Supreme Court Finally Fulfills Promise of *Booker*

BY ALAN ELLIS AND JAMES H. FELDMAN, JR.

After *Booker,* defense attorneys were hopeful that district court judges would finally be freed from the constraints of the U.S. Sentencing Guidelines and allowed to exercise their discretion to do justice at sentencing. The euphoria did not last long. Courts of appeals soon rejected numerous 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. (*See, e.g.*, United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); United States v. Johnson, 427 F.3d 423, 426-27 (C.A.7 2005); United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006); United States v. Valtierra-Rojas, 468 F.3d 1235, 1239 (10th Cir. 2006).) After the Supreme Court held in *Rita v. United States*, 127 S. Ct. 2456 (2007), that courts of appeals (but not district courts) may presume that sentences within the advisory guideline range are "reasonable," the message seemed to be that while the guidelines were "advisory," district courts that didn't want to be reversed should not stray too far from the "advisory" range. All that changed on December 10, 2007, when the Supreme Court announced its decisions in *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586 (Dec. 10, 2007), and *Kimbrough v. United States*, 552 U.S. ___, 128 S. Ct. 558 (Dec. 10, 2007), opening up a new era in federal sentencing in which judges will once more be allowed to be judges.

Gall involved a conspiracy to distribute an illegal drug known as "ecstasy." Although the guidelines recommended a sentence of 30 to 37 months' imprisonment, the district court sentenced Gall to 36 months' probation. The court cited several unusual mitigating factors to supports its sentence. First, when Brian Gall committed his offense in 2000, he was an immature 21-year-old sophomore at the University of Iowa, and an ecstasy user himself. Second, several months after joining the conspiracy, Gall made a significant change in his life. Without intervention from the legal system, he 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 his rehabilitation by indicting him. Gall 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%" variance from the guideline range was not supported by sufficiently extraordinary reasons. The Supreme Court reversed the court of appeals.

Although *Gall* notes that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one," *id.* at 597, the Court explicitly "reject[s] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." (128 S. Ct. 595.) It also "reject[s] 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." (*Id.*) 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.* The 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% departure regardless of whether the Guidelines range is 1 month or 100 years." (128 S. Ct. 595.) The Court was also critical of the fact that this approach also "gives no

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weight" to what the Court characterized as the "substantial restriction of freedom involved in a term of supervised release or probation," *id.* (internal citation omitted)—a subtle invitation to courts to impose sentences of probation more often.

But *Gall* does more that invalidate particular approaches to reviewing variances from the guidelines. It also reminds us 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 section 3742(e). Although the Supreme Court thought *Booker* had "made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions," 128 S. Ct. at 594, the Court found that the decisions of the courts of appeals that required "extraordinary" reasons for significant deviations from the guidelines "more closely resembled *de novo* review." (*Id.* at 600.)

Gall makes it "pellucidly 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." (*Id.* at 596.) 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." (128 S. Ct. at 597.)

After establishing the nature of appellate review of sentences following *Booker*, the Court conducted such a review of the sentence in *Gall*. The Court first noted that the district court had committed no significant procedural error. Next, it considered the government's arguments for finding the sentence of probation unreasonable. The government's first argument was that the district court's sentence failed to consider the "health risks posed by ecstasy." (128 S. Ct. at 599.) The Court rejected this argument, because "the prosecutor did not raise ecstasy's effects at the sentencing hearing." The Court observed that "[h]ad the prosecutor raised the issue, specific discussion of the point might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative." (*Id.*) This dictum gives support for courts of appeals decisions that require district courts to specifically address sentencing arguments made by the parties. (*See, e.g.*, United States v. Richardson, 437 F.3d 550, 554 (6th Cir. 2006) (district court must consider a defendant's argument regarding sentencing and explain its reasons for rejecting it).)

Next, the government argued that the sentence of probation did not adequately address the seriousness of the offense. The Supreme Court rejected this argument as well, noting that the district court was obviously aware of the seriousness of the offense, since it had sentenced Gall's codefendants to significant prison terms. (*Id.*)

Finally, the government argued that the sentence of probation created unwarranted disparities among defendants with similar records who committed similar conduct. The Supreme Court rejected this argument as well, noting that the district court had, in fact, considered the probationary sentence in light of the sentences received by Gall's codefendants, *id.* 599-600, thus implicitly rejecting the argument that has been often made in other cases, that courts must consider disparity only on a national scale. (*See, e.g.*, Navedo-Concepción, 450 F.3d 54, 59 (1st Cir. 2006) ("Congress's concern with disparities was mainly national.").)

Although *Gall* holds that a district court does not abuse its discretion by basing a below-guideline sentence on offender characteristics, *Kimbrough* holds 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 Sentencing Commission's and Congress's judgment 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 on its disagreement with the policies behind the applicable guideline. *Kimbrough* gives defense attorneys license to think creatively about how guideline sentences themselves create "unwarranted disparities."

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It may now be entirely possible to obtain a lower non-guideline sentence by arguing that a particular guideline sentence would create unwarranted disparities with sentences imposed in similar state cases. For example, the extremely harsh guidelines for simply downloading child pornography from the Internet may be particularly vulnerable to attack after *Kimbrough*.

Although the promise of *Kimbrough* is great, it is important to remember that, in many ways, the history of the crack guidelines makes them unique. Although 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. The Court, therefore, speculated in dictum that "closer review may be in order when the sentencing judge varies from the Guidelines based *solely* on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." (128 S. Ct. at 575 (emphasis added).) It therefore remains to be seen whether the broadest reading of *Kimbrough* will survive future challenges.

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's up to defense attorneys to present sentencing courts with the evidence and arguments they need to exercise that discretion to produce just sentences. ■