

THE SUPREME COURT FINALLY FULFILLS THE PROMISE OF BOOKER

by Alan Ellis and James H. Feldman, Jr.

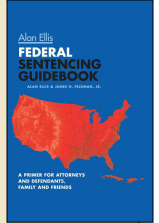
After *Booker*, we were hopeful that district court judges would finally be freed from the constraints of the guidelines and allowed to exercise their discretion to do justice at sentencing. Our euphoria did not last long. Courts of Appeals soon rejected numerous below-guideline sentences as “unreasonable” 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. After the Supreme Court held that Courts of Appeals (but not district courts) may presume that sentences within the advisory guideline range are “reasonable,” *Rita v. United States*, 127 S.Ct. 2456 (2007), 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 this past December, 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 the illegal drug, “ecstasy.” Although the guidelines recommended a sentence of 30–37 months’ imprisonment, the district court sentenced Gall to 36 months’ probation. The court cited several unusual mitigating factors to support its sentence. First, when Brian Gall committed his offense, he was an immature 21-year-old college sophomore, and an ecstasy user himself. Second, several months after joining the conspiracy, Gall voluntarily 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 with an indictment. 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 weight” to what the Court characterized as the “substantial restriction

continued on p. 2

FEDERAL SENTENCING GUIDEBOOK
UPDATED EDITION NOW AVAILABLE!



Booker, *Gall*, and *Kimbrough* have radically impacted federal sentencing guidelines. Alan Ellis’ updated *Federal Sentencing Guidebook* explains in simple, straightforward language how the rules have changed and how federal practitioners and their clients can benefit. A must-have primer that will help bridge the gap in client-attorney communications, the *Guidebook* includes detailed advice and practice tips to achieve lower sentences. Every client should have one, so order multiple copies and save: one copy at \$19.95 or three or more copies at \$14.95 each. For more information and/or to order, click here: www.alanellis.com

NEWS FROM THE LAW OFFICES OF

AlanEllis

SAN FRANCISCO PHILADELPHIA

FEDERAL SENTENCING AND POST-CONVICTION NEWS

Published Quarterly

Alan Ellis, PUBLISHER
James H. Feldman, Jr., EDITOR

CALIFORNIA

495 Miller Ave.
Mill Valley, CA 94941
Phone: (415) 380-2550
Fax: (415) 380-2555
AELaw1@alanellis.com

PENNSYLVANIA

50 Rittenhouse Place
Ardmore, PA 19003
Phone: (610) 658-2255
Fax: (610) 649-8362
AELaw2@alanellis.com

www.alanellis.com

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 than 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 § 3742(e). While the Supreme Court thought *Booker* had “made it ... 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 which required “extraordinary” reasons for significant deviations from the guidelines “more closely resembled *de novo* review.” 128 S.Ct. at 600.

Gall makes it 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.” 128 S.Ct. 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.” 129 S.Ct. at 597.

While *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 one hundred 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

Alan Ellis has been referred to as a “nationally recognized expert in federal criminal sentencing” by the U.S. Court of Appeals for the Ninth Circuit. ‘Federal Lawyer’ magazine has described Mr. Ellis as “one [of] this country’s pre-eminent criminal defense lawyers.”

James H. Feldman, Jr. is editor of “Federal Sentencing and Post-Conviction News” and is of counsel to the firm.

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 in part 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.” It may now be entirely possible to obtain a lower non-guideline sentence by arguing, among other reasons, 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. While 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. It remains to be seen whether the broadest reading of *Kimbrough* will enable future challenges to overly harsh guidelines, although as noted below at least one such challenge apparently has survived appellate review.

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.

Early cases show *Gall* and *Kimbrough* to be a net gain for defendants. Prior to *Gall* and *Kimbrough*, it was commonplace for Courts of Appeals to grant government appeals of below guideline sentences and to deny defendant appeals of above guideline sentences. Now Courts of Appeals are rejecting substantive reasonableness claims by both the government and defendants. Here are summaries of several appeals the government recently lost:

United States v. Pauley, 511 F.3d 468 (4th cir. 2007). This is a child pornography case in which a middle school art teacher purchased from a student nude photos which the student had taken of herself and then offered to the teacher in return for money. Although the guideline range was 78-97 months, the court imposed a below guideline range of 42 months. To justify the sentence, the court relied on the fact that the victim approached the defendant with the offer to sell the photos, the victim took the photos with her own camera, the face of the victim was not in any photo, and the defendant possessed fewer than 24 photos, was remorseful, and until this case had been a model citizen, father, and teacher. The government appealed, arguing that the district court had placed too much emphasis on one § 3553(a) factor, and that

the court's reasoning had not been compelling enough for such a large variance. Prior to *Gall*, the government may well have won this appeal. Instead, the Court of Appeals affirmed.

United States v. McBride, 2007 WL 4555205 (11th Cir. Dec. 28, 2007). The defendant in this child pornography case faced a mandatory five-year sentence and a maximum sentence of 20 years for distributing child pornography. Although the case involved nearly 1,000 images and 45 videos, some of which involve prepubescent minors and sadism, and even though the defendant had a history of abusing children, the district court imposed a sentence of 84 months' imprisonment, well below the 151-188 range recommended by the guidelines. The sentencing court justified the variance by the defendant's tragic history. His father was murdered when he was two years old, his mother and uncle abused him, his grandfather sexually abused him, and he lived in foster care from age 12 until he became an adult. The government appealed. The Court of Appeals affirmed.

United States v. McGhee, 2008 WL 141168 (8th Cir. Jan 16, 2008). In this crack cocaine case, the guidelines recommended a 235-203-month sentence, but the sentencing court imposed a sentence of 139 months, based on its disagreement with the

NEWS FROM THE BUREAU OF PRISONS

With the passage of the Adam Walsh Act, as codified in 18 U.S.C. § 3621(f), the BOP has further expanded its monitoring, evaluation, and treatment programs for sex offenders. As required by the Walsh Act, a specialized sex offender program is offered in each BOP region. Inmates with a history of sexual offenses may be designated to the Sex Offender Management Program at one of six institutions: FMC Devens; United States Penitentiary Marion; USP Tucson; Federal Correctional Institution (FCI) Seagoville; FCI Petersburg-Medium; and FCI Marianna. Assignment is made in accordance with the security level of the individual.

Inmates at any BOP institution may choose to volunteer for an intensive residential sex offender treatment program offered at FMC Devens. The program employs a wide range of cognitive-behavioral and relapse prevention techniques to help the sex offender manage his sexual deviance both within the institution and in preparation for release. Ordinarily, participants complete the program in 12 to 18 months toward the end of their sentences.

crack-powder 100-to-1 ratio. The government appealed. The Court of Appeals affirmed, citing *Gall* and *Kimbrough*.

United States v. Lehmann, 2008 WL 150667 (8th Cir. Jan 17, 2008). This felon-in-possession of a firearm case involved a single mother with a felony record who had taken a gun from her alcoholic ex-boyfriend and hidden it on a shelf in a closet. After the defendant's 14-year-old daughter found the gun and used it to commit suicide, the defendant was indicted. Although the guidelines recommended a sentence of between 37-46 months' imprisonment, the court imposed five years' probation, based on the testimony of a psychologist that the defendant's 9-year-old son would likely be severely damaged if his mother were imprisoned, the fact that the defendant had already suffered from the death of her daughter, and the unusual nature of the case. The government appealed. Although the Court of Appeals noted that it had "routinely" rejected as unreasonable those variances that resulted in a sentence of probation when the guidelines recommend a term of imprisonment," the Court also noted that the Supreme Court had not only approved a probationary sentence in *Gall*, but had suggested in that case that "exceptional family circumstances" could support such a sentence. Since the district court had found "exceptional family circumstances," and since *Gall* prohibited any kind of proportionality review, the Court of Appeals found no abuse of discretion and affirmed.

United States v. Grossman, 2008 WL 160612 (6th Cir. Jan. 18, 2008). This case involved a guilty plea to one count of possessing child pornography. Although the guideline range would normally have been 135-168 months, because the statutory maximum was ten years, the guidelines recommended a 120-month sentence. The district court justified its 66-month sentence by explaining that the defendant was an educated man who understood that the children in the photographs were the real victims of his offense, and was a good candidate for rehabilitation. The court also criticized the many guideline adjustments which the court observed "almost repeat each other," thus resulting in a range that is greater than necessary. The government appealed. Applying the "due deference" required by *Gall*, the Court of Appeals affirmed. Although the Court noted that *Kimbrough* left open the question whether a court's "wholesale disagreement with a guideline" could support a variance, it declined to address that issue, holding instead that the district court's reliance on particular offender characteristics was sufficient to support the sentence.

United States v. Hayez, 2008 WL 78710 (C.A.4 Jan. 8, 2008). After the district court imposed a 36-month sentence in this tax case, the government cross-appealed, arguing that the 43% downward variance was unreasonable. Following *Gall*, the government moved to dismiss its appeal, which the Court approved.

DISCLAIMER: These materials have been prepared by the Law Offices of Alan Ellis for informational purposes only and are not legal advice. Transmission of the information is not intended to create, and receipt does not constitute, an attorney-client relationship. Readers should not act upon this information without seeking competent counsel. The information contained in this newsletter is provided only as general information which may or may not reflect the most current legal developments. This information is not provided in the course of an attorney-client relationship and is not intended to constitute legal advice or to substitute for obtaining legal advice from a duly licensed attorney.

For 39 years, The Law Offices of Alan Ellis has worked with federal defendants and inmates, and consulted with many of the nation's leading criminal defense attorneys, to develop strategies that obtain the lowest possible sentence for clients, to be served at the best facility possible, with the greatest opportunity for early release.

Areas of concentration include:

- **Plea negotiations**
- **Sentencing representation and consultation**
- **Prison designation, transfers and disciplinary matters**
- **Rule 35 motions**
- **Direct appeals in all circuits of convictions and sentences**
- **Supreme Court practice**
- **Habeas corpus 2255 and 2241 petitions**
- **International prisoner transfer treaty work for foreign inmates and Americans incarcerated abroad**
- **Parole representation**
- **International criminal law**
- **China legal matters**

The firm has an international practice with regional offices in Mill Valley (San Francisco), CA, Ardmore (Philadelphia), PA, and China.



FIRM MEMBERS

Alan Ellis

Anna M. Durbin, OF COUNSEL

James H Feldman, OF COUNSEL

Peter Goldberger, OF COUNSEL

Karen Landau, OF COUNSEL

Pamela A. Wilk, OF COUNSEL

Deborah Bezilla, ADMINISTRATIVE ASSISTANT

J. Michael Henderson, FEDERAL PRISON CONSULTANT

Chris Lege, LEGAL ASSISTANT

Sandra Muncy, EXECUTIVE ASSISTANT

Lianne C. Scherr, L.C.S.W., MITIGATION SPECIALIST

Zheng Jie (Hai Lin), CHINA ASSISTANT

THE LAW OFFICES OF

AlanEllis

495 MILLER AVENUE
MILL VALLEY, CA 94941

PRESORTED STANDARD
U.S. POSTAGE
PAID
THEPRINTERS.COM
STATE COLLEGE, PA
16801