Federal Sentencing Under The Advisory Guidelines: A Primer for the Occasional Federal Practitioner

— Part Two

Sentencing Discretion After *Booker, Gall,* and *Kimbrough*

Part One of this two-part article explained how the advisory guideline range is determined under most circumstances. Part Two completes the primer on the guidelines by explaining how the advisory range is determined in special situations, such as where defendants are subject to the career offender guideline or the Armed Career Criminal Act. It then discusses the new sentencing discretion courts now enjoy after *Booker*, *Gall*, and *Kimbrough*.

The U.S. Sentencing Guidelines generally determine the sentencing range by calculating the offense level and the criminal history category in the ways discussed in Part One of this article. This method usually produces a sentence that any reasonable person would consider punitive enough. Sometimes, however, Congress wants to make sure that the guideline range is even harsher. Congress has mandated extremely high guideline ranges for four types of defendants. The U.S. Sentencing Commission has adjusted the guidelines to comply.

The "career offender" is the first type of defendant for whom there is a higher guideline range. To be a career offender, a defendant must meet three conditions. He must have been at least 18 years old when he committed his current offense. His current offense must be a crime of violence or a "controlled substance" offense. Finally, he must have two prior convictions for crimes of violence or controlled substance offenses. The Career Offender guideline sets offense levels based on statutory maximums.[1] It also places all "career offenders" in Criminal History Category VI.

"Armed career criminals" must receive sentences of at least 15 years' imprisonment. They may be sentenced up to life in prison. An "armed career criminal" is someone who violates 18 U.S.C. § 922(g) and meets other

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conditions set by § 924(e) (the Armed Career Criminal Act, also known as "ACCA"). Section 922(g) mainly applies to gun possession by previously convicted felons. Explaining these offenses is beyond the scope of this article. The guideline offense level for ACCA defendants is determined by USSG § 4B1.4. This guideline requires the court to calculate a defendant's offense level using the one of several methods that produces the greatest offense level. The first method is to determine the defendant's normal guideline level. The second uses the career offender guideline, if that is applicable. The third imposes an offense level of 33 or 34. The ACCA guideline also controls a defendant's criminal history category. It requires a criminal history category of at least IV. In some cases it requires a court to use Category VI.

"Repeat sexual offenders" are subject to statutory maximums that are twice as long as first offenders.[2] The guidelines take this into account through USSG § 4B1.5. This is the guideline for "repeat and dangerous sex offenders against minors." This guideline sets the offense level based on the statutory maximum. It requires a criminal history category of at least Category V.

Some laws require courts to impose a sentence that is no less than a certain number of years. Mandatory minimum sentences are the most common way that Congress makes sure that some defendants receive harsher sentences than their guidelines would otherwise require. For example, a defendant convicted of growing 100 or more marijuana plants must be sentenced to at least five years in prison, no matter how much the plants weigh.[3] If a defendant grew 100 marijuana plants that each produced 100 grams of useable marijuana, he would have grown 10 kilograms of marijuana. This normally results in a base offense level 16. If this defendant received no other levels and was in Criminal History Category I, his guideline range would normally be 21-27 months. However, because of the mandatory minimum, the court would have to impose a five-year (60-month) sentence on that count.

Other § 3553(a) Factors

After the sentencing court calculates the guideline range,[4] it must "consider" it along with the other factors listed in 18 U.S.C. § 3553(a). Those factors are the nature and circumstances of the offense and the history and characteristics of the defendant,[5] the purposes of sentencing,[6] the kinds of sentences available,[7] the policy statements issued by the Sentencing Commission, such as those related to departures,[8] the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,[9] and the need to provide restitution to any victims of the offense.[10]

Departures and Variances

Another one of the seven factors a sentencing court must "consider" is the Sentencing Commission's policy statements. The sections of the Sentencing Guidelines Manual that deal with "departures" are all "policy statements." When the guidelines were mandatory, a "departure" was the way that they dealt with situations that were either not covered by the guidelines at all, or which they did not adequately cover.

The guidelines themselves recognize that it may be appropriate for a court to impose a sentence that is lower or higher than the otherwise recommended range. When a court lowers the offense level or criminal history category for this reason, it is called a "downward departure." When it raises one of them for this reason, it is called an "upward departure." When a court "departs," it does not have to say that it is departing up or down any particular number of offense levels or criminal history categories. It can simply depart to a sentence that is higher or lower than the guideline range. When the guidelines were still mandatory, departures were the only way a court could impose a sentence outside the guideline range.

Now that the guidelines are advisory, it is less important whether a particular mitigating or aggravating factor would justify a departure. That is because courts may now sentence below or above the guideline range if they think that is necessary to achieve a sentence that is "sufficient, but not greater than necessary" to achieve the goals of sentencing — regardless of whether there are grounds for a departure under the guidelines. A sentence above or below the guideline range that is not supported by a "departure" is called a "variance."

Although a court may now impose a below-guideline sentence even when guideline policy statements provide no basis for a departure, policy statements are still important. If a mitigating factor would have justified a downward departure under the mandatory guideline system, it may be easier to justify a lower sentence to a court.

There are several factors that sentencing guideline policy statements provide may never support departures. They include race, sex, religion, lack of youthful guidance, drug or alcohol dependence, and post-sentencing rehabilitation. But now that the guidelines are no longer mandatory, courts may, in appropriate cases, rely on these formerly excluded factors to impose a sentence that is outside the guideline range.

There are three situations in which guideline policy statements say that departures may be appropriate. The first is where the case involves a factor that is not mentioned by the guidelines at all. Such factors are likely to be unique to the case in question. The second situation is where a case involves a factor for which a policy statement "encourages" departures. Encouraged *downward* departures are listed in USSG §§ 5K2.1-5K2.18 and § 5K2.20. Some of the circumstances for which the guidelines encourage downward departures are:

- ❖The victim's wrongful conduct provoked the offense;
- ❖The defendant committed the offense to avoid a greater harm. The guidelines give "mercy killing" as an example;
- ❖The defendant was forced to commit the offense. This departure is helpful when there was coercion, but not enough to warrant an acquittal;
- ❖The offense was out of character for the defendant. The guidelines call this *aberrant behavior*;
- ❖The defendant's diminished mental capacity contributed to the offense. "Diminished mental capacity" refers to psychological problems. It also covers very low intelligence. The guidelines recognize two kinds of diminished capacity. One kind of diminished capacity makes it difficult for a defendant to control his behavior. The other kind makes it difficult for a defendant to understand that what he did was wrong. This departure is encouraged only for non-violent offenses and for offenses that were not caused by voluntary drug or other intoxicant use. It is also not generally available to sex offenses; and
- ❖The defendant voluntarily disclosed the offense.

The guidelines encourage *upward* departures for things such as extreme conduct, abduction or unlawful restraint, extreme psychological injury, and significantly endangering the public welfare. Some of the guidelines in Chapter Two also mention "encouraged departures" for specific types of offenses. Most of these point upward, but some encourage downward departures.

The third situation in which guideline policy statements recognize that departures may be appropriate is where a case involves a "discouraged factor" to an extraordinary degree. The guidelines say that these factors are "not ordinarily relevant" to whether a court should depart. Departures based on such factors are recommended only if they are present to an extraordinary extent. Factors for which departures are "discouraged" include:

- A defendant's age;
- A defendant's education;
- A defendant's skills;
- A defendant's physical, mental, or emotional condition;
- A defendant's civic and charitable contributions;
- A defendant's employment record; and
- A defendant's family ties and responsibilities.

These factors are "discouraged" as reasons for departure because they are more common. For example, it is not unusual for a defendant facing sentencing to have emotional problems. Children and spouses often suffer when one of their family members is sent to prison. Policy statements recommend that courts not depart for these reasons unless the emotional problem or the suffering of the spouse or children is extraordinary.

Sometimes policy statements recommend that courts consider departures based on a factor that the guidelines have considered. This can happen when the factor is present to a degree that the guidelines did not consider. For example, the guidelines provide for a downward adjustment for acceptance of responsibility. Some courts have departed downward for extraordinary acceptance of responsibility. When a court "departs" for this reason, it means that it lowers the offense level even more than the two or three levels provided by the guidelines.

Courts have found extraordinary acceptance of responsibility in several situations. Defendants who have begun to pay restitution before they have been charged with an offense have gotten this departure. So have defendants who have taken steps to rehabilitate themselves before being charged. Now that the guidelines are no longer mandatory, courts may chose to impose sentences below the recommended range for reasons that the Sentencing Commission took into account, as long as they "consider" the guidelines, policy statements, and other factors required by 18 U.S.C. § 3553(a), and as long as they explain why the lower sentence is "sufficient, but not greater than necessary" to achieve the goals of sentencing.

A defendant also may receive a downward departure if he helps the government prosecute or investigate someone else. A guideline policy statement recommends that a court not depart for this reason unless the prosecution files a motion that states that the defendant provided "substantial assistance." Normally, a defendant cannot force the government to file a substantial assistance motion. There are two, and in some circuits three, exceptions to this rule. The first is when the government refuses to file a motion for an unconstitutional reason, such as a defendant's race. The second is when the government has agreed in a plea agreement to file the motion, and then does not. It is unusual for the government to promise in advance to file a substantial assistance motion. Plea agreements often mention conditions under which the government will file substantial assistance motions, but usually give the government sole discretion to determine whether those conditions have been met.

In some circuits, there is a third exception to the general rule. This exception can help defendants with cooperation agreements that provide that the government will file the motion if it believes the defendant's cooperation amounts to substantial assistance. Agreements like these, however, are hard to enforce. The government can always say that it did not believe that the defendant's cooperation amounted to substantial assistance. In some circuits a defendant can force the prosecution to file a departure motion if he can demonstrate that the prosecution's refusal to file the motion was made in bad faith. The defendant must prove that his cooperation met the prosecution's standards for substantial assistance, but the prosecution refused to file the motion anyway.

Unless one of these conditions apply, a defendant cannot force the government to file a departure motion. This is not to suggest that substantial assistance motions are rare. They are not. The latest figures available (for 2007) reflect that a government substantial assistance motion is the most common reason for departure. Courts departed in 14.4 percent of the sentences imposed that year in response to substantial assistance motions.

Now that the guidelines are no longer mandatory, courts have the authority to impose lower sentences to reward cooperation — even where the prosecution has refused to file a departure motion. The one exception to this rule is where a mandatory minimum sentence applies. In that situation, a government motion is *required* before a court can impose a sentence below that minimum.

Substantial Assistance Motions, Cooperation Agreements, and The Safety Valve

There are two exceptions to laws that require mandatory minimum sentences. One applies when the prosecutor makes a substantial assistance motion. This exception applies to all mandatory minimum cases. The other applies only to drug cases. It is known as the safety valve.

Substantial Assistance Motions

Substantial assistance motions reward defendants who "cooperate" with the government. There are two kinds of substantial assistance motions. One kind permits courts to go below mandatory minimums. That kind of motion is authorized by 18 U.S.C. § 3553(e). The other kind asks courts to depart below the guideline range — but not below a mandatory minimum. That kind of motion is authorized by USSG § 5K1.1.

Prosecutors do not file departure motions for all cooperators. A prosecutor will file a motion only if the cooperation was "substantial." What is "substantial" in one prosecutor's office may not be "substantial" in another office. All prosecutors think that testifying against another person is "substantial." Some prosecutors think that talking about another person is not "substantial" if it does not lead to an arrest or conviction.

In a case involving a mandatory minimum sentence, a substantial assistance departure motion can give a court the power to impose a sentence as low as probation. A court can impose a lower sentence without a substantial assis-

tance motion in a case that does not involve a mandatory minimum sentence. But it is more likely that a court will impose a lower sentence if the government files a motion. A court will usually impose a lower sentence when the government files a departure motion. But not always. Departure motions do not *require* courts to impose lower sentences. Sometimes prosecutors make recommendations in their motions. A court also does not have to go along with a prosecutor's recommendation. It is up to the court how low to go. In some cases defense counsel can persuade the court to go even lower than recommended by the prosecutor.

Cooperation Agreements

Plea agreements sometimes require defendants to cooperate with the government. These are called "cooperation agreements." Cooperation agreements provide different kinds of benefits to defendants. Sometimes the prosecution promises to file a substantial assistance departure motion. If the government makes the promise without any conditions, it *must* file the motion. More often, a promise by the prosecution comes with conditions attached. The usual condition is that the defendant's cooperation must be "substantial." Usually it is entirely up to the prosecutor to decide what counts as being "substantial." Sometimes the government promises only to "consider" filing a motion. These kinds of agreements often lead to departure motions, but they are not guarantees.

The Safety Valve

There are no mandatory minimums in drug cases for defendants who quality for the safety valve. If a defendant qualifies for the safety valve, the court may sentence him below the mandatory minimum.[11] Most defendants who qualify for the safety valve also qualify for a two-level decrease in their offense levels.[12] There is one exception to this rule. A safety valve decrease cannot take a defendant's offense level below Level 17.[13]

A safety valve reduction is not the same thing as a departure. A defendant who qualifies for the safety valve will usually receive a lower sentence because his guideline range will usually be lower. It will usually be lower because no mandatory minimum will make it higher, and because he will receive a two-level decrease.

The prosecution does not have to file any motion to qualify a defendant for the safety valve. A defendant must meet five conditions:

- ❖Defendant has no more than one criminal history point;
- ❖Defendant did not use or threaten violence, and defendant did not possess a dangerous weapon in connection with the offense;
- ❖No one was killed or seriously injured by the offense;
- ❖Defendant was not an organizer, leader, manager, or supervisor of other people involved in the offense; and
- ❖Prior to sentencing, defendant tells the prosecution everything he knows about his offense and "relevant conduct."

The requirement that a defendant talk to the prosecution about his own offense and "relevant conduct" does not mean that he must give the government new information. It does mean, however, that sometimes a defendant must tell the prosecution about the criminal conduct of other people. A defendant does not have to testify against anyone to qualify for the safety valve.

Probation, Split Sentences, and Community or Home Confinement

Now that the guidelines are advisory, the restrictions they used to impose on probation, split sentences, and community or home confinement no longer limit courts in the same way. Courts now have the authority to impose these kinds of sentences in almost any case — even if there is no reason to "depart." The exception is where a statute prohibits a certain kind of sentence. Because a court must still "consider" the guidelines, it is important to understand how these restrictions work.

The guidelines recommend probation only if the range is in Zone A or Zone B of the Sentencing Table. Zone A means the guideline range is between zero and six months. A sentence of probation would be within the guideline range because a sentence of zero months is a sentence within the range. A sentence within this range also does not have to have home or community confinement as a term of probation.[14] "Community confinement" means a halfway house.

Defendants in Zone B also may receive sentences of probation that are within the guideline range. Zone B ranges have low ends between one and six months, and high ends of 12 months or less. For defendants in Zone B, the sentence must include some kind of confinement as a term of probation for a probation sentence to be within the guideline range. That confinement can be in a halfway house or home confinement. Zone B sentences may allow work release from the confinement without being outside the guideline range.[15]

Defendants in Zone C may receive what is sometimes called a *split sentence* and still be within the guideline range. Zone C ranges have low ends greater than six months, but less than 12 months. Defendants in Zone C may receive sentences within the guideline range that require them to serve at least half of the minimum term in prison, and the other half in community confinement or home detention as a condition of supervised release.[16] For example, if a defendant has a guideline range of 8-14 months, putting him in Zone C, the judge could give a sentence within the guideline range that includes four months' imprisonment and supervised release that included a condition that the defendant serve four months in a halfway house or in home detention.

The guidelines recommend that defendants in Zone D not be sentenced to terms of probation. Zone D ranges have low ends of at least 12 months. After *Booker*, some creative lawyers have successfully urged judges to place their clients on probation or impose split sentences for people whose guidelines fall within Zone D. For example, judges have imposed sentences of a year and a day of incarceration followed by supervised release, with a year's home confinement as a condition of supervised release, rather than two-year advisory guideline prison sentences.

Defendant Already Serving a Sentence

Some defendants are already serving sentences for other crimes when they are sentenced. Sometimes the guidelines recommend a sentence that runs *consecutively* to the first sentence. If the court accepts that recommendation, the new sentence will not even start until the defendant completes the first sentence. In other cases, the guidelines recommend *concurrent* sentences. That means that if the court accepts the recommendation, the defendant will serve both sentences at the same time, at least starting from when the second sentence is imposed.[17] In other cases, the guidelines make no specific recommendation, other than that courts use their discretion to impose concurrent or consecutive sentences, or sentences that are a little of both.

The guidelines recommend consecutive sentences for crimes committed while the person was already in prison, on work release, furlough, or escape status.[18] The guidelines recommend concurrent sentences if two conditions are met. First, the defendant must not have committed the offense in prison, on work release, furlough, or escape status. Second, the guidelines for the current offense must take the earlier offense conduct into account. This can happen when a defendant is prosecuted for a federal offense after he was prosecuted for a state offense that punishes some or all of the same conduct.

Sometimes a defendant is serving a sentence for an unrelated crime that he did not commit in prison. For these cases, the guidelines make no recommendation other than that courts use their discretion to run the sentence consecutively or concurrently, or a combination of the two. The guidelines recommend that judges decide what result is most fair in such cases.

Supervised Release

There is no parole for defendants sentenced for crimes committed on or after Nov. 1, 1987. That does not mean that after a defendant is released from prison he is no longer under any supervision. The guidelines recommend that a court impose a term of "supervised release" whenever it sentences a defendant to more than a year in prison.[19] Terms of supervised release range from one to five years, and sometimes even life, depending on the offense and the maximum punishment.[20]

Defendants on supervised release are under the supervision of probation officers. They must report to their probation officers on a regular basis. They also need permission from their probation officers to travel outside of their district. Defendants on supervised release must follow numerous conditions, many of which are listed in USSG § 5D1.3. For example, defendants on supervised release must work unless their probation officers excuse them. They are also not allowed to be in touch with the people they met in prison, unless their probation officers allow it. Federal law allows a court to terminate a term of supervised release after a defendant has successfully completed one year of supervised release.[21]

A defendant who violates one of the conditions of supervised release can be sent to prison for up to the full term of supervised release. Before a court can send someone to prison for violating a term of supervised release, it must "consider" many of the same factors that it had to consider before imposing sentence in the first place.[22] Those factors include the sentencing guidelines and policy statements.

Chapter Seven of the Guidelines Manual includes policy statements relevant to the revocation of supervised release. Whether a defendant who violates the conditions of supervised release will be sent to prison, and if so, for how long, depends on the seriousness of the violation. Defendants who violate supervised release are not usually sent to prison for the full term of the supervised release. How long a violator must serve depends on the seriousness of the violation and the violator's criminal history category. Chapter Seven, Part B of the guidelines deals with violations of probation and supervised release.

Fines, Restitution, Forfeitures, and Special Assessments

Every federal sentence includes a $100 special assessment for each felony count of conviction.[23] For example, if a defendant is convicted on 10 felony counts, he will receive a $1,000 special assessment.[24] Sentences often include other financial penalties as well, such as restitution, fines, and forfeitures.

Restitution is an order to pay money that goes to the victims of the offense. Courts are often required to order defendants to pay the full amount of victims' loss as restitution. A court must order full restitution in most cases even if the defendant does not and never will have the money to pay it. If a defendant does not have resources to pay the restitution, the guidelines recommend that the court order him to make small monthly payments that he can afford.[25] A court can require a defendant to make payments on a restitution order as a condition of supervised release.

The guidelines recommend that a court impose a fine unless the defendant is unable to pay one and is unlikely to become able to pay one.[26] Courts do not impose fines in most cases because most defendants are unable to pay them. The guidelines recommend a range for fines based on a defendant's offense level. A defendant's criminal history does not affect the fine range. For example, the fine range for offense levels 16-17 is $5,000 to $50,000. The fine table is found at USSG § 5E1.2(c)(3). A court must consider this range, just as it must consider the guideline imprisonment range. But it is no more required to impose a fine within the range than it is to sentence within a range. If a court orders a defendant to pay restitution and a fine, any money the defendant pays will be used to pay the restitution first.

A few statutes require defendants to pay the cost of their prosecution. These include several tax offenses, as well as larceny or embezzlement in connection with commodity exchanges. These statutes are listed in the commentary that follows USSG § 5E1.5.

Finally, some statutes require a court to impose an order of forfeiture as part of the sentence. When property is forfeited, it is turned over to the government. Racketeering and drug laws, for example, require defendants to forfeit to the government certain property used in the offense or purchased with money gained from the offense.

Appeals From Sentencing Decisions

Prior to the guidelines, it was nearly impossible to appeal a sentence. That changed with the guidelines system. When the guidelines were mandatory, it was possible to appeal a sentence if it was imposed as a result of an incorrect application of the guidelines or if the court departed upwards. The government could also appeal sentences it believed were imposed as a result of an incorrect application of the guidelines or if the court departed downwards. After *Booker*, it is still possible for defendants and the government to appeal sentences. Now courts of appeals review sentences for "reasonableness."

There are two types of reasonableness that courts of appeals review. The first thing a court of appeals does is to review a sentence for procedural reasonableness. There are several factors an appeals court will examine to determine procedural reasonableness. First, it looks to whether the district court correctly calculated the guideline range. If the district court did not calculate the guideline range correctly, then it did not consider the correct range as required by § 3553(a). That makes the sentence procedurally "unreasonable." Appellate courts review guideline issues *de novo*.

The appeals court will also determine procedural reasonableness by looking at whether the district court considered the other § 3553(a) factors and the arguments of the parties for a sentence outside the guideline range. District courts must adequately articulate their reasons for imposing a partic-

ular sentence. If a court rejects an argument for a sentence outside the guideline range, it must adequately explain its reasoning. If it does not, the sentence is procedurally unreasonable.

Appeals courts also review sentences for substantive reasonableness. Although *Booker* promised that district court judges would finally be freed from the constraints of the guidelines and allowed to exercise their discretion to do justice at sentencing, appellate courts soon rejected numerous below-guideline sentences as "unreasonable" simply because they did not believe that the mitigating circumstances on which the district courts relied were significant enough to support large "variances" from the bottom of the guideline ranges.

Gall and *Kimbrough*

After the Supreme Court held that appellate courts (but not district courts) may presume that sentences within the advisory guideline range are "reasonable,"[27] the message seemed to be that while the guidelines were "advisory," district courts that did not want to be reversed should not stray too far from the "advisory" range.[28] All that changed in December 2007 when the Supreme Court announced its decisions in *Gall v. United States*[29] and *Kimbrough v. United States*,[30] opening up a new era in federal sentencing in which judges once more are allowed to be judges.

Gall involved a conspiracy to distribute the illegal drug ecstasy. Although the guidelines recommended a sentence of 30-37 months' imprisonment, the district court sentenced Gall to 36 months' probation. The court cited several unusual mitigating factors to support its sentence. First, Brian Gall committed his offense when he was an immature 21-year-old college sophomore, and an ecstasy user himself. Second, several months after joining the conspiracy, Gall voluntarily stopped using illegal drugs and formally notified other members of the conspiracy that he was withdrawing from it. After that, Gall not only never used or distributed any illegal drugs, he finished his education and went to work in the construction industry.

After four years of leading an exemplary life, the government rewarded Brian Gall's rehabilitation with an indictment. He pled guilty. At sentencing, the court explained that a probationary sentence was sufficient, but not greater than necessary, to meet the goals of sentencing because Gall had in essence rehabilitated himself some four years before he had even been indicted. The government appealed and the Eighth Circuit reversed, holding that the district court's "100 percent" variance from the guideline range was not supported by sufficiently extraordinary reasons. The Supreme Court reversed the court of appeals.

Although *Gall* noted that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one,"[31] the Court explicitly "reject[ed] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the guidelines range."[32] It also "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[33] The Court noted that these approaches come perilously close to establishing a presumption that sentences outside the guideline range are "unreasonable" — a presumption the Court previously rejected in *Rita v. United States*.[34]

The *Gall* Court was particularly critical of what it termed the "mathematical approach." Viewing variances as percentages of the bottom of the guideline range tend to make sentences of probation seem "extreme," since "a sentence of probation will always be a 100 percent departure regardless of whether the guidelines range is 1 month or 100 years."[35] The Court was also critical of the fact that this approach also "gives no weight" to what the Court characterized as the "substantial restriction of freedom involved in a term of supervised release or probation,"[36] — a subtle invitation to courts to impose sentences of probation more often.

But *Gall* did more than invalidate particular approaches to reviewing variances from the guidelines. It reminded the courts of appeals that *Booker* not only invalidated the statutory provision that made the guidelines mandatory (18 U.S.C. § 3553(b)(1)), it also invalidated 18 U.S.C. § 3742(e), which directed appellate courts to review departures from the guidelines *de novo*. Prior to *Gall*, the courts of appeals seemed to ignore the significance of *Booker's* invalidation of § 3742(e). While the Supreme Court thought *Booker* had "made it … clear that the familiar abuse of discretion standard of review now applies to appellate review of sentencing decisions,"[37] the Court found that the decisions of the courts of appeals that required "extraordinary" reasons for significant devia-

tions from the guidelines "more closely resembled *de novo* review."[38]

Gall makes it clear that the Supreme Court meant what it said in *Booker*: While sentencing courts must consider the guideline range as a "starting point," the "guidelines are not the only consideration."[39] District courts must also consider *all* of the other factors listed in 18 U.S.C. § 3553(a). Once a court of appeals is satisfied that a district court has properly considered all of the factors listed in 18 U.S.C. § 3553(a), its review of a sentence is under the deferential abuse of discretion standard. While a court of appeals "may consider the extent of the deviation, [it] must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."[40] *Gall* does not mean that a district court's non-guideline sentence cannot be reversed for substantive unreasonableness. But reversal is unlikely in a case in which the district court has provided a detailed written explanation of why the § 3553(a) factors support the variance.

While *Gall* held that a district court does not abuse its discretion by basing a below-guideline sentence on offender characteristics, *Kimbrough* held that a district court does not abuse that discretion when it bases a below-guideline sentence on disparities in sentencing caused by the guidelines themselves. In *Kimbrough*, the district court imposed a below-guideline sentence in a crack cocaine case because it disagreed with the judgment of the Sentencing Commission and Congress that the distribution of any quantity of crack cocaine should be punished as severely as the distribution of 100 times as much powder cocaine — the infamous "100-to-1 ratio."

The essence of the holding in *Kimbrough* is that a district court's judgment that a particular sentence is "sufficient, but not greater than necessary" (the overarching command of 18 U.S.C. § 3553(a)) is entitled to great weight, even if the district court's judgment is based in part on its disagreement with the policies behind the applicable guideline. *Kimbrough* gave defense attorneys license to think creatively about how guideline sentences themselves create "unwarranted disparities." It may now be entirely possible to obtain a lower non-guideline sentence by arguing, among other reasons, that a particular guideline sentence would create unwarranted disparities with sentences imposed in similar state cases.

Although the promise of *Kimbrough* is great, it is important to remember that in many ways the history of the crack guideline makes it unique. While the majority observed that in the "ordinary" case, "the commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives,'" it seemed to place special significance on the fact that the Sentencing Commission long ago concluded that the 100-to-1 ratio was unjust. It remains to be seen whether the broadest reading of *Kimbrough* will enable future challenges to overly harsh guidelines.

The pendulum has finally swung to the point that judges now have more discretion than they have ever had since pre-guideline days to fashion an appropriate sentence in a particular case. Now it is up to defense attorneys to present sentencing courts with the evidence and arguments they need to exercise that discretion to produce just sentences.

After Sentencing — Taking Advantage of Favorable Guideline Amendments

The guidelines that a court uses at sentencing can change. Some amendments make the guidelines harsher. Once a defendant is sentenced, he is protected from that kind of change. Amendments can also reduce offense levels. Defendants who have already been sentenced can sometimes take advantage of these reductions. Before a defendant who has already been sentenced can take advantage of an amendment, the amendment must be listed in USSG § 1B1.10.

If an amendment is listed in § 1B1.10, the sentencing court has the *discretion* to modify a defendant's sentence. The sentencing court does not have to reduce a defendant's sentence based on a retroactive amendment. Once the guidelines make an amendment retroactive, the defendant may make a motion to modify sentence. The sentencing court could also modify the sentence on its own, without a motion.[41]

One of the most recent significant changes to the guidelines (which was shortly thereafter made retroactive) involved the crack cocaine guidelines. On Nov. 1, 2007, a new guideline amendment (Amendments 706 and 711) became effective that results in somewhat lower offense levels in many crack cocaine cases. Generally speaking, after Nov. 1, offense levels in cases involving crack cocaine are two levels lower than they would have been. The amendments make changes to the drug quantity table in USSG § 2D1.1(c) as well as to Application Note 10 of that guideline.

These amendments are the culmination of a more than 10 years' effort by the U.S. Sentencing Commission and sentencing reform groups to correct a serious pattern of unfairness in the sentencing of crack cocaine cases. The problem began when Congress passed the Anti-Drug Abuse Act of 1986. That law established mandatory minimum and statutory maximum sentences based on drug quantities. It also established a 100-to-1 ratio between powder and crack cocaine. Under that law, 100 times as much powder cocaine was required to trigger a given mandatory minimum and statutory maximum when compared to the amount of crack cocaine required. The problem got even worse when the commission adopted the same ratio in setting guideline offense levels in crack and powder cocaine cases.

By 1995, the Sentencing Commission had concluded that the 100-to-1 ratio was based on false presumptions. The commission concluded that crack was not significantly more dangerous or harmful than powder, and therefore proposed amending the guidelines to eliminate the 100-to-1 ratio and to replace it with a 1-to-1 ratio. Congress rejected that amendment, but asked the commission to propose changes to the law. The commission did just that in 1997 and 2002, but Congress took no action. Finally, in 2007, the commission proposed more modest changes to the crack-powder ratio, and Congress allowed them to become effective on Nov. 1, 2007. The mandatory minimum statutes, however, have not been altered.

While the change became effective on Nov. 1, the commission had not yet decided whether to make the amendment retroactive. If a guideline amendment that lowers offense levels is not made retroactive, then people sentenced to higher terms of imprisonment under the old rule do not benefit. Following public hearings on the retroactivity issue, the commission decided on Dec. 11, 2007, to make the amendments retroactive — but only beginning March 3, 2008.

What that means is that since March 3, 2008, defendants already serving sentences in cases involving crack cocaine have been applying for reductions in their sentences. The Sentencing

Commission estimates that over 19,500 inmates could be affected by this newly retroactive guideline.

The Sentencing Commission's decision to make the crack guideline retroactive is a good thing, but it does not guarantee a lower sentence. When the Sentencing Commission makes a guideline retroactive, it gives the court the *power* to lower a sentence — but it does not *require* the court to lower it.

Before deciding to lower a particular defendant's sentence, the court has to consider the factors listed in 18 U.S.C. § 3553(a). These are the same factors a court must consider before imposing sentence in the first place, although in most of the 19,500 cases the factors will have been given only limited consideration because the guidelines were thought to be mandatory prior to *Booker*. After *Booker*, this consideration can be much wider-ranging. Included among those factors are the history and characteristics of the defendant and the need to protect the public from further crimes of the defendant. If, after considering those factors, the court believes that a lower sentence would be "sufficient, but not greater than necessary" to achieve the goals of sentencing, it may lower the defendant's sentence — but only if, under 18 U.S.C. § 3582(c)(2), such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

This last requirement used to be satisfied simply by showing that the amendment is listed in USSG § 1B1.10(c) (p.s.). However, beginning March 3, 2008, the Sentencing Commission has added new requirements designed to reduce a court's discretion. This amended policy statement says that courts may not lower a sentence in cases where the amended guideline does not result in a lower guideline range. Even if the new range is lower, the policy statement attempts to prevent courts from imposing sentences lower than the bottom of the new range. The policy statement makes an exception for cases in which the court had previously departed downward. In such cases, the new sentence may be proportionally less than the new guideline range. The new policy statement also attempts to prevent courts from lowering sentences where defendants already received lower non-guideline sentences pursuant to *United States v. Booker*.[42] There is a possibility that these new restrictions can be challenged because they limit the discretion Congress intended to give courts in § 3582(c)(2).

Whether a particular defendant gets his or her sentence lowered will depend, at minimum, on whether the court is convinced that a lower sentence will be adequate to meet the goals of sentencing. Some defendants will need to present a sophisticated legal argument even to convince a judge that they are eligible for a reduction in sentence.

Notes

1. USSG § 4B1.1.
2. 18 U.S.C. § 2247.
3. 21 U.S.C. § 841(b)(1)(B)(vii).
4. *Id.* § 3553(a)(4),
5. *Id.* § 3553(a)(1),
6. *Id.* § 3553(a)(2),
7. *Id.* § 3553(a)(3),
8. *Id.* § 3553(a)(5),
9. *Id.* § 3553(a)(6),
10. *Id.* § 3553(a)(7).
11. USSG § 5C1.2(a).
12. USSG § 2D1.1(b)(6).
13. USSG § 5C1.2(b).
14. USSG § 5B1.1(a)(1).
15. USSG § 5B1.1(a)(2).
16. USSG § 5C1.1(d)(2).
17. If the defendant is currently in custody serving another sentence, the court must include special language in the judgment that will permit the new federal sentence to run concurrently with the other sentence. Otherwise, the Bureau of Prisons will not begin to run the new federal sentence until the defendant has completed serving his other sentence.
18. USSG § 5G1.3(a).
19. USSG § 5D1.1(a).
20. USSG § 5D1.2.
21. 18 U.S.C. § 3583(e)(1).
22. 18 U.S.C. § 3583(e).
23. For offenses committed prior to April 24, 1996, the assessment is $50 for each count. 18 U.S.C. § 3013.
24. 18 U.S.C. § 3013.
25. USSG § 5E1.1(f).
26. USSG § 5E1.2(a).
27. *Rita v. United States*, 551 U.S. ___, 127 S. Ct. 2456 (June 21, 2007).
28. Although a court of appeals may presume that a sentence within the guideline range is "reasonable," it may not presume that a sentence outside the range is "unreasonable."
29. 552 U.S. ___, 128 S. Ct. 586 (Dec. 10, 2007).
30. 552 U.S. ___, 128 S. Ct. 558 (Dec. 10, 2007).
31. *Id.* at 597.
32. 128 S. Ct. 595.
33. *Id.*
34. 551 U.S. ___, 127 S. Ct. 2456 (June 21, 2007).
35. 128 S. Ct. 595.
36. *Id.* (internal citation omitted).
37. 128 S. Ct. at 594.
38. 128 S. Ct. at 600.
39. 128 S. Ct. 596.
40. 129 S. Ct. at 597.
41. *See* 18 U.S.C. § 3582(c)(2).
42. 543 U.S. 220 (2005).

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