

New Jersey Law Journal

VOL. CXCII – NO.15 – INDEX 127

APRIL 14, 2008

ESTABLISHED 1878

IN PRACTICE

CRIMINAL LAW

BY JOHN P. LACEY

The Pendulum Swings Back

Supreme Court restores district judges with wider discretion to impose appropriate sentence

The implementation of the federal Sentencing Reform Act (“SRA”) on November 1, 1987, marked the beginning of determinate sentencing for those convicted of federal crimes. It also marked the decline of the authority of federal judges to exercise the broad discretion they had traditionally possessed in sentencing federal criminal offenders. Now, 20 years later, the United States Supreme Court apparently has returned to sentencing judges the vast discretion that was theirs prior to the SRA.

As many seasoned practitioners will recall, prior to the SRA, federal judges possessed virtually unfettered discretion to sentence offenders as the judges saw fit, from probation to the statutory maximum. Those sentencing judges also possessed broad authority to consider almost any factor to determine the “appropriate” sentence with the exceptions being factors such as race, religion or ethnicity. The result of this process was that defendants who had committed similar offenses often received widely disparate sentences.

From the perspective of many who were critical of the system, such dispar-

ities were explained by the inherent prejudices brought to the bench by each judge. So-called “liberal” judges were often seen as “soft on crime” because they would sentence first-time offenders to a term of probation. In contrast, “conservative” judges would routinely impose a term of imprisonment even in the least serious cases. The SRA was enacted to eliminate sentencing disparities by establishing relatively narrow sentencing ranges for defendants convicted of similar offenses.

Under the SRA, Congress revolutionized virtually every element of the sentencing process. First, it passed 18 U.S.C. § 3553, the statute that generally specified the factors a judge should consider in issuing a particular sentence. These factors included: (1) the “nature and circumstances of the offense”; (2) the general purposes of sentencing, such as punishment, general and specific deterrence, and providing the defendant with needed training and medical treatment; (3) the types of sentences available; (4) “the need to avoid unwarranted disparities”; and (5) providing restitution to victims. 18 U.S.C. § 3553(a)(1)(7).

Second, Congress established the United States Sentencing Commission to help eliminate, or at least reduce, the perceived disparities that existed in the federal sentencing process. The commission, in turn, formulated the federal

Sentencing Guidelines. These guidelines established narrow sentencing ranges for virtually every defendant convicted of committing a federal felony. The guidelines ranges were mandatory, leaving judges with little discretion to impose sentences outside the applicable guidelines range unless the defendant had provided “substantial assistance” to the government. The result was that the many offenders, who would have received probationary terms prior to the SRA, were sentenced to terms of imprisonment. Thus, the guidelines certainly met the “need to avoid unwarranted disparities,” but often at the expense of the other statutory factors set forth in 18 U.S.C. § 3553.

Stripped of much of their discretion and often compelled to imprison defendants whom the individual sentencing judge’s court believed could be rehabilitated without being sentenced to prison, some federal judges stopped taking criminal cases. Others resigned from the bench. In either case, the result was the loss of experienced jurists in criminal cases who were more inclined to mete out sentences that were below the ranges set forth in the applicable sentencing guidelines range.

The process of returning discretion to sentencing judges has taken over two years. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision of the SRA mandating that judges follow the sentencing guidelines violated the Sixth Amendment of the U.S. Constitution. The court excised the offending provisions, leaving the sentencing guidelines intact, but rendering them “advisory.” Without elaboration, the *Booker* court

Lacey concentrates in business litigation, white collar criminal defense and internal corporate investigations and is a partner with Connell Foley in Roseland.

instructed that appellate courts would still review individual sentences for “reasonableness.” Post-*Booker*, some circuit courts interpreted “reasonableness” to mean that, in the ordinary case, a sentence outside the prescribed guideline range was “per se” unreasonable and would be vacated in favor of a sentence within the applicable guideline range. Thus, while the *Booker* court had said the guidelines were “advisory,” the practical result was that the guidelines continued to be mandatory in many districts, leaving sentencing judges in the same position they were in prior to *Booker*.

In two separate decisions issued late last year, the Supreme Court clarified *Booker* and, in substance, returned to the district courts much, if not all, of the discretion that had been taken away with the passage of the SRA. See *Gall v. United States*, (2007 WL 4292116 (12/10/07)) and *Kimbrough v. United States*, (2007 4292040 (12/10/07)).

Regarding *Gall v. United States*, Brian Gall was a sophomore at the University of Iowa when he first joined an ongoing “ecstasy” drug distribution ring. Gall himself was a user of ecstasy, cocaine and marijuana. His role in the conspiracy was limited. Gall would receive ecstasy pills from one co-conspirator and then deliver the pills to other conspirators. Those conspirators, in turn, sold the pills to the ring’s customers. In sum, Gall was typical of the many young drug users who sold drugs to support their own drug use and who now reside in federal prisons.

Gall ceased using ecstasy within two months of joining the conspiracy. After about seven months, Gall withdrew from the conspiracy. He did not sell any illegal drugs thereafter. In the words of the sentencing judge, Gall had “self-rehabilitated.” Three and a half years after his withdrawal, Gall was charged in the Southern District of Iowa with participation in a conspiracy to distribute ecstasy, cocaine and marijuana that commenced in 1996 and continued until October 2002.

Pursuant to an agreement with the government, Gall pled guilty and stipulated that he was responsible for “at least 2,500 grams of ecstasy” or “the equivalent of at least 87.5 kilograms of marijuana.” The presentence report reflected that Gall, as a first offender, was subject

to a guideline range of 30-37 months. There was no evidence that Gall was eligible for a downward departure for providing “substantial assistance” to prosecutors. Thus, barring some substantial mitigating factors, Gall would normally have been incarcerated for at least 30 months.

The sentencing judge acknowledged a “small flood” of letters submitted on Gall’s behalf. The court also cited Gall’s withdrawal from the conspiracy, his subsequent graduation from college, and his law-abiding life after college. Rejecting the arguments of the government that Gall should be sentenced within the applicable sentencing guidelines range, the sentencing judge forewent all possible sentences involving incarceration or house arrest. Instead, the court sentenced Gall to a 36-month term of probation.

The Eighth Circuit overturned the sentence, finding that the “100 percent downward variance” from the prescribed guidelines sentence was not warranted in the absence of “extraordinary” circumstances. The Supreme Court reversed, reinstating Gall’s sentence of probation. The *Gall* court first noted that the district judge had not committed any procedural error, specifically recounting that the sentencing judge had (1) correctly calculated the prescribed guidelines range; (2) allowed both parties to submit their arguments concerning the appropriate sentence; (3) considered all of the statutory factors set forth in 18 U.S.C. § 3553(a); and (4) “thoroughly documented his reasoning.” Then, noting § 3553’s admonition that courts consider the need to avoid “unwarranted disparities” in sentences, the *Gall* court stated that the district judge also had properly “considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.”

Because the district judge properly had followed the above process, the *Gall* court stated that the only remaining question for the appeals court

was whether the sentence was reasonable – i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of probation and justified a substantial deviation from the Guidelines range.

The *Gall* court found that the Court of Appeals had overstepped its authority and had not given “due deference” to the district judge’s findings. In doing so, the court made it clear that sentences outside of the guidelines range, including sentences of probation where a defendant is unlikely to commit future offenses, will be permitted because “the Guidelines are not mandatory, and thus the ‘range of choice dictated by the facts of the case’ is significantly broadened.”

In sum, while the appellate court may have disagreed with the district judge’s findings,

it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors on the whole justified the sentence.

In *Kimbrough v. United States*, (2007 WL 4292040 (U.S. 12/10/07)), the court reviewed the sentence of a drug dealer convicted of various offenses involving the distribution of crack and powder cocaine and related firearm offense.

At sentencing, the district judge properly calculated the applicable guideline range, finding the defendant was subjected to a guidelines range of 168 to 210 months for the drug offenses, plus the statutory minimum of sixty months for the firearm offense. This subjected Gall to a guidelines range of 228 to 270 months, or 19 to 22 years and six months.

The district court declined to sentence Kimbrough within the guidelines range, finding it was “greater than necessary” to achieve the goals of sentencing delineated in 18 U.S.C. § 3553(a). Among other factors, the district judge noted that, if Gall had been convicted of distributing only powdered cocaine rather than crack cocaine, Gall’s guidelines range would have been 97-106 months, excluding the five-year mandatory minimum on the firearms conviction.

tion. Accordingly, the district court sentenced Gall to 180 months in prison, 4½ years below the minimum sentence in the applicable guidelines range.

The Fourth Circuit vacated the sentence, but the Supreme Court reversed. In reinstating the sentence, the *Kimbrough* court noted that 18 U.S.C. § 3553 “contains an overarching provision instructing courts to ‘impose a sentence sufficient but not greater than necessary’ to accomplish the goals of sentencing.”

For practitioners, the *Gall* and *Kimbrough* decisions hopefully complete the task that *Booker* began. First time offenders who are unlikely to commit future offenses need not be sentenced to lengthy jail terms. For

judges, the decisions mean much more. They can once again utilize their human and analytical skills and plain common sense to determine whether a particular defendant should be sentenced to probation or jail. They no longer have to be the designated “bean counters” for the Sentencing Guidelines Commission.

Instead, the judges can exercise their Article III authority to determine that probation is sufficient to fulfill the purposes of § 3553. Blind adherence to the guidelines is no longer required. Sentencing judges may look at all aspects of a defendant’s life, including whether he has a job, a supportive family, or a long history of law-abiding behavior, to determine whether a sen-

tence substantially below the prescribed sentencing guidelines range is appropriate.

If, in the end, a district judge gives due consideration to the guidelines and reasonably determines that a more lenient sentence is justified based on the § 3553 factors, the district court’s sentence should withstand appellate review. However, in the wake of *Gall* and *Kimbrough*, defense counsel must be extraordinarily careful. The same discretion that now will allow district judges to impose more lenient sentences than prescribed in the applicable sentencing guidelines can also be exercised to mete out a sentence more severe than provided for in the guidelines. ■