

***Gall, Kimbrough* and Crack Retroactivity:
Positive but Incomplete Steps in the Evolution of
Federal Sentencing**

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The week of December 10, 2007 was a momentous one in the area of federal sentencing law. The Supreme Court issued its long awaited decisions in *Gall v. United States*¹ and *Kimbrough v. United States*,² upholding the district court's exercise of sentencing discretion in both cases, and the United States Sentencing Commission voted to make retroactive its recent amendments to the federal sentencing guideline for crack cocaine offenses. These were surely positive developments, but some curbing of enthusiasm may be in order.

While the holdings in *Gall* and *Kimbrough* (both supported by the votes of seven Justices) appear to promise district courts greater discretion in sentencing, a closer look at the Court's language leaves one uncertain. *Gall* appears to give with one hand and take away with the other. *Kimbrough* sanctions disagreement with the notorious crack cocaine guideline, yet refuses to fully accept the government's concession that district courts may disagree with other policies embedded in the guidelines. Finally, with respect to the crack guideline, it is important to realize that the crack versus powder issue is a highly-atypical sentencing problem and that neither *Kimbrough* nor the Commission did much to ameliorate the disparity between the punishment for dealing in the two substances.

I. *GALL*

In *Gall*, District Judge Pratt placed a drug offender on probation, despite an advisory guideline range of 30-37 months. The *Gall* defendant was very sympathetic: he was a member of the drug conspiracy for only a short time, withdrew from it years before he was charged, and in the interim graduated college and started a successful

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¹ *Gall v. United States*, 128 S. Ct. 586 (2007).

² *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

business.³ The court of appeals reversed, finding Judge Pratt's "extraordinary . . . 100% downward variance" unsupported by proportionately extraordinary circumstances.⁴

The Supreme Court rejected an appellate rule that required extraordinary circumstances to justify a sentence outside the guidelines. The Court also rejected use of a rigid mathematical formula that used the percentage of departure as the standard for determining the strength of the justification required for a specific sentence.⁵ The Court found that both such rules came too close to creating a presumption of unreasonableness for sentences outside the guideline range. Rather, the Court held that the abuse of discretion standard applied to appellate review of all sentencing decisions, whether inside or outside the range.⁶ On this understanding, the Justices reversed the court of appeals and upheld Judge Pratt's sentence.⁷

There is much to like in *Gall*. The Justices warned appellate courts to back off from their over-zealous enforcement of the guidelines post-*Booker*, and they complimented the work of a conscientious district judge who took the time to carefully review the case before him and explain his reasons for imposing sentence. But uncertainties remain.

First, the Justices refused to reject outright the "proportionality" review employed by many courts of appeals. Rather, at several points the Court appeared to sympathize with this notion, which links substantive reasonableness to the guidelines, stating:

[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.⁸

And that:

If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.⁹

³ *Gall*, 128 S. Ct. at 591-93.

⁴ *Id.* at 594.

⁵ *Id.* at 595.

⁶ *Id.* at 596.

⁷ *Id.* at 600-02.

⁸ *Id.* at 594.

⁹ *Id.* at 597.

The Justices also gave appellate courts the green light to continue to “consider the extent of the deviation” in reviewing sentences.¹⁰ Further, in ostensibly repudiating the Eighth Circuit’s method of review, the Court seemed to set up something of a straw man, rejecting only “an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range.”¹¹ But the courts of appeals had not required extraordinary circumstances to justify *any* sentence outside the range, only sentences that varied substantially from the guidelines. Finally, other than signaling that appellate courts could continue to consider the extent of the variance, the Court provided little guidance concerning what substantive review *does* entail, thus at least implying that the guidelines remained the touchstone of substantive reasonableness.

Second, the actual holding of *Gall* may provide less additional discretion to district courts than meets the eye. This is so because, as noted, the *Gall* defendant was an extremely sympathetic figure. It is not difficult to envision some appellate courts distinguishing his case from others in which district judges impose a sentence of probation.

II. *KIMBROUGH* AND *CRACK*

In *Kimbrough*, the Court held that a district judge may “conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”¹² Presumably, this holding frees district judges to reject the 100:1 crack to powder ratio in all cases, without attempting to “refract[.]” the Sentencing Commission’s criticisms of that ratio “through an individual defendant’s case.”¹³

This is a positive development, as the 100:1 ratio is notorious for its unfairness and racially disproportionate impact.¹⁴ However, the Court’s endorsement of greater district court discretion to sentence outside the guidelines again seemed somewhat tepid. It is hardly inspiring that even in the face of the government’s concession “that, as a general matter, ‘courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,’”¹⁵ the Court did not embrace such discretion, but stated that:

a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case “outside the ‘heartland’ to which the Commission intends

¹⁰ *Id.*

¹¹ *Id.* at 595.

¹² *Kimbrough*, 128 S. Ct. at 575.

¹³ *United States v. Joiner*, 457 F.3d 682, 688 (7th Cir. 2006).

¹⁴ *See, e.g., United States v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005).

¹⁵ *Kimbrough*, 128 S. Ct. at 570.

individual Guidelines to apply.” *Rita*, 551 U.S., at ----, 127 S. Ct., at 2465. On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range “fails properly to reflect § 3553(a) considerations” even in a mine-run case. *Ibid.* Cf. Tr. of Oral Arg. in *Gall v. United States*, O.T.2007, No. 06-7949, pp. 38-39. The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role.¹⁶

As Justice Scalia explained in his concurrence, the suggestion that closer review may be proper when the judge rejects policies embedded in the guidelines is contrary to the Court’s previous statements on the issue.¹⁷

These statements mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines. If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court’s application of the § 3553(a) factors is entirely reasonable; then the “advisory” Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.¹⁸

Further, in evaluating both *Kimbrough* and the revision of the crack guideline, it is important to remember that the issue is an atypical one. The guidelines contain few, if any, similar policy issues. Moreover, the 100:1 ratio is so outrageous that it may encourage observers to overlook the more basic flaws in the guidelines, including their overall harshness. District judges must be free to declare that in cases not involving crack, the guidelines are simply excessive.

Finally, the 100:1 ratio remains in the mandatory minimum statute applicable in drug cases, 21 U.S.C. § 841(b), which only Congress can change. Indeed, even with the Commission’s revision, the guidelines retain a very large disparity between crack and powder, between 25:1 and 80:1.¹⁹ Thus, while *Kimbrough*, the amendment, and the retroactivity decision are steps in the right direction, observers should not fool themselves into thinking that the deficiencies in cocaine sentencing policy have been remedied.

¹⁶ *Id.* at 574-75.

¹⁷ *Id.* at 576-77 (Scalia, J., concurring).

¹⁸ *Id.* at 577.

¹⁹ *Id.* at 573.

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III. CONCLUSION

The Court's December 2007 sentencing decisions and the Commission's retroactivity vote are advances, but the quest for a fair federal sentencing system is far from over.