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From *Booker* To *Spears*

A Roadmap for Sentencing Guidelines

By Stuart Chanen and Chris Stetler

Chief Justice Roberts commented in a recent dissent that the Supreme Court's sentencing rulings "have given the lower courts a good deal to digest over a relatively short period." Indeed. Since its landmark holding in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines were simply advisory, the Court has swiftly and significantly diminished the relevance of the Guidelines and increased the discretion of district court judges in sentencing defendants. As a result, the defense bar has been given vital tools in advocating on behalf of its clients.

Booker, *Rita*, *Kimbrough*, *Gall*, and *Spears*

In *Booker*, the Supreme Court found that the then-mandatory Guidelines conflicted with Sixth Amendment requirements and remedied that conflict by excising from the Sentencing Reform Act the provision that made the Guidelines mandatory, thereby making the Guidelines "effectively advisory." Following Booker, sentencing judges are supposed to impose a sentence sufficient — but not greater than necessary — to accomplish the goals of sentencing after a consideration of seven factors, only one of which is the applicable Guideline range. The *Booker* Court also held that because the Act's appeals-related section (18 U.S.C. § 3742(e)) contained cross-references to the unconstitutional mandatory-application provision, the appropriate standard of appellate review for every sentence would be "reasonableness."

Two years after *Booker*, the Court found in *Rita v. United States*, 551 U.S. 338 (2007), that courts of appeals may — but are not required to — apply a presumption of reasonableness to sentences within the Guidelines range. In so holding, however, the Court reasoned that such a presumption, "rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." The Court also emphasized that such a presumption could apply only at the appellate court level, and that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Additionally, the Court clarified that "appellate courts may not presume that every variance from the advisory Guidelines is unreasonable."

Later that year, in *Gall v. United States*, -- U.S. -- , 128 S.Ct. 586 (2007), the Court rejected: 1) appellate rules requiring "extraordinary circumstances" to "justify a sentence outside the Guidelines range"; and 2) "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." These approaches, said the Court, were inconsistent with the requirement that "courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard."

Gall also holds that appellate courts may consider the extent of the deviation from the Guidelines, but "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 because a sentencing judge is in "a superior position to find facts and judge their import under § 3553(a) in the individual case."

After applying these principles, the Court in *Gall* upheld as reasonable a three-year probationary sentence even though the Guidelines called for 30-37 months' imprisonment, because the sentencing judge appropriately considered the § 3553(a) factors. The Court also found that it was proper for the sentencing judge to consider the defendant's young age and immaturity, unlikelihood of returning to criminal behavior, and rehabilitation. The impact of this holding was now unequivocally clear: the Supreme Court had just affirmed a sentence of probation for a defendant who only two years earlier would have received a "mandatory" 30-month sentence.

The same day, the Court dealt another blow to the Guidelines' significance by holding that sentencing judges need not adhere to the 100-to-1 ratio for crack cocaine quantities. *Kimbrough v. United States*, -- U.S. -- , 128 S.Ct. 558 (2007). Because the Guidelines are advisory, sentencing judges may generally vary from the Guideline range "based solely on policy considerations, including disagreements with the Guidelines."

In January 2009, the Court reiterated this point in holding that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines *based on a policy disagreement with those Guidelines*." *Spears v. United States*, 555

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U.S. -- , 2009 WL 129044 (Jan. 21, 2009) (emphasis added). The sentencing judge rejected the 100-1 crack-to-powder-cocaine ratio called for by the Guidelines and applied its own 20-1 ratio. The Supreme Court found such a decision to be permissible even "in a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range." The Court summarily reversed the Eighth Circuit and reinstated the district court's sentence. Although four Justices dissented from the summary reversal, three of them appear open to the majority's conclusion on the merits. This may very well be the final nail in the Guidelines' coffin.

Potential Impact for White-Collar Defendants

What exactly does it mean when the Supreme Court states that sentencing judges may "reject" and "vary categorically" from Guideline ranges on the sole basis of "policy disagreements" with the guideline at issue? May a sentencing judge vary from the Guidelines based on her belief that the loss table under Guideline § 2B1.1(b) is unreasonably harsh? May a sentencing judge conclude that it makes no sense to treat "intended loss" the same as "actual loss" for purposes of calculating a Guideline sentence?

Kimbrough and *Spears* appear to answer Yes. When the Supreme Court held that sentencing judges may "vary categorically" from guideline sentences based on policy disagreements, they did not limit the potential range of policy disagreements. At least one appellate court appears to have adopted this view. After *Kimbrough*, the First Circuit remanded two non-crack cases for resentencing because the sentencing judges did not believe they had the ability to vary from the Guidelines based on policy disagreements. *United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008) (the defendant's career offender status under § 4B1.1); *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008) (the defendant's use of a computer during the crime under § 2G1.3(b)(3)). The defense bar can and should encourage other jurisdictions to adopt this broad approach to the principles set forth in *Kimbrough* and *Spears*.

The New Sentencing Regime

In the post-*Booker* era, sentencing judges are no longer permitted to presume that a Guideline sentence is reasonable. Rather, the court may impose sentences "sufficient, but not greater than necessary" to accomplish the goals of sentencing enumerated in 18 U.S.C. § 3553(a), *i.e.*, sentences that: 1) "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense"; 2) "afford adequate deterrence to criminal conduct," 3) "protect the public from further crimes of the defendant," and 4) "provide the defendant with needed training, medical care or correctional treatment in the most effective manner."

In determining the appropriate sentence, the statute directs the sentencing judge to consider seven factors, only one of which is the relevant Guideline range. So long as the sentencing judge considers each of those seven factors, there is no procedural error, and a sentence may only be overturned if the appellate court concludes, after affording a great deal of discretion to the sentencing judge, that the sentence is substantively unreasonable. Extraordinary circumstances need not be present to justify a variance from the Guideline range, and rigid mathematical formulas cannot be used to asses the reasonableness of a sentence.

Defense lawyers therefore have great leeway in arguing for a sentence that varies from the Guidelines. They can focus on any number of the seven § 3553(a) factors and, while the holdings in *Kimbrough* and *Spears* were limited to a sentencing judge's disagreement with the Guidelines' disparity between powder and crack cocaine, we think that the reasoning can and should be applied equally to disagreements with other Guideline policies. It is increasingly hard for a sentence to be overturned as unreasonable. *See, e.g.*, the cases compiled at http://www.kattenlaw.com/katten-muchin-rosenman-white-col lar-criminal-sentencing-survey/.

Conclusion

The Supreme Court stated in 1996 that it has been "uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue" *Koon v. United States*, 518 U.S. 81 (1996). While that statement may not have been entirely accurate at the time, it surely is now. The § 3553(a) factors now rule, not the Guidelines. This post-*Booker* regime has opened the door for defense lawyers to advocate creatively and effectively at sentencing with a focus on the defendant as an individual, not on the overly rigid approach taken by the increasingly irrelevant Sentencing Guidelines.