Chapter Three

Legal Issues

Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This chapter addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 2007.

United States Supreme Court Cases on Sentencing Issues

Decisions

In *Rita v. United States*,[2] the Supreme Court, in an 8-1 decision,[3] held that courts of appeals may apply a presumption of reasonableness when reviewing a sentence imposed within the sentencing guideline range, and affirmed the within-guidelines sentence imposed in the case. Writing for the majority, Justice Breyer, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito, emphasized the close relationship between the guidelines and the section 3553(a) factors.

First, the Court discussed the statutory provisions governing the promulgation of the guidelines and how those provisions mirror the factors that section 3553(a) requires sentencing courts to consider, noting that "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."[4] Second, the Court discussed the process that the Commission used to initially promulgate and subsequently amend the guidelines, concluding that the guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice" and that they "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[5] In sum, the Court said:

> [T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.
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> Further, the presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the sentencing judge and the Commission what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set forth above.
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> Congressional statutes then tell the Commission to write Guidelines that will carry out these same § 3553(a) objectives . . . .[6]

The Court also relied on the adversarial process that occurs during the sentencing process as a further rationale for a presumption of reasonableness:

> The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense

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[2] — U.S. —, 127 S. Ct. 2456 (June 21, 2007).

[3] Justice Breyer delivered the Opinion of the Court. Justice Souter authored a dissenting opinion.

[4] 127 S. Ct. at 2463.

[5] *Id.* at 2464-65.

[6] *Id.* at 2463.

that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG §5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. See Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See Rules 32(f), (h), (i)(C) and (i)(D) . . . . [7]

The majority also stated that circuits are not required to employ a presumption when conducting reasonableness review and that the presumption is to be applied only on appeal.

Another important part of the majority opinion is its discussion of certain procedural issues. Specifically, the Court (and in this it was joined by Justices Scalia and Thomas) examined the district court's statement at sentencing to determine whether it complied with the requirement in section 3553(c) that the court "state in open court the reasons for its imposition of the particular sentence."[8] The Court stated that the amount of detail required in such a statement would vary depending on the circumstances of the case, but that the district court "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[9] Further, the Court said, when imposing a within-guidelines sentence, a brief explanation may be sufficient

The Court approved the sentencing judge's brief explanation in sentencing Mr. Rita, noting that the judge had clearly heard and considered the arguments relating to Mr. Rita's military service, his health issues, and his vulnerability in prison, but "simply found [them] insufficient to warrant a sentence" [10] below the guideline range. On this issue, the Court concluded: "Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively."[11]

In *Lopez v. Gonzalez*,[12] the Supreme Court, in an 8-1 decision,[13] held that, for purposes of the Immigration and Naturalization Act, conduct that constitutes a felony under state law but is characterized as a misdemeanor under the Controlled Substances Act is not a "felony punishable under the Controlled Substances Act" ("CSA"). Prior to *Lopez*, most courts interpreted "any felony punishable under the CSA" to include any state drug offense labeled a felony by the state and involving conduct punishable under the Controlled Substances Act, regardless of whether the conduct was punishable as a felony under the CSA. Under this interpretation, simple drug possession (which in many states is considered a felony, but in almost all instances is considered a misdemeanor under the CSA) was considered a "drug trafficking crime" under 8 U.S.C. § 1101(a)(43)(B), and therefore an aggravated felony. The minority view held that in order to constitute an "aggravated felony," the state conviction must have been for conduct that would constitute a felony under the CSA. Rejecting the majority circuit courts' view, the Supreme Court held that a state drug offense is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) only if the offense proscribes conduct punishable as a felony under the CSA. In reaching this conclusion, the Court focused on Congress's use of the term "illicit trafficking" at the beginning of section 1101(a)(43)(B). In the Court's view, "trafficking" connotes commercial dealing, which is not an element of state felony offenses which prohibit mere possession. Trafficking, the Court said, should be given its ordinary meaning, and should not be

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7 *Id.* at 2465.

8 18 U.S.C. § 3553(c) (2000 ed., Supp. IV).

9 127 S. Ct. at 2468.

10 *Id.* at 2469.

11 *Id.*

12 — U.S. —, 127 S. Ct. 625 (Dec. 5, 2006).

13 Justice Souter delivered the opinion of the Court, from which Justice Thomas dissented.

read to include simple possession absent a clear indication from Congress that it intended such an unorthodox definition.

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in two cases to address circuit splits that had arisen in the wake of the Court's decision in *United States v. Booker*.[14] In *Gall v. United States*,[15] the question presented was whether courts of appeals, when reviewing sentences for "reasonableness" as prescribed in *Booker*, may "require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances."[16] In *Kimbrough v. United States*,[17] the questions presented were whether and how the district court could properly consider the 100:1 crack/powder ratio and the Commission's various reports on the issue of crack cocaine sentencing, and how the district court should balance the various factors set forth in 18 U.S.C. § 3553(a).

The Supreme Court also granted review in four cases requiring interpretation of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. §§ 924(e) *et seq.* *Logan v. United States*[18] presented the question whether a conviction for which a defendant's civil rights were never revoked can operate as a predicate offense under the ACCA. *Watson v. United States*[19] asked whether receipt of a firearm in a drugs-for-guns transaction constitutes "use" of the firearm during and in relation to a drug trafficking offense for purposes of the ACCA.

United States v. Rodriquez[20] asked whether a state drug trafficking offense for which a ten-year statutory maximum applies only if the defendant is a recidivist qualifies as a predicate offense under the ACCA. Finally, *United States v. Begay*[21] presented the issue of whether felony driving while intoxicated is a "violent felony" for ACCA purposes.

Decisions of the United States Courts of Appeals

In the course of the year, the courts of appeals continued to work through various issues in post-*Booker* sentencing jurisprudence. Although the Supreme Court's opinion in *Rita*, discussed above, clarified the presumption of reasonableness, a number of splits among the circuits regarding procedural and substantive issues remained. These issues included proportionality review, policy disagreements with the guidelines, and notice to the parties of a court's intention to vary from the guidelines.

In a number of circuits, courts of appeals evaluate the substantive reasonableness of sentences by applying a form of "proportionality review" to the sentences. In its simplest form, this review required that the more a sentence imposed deviates from the guideline range, the more significant the justification for the variance needed to be. In practice, this review took different forms in various circuits, with some circuits employing various analytical approaches to evaluate how far from the guideline range a given sentence is.

Some courts, for example, expressed the variation in terms of percentage; others looked to guideline

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[14] 543 U.S. 220 (2005).

[15] 127 S. Ct. 2933, 168 L.Ed.2d 261 (June 11, 2007) (No. 06-6330).

[16] Review in the *Gall* case was granted shortly after the defendant in *Claiborne v. United States*, argued on the same day as *Rita v. United States*, passed away, rendering the appeal moot. 127 S. Ct. 2245, 167 L.Ed.2d 1080 (June 4, 2007) (No. 06-5618). *Claiborne* also presented the issue of whether, after *Booker*, an appeals court could properly require that a sentence that constitutes a substantial variance from the guidelines be justified by extraordinary circumstances.

[17] 127 S. Ct. 2933, 168 L.Ed.2d 261 (June 11, 2007) (No. 06-7949).

[18] 127 S. Ct. 1251, 167 L.Ed.2d 72 (Feb. 20, 2007) (No. 06-6911).

[19] 127 S. Ct. 1371, 167 L.Ed.2d 158 (Feb. 26, 2007) (No. 06-571).

[20] 128 S. Ct. 33, 168 L.Ed.2d 808 (Sept. 25, 2007) (No. 06-1646).

[21] 128 S. Ct. 32, 168 L.Ed.2d 808 (Sept. 25, 2007) (No. 06-11543).

offense levels.[22] The imposition of probationary sentences in lieu of custodial sentences produced difficulties for courts employing proportionality review and for those not adopting this approach.[23] Two circuits, the Sixth and the Ninth, delayed en banc cases presenting these issues in light of the Supreme Court's grant of *certiorari* in *Gall*.[24]

Courts of appeals addressed the issue of whether a variance is reasonable when it is based on a district court's disagreement with a policy decision reflected in the guidelines. The issue has arisen most prominently in the area of crack cocaine sentencing, where the 100:1 crack/powder cocaine drug quantity ratio has prompted some judges to impose sentences that vary from the guidelines.

Courts in the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have held that judges may not vary from the guidelines solely on the basis of a policy disagreement with the 100:1 ratio.[25] To the contrary, however, the Third and D.C. Circuits held that a district court errs when it *refuses* to consider the impact of the 100:1 crack/powder ratio. In *United States v. Gunter*,[26] the Third Circuit vacated the sentence on grounds that it was procedurally unreasonable because "the District Court here believed that it had no discretion to impose a below-Guidelines sentence on the basis of the crack/powder cocaine differential and, thus, treated the Guidelines range difference as mandatory in deciding the ultimate sentence."[27] In *United States v. Pickett*,[28] the D.C. Circuit vacated and remanded a crack cocaine sentence so that the district court could "evaluate how well [§2D1.1] effectuates the purposes of sentencing enumerated in § 3553(a)."[29] As discussed above, the Court granted *certiorari* in *Kimbrough* to address the issue.

A circuit split has developed on the issue of whether Rule 32(h) of the Federal Rules of Criminal Procedure requires a district court to provide advanced notice that it is contemplating imposing a non-guideline sentence or "variance," as distinguished from departures provided for under the guidelines scheme. The disagreement underlying the circuit split is essentially over the issue of whether the concerns that led to the creation of Rule 32(h)[30] apply with equal force to variances now that the guidelines are advisory. The Third, Fifth, Eighth and Eleventh Circuits have held that Rule 32(h) does not require advance notice for variances based upon the 3553(a) factors.[31] The Seventh Circuit differs slightly from these four circuits because the Seventh Circuit has held that departures are now "obsolete" and "beside the

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22 *United States v. Chettiar*, 501 F.3d 854, 860 (8th Cir. 2007) (discussing the various methods for evaluating the extent of a variance, but declining to decide whether one method is generally preferable).

23 *Compare United States v. Davis*, 458 F.3d 491 (6th Cir. 2006) (vacating and remanding a one-day sentence) *with United States v. Husein*, 478 F.3d 318 (6th Cir. 2007) (affirming a one-day sentence).

24 *United States v. Vonner*, No. 05-5295 (6th Cir. Oct. 12, 2006); *United States v. Carty* and *United States v. Zavala*, Nos. 05-10200, 05-30120 (9th Cir. Aug. 25, 2006) (consolidated for en banc review).

25 *United States v. Pho*, 433 F.3d 53, 54 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006); *United States v. Leatch*, 482 F.3d 790 (5th Cir. 2007); *United States v. Jointer*, 457 F.3d 682, 687-88 (7th Cir. 2006); *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006).

26 *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006).

27 *Id.* at 246.

28 *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007).

29 *Id.* at 1353.

30 Rule 32(h) codified the holding of the Supreme Court in *Burns v. United States*, 501 U.S. 129, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991), that advance notice is necessary to a "full adversary testing of the issues relevant to a Guidelines sentence," *id*. at 135.

31 *United States v. Vampire Nation*, 451 F.3d 189, 196 (3d Cir. 2006); *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), petition for cert. filed, 75 U.S.L.W. 3585 (U.S. April 18, 2007) (No. 06-1381); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), petition for cert. filed, No. 06-7517 (Oct. 26, 2006).

point.”[32] As a result, the Seventh Circuit has held that Rule 32(h) has no “continuing application” in the circuit and that “defendants are on notice post-*Booker* that sentencing courts have discretion to consider any of the factors specified in § 3553(a).” [33]

In contrast, the Second, Fourth, Sixth, Ninth and Tenth Circuits have held that the rule applies equally to variances and departures.[34] These circuits have generally concluded that any distinction between the factors in section 3553(a) and the factors supporting a possible departure under the guidelines is insufficient to undermine the concerns about effective adversarial testing that led to Rule 32(h).

“Defendants are, indeed, constructively ‘on notice’ of § 3553(a) factors post-*Booker*. Under the previous sentencing regime, however, they were equally aware of the specific circumstances for departure under the Guidelines.”[35]

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[32] *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006) (quoting *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) and *United States v. Laufle*, 433 F.3d 981, 986-87 (7th Cir. 2006)).

[33] *Id.* at 1006-1007.

[34] *United States v. Anati*, 457 F.3d 233, 237 (2d Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006); *United States v. Dozier*, 444 F.3d 1215, 1217-18 (10th Cir. 2006).

[35] *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007).