
U.S. Supreme Court Dramatically Limits Federal Sentencing Guidelines



James R. Sturdivant

In a decision on December 10, 2007, the United States Supreme Court substantially limited the binding effect of Federal Sentencing Guidelines. When first announced, the case, *Gall v. United States*, 522 U.S.

(December 10, 2007), appeared to be limited in its application to drug conspiracies. However, even a cursory reading of the actual opinion soon revealed the case had more significant impact on all federal criminal sentencing, and may turn out to have even greater application to white collar criminal matters than drug investigations.

Although the impact of *Gall* will be more certain after it is analyzed and interpreted by the various federal circuit courts of appeal, *Gall* may very well mark the point at which the high court placed the decision on what sort of criminal sentences should be imposed squarely back in the hands of the nation's 650 district court judges. This would be in eerie similarity to the federal criminal sentencing landscape as it existed prior to the enactment, in 1987, of the (so-called) Federal Sentencing "Guidelines."

BACKGROUND

Prior to 1987, federal district court judges, those trial level judges who sit and hear and accept guilty pleas, and actually preside over federal criminal trials, were the chief arbiters of federal sentences. As is the case in virtually every form of litigation, whether civil or criminal, and whether complex or simple, the question of "which judge did you draw?" was a critical one for the experienced attorney, not to mention his or her client, in federal criminal cases. However, in 1987, that crucial question became less important with respect to the actual sentence which a defendant might receive. While the identity of the individual judge who actually would preside over a defendant's case continued to be critical in the

areas of pretrial motion practice and the actual trial itself, once a defendant had actually been found guilty, or had entered a plea, the federal judge's sentencing decision ceased to be, in large part, that judge's actual decision, especially with regard to whether to allow probation or to require imprisonment.¹ This is

because in 1987, Congress imposed regulations, arguably misnamed "guide-lines," which largely dictated, with very few exceptions, the type of sentence a defendant could receive. The idea was that an expert "Sentencing Commission" basically would create formulas, in advance, for each and every federal offense in existence, and modify the Federal Sentencing Guidelines each year thereafter, so that a judge would be required to plug in a defendant, his offenses, and the underlying circumstances. In such scenarios, sentences then would be more or less identical to similarly situated defendants, (a) no matter who the individual judge was, and (b) no matter where a case was geographically situated. The catchword of the day was the need to "reduce unwarranted sentencing disparity" among both individual judges that make up the federal judiciary, and among regions of the country. Unfortunately, the guidelines proved all too often to be rigid and arbitrary, in the minds of many in the legal community, including many judges. Inconvenient fact patterns kept bringing about situations of grave injustice.

One of the most common problems centered around drug cases, where more sophisticated drug traffickers would screen their identities from "mules" who were actually transporting their drugs and/or money. In other words, at a certain point up the organizational chain, a "mule" simply would not know for whom he was working. He could not provide the

¹ Another area of specialty in federal sentencing law is the often intricate nature of the guidelines themselves. Deciding the total offense level, including whether any downward or upward departures apply in a given case, was and continues to be a critical area, and the individual judge drawn remains an important component of the equation.

authorities with significant information, even if he so desired. This limited prosecutors, at least in their views, to seek a substantial “downward departure.” As a result, cases frequently arose where the “mule” would receive much harsher punishment than someone higher up in the organization who had eventually been caught and decided to cooperate, using inside knowledge to bargain for a lesser sentence. This is but one example of countless fact patterns which did not strike the typical jurist as being particularly just.

Eventually, there arose within the federal judiciary a groundswell of criticism over the guidelines, which, among other things, centered around the fact that they were in fact more like binding regulations and “did not allow judges to be judges.”

THE BOOKER DECISION

In January 2005, the Supreme Court decided the case of *United States v. Booker*, 543 U.S. 220, which impacted the guidelines in a significant fashion. It articulated that appellate review of sentencing decisions would be limited to whether they were reasonable, and the guidelines were but one factor among many under 18 United States Code § 3353(a).² All listed factors are supposed to be employed in fashioning a sentence “sufficient but not greater than necessary to achieve the four objectives of Factor 2. *Id.*

However, *Booker* left a serious question concerning the amount of weight to which a district court judge was obligated to give his guidelines’ calculations. The federal circuit courts of appeal interpreted *Booker* in a variety of ways. Some, including the Eleventh Circuit, seemed to suggest that *Booker* mandated that the guidelines be

treated as a “super factor,” and then applied in accordance with the other factors articulated at 18 U.S.C. § 3353. Certainly, the situation seemed to suggest that if a judge was going to impose a sentence other than that contemplated by the guidelines, the judge better have a pretty good reason for doing so, or a reversal was likely.

GALL V. UNITED STATES, DECEMBER 10, 2007

In the *Gall* decision, the Supreme Court settled this issue with a decision which came down solidly in favor of the idea that a federal district court judge – the trial level of the federal judiciary – is the judicial officer most appropriately suited to hand down sentences for federal criminal defendants who come before them. The Court, in crystal clear language, laid down a deferential “abuse of discretion” standard for federal sentences. The Court articulated that the guidelines are only advisory, in accordance with the earlier *Booker* decision, and then went even further, holding that although an appellate court may take the extent of a deviation from the guidelines into consideration in determining whether the district court did “abuse its discretion,” a reviewing court may not require extraordinary circumstances or employ a rigid mathematical formula using a departure’s percentage as the standard for determining the strength of the justification required for a specific sentence. The decision specifically admonished the intermediate appellate courts not to apply a heightened standard of review to sentences outside the guidelines range, whether more or less lenient, reiterated that an abuse of discretion standard governs appellate review of all sentencing decisions, and admonished the intermediate courts not to view sentences outside the guidelines range as presumably unreasonable.

While the Supreme Court did articulate that the guidelines continue to be relevant, inasmuch as they are the “starting point” and initial “benchmark” for federal sentences, the Court made it very clear that the judge should fully consider all Section 3353(a) factors in determining a particular sentence (see Note 2, *supra*). Put another way, there is no presumption of validity or appropriateness which attaches to the guidelines’ calculations determined by the court. This goes much further than the original *Booker* decision, which left this question unclear.

²The factors are:

1. The nature and circumstances of the offense.
2. The need for the sentence imposed
 - (a) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
 - (b) to provide adequate deterrence to criminal conduct;
 - (c) to protect the public from further crimes of the defendant; and
 - (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
3. The kinds of sentences available.
4. The sentence contemplated by the Guidelines.
5. Any relevant policy statement issued by the Sentencing Commission.
6. The need to avoid unwarranted sentencing disparities.
7. The need to provide restitution.

Further, the High Court specifically directed that a district court judge, when imposing sentence, may not presume that the guidelines range is reasonable, but rather must make an individualized assessment of an appropriate sentence based upon individual facts presented.

IMPACT OF GALL ON THE AVAILABILITY OF PROBATION

Another significant and important aspect of the *Gall* decision is its repeated admonishments regarding the absolute seriousness of a probationary sentence.

The High Court also admonished the Eighth Circuit for its failure to give “virtually no deference” to the district court’s decision to impose a sentence of probation in the case of Mr. Gall. Gall had withdrawn, voluntarily, from a conspiracy to distribute ecstasy he entered into while in college. A significant amount of time passed after his withdrawal, and the eventual incrimination of a former co-conspirator, who implicated Mr. Gall. The district court sentenced Mr. Gall to probation, based largely on the fact that he had withdrawn voluntarily from the conspiracy at a much earlier stage, had apparently recognized the dangers his lifestyle previously posed for living a productive and healthy normal life, and completely turned his life around, *prior* to being implicated in the investigation. Based upon these factors and the lack of any other criminal history on Mr. Gall’s part, the district judge imposed a sentence of probation, rather than the 30 months of prison called for by the Guidelines.

As most readers will know, probation is a form of supervision, usually by a probation officer, which subjects a defendant to such requirements as restrictions on travel, his associations and employment conditions, his financial transactions, and monitoring for drug and alcohol use or abuse. Since a sentence of probation typically allows a defendant to work, live at home, and live a relatively “normal” life, probation is vastly preferable to a sentence of incarceration. However, in the *Gall* decision, the Supreme Court seemed to go to great lengths to remind everyone involved in federal criminal cases, from the judges who sit on the various federal circuit courts of appeal down to the prosecutors and defense attorneys who advocate for various sentences before district judges, that probation is serious business.

It seems the High Court has given defense attorneys in particular quite a bit of ammunition when those attorneys are arguing for a probationary sentence, which is so often

attacked by the prosecution, or by the news media, as a “slap on the wrist.” Although this was a drug case, Mr. Gall had a background which is remarkably similar to many white collar criminal defendants who find themselves standing before the bar of justice. Like many of those defendants, Gall had a “small flood” of letters from parents, relatives, his fiancée, neighbors and business associates, “uniformly praising his character and work ethic.” The High Court then went on to quote with approval the district court’s sentencing opinion, in which the district judge stated:

Gall will have to comply with strict reporting conditions along with a three year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his probation officer or, perhaps, even the court. Of course, the defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.

“...the Supreme Court seemed to go to great lengths to remind everyone involved in federal criminal cases . . . that probation is serious business.”

Later in the opinion, the High Court reiterated the idea that a probationary sentence is by no means a “slap on the wrist.”

Offenders on probation are . . . subject to several standard conditions that substantially restrict their liberty. Inherent in the very nature of

³Often, defendants on probation are forbidden to consume any alcohol.

probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their home, refrain from associating with any person convicted of a felony, and refrain from excessive drinking.³ Most probationers are also subject to 'individual special conditions' imposed by the court.

Gall, for instance, may not patronize any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as requested by his probation officer.



CONCLUSION

The lasting impact of *Gall* remains to be seen.⁴ However, it certainly frees defense counsel and clients from the constraints of a highly regulated and restricted sentencing scheme, which existed up until January 2005. Prior to *Gall*, it appeared most federal appellate courts were grudgingly applying the 2005 *Booker* decision, hoping to see it explained away by subsequent decisions or undone by Congressional action. Now *Booker* seems to be the first crack in the dam which eventually burst with *Gall*,⁵ in all other cases in which mandatory minimum sentences do not apply. *Gall* gives hope and optimism that a defendant's individual circumstances and life experiences will be considered by a judge when imposing sentencing. Further, *Gall*'s endorsement of the idea that a probationary sentence is not an insignificant one leaves open a better chance that non-violent and otherwise deserving defendants whose offenses are of the white collar variety will receive a more creative and flexible sentencing decision. This means they may avoid or greatly reduce the period of incarceration, depending upon their judge, the particular facts of their case, and individual circumstances, such as health, family obligations, and the like.

One could almost be forgiven for feeling like he had entered a time warp and slipped back to 1965 or 1966, during the glory days of the much maligned "Warren Court." Such a strong endorsement of the idea that a probationary sentence is, in fact, "real punishment" seems extraordinary to defense counsel who have labored in the post-guidelines era of ever-harsher and increasingly rigid federal sentences.



JAMES R. STURDIVANT is a member of the firm's Litigation Group, practicing in the areas of white collar and federal investigations, criminal matters, DUI and municipal criminal cases.

He is also experienced in general civil litigation, serves as an arbitrator in civil disputes and a Hearing Officer for the Jefferson County Personnel Board. Sturdivant was as a federal prosecutor for the Northern District of Alabama from January 1992 to July 1995. He was an attorney in the Judge Advocate General's Corps, United States Army from 1988 to 1992, where he served various legal assignments at Aberdeen Proving Ground, Maryland. He was eventually assigned sole defense counsel for the entire post, representing soldiers facing trial by court-martial or administrative separation. Sturdivant is a member of the American, Alabama and Birmingham Bar Associations, the National Association of Criminal Defense Lawyers, and the Alabama Criminal Defense Lawyers Association. Currently, he chairs the Birmingham Bar Association's Criminal Justice Section.

⁴The Eleventh Circuit has applied *Gall* in a restrictive manner in *U.S. v. Pugh*, decided on January 31, 2008. *United States v. Pugh*, F.3d, 2008 WL 253040 (11th Cir. Jan. 31, 2008). However, *Pugh* is an unusual case in that it involved a child pornography conviction where the district court imposed a sentence of probation on a defendant whose guideline range was between 97-120 months. The public defender in the Southern District of Alabama has not, as of the date of this outline (2/15/08), made a decision regarding an appeal *en banc*, or a direct appeal to the U.S. Supreme Court. The 11th Circuit also focused on the unavailability of a long supervised release period, since supervised release is not an option if no period of confinement is imposed. *Pugh*, 2008 WL at *16 - *17. See also 18 USC § 3583(a); United States Sentencing Guidelines § 5D1.1; and *United States v. Thomas*, 135 F.3d, 875 (2d Cir. 1998) ("plain language of § 3583 (a) and USSG § 5D1.1 compels the conclusion that supervised release presupposes a period of imprisonment." *Thomas* at 875).

⁵These would be sentences which carry a statutory mandatory minimum of imprisonment upon conviction of a certain number of years, most often offenses involving drug dealing activities, firearms, child pornography/exploitation, or actual or threatened violence. (Examples include 18 USC § 924(c) (using or carrying a gun in connection with drug trafficking - seven years), or 18 USC § 2251 (sexual exploitation of children - fifteen years).)