge of the case, gleaned from nothing more than media reports and my reading of a pleading or two, my thought process was as follows:

1. Regardless of what you think of Roger Stone and/or his politics, the sentencing range determined by the United States Sentencing Guidelines was ridiculously excessive.
2. It was depressing to see the prosecutors originally assigned to the case push for a sentence in accordance with those guidelines.
3. It was nice to see prosecutors—albeit ostensibly politically motivated prosecutors—actually tell a court: Hey, the guidelines are too high, the court should impose a lesser sentence.
4. It sure would be nice to see more prosecutors exercise a little reasoned judgment in cases that aren't so high-profile and politically unique and advocate for sentences not so inflated by the

Sentencing Guidelines.

As to point 4, while I thought it would be nice, I really didn't expect to see it.

This week, I saw it.

United States of America v. David Britt

United States of America v. David Britt (Case 1:18-cr-00036-JPO) Last October, in a criminal case pending in the United States District Court for the Southern District of New York, David Britt, a former audit partner at accounting giant KPMG, pled guilty to one count of conspiracy to commit wire fraud. The case arose out of the receipt by KPMG of confidential information belonging to the Public Company Accounting Oversight Board ("PCAOB"), a post-Enron body created by Congress to oversee auditors of public companies.

KPMG obtained the information via a former PCAOB official, who left that body and went to work for KPMG. The information included the names of KPMG clients as to whom the PCAOB planned to review the audits conducted by KPMG. Having this information allowed KPMG to reassess those audits, beef up the files, and, sometimes, perform corrective or new audit work prior to the PCAOB's review.

This past Tuesday, in a filing to the Court known as a "Sentencing Memorandum," the prosecutors in the case did not pull any punches letting the Court know just how egregious they believed Britt's conduct had been.

> *The Sentencing Memorandum used terms such as "**incredibly serious**" and "**pervasive wrongdoing**" to describe Britt's behavior. It said that he and his co-conspirators "**perpetrated a fraud that caused the PCAOB to suffer hundreds of thousands of dollars in lost employee time**," and that the crime "**undermined the PCAOB's role as a watchdog**."*

The Memorandum also highlighted Britt's lofty position at KPMG, as co-chair of the firm's banking and capital markets group.

The Memorandum noted that, in the plea agreement reached between the Government on one side and Britt and his lawyers on the other, the parties all agreed that the Sentencing Guidelines recommended that the Court sentence Britt to a prison term of between 27 to 33 months.

A sentence within the range recommended by the Sentencing Guidelines is called a "Guidelines Sentence". In my experience, prosecutors generally urge the Court to sentence the defendant to a Guidelines Sentence, unless the defendant essentially "flips" by providing "substantial assistance" that helps the Government go after other people. Nothing in the Government's Sentencing Memorandum in Britt's case suggests that he provided substantial assistance.

And yet, in this case, the Government is not asking the Court for a Guidelines Sentence, but instead

urges the Court to "impose a significant, but below-Guidelines, sentence on the defendant."

To support this position, the Sentencing Memorandum cites two factors:

- certain "history and characteristics" of Britt brought to the attention of the Court by his attorneys in an earlier submission, and
- the fact that other participants in the scheme received below-Guidelines sentences.

With respect to the latter point, the Government noted that one co-defendant, who held an even higher position within KPMG than did Britt, received a sentence of one year plus one day.

> *Another co-defendant, a PCAOB employee "who set the scheme in motion by providing the confidential PCAOB information," received a nine-month sentence. And an eight-month sentence went to yet a third co-defendant, another former PCAOB staffer (and former FBI agent) "who destroyed evidence in an effort to cover-up the fraudulent scheme."*

The prosecutors seemed to invoke fundamental fairness—Britt should not be sentenced more harshly than others who had acted in a similar or worse fashion.

United States of America v. Booker

United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) At one time federal courts had very little leeway to sentence outside the suggested Guidelines range. That changed with a Supreme Court opinion in 2005, after which the Guidelines became advisory rather than mandatory.

> *Congress has directed the federal courts to consider several factors when imposing a sentence, including the history and characteristics of the defendant and "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."*

18 U.S. Code § 3553 In the years since 2005, courts have embraced their authority to consider non-Guidelines criteria when imposing sentences and to sentence below (and, sometimes, above) the Guidelines. (The United States Sentencing Commission provides mountains of statistics to back up that statement.)

The 'Stone' Cold Conclusion

Federal prosecutors, in contrast and on average (for there are, as clearly demonstrated here, exceptions), have been much slower to accept the non-mandatory nature of the Guidelines. The Sentencing Memorandum filed by the Government regarding Britt was a breath of fresh air, unaccompanied by the foul taste of politics that tainted the somewhat similar and otherwise welcome approach taken by DOJ in the Stone case.