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Sentencing Guidelines

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In a series of recent decisions, the U.S. Supreme Court has made clear that in establishing "reasonableness" review of sentences, its 2005 *Booker* decision restored the "substantial deference" that the Court decreed, over a decade ago, was owed sentencing judges.[1]

Last month, however, in its first major application of these decisions to a substantially below-the-range sentence, the U.S. Court of Appeals for the Second Circuit, in *United States v. Cutler*, gave sharp teeth to reasonableness review, undertaking a searching analysis not only of the district court's sentencing procedure but also of the factual underpinnings and reasonableness of the ultimate sentences.

'Rita,' 'Gall' and 'Kimbrough'

Through its recent decisions, the Supreme Court sought to resolve three conflicts in the circuits' interpretations of reasonableness review: whether a sentence within the U.S. Sentencing Commission Guidelines is presumptively reasonable, whether an outside-the-range sentence can be based on a policy disagreement with the guidelines, and whether greater deviations from the guidelines range require greater justification.

In *Rita v. United States*,[2] the Court held that appellate courts may, but are not required to, apply a presumption of reasonableness to within-guidelines sentences. The Court observed that a presumption of reasonableness simply reflects the fact that "both the sentencing judge and the Sentencing Commission . . . have reached the same conclusion as to the proper sentence in the particular case."[3] Still, the Court cautioned, the fact that "courts of appeals [may] adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness" for nonguidelines sentences.[4]

In *Kimbrough v. United States*,[5] the Court held that judges are free to impose a nonguidelines sentence on the basis of policy disagreements with the guidelines, in this case, the crack guidelines. While "[a] district judge must include the Guidelines range in the array of factors warranting consideration", the Court held, "[t]he judge may determine . . . that, in the particular case, a within-Guidelines sentence is greater than necessary to serve the objectives of sentencing."[6]

Finally, in *Gall v. United States*,[7] the Court held that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences - whether inside, just outside, or significantly outside the Guidelines range - under a deferential abuse of discretion standard."[8]

The Court specifically "reject[ed] . . . an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[9] To hold otherwise would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[10] Indeed, the Court held that the sentencing judge "may not presume that the Guidelines range is reasonable."[11]

The Court then explained the duties of the sentencing and appellate courts. "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range" and remain "cognizant" of that range throughout sentencing.[12]

Appellate courts, on the other hand, "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [or] selecting a sentence based on clearly erroneous facts . . . . Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[13] The court "may consider the extent of the deviation, but must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance."[14] "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."[15]

'United States v. Cutler'[16]

Advocates of sentencing discretion heralded *Rita*, *Gall* and *Kimbrough* as landmark decisions providing judges with the most discretion since the advent of the guidelines.[17] The Second Circuit's subsequent decision in *Cutler* gives a different impression.

Tollman-Hundley Hotels, headed by Stanley Tollman and Monty Hundley, owned an extensive network of hotels. James Cutler was Tollman-Hundley's CFO and Sanford Freedman its executive vice president and general counsel. The hotels proved lucrative and, by the late 1980s, Mr. Tollman and Mr. Hundley each amassed net worths of over $100 million.

The 1990s, however, brought a downturn in the hotel business and Tollman-Hundley sought refinancing of its debt. Both Mr. Tollman and Mr. Hundley signed deficiency notes with various banks, agreeing to personally repay approximately $100 million.

Intent on using their wealth to invest in a Mississippi casino boat instead, Mr. Tollman and Mr. Hundley employed Mr. Cutler and Mr. Freedman to convince the banks that they were insolvent and to buy their debt back for pennies on the dollar. Both Mr. Freedman and Mr. Cutler communicated to the banks that Mr. Tollman and Mr. Hundley were unable to pay their debt. Mr. Freedman then instructed a casino investor, James Cohen, to tell the banks that he represented a foreign investor who wanted to buy the debts, but only at a deeply discounted price.

There was no foreign investor. Rather, Mr. Freedman created two shell companies that, although supposedly controlled by the investor, were actually controlled by Mr. Tollman and Mr. Hundley. At the same time they were convincing the banks that Mr. Tollman and Mr. Hundley were insolvent, Mr. Freedman and Mr. Cutler was informing the Mississippi gaming commission that they were worth millions.

The banks ultimately parted with their debt and Mr. Freedman received over $3 million, and Mr. Cutler approximately $1.3 million, in salary and stock for their participation in the fraud.

The Sentencing

Both Mr. Cutler and Mr. Freedman were convicted after trial of conspiracy, bank fraud and making false statements to a federally insured bank. Mr. Cutler was also convicted of tax fraud based on a scheme to hide the salaries of Tollman-Hundley's top employees and Mr. Freedman was convicted of perjury.

Judge Loretta Preska began by calculating the base guidelines range. She found that the bank fraud resulted in a $106 million loss and involved more than minimal planning, yielding a common base offense level of 26 (or 63-78 months) for both Mr. Cutler and Mr. Freedman.

Mr. Cutler received a two level enhancement for the tax fraud, resulting in a guidelines range of 78-97 months. Although it declined to grant any role adjustments, the court departed downward six levels because the loss amount overstated Mr. Cutler's role in the offense, based in part on its finding that he "received little, if any, personal gain" relative to the loss.[18] The court also departed downward nine levels for extraordinary family circumstances. Judge Preska noted that absent child support payments to Mr. Cutler's ex-wife, Mr. Cutler's eldest daughter would not be able to return to college and his two younger daughters would be uprooted from their schools.

Evaluating the §3553(a) factors, the court concluded that "with respect to this type of offense . . . the relative length of the sentence does not seem to be as important in

providing deterrence" and a lengthy prison term would interfere with Mr. Cutler's restitution obligations.[19] Judge Preska sentenced Mr. Cutler to a year-and-a-day imprisonment.

With respect to Mr. Freedman, the court found the evidence insufficient to support a three-level enhancement for supervisory role. The court also rejected a two-level enhancement for obstruction of justice on the ground that the government dropped a corresponding count from the indictment.

The court granted a downward departure based on a combination of Mr. Freedman's health and age (69). The court found that, although the Bureau of Prisons has thousands of prisoners suffering from the same heart condition as Mr. Freedman and he had recovered from a separate near-fatal illness, Mr. Freedman had demonstrated a need for constant monitoring that the BOP could not provide, concluding that a prison term would "in effect be a death sentence."[20] As with Mr. Cutler, the court also ruled that the loss "wildly" overstated the seriousness of Mr. Freedman's conduct in light of his relatively small gain.

The court also concluded that Mr. Freedman's relationships with his mentally disabled brother (with whom he regularly spoke by telephone) and his 97-year-old mother-in-law (whose finances he managed and with whom he regularly visited) were extraordinary to a degree not taken into account by the guidelines. The court declined, however, to quantify these departures or calculate an ultimate guidelines range.

The court then addressed the 3553(a) factors, concluding that they, too, supported a nonprison sentence. The court found that, in light of the punishment Mr. Freedman had already received as a result of "the public nature of the prosecution, the public humiliation [he] has suffered, the loss of his law license . . . and the certainty of prosecution" in addition to the departure grounds noted above, three years probation represented just punishment.[21]

Appellate Review

The Second Circuit reversed and remanded both sentences, finding over a dozen separate errors in the district court's sentencing analysis. For starters, the court held that the district court exceeded its departure authority by downwardly departing because the loss overstated Mr. Cutler's role. The guidelines provide a means, through minor and minimal role adjustments, of accounting for a relatively less-culpable role. "If Cutler's role were significantly less than that of the average participant in such an offense, the Guidelines made adequate provision for a reduction in his offense level."[22]

Nor could the sentencing court depart because the loss overstated the seriousness of the offense itself. The court held that the application note authorizing that departure does not apply where, as here, the defendants intended to cause the entire loss. Notably, the court relied on an example of unintended loss that the Sentencing Commission withdrew in

2001, after the conduct at issue but before sentencing.

The court further held that a downward departure for family circumstances was inappropriate. The court concluded that Mr. Cutler created his child support problem by placing his assets outside his children's reach and, therefore, should not benefit from a lighter sentence. While the court acknowledged that Mr. Freedman had a close relationship with his brother and mother-in-law, the court reviewed the record and concluded that others could take his place during incarceration.

The district court's refusal to grant an upward adjustment in Mr. Freedman's sentence for obstruction of justice solely on the ground that a related charge dropped was also held to be procedural error because the court was required to consider uncharged conduct under the guidelines. The court also held that the district court's failure to calculate the ultimate guidelines range for Mr. Freedman ran afoul of *Gall.*

The court then noted several misapplications of the 3553(a) factors. For instance, the district court's conclusions that the length of the sentence for this "type" of offense was not important to provide deterrence,[23] that a large restitution obligation could justify a five-year reduction in sentence or that a light sentence was warranted because of the public nature of the trial all conflicted with 3553(a)'s requirement that the court consider the need for deterrence and just punishment. The court similarly rejected Mr. Freedman's disbarment as justifying a lower sentence. All lawyers convicted of felonies, the court noted, face disbarment.

Notably, the district court had concluded that while Mr. Freedman's lifetime of charitable works, the collateral consequences of his conviction, and the application of overlapping enhancements individually did not justify a downward departure, the combination of these factors did support such a departure. The court of appeals gave this finding short shrift, holding that Mr. Freedman's health, "either alone or in combination with any other factors," did not warrant departure.

The court also found several of Judge Preska's factual findings clearly erroneous, including that the defendants obtained little if any personal gain from the fraud. Remarkably, the court spent eight pages dissecting Mr. Freedman's medical records before concluding that his heart condition did not require constant monitoring and thus did not justify a sentence of probation.

Having found several procedural errors, the court nonetheless went on to conclude that a year-and-a-day sentence for Mr. Cutler and probationary term for Mr. Freedman were substantively unreasonable.

Judge Rosemary Pooler wrote separately to note that, while she agreed that the sentences should be vacated and remanded for procedural errors, the district court, consistent with *Gall,* should have been given an opportunity to correct those errors before the court of appeals engaged in substantive review of the defendants' sentences.

A More Reasonable Review

As the Supreme Court in *Gall* observed, "district courts have an institutional advantage over appellate courts in making" sentencing decisions. "The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." This advantage is only amplified by the fact that district courts "see so many more Guidelines sentences than appellate courts do."[24]

In fact, in 2007, district courts in the Second Circuit sentenced 4,454 defendants.[25] Only 5 percent of those sentences were appealed.[26] Appeals contending a sentence was too low represented only a small fraction of that small fraction - 10 were filed in 2007, challenging 0.23 percent of all sentences imposed that year.[27]

Consistent with these facts, *Gall* expressly calls for a two-step review process. First the appellate court must determine if the sentencing judge followed proper procedures, including correctly calculating the guidelines range and considering all the 3553(a) factors. "Assuming that the district court's sentencing decision is procedurally sound, the appellate court should *then* consider the substantive reasonableness of the sentence."[28] This makes sense: in the absence of correct procedures, an appellate court will generally lack a proper foundation from which to determine if the ultimate sentence is reasonable.

The *Cutler* court correctly found that the district court committed a number of procedural errors. But at the same time, the court reached conclusions about the substantive reasonableness of the defendants' sentences without first giving the district court a chance to choose procedurally proper sentences.

Perhaps the court felt that the sentences were too lenient no matter what, in view of the magnitude of the fraud and defendants' financial gain. On the other hand, it may very well be that the district court, after applying proper procedures, could reasonably conclude that a 69-year-old (now 71) disbarred attorney with unusual family ties and poor health presents such a low risk of recidivism, and has suffered sufficient punishment, that a noncustodial sentence is appropriate. Indeed, the Supreme Court in *Gall* upheld reliance on the defendant's age (in that case, his youth) in sustaining his below-the-range sentence and Dynegy tax lawyer Jamie Olis received a below-the-range sentence in part because the loss of his law license diminished the need for specific deterrence.[29]

Like the Eighth Circuit in *Gall,* the *Cutler* court "correctly stated that the appropriate standard of review was abuse of discretion, [but] engaged in an analysis that more closely resembled de novo review of the facts presented and determined that, in its view, the degree of variance was not warranted."[30] In uttering those words, the Supreme Court ruled that the Eighth Circuit's approach was error. So too did Judge Pooler, with respect to the majority's approach in *Cutler.*

Indeed, *Cutler* seems in tension with another of the Second Circuit's recent descriptions of

its approach to reasonableness review. Just two weeks before *Cutler,* in *United States v. Regalado*, the court "confirm[ed] the broad deference that this Circuit has afforded the sentencing discretion of the district courts."[31] Time will tell whether, or how, these seeming conflicts in the Second Circuit's approach to sentencing review are ultimately resolved.

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Endnotes:

1. *Koon v. United States*, 518 U.S. 135 (1996).

2. 127 S.Ct. 2456 (2007).

3. 127 S.Ct. at 2463.

4. Id. at 2467.

5. 128 S.Ct. 558 (2007).

6. 128 S.Ct. at 564. In fact, even the government acknowledged that "courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines." Id. at 570.

7. 128 S.Ct. 586 (2007).

8. 128 S.Ct. at 591.

9. Id. at 594-95.

10. Id. at 595.

11. Id. at 590.

12. Id. at 596.

13. Id. at 597.

14. Id.

15. Id.

16. 2008 WL 706633 (2d Cir. March 17, 2008).

17. See, e.g., Douglas A. Berman, "Judicial Reactions, Formal and Informal, to 'Gall' and 'Kimbrough,'" Sentencing Law and Policy (Dec. 11, 2007) available at http://sentencing.typepad.com/sentencing_law_and_policy/gall_reasonableness_case/inde ("federal sentencing judges long troubled by the rigidity and severity of the federal guidelines are sure to celebrate the Supreme Court's work . . . in *Gall* and *Kimbrough*"); Jack King, NACDL News at 6 (January/February 2008) ("the Court affirmed in [*Gall* and *Kimbrough*] that the federal sentencing guidelines are actually 'advisory,' and that experienced federal judges have broad discretion in crafting an appropriate sentence outside the federal sentencing guidelines").

18. Id. at *10.

19. Id. at *11.

20. 2008 WL 706633 at *14.

21. Id. at *16.

22. Id. at *22.

23. Id. at *25.

24. 128 S.Ct. at 597-98 (internal citations and quotation marks omitted).

25. United States Sentencing Commission, 2007 Sourcebook of Federal Sentencing Statistics, Table 2 (October 2007), available at http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm.

26. Id. at Table 55.

27. Id. at Table 56A.

28. *Gall,* 128 S. Ct. at 597 (emphasis supplied).

29. Id. at 601-02; *United States v. Olis,* 2006 WL 2716048 at *12 (S.D. Tex., Sep. 22, 2006).

30. *Gall,* 128 S. Ct. at 600.

31. 518 F.3d 143, 147 (2d Cir. 2008); see also *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("The appellate function in this context should exhibit restraint, not micromanagement.").