

# OSJCL AMICI: VIEWS FROM THE FIELD

## Ohio State Journal of Criminal Law

### *Gall, Kimbrough and Me*

Nancy Gertner\*

There is both promise and danger in the Supreme Court's recent decisions in *Gall v. United States*, 128 S. Ct. 586 (2007) and *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The promise is clear: *finally*, courts will be allowed to focus on *all* the purposes of sentencing in the Sentencing Reform Act, rather than being fixated on just the goal of avoiding sentencing disparity. *Finally*, courts can stop being concerned solely with the question: am I doing the same thing as what the judge in the next courtroom is doing, even if neither of us is making any sense? *Finally*, common law judges can be real participants in sentencing and develop a common law of sentencing. *Finally*, judges can work to generate a new set of sentencing precedents rather than simply ceding all decisions to the U.S. Sentencing Commission. The language in the *Gall* and *Kimbrough* decisions, not to mention their holdings, sound new themes in sentencing not heard of in appellate decisions since the dawn of the Guidelines era.

The dangers are less clear. It is *not* the danger of rampant disparity as some may say, the “free-at-last regime” where trial judges do whatever they want without meaningful review. Rather, it is the opposite: the danger of mindless Guideline compliance, even while intoning “the Guidelines are advisory.” It is the danger that the Supreme Court will stop taking sentencing appeals, leaving the application of *Gall* and *Kimbrough* to the appellate courts, many of whom have yet to see a Guideline sentence they do not like, or a variance they can support. It is the danger that *Gall* and *Kimbrough* will go the way of other criminal justice decisions of the Supreme Court (the federalism decision, *United States v. Lopez*, comes to mind) with the courts paying lip service to the principles in *United States v. Booker*, but effectively ignoring these principles.

But first, the promise. *Gall* upheld a variance from the Guidelines for a young man who had joined an ongoing ecstasy conspiracy while he was in college and addicted to drugs, but later withdrew from the conspiracy entirely on his own. From that date on, he gave up drug use and drug-dealing, moved to another state, and worked steadily. When the federal government caught up with him, he cooperated. The Guideline range was 30 to 37 months, but the judge sentenced Gall to probation, with a written decision explaining why. (Indeed, as I recount the

---

\* United States District Judge for the District of Massachusetts.

facts of the case I am moved to observe that the judge needed to exercise *his* discretion because the prosecutor had not, prosecuting Gall as if he were indistinguishable from the other participants.) The trial court's decision was reversed by the Eighth Circuit and, in turn, reversed by the Supreme Court. If the Guidelines were to be as advisory as the *Booker* remedial decision said they were, then the Court had to sustain the trial judge's decision, especially one as thoughtful and careful as this one.

*Kimbrough* was more surprising. The issue was not imposing a non-Guideline sentence solely because of facts specific to the case, as in *Gall*, assuming the general application of the Guidelines. *Kimbrough* involved the imposition of a non-Guideline sentence at least in part because of a disagreement with the Guideline addressing a particular offense, crack cocaine.

*Kimbrough* pleaded guilty to distributing more than 50 grams of crack, and faced a term of fifteen years to life, and a Guideline range of 19 to 22.5 years. The range was high because of the interaction of the statutory mandatory minimums, with a 100:1 crack/powder drug weight ratio, and the Guidelines, which exacerbate the sentencing impact of that differential. The judge, rejecting the Guideline increase, sentenced *Kimbrough* to the mandatory minimum. He based his oral decision in part on the facts of *Kimbrough's* situation and in part on the (un)fairness of the crack cocaine differential. The Fourth Circuit reversed, on the ground that any outside-the-Guideline sentence was per se unreasonable when based on a disagreement with a Guideline as opposed to when based on facts specific to a defendant. The Supreme Court reversed the Fourth Circuit, legitimizing the district court's consideration of the fairness of the Guideline in question.

The issues and rulings in *Gall* and *Kimbrough* are closer than might appear at first glance. *Gall*, in effect, was a challenge to the Guideline's treatment of *offender* characteristics in a given case, characteristics like age or drug addiction, which had largely been excluded from consideration under a Guidelines regime. The judge in *Gall* used those characteristics to distinguish *Gall* from others to whom the relevant Guideline applied. While the ecstasy Guideline will live on after *Gall*, the Guidelines rejecting age or drug addiction have been undermined. *Kimbrough* was a challenge to a Guideline's treatment of *offense* characteristics, not simply as applied in a given case, but across the board. While the Court described its decision as involving the application of the Guidelines to a particular case, in fact the decision fundamentally undermines the crack-cocaine differential in many other cases.

To be sure, the Supreme Court continued to keep the Guidelines front and center: the district judge must give "serious consideration" to the extent of any departure from the Guidelines and must support sentences that are "unusually lenient or an unusually harsh with sufficient justifications."<sup>1</sup> Any "major

---

<sup>1</sup> *Gall*, 128 S. Ct. at 594.

departure” should be supported by “a more significant justification” than a minor one.<sup>2</sup>

But the Court sprinkled the decision with comments that have only been heard in the academic literature critical of the Guidelines and in the occasional decision of an intrepid trial court. These comments challenge what I have described as the “ideology” of the Guidelines: that they fully embody all of the purposes of sentencing, that they were comprehensive, that the drafters thought of everything, that they were based on careful empirical study, and thus, all judges had to do to comply with the Sentencing Reform Act was to rotely *apply the Guidelines*.

The Guidelines were now only a “rough approximation” of 3553(a)’s objectives, not their full embodiment.<sup>3</sup> The Court eschewed a strict proportionality test that requires “extraordinary circumstances” to justify an outside the Guidelines range sentence, or indeed, any rigid mathematical formula. (We have already had a jurisprudence of “extraordinariness” under the mandatory Guideline regime; few if any departures fit the bill. My personal favorite was when the First Circuit determined that extraordinary family circumstances meant that the defendant was “irreplaceable.”).

In rejecting the mathematical proportional approach, the Court seemed to question the false mathematical clarity of the Guidelines. The mathematical approach wrongly “assumes the existence of some ascertainable method of assigning percentages to various justifications.”<sup>4</sup> The same can be said of many provisions of the Guidelines: why four points for an organizer or leader enhancement rather than five or six? Why not a sliding scale? While the Court acknowledged that the Guidelines were based on “extensive empirical evidence,” it conceded that some guidelines were not. Some lacked any empirical basis at all.<sup>5</sup>

But one of the most significant parts of *Gall* was what the Court said about probation. The Court challenged a critical judgment made by the initial Guideline drafters. Prior to the Guidelines, nearly 50% of federal defendants were sentenced to probation; afterwards, it was only 15%. The Guideline drafters had intentionally reduced the numbers of defendants who might qualify. In contrast, the Court in *Gall* agreed that probation was a “substantial restriction of freedom” and not a meaningless gesture of leniency.<sup>6</sup>

Finally, the Court gave new legitimacy to the competence of the district court in sentencing. The sentencing judge is “in a superior position to find facts and judge their import under § 3553(a) in the individual case.”<sup>7</sup> The district court has an “institutional advantage” because it has seen so many more cases.<sup>8</sup> In effect,

---

<sup>2</sup> *Id.* at 597.

<sup>3</sup> *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

<sup>4</sup> *Gall*, 128 S. Ct. at 596.

<sup>5</sup> *Id.* at 594 n.2.

<sup>6</sup> *Id.* at 595.

<sup>7</sup> *Id.* at 597 (quoting the Amicus Curiae Brief for Federal Public and Community Defenders)

<sup>8</sup> *Id.* at 598 (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

for any set of sentencing facts there may be a range of sentencing choices. The courts of appeals may have their opinion as to where the defendant fits; the district court, another. (I have always said that I wanted to be reviewed through the same lens as a state judge who is wrong on a constitutional matter in a *habeas* case: I have to be not just wrong, but very, very, wrong.)

Perhaps the most important comment in *Gall* was the recognition, late in coming, that harsh punishment *without* taking into account the facts and circumstances of an individual promotes disrespect for the law. The Guidelines promoted a false uniformity when real differences between offenders were ignored. Thus, the district court appropriately “considered the need to avoid unwarranted disparities but also considered the need to avoid unwarranted *similarities* among other co-conspirators not similarly situated.”<sup>9</sup>

*Kimbrough* clearly goes much farther, not just by legitimizing an across-the-board challenge to a Guideline, but subjecting it to what looks like an Administrative Procedure-like review. A judge, in sentencing a particular defendant, may determine that a within-guidelines sentence is “greater than necessary” to serve the objectives of sentencing, and in making that determination, the court “may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.”<sup>10</sup> In other words, how did the Guideline measure up to the statute? Is there empirical support of it?

Thus, the Court agreed that the crack/powder disparity was inconsistent with the 1986 statute that it purported to apply, leading to the “anomalous result” of sentencing retail crack dealers to a longer sentence than the wholesale cocaine dealers who supply them.<sup>11</sup> The Court agreed that the sentencing judge could consider the racial impact of the Guideline and the extent to which it promoted profound disrespect for the law. There are other Guidelines vulnerable under the same analysis: without empirical support, they lead to anomalous results.

But here are the dangers. How will *Gall* and *Kimbrough* be applied? *Booker* did not unleash judges and herald a return to indeterminate sentencing. Rather, the vast majority of judges in the vast majority of cases did essentially nothing new. After nearly twenty years of mandatory “guidelines,” many judges feared that they were simply not competent to make sentencing judgments without the Guideline script. Others, particularly several Courts of Appeals, agreed that the Guidelines were “advisory,” even rejected the label that they were “presumptively reasonable,” but never saw a Guideline sentence they did not like, or a departure or variance they did not reject. It was as if certain patterns of thought were so deeply ingrained that judges were having a problem seeing anything else. Few defense lawyers knew how to critique the Guidelines much less give coherent reasons for rejecting them. Probation officers had become “guideline specialists” rather than

---

<sup>9</sup> *Id.* at 600.

<sup>10</sup> *Kimbrough*, 128 S. Ct. 558, 564 (2007).

<sup>11</sup> *Id.* at 568 (citing the United States Sentencing Commission’s 1995 Special Report to Congress at 66-67).

sentencing specialists. Prosecutors were instructed to recommend only Guideline sentences. There were no alternative sentencing theories: it was all the Guidelines all the time. “*Booker* or no *Booker*,” I said, quoting Yogi Berra, it was “*deja vu* all over again.”<sup>12</sup> While sentencing was not likely to return to the “free-at-last” regime that predated the Guidelines, sentencing without standards or rules, I have noted that “unless the courts and the [Sentencing] Commission are vigilant, there will never be a truly advisory sentencing regime either.”<sup>13</sup>

I fear that the appellate courts and the Commission will not be vigilant in supporting an advisory regime. This has been a revolution from above: initiated, maintained, and supported by the Supreme Court. Other major criminal justice decisions of the Supreme Court, such as *United States v. Lopez*,<sup>14</sup> have been effectively ignored by the lower courts. Other sentencing decisions in the post-Guideline era that would have introduced more judicial discretion into the process (long, long before *Booker*) have been undermined by the appellate courts charged with applying them. This is not the first time the Supreme Court told the district courts that the Guidelines were not to imposed rigorously. In *Koon v. United States*,<sup>15</sup> the Court underscored the fact that judicial discretion remained even after the Guidelines and endorsed an “abuse of discretion” review standard that clearly would be more deferential to the trial judges. The Court’s pro-discretion message in *Koon*, however, was widely ignored, even before the Feeney amendment was passed (which essentially eviscerated it). And even when Justice Breyer emphasized judicial discretion when he was on the First Circuit, the rest of the Court did not follow. Indeed, the First Circuit became one of the most mandatory of the mandatory circuits. It is conceivable that the only Guideline *really* undermined by *Kimbrough* is the *sui generis* one dealing with crack cocaine.

Since it is not likely that the Supreme Court will get involved in the minutiae of sentencing—except perhaps for a few major post-*Booker* issues remaining, like acquitted conduct, mandatory minimum sentencing, etc.—how these decisions will play out will depend entirely on the Courts of Appeals, and the signs are not good. Most appellate judges never knew anything but a Guideline regime. From the outset they believed that they were the regulators, and the district courts were the regulated. Although they saw only the cases at the margins—the cases in which the judges have departed or varied—not the cases in which the Guidelines were applied, that did not stop appellate courts from enforcing the Guidelines with a rigor even the Sentencing Reform Act’s drafters would not have foreseen.

As far as the Commission is concerned, it could go beyond monitoring compliance with the Guidelines as if that is the be-all and end-all of sentencing. It could continue to reexamine the Guidelines as it has done so well with the crack

---

<sup>12</sup> Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 137 (2006), <http://www.thepocketpart.org/2006/07/gertner.html>

<sup>13</sup> *Id.*

<sup>14</sup> 514 U.S. 549 (1995).

<sup>15</sup> 518 U.S. 81 (1995).

Guidelines. It could look at those Guidelines that courts are having problems with and reconsider them. That was the way the system was supposed to work: sentencing departures by trial judges would highlight the area in which Guideline change was needed. It could begin to provide real findings for the Guidelines, rather than the cursory explanations. If the Court is true to its approach in *Kimbrough*, the Commission will have to prove the appropriateness of a Guideline, just as any agency would do. It can produce expert studies about drug addiction and crime, sentencing alternatives, recidivism and what affects it, the efficacy of particular programs. In short, the Commission could effectively redesign its mission as buttressing and supporting judicial discretion and not just blocking it.

When *Booker* came down, I suggested that there was middle ground between mandatory guideline rules and the “free at last” approach. I indicated that the source of standards could be the Guidelines, along with the statutes and a common law of sentencing. I suggested that judges use our judicial tools—considering whether the rules of general application should be applied in a given case, analyzing fact patterns not meaningfully covered by the Guidelines, and subject the Guidelines to administrative procedure-like review by examining the relationship between the Guidelines and the statutes. If the judge in Texas sentences and describes why, as the judge in *Gall* did, other judges will follow. There may be somewhat more disparity than existed before *Booker*, but there will be less false uniformity and hopefully, a fairer regime.