New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 238—NO. 122 WEDNESDAY, DECEMBER 26, 2007 ALM

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Sentencing Post-'Gall': Reasonableness v. Proportionality

On Dec. 10, 2007, the U.S. Supreme Court issued two very significant decisions governing sentencing of convicted defendants, *Kimbrough v. United States*[1] and *Gall v. United States*.[2] While the impact of *Kimbrough* may well prove to be limited to cases involving crack cocaine, *Gall* appears likely to have major implications for sentencing in federal cases of all kinds, especially white-collar cases.

Case Facts

Brian Gall was a 21-year old, drug-using college student with a minor, nonviolent criminal history when he became part of a chain of dealers selling Ecstasy on campus. After clearing some $35,000 profit from the scheme, Mr. Gall decided to get out of the drug business and clean up his life. He succeeded at both goals, ceasing both the use and the sale of drugs. He obtained his degree and became a valuable member of society as a construction worker, carpenter and owner of a contracting business.

Once contacted by federal officials, Mr. Gall was upfront about his past involvement in the drug-dealing conspiracy. He turned himself in to authorities, accepted responsibility and pleaded guilty. As with all federal criminal convictions, Mr. Gall's sentencing was controlled by the U.S. Sentencing Guidelines (guidelines).[3] These guidelines create a complex calculus involving statutory sentence range, criminal history, details of the crime and certain other factors that ultimately leads to a range of appropriate sentences for each convicted or guilty-pleading defendant. Mr. Gall and the government stipulated that the guidelines would dictate a sentence range of 30-37 months of imprisonment. However, relying heavily on Mr. Gall's "self-rehabilitation," the district judge departed from the guidelines and sentenced him to no prison time but rather a three-year term of probation.[4]

When the government appealed the sentence, the U.S. Court of Appeals for the Eighth Circuit reversed,[5] insisting that the downward deviation from the guidelines sentence was so extraordinary (100 percent in the court's view) as to require "extraordinary circumstances" to justify it. The court went on to reject every factor relied on by the district judge in support of its sentence (such as Mr. Gall's youth and immaturity, his minor role in the conspiracy, his acceptance of responsibility, his exemplary conduct post-crime, and the impact his imprisonment would have on his family and community) as being either already factored into the guidelines' sentence calculation or inappropriate for consideration.

Even before the Supreme Court issued its reversal of the Eighth Circuit, the case's importance was attested to by more than the grant of certiorari. A large number of briefs were submitted to the Supreme Court in support of Mr. Gall's position by amici curiae such as the National Association of Federal Defenders and the New York Council of Defense Lawyers. The reason for the significance of this case lies in the controversial history of federal sentencing mandates and the judicial scrutiny recently devoted to that history.

Sentencing Reform Act of 1983

When Congress passed the Sentencing Reform Act of 1983, which established the commission that was to create the guidelines, the main concern was the lack of uniformity in sentencing and corresponding disparities that were noted among defendants of different racial, ethnic and economic backgrounds. A fundamental reason for these systemic weaknesses was thought to be the lack of reasoned opinions about sentencing. It was the hope of Congress (and such influential proponents of sentencing reform as the late Judge Marvin Frankel) that district courts would explain their sentencing decisions, appellate courts would review their reasoning for reasonableness, and

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consequently, a dialogue among district courts, appellate courts and the commission would lead to guidelines that would incorporate the jurisprudence that led district courts to reasonable sentencing decisions.

Unfortunately, the mandatory nature of guidelines' sentences and the strict attitude that appellate courts developed to reviewing sentences that deviated from the guidelines led to a nonevolving system of very rigid sentencing. The situation was exacerbated by the commission's decision to assign much greater weight to objective, easily measurable factors such as quantities of drugs involved or amount of monetary loss caused, than to subjective factors such as individual defendants' states of mind, or behavior apart from the crime in question, or status in family or community.

The regime of the guidelines began to decay when a decision of the Supreme Court in 2000, *Apprendi v. New Jersey*,[6] held that any statutory scheme that permitted a defendant to be sentenced based on facts not found by a jury (or pleaded to by the defendant) violated the Sixth Amendment to the Constitution. Five years later came the inevitable recognition that mandatory sentencing pursuant to the guidelines involved reliance by the sentencing court on factors that the guidelines made relevant but that had not been found by the jury. Therefore, in its 2005 decision in *United States v. Booker,*[7] the Supreme Court abolished the mandatory nature of the guidelines' sentences, making them instead "advisory," and also replaced de novo review of sentences by the courts of appeals with the narrower standard of review for abuse of discretion. Finally, in *Rita v. United States*,[8] earlier this year, the Supreme Court held that while it was not improper to presume that a sentence within the guidelines was reasonable, it was improper to presume that a sentence outside the guidelines was unreasonable.

The federal courts of appeals were, by and large, loath to give up their close supervision of sentencing. Eight of the circuits adopted a standard similar to that employed by the Eighth Circuit in *Gall*, pursuant to which the justification for a deviation from guidelines sentencing had to be "proportional" to the extent of the deviation, and a district court would be held to have abused its discretion if it did not state facts in support of a major deviation that, in the appellate court's view, constituted "extraordinary circumstances." Since a sentence of probation with no jail time was viewed as a 100 percent deviation, it took a great deal to persuade an appeals court that there were circumstances sufficiently extraordinary to justify such a sentence if the guidelines called for jail time.

'Gall' does not overrule High Court precedent, and is presented as a natural consequence of 'Booker' and 'Rita.' If that position is accepted, then a defendant sentenced after 'Booker' should have his sentence reviewed under 'Gall.'

Supreme Court's Holding

In reversing the Eighth Circuit in *Gall,* the Supreme Court held that the "proportionality" standard fell afoul of *Booker* and *Rita*; that the "abuse of discretion" review of a sentence, including a deviation from the guidelines, by a court of appeals had to be extremely deferential to the district court; and that the only remaining question for the appeals court was whether the sentence imposed by the district court was "reasonable" in light of all the circumstances. The Supreme Court expressly blessed the analysis performed by the district court in *Gall,* including its heavy reliance on subjective factors such as the defendant's "self-rehabilitation" and the impact the sentence would have on family and community. Perhaps surprisingly, the decision did not arouse much controversy on the Court, with only Justices Clarence Thomas and Samuel Alito dissenting.

Many scholars in the area, such as Professor Kate Stith of Yale Law School, have expressed the hope that *Booker* and its progeny might lead to putting the sentencing reform movement back on track, in the direction of a uniformity to be created by a dialogue among district courts, appellate courts and the commission rather than by unilaterally imposed guidelines unable to evolve under rigid standards of review.[9] *Gall* appears to vindicate that hope. Despite the negative attitude of the appellate courts between *Booker* and *Gall,* the percentage of sentences below guidelines range (not counting downward deviations requested by the government) increased from 5.5 percent in 2004 to over 12 percent in 2006. This trend can now be expected to accelerate.[10]

In the area of white-collar crime, the problem with sentencing under the guidelines has been that the heavy reliance on "amount of loss caused" has led to notably stiff sentences for first offenders who could undoubtedly have been rehabilitated by much lighter sentences (see, for example, Bernie Ebbers, John and Timothy Rigas, Patrick Bennett and Jeffrey Skilling). If the subjective factors that moved the trial court in *Gall* to treat them as outweighing the objective quantity of drugs involved are sufficient to make the resulting sentence "reasonable", then similar factors can equally well outweigh the objective amount of loss caused in white-collar cases.[11]

District Judges

The post-*Gall* world creates great opportunities for district judges to have a major impact on sentencing jurisprudence in the United States, and for white-collar defendants and their counsel to persuade

district judges to move downward from guidelines ranges based on subjective factors. Many such factors—defendants' age, health, character, lack of prior criminal record, post-crime rehabilitation, family and community ties, charitable activities, etc., as well as the simple sense that the guidelines sentence is just unfair—were expressly rejected by courts of appeals under the "proportionality" standard, but are now fair game in a "reasonableness" world. Of course, it remains to be seen whether the district judges will welcome their new responsibilities; many who have grown up in an environment where adherence to the guidelines was either mandatory or the default position may be reluctant to start making bold deviations. It will also be important to observe whether the new freedom bestowed on trial judges causes a recurrence of the non-uniform sentencing that led to creation of the guidelines in the first place, or whether instead the dialogue that the earlier sentencing reformers hoped for will create a new kind of uniform jurisprudence, incorporating more, but more standardized, recognized justifications for deviating sentences.

In those connections, it is worth noting that since the Sentencing Reform Act of 1983, it has actually been the responsibility of each district judge when passing sentence to justify the sentence as "sufficient, but not greater than necessary" to carry out the goals of 18 U.S.C. §3553(a)(2)[12] in the particular circumstances of the case at bar. This requirement has usually been subsumed in the discussion of guidelines factors. Now, the district judges' obligation to comply with this section will be front and center. Counsel, as well, will have a weighty responsibility to provide trial courts with material to permit such justification.

Analysis

A final question to consider in the post-*Gall* world is the extent to which judges who previously wished they had discretion to impose sentences below the guidelines range in particular cases but believed they did not will permit the defendants in such cases to reopen the question of their sentences in light of *Gall*.[13] Briefly stated, the current law on retroactive application of new constitutional decisions was laid down by the Supreme Court in 1989, in *Teague v. Lane*.[14] A decision that creates a new rule will ordinarily be applied to cases still on direct review, but not to cases on collateral review through writs of habeas corpus or the like, whereas a case that merely applies an existing rule in a new situation will be applied on collateral review as well.

Of course, the boundary between "new rules" and "new applications" is not always a clear one. A case is most likely to be deemed to create a new rule when it overrules existing Supreme Court precedent. *Gall* does not overrule any Supreme Court precedent, and, indeed, is presented largely as a natural consequence of *Booker* and *Rita.* If that position becomes accepted, then any defendant who was sentenced after *Booker* was decided should be entitled to have his sentence reviewed under *Gall.*

Even if *Gall* is ultimately deemed to have created a new rule, there are two exceptions to the nonretroactive conclusion contained in *Teague*: the new rule will be applied to cases on collateral review if (1) it affects primary, substantive conduct, or (2) it implicates the fundamental fairness of criminal proceedings. It is hard to see how the *Gall* rule could be successfully argued to impact primary behavior. And while an argument could be made that it affects fundamental fairness, the outlook for such an argument is not bright, given that even though the right to counsel has been held to be such a fundamental right, many other new rules founded in the Sixth Amendment have been held to be not retroactive.

The white-collar bar should take careful note of *Gall,* and be prepared to take advantage of it both in existing cases and in matters where clients were sentenced in the recent past. Some creativity and attention to detail will enable counsel to serve their clients well in the new, post-*Gall* world.

1. Dkt. No. 06-6330.
2. Dkt. No. 06-7949.
3. United States Sentencing Commission, Guidelines Manual. Practice and jurisprudence under the guidelines are discussed in more detail throughout this article.
4. *United States v. Gall,* 374 F.Supp.2d 758 (S.D. Iowa 2005).
5. *United States v. Gall,* 446 F.3d 884 (8th Cir. 2006).
6. 530 U.S. 466 (2000).
7. 543 U.S. 220 (2005).
8. 127 S. Ct. 2456 (2007).
9. E.g., Stith & Dunn, "A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch," 58 Stan. L. Rev. 217, 230 (2005).
10. There is some evidence that the 2004 numbers were abnormally low; a comparison between 2003 and 2006 shows virtually no change. If 2004 numbers are ignored, then there was no such trend pre-*Gall,* and it is to be anticipated that *Gall* will cause such a trend to develop.
11. According to the Supreme Court, the "quantity of drugs involved" standard is faulty not merely because it ignores the subjective, but because it departs from the approach usually taken by the commission in fashioning guidelines sentences, which relied heavily on empirical data about past sentencing practices. That the commission deviated from this empirical approach when it came to drug sentence guidelines made it more likely that a district judge's deviation from a guidelines sentence in a drug case would be reasonable. *Kimbrough* at pp. 7-11; *Gall* at pp. 7-8 & n.2. There was a similar departure from empirical data in creating guidelines sentences in the securities fraud area; there was no empirical data linking sentence length to size of loss caused. This led to the kind of unreasonableness in sentencing white-collar defendants discussed above; why should the sentence of an auditor change dramatically based solely on how large her client happens to be?
12. These include promoting respect for the law, just punishment of the offender, adequate deterrence, protection of the public and rehabilitation of the defendant.
13. The tide may be turning in favor of defendants who were over-sentenced, at least in drug cases. Significantly, the day after *Gall* came down, the Sentencing Commission decided to make lower sentence guidelines for crack cocaine offenses retroactive, thereby rendering about 2,500 prisoners eligible for immediate release and invalidating sentences currently being served by a total (by some estimates) of 19,500 convicts (approximately 10 percent of the federal prison population). Although there remain questions to be answered as to how exactly the affected sentences will be rectified, it appears that most of them will be corrected. The disparity between sentencing for crack and for powder cocaine offenses was the subject of the Supreme Court's decision in *Kimbrough*, decided together with *Gall.*
14. 489 U.S. 288 (1989).

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