A Guide to Negotiating Federal Guilty Pleas in a Post-*Gall* Sentencing World

BY LAURIE L. LEVENSON

"The Guidelines are dead. Long live the Guidelines." After 24 years, federal sentencing has come nearly full circle. Prior to the Sentencing Reform Act (SRA) of 1984, judges had broad discretion to impose sentences in federal cases. The U.S. Sentencing Guidelines changed all that. Constrained by the guidelines, judges were forced to impose sentences that were limited, in large part, by what charges prosecutors had brought. By their nature, the guidelines gave prosecutors the upper hand in plea negotiations. Departures were relatively rare and usually based upon the defendant's cooperation. Without cooperation, defendants had little hope of escaping the often harsh terms of the guideline sentences.

All that changed with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Court held that in order to be constitutional, the guidelines must be construed as "advisory," rather than "mandatory." Ultimately, courts were to impose sentences according to the terms of 18 U.S.C. § 3553(a), with the sentencing guidelines being the starting place, not ultimate decider, of what sentence would be imposed.

The Court's ruling in *Booker* has loosened the guidelines' stranglehold on defense counsel in plea negotiations, but not released them completely. In *Booker*'s wake, the guidelines continued to reign. Statistical reports from the U.S. Sentencing Commission indicate that courts remain reluctant to stray from the guidelines unless the government recommends it. Nongovernment-sponsored departures from the guideline range occurred in only 12 percent of the sentences in 2007. Following the Supreme Court's cue in *Rita v. United States*, 127 S. Ct. 2456 (2007), district judges recognize that their sentences enjoy a presumption of reasonableness on appeal if they are within the sentencing guidelines.

Yet, there is reason to believe that the sentencing dynamic is changing and may have a pronounced effect on plea negotiations in this post-*Booker* era. First, the Supreme Court recently decided two cases that emphasized that even though the guidelines serve an advisory role in sentencing, the sentencing judge enjoys substantial discretion in imposing an appropriate sentence after considering all of the sentencing factors under 18 U.S.C. § 3553(a). Under that provision, judges must consider seven factors when imposing sentence. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." (18 U.S.C. § 3553(a)(1).) The second factor requires the consideration of the general purposes of sentencing, including: "The need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." (18 U.S.C. § 3553(a)(2).) The third factor pertains to the kinds of sentences available; the fourth to the sentencing guidelines; the fifth to any relevant policy statement issued by the sentencing commission; the sixth to the need to avoid unwarranted sentence disparities; and the seventh to the need to provide restitution to any victim. (18 U.S.C. §§ 3553(a)(3)-(7).)

In *Gall v. United States*, 128 S. Ct. 586 (2007), the Court emphasized that sentencing judges do not need extraordinary reasons to sentence a defendant outside the guidelines range. Post-*Booker*, appellate courts must review the sentence imposed under an abuse-of-discretion standard regardless of whether that sentence is inside or outside the guidelines range. This includes the decision of a court to impose a probationary sentence.

In a companion case, *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court further loosened the reins on sentencing courts by allowing them to depart from the guidelines-recommended sentence even when they do so because of a disagreement with a policy decision by the sentencing commission. In *Kimbrough*, the sentencing court refused to accept the 100-to-one ratio disparity between the guidelines then applicable to crack versus powder cocaine offenses. Writing for the Court, Justice Ginsburg concluded for the

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Court that the ultimate decision is whether a sentence was "reasonable" and, if a sentencing judge reasonably appraises the circumstances in the case, the judge is not locked into the guidelines. As if offering a mantra for defense lawyers, she began her opinion by reiterating, "the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."

Recommendations for Post-*Booker* Plea Bargaining

The challenge now is for the federal defense bar to learn how to use this mantra effectively in their plea negotiations. If the guidelines are indeed going to be only one factor in sentencing, the responsibility is on defense counsel to ensure that the prosecutor is presented with all of the other factors that should apply in the client's case. Here are some suggestions.

1. Take It in Order

The very order of sentencing factors in 18 U.S.C. § 3553(a) gives defense counsel the opportunity to change the dynamic of plea bargaining. Instead of focusing on the guidelines, defense counsel should focus on the defendant and the circumstances of the offense. The very first statutory factor is what sentence is needed "to provide just punishment for the offense." There are no limits as to what may be argued under this factor. However, consider how effectively Brian Gall's lawyers argued the circumstances of his crime in defending the reasonableness of the district court's probationary sentence.

Brian Gall was a sophomore at the University of Iowa when he began dabbling in drugs. He soon became involved in an on-campus drug ring, selling primarily the drug MDMA, also known as ecstasy or "E." After making nearly $30,000 over several months, Gall abruptly quit the conspiracy on his own volition. He went through a sort of "self-rehabilitation." He graduated in 2002, moved away from Iowa and became a hard-working and law-abiding member of society. In the meantime, the authorities caught his former coconspirators. They tracked Gall down in Arizona and he immediately admitted his involvement and cooperated with the government. Over a year later he was indicted. Upon entering a guilty plea, the government recommended the guideline range of between 30-37 months. His attorney's skillful presentation of Gall's compelling individual story led the judge to sentence him to 36 months *probation*. The Supreme Court upheld the sentence even though Gall's situation did not present "extraordinary circumstances."

In post-*Gall* plea bargaining, defense counsel must emphasize that the burden is not on them to show extraordinary sentences for a nonguidelines sentence. Rather, the responsibility of the court and prosecutor is to find the sentence that fits the crime and the defendant. The guidelines remain relevant to the process, *Gall*, 128 S. Ct. at 596-97, but section 3553(a) requires that they "must make an individualized assessment based on the facts presented." (*Id*.) Neither the prosecutor nor the court may presume that a guidelines sentence is reasonable until there is a full consideration of the defendant and his or her circumstances.

Moreover, contrary to the way that prosecutors have been thinking for decades, *Gall* makes it clear that there is no proportionality requirement (greater the deviation, the greater justification) when deciding the appropriate sentence. So long as defense counsel can give the court the information to "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing," *id*. at 597, the sentence will be upheld.

Accordingly, defense counsel should view plea bargaining as the "warm-up act" for the defendant's sentencing hearing. Defense counsel's goal is to articulate for the prosecutor why a sentence is appropriate. When preparing the plea agreement, those reasons, as well as the actual counts for the plea, should be incorporated into the agreement.

*2. Consider Post-*Gall *Sentencing Patterns*

Because prosecutors and courts have relied for so long on the sentencing guidelines, it is important that defense counsel offer examples of how judges are imposing sentences different from those dictated by the guidelines.

First, although *Gall* makes it clear that extraordinary circumstances are not required for a sentence below the guidelines, to the extent there are such circumstances, they should be the focus of plea discussions. Since *Gall*, judges have found that extraordinary circumstances supported the court's decision to give a lighter sentence than provided in the guidelines. For example, in child pornography cases, courts have reduced the guidelines sentence range from 78 to 97 months' imprisonment to 42 months' imprisonment when there have been "extraordinary circumstances." (*See* United States v. Pauley, 511 F.3d 468 (4th Cir. 2007).) The circumstances the court considered included: (1) the defendant was initially approached by the victim with the proposal to take the pornographic shots; (2) fewer than two dozen pornographic shots were taken; (3) the victim's face did not appear in any of the photographs; (4) the defendant displayed deep remorse; (5) besides the conduct at issue in the case, the defendant was otherwise a model citizen, good father, and teacher; (6) as a result of his conviction, the defendant lost his teaching certificate and state pension; (7) the defendant agreed to a lifetime of supervised release; (8) no other child pornography was found in the defendant's house; and (9) the defendant would receive counseling that would make it extremely unlikely that he would reoffend. (*See also* United States v. Smith, 2008 U.S. App. LEXIS

8794 (4th Cir. 2008) (child pornographer sentenced to 24 months imprisonment after plea deal and recognition that he was unlikely to engage in similar conduct in the future).)

Moreover, in looking for distinguishing circumstances, defense counsel should not just focus on the defendant's offense. Plea bargaining post-*Gall* allows the defense to argue family ties and responsibilities, factors that ordinarily were not relevant under the guidelines departure analysis. Defense counsel can also focus on changes in a defendant's behavior, even since the time of the offense. Nothing should be excluded from consideration. Even a defendant's conduct in prison, including being a "model prisoner" and continuing his or her education, can be grounds for a nonguidelines sentence. In fact, defense counsel can gain credibility in plea negotiations by recognizing that the defendant may need "the discipline of a corrective institution for a period, but still has the capacity to change his ways and lead a fruitful life." (*See* United States v. Moreland, 2008 U.S. Dist. LEXIS 27292 (S.D.W.Va. 2008) (defendant convicted of selling cocaine sentenced to mandatory minimum sentence and not enhanced sentence of 360 months to life imprisonment under guidelines).)

impose restrictions on his activities while allowing him to continue supporting his family and paying his substantial [$2.1 million] restitution obligation." (*Id*. at *16.)

In this post-*Gall* era, even pleas to drug trafficking offenses have resulted in probationary sentences. For example, in *United States v. Pyles*, 2008 U.S. App. LEXIS 7286 (4th Cir. 2008), Derry Pyles pled guilty to one count of aiding and abetting the distribution of crack cocaine. Initially, the Fourth Circuit reversed the district court's imposition of five years' probation with six months of home confinement. However, after *Gall*, the Supreme Court remanded the case for further consideration. On remand, the appellate court upheld the sentence. Although the guidelines for Pyles's sentence were 63 to 78 months' imprisonment, the district court concluded that "a sentence of probation will allow Pyles to complete valuable vocational training and take advantage of available opportunities for advancement at work in the most effective manner." (*Id*. at *5.) Moreover, the court rejected the argument that probation is just a slap on the hand. There are significant restraints with a probationary sentence and, in the words of the Fourth Circuit, it is not a "get-out-of-jail free card" either. (*Id*. at *8.)

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Second, emphasize that a conviction itself, even with a probationary sentence, can be considered a significant penalty. Indeed, the Supreme Court noted in *Gall*, "probation, rather than 'an act of leniency,' is a 'substantial restriction of freedom.' " (*Gall*, 128 S. Ct. at 593 (quoting district judge).) A similar argument was successful in *United States v. Diambrosio,* 2008 U.S. Dist. LEXIS 20963 (E.D. Pa. 2008). Salvatore Diambrosio was convicted of wire fraud for intentionally defrauding an options trading firm of approximately $2.8 million. Diambrosio was the stock execution clerk. Even though he went to trial and was convicted by a jury, the court only imposed five years of probation, including a one-year term of home confinement. In his favor, Diambrosio had strong family and community ties. Typical quotes in the letters to the judge included, "Family always comes first with him. The love he has for his children is unbelievable." (*Id*. at *9.) In imposing a probationary sentence with home confinement, the court emphasized that "[a] probationary sentence would significantly limit Defendant's liberty and

Third, emphasize that *Gall* made it clear that not all coconspirators' sentences need to be the same. In fact, a key part of plea bargaining is to distinguish one defendant from another. This need not be done solely by offering cooperation by a defendant. Rather, the door is open to argue all distinctions that may apply, from the family background of a defendant to his or her role in the conspiracy. (*See* United States v. Smart, 518 F.3d 800, 804 (10th Cir. 2008) ("After *Gall*, it is clear that codefendant disparity is not a per se "improper" factor, such that its consideration would constitute procedural error").)

Fourth, use the statistics. Although judges are still staying close to the guidelines, there are certain types of cases where they have been more willing to give a probationary sentence than in others. The 2007 Table of Sentences, Table 4, indicates probationary sentences (straight probation or split sentences) were imposed in more than 50 percent of tax offenses, 39 percent of immigration cases, 37 percent of obstruction of justice cases, 85 percent of environmental

cases, 38 percent of fraud cases, 67 percent of embezzlement cases, and 60 percent of nontrafficking drug offenses. Although the classic paradigm for punishment has been incarceration, these statistics, as well as the Court's language in *Gall*, open the door for defense counsel to craft a plea bargain sentence that includes other types of punishment and does not focus on prison.

***3. Be Prepared for the Prosecution to Use* Gall**

Finally, defense counsel must recognize that *Gall* is a two-way street. It allows the court to impose sentences above the guidelines and prosecutors will no doubt remind defense lawyers of this risk in plea negotiations. For example, in *United States v. Klups*, 514 F.3d 532, the Court found a 60-month prison sentence reasonable where the guidelines would have advised only 24 to 30 months. The defendant pled guilty to the charge of traveling with the intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a). The district court judge reasoned that the drastic upward variance in the sentence was appropriate because of the seriousness of the offense and the interest in "protecting the public from future sex crimes by Klups." (*Id*. at 537.) In plea bargaining, it is critical that defense counsel reach an agreement with the government as to what facts underlie the conviction, as well as the defendant's likelihood for recidivism. It is unwise to wait for the probation officer to notify the court of a defendant's prior record and have that submitted to the court without a plea agreement that addresses the impact of those prior convictions. (*See*, *e.g.*, United States v. Braggs, 511 F.3d 808 (defendant had been previously convicted of theft and fraud offenses four times and was sentenced to 48 months of imprisonment when the guidelines recommended 15-21 months.) *See also* United States v. Evans, 2008 U.S. App. LEXIS 11245 (4th Cir. 2008) (defendant convicted of identity theft sentenced to 125 months' imprisonment though guidelines recommended only 24-30 months because of defendant's prior convictions).)

Conclusion

Gall, like *Booker*, took some negotiating leverage away from the prosecution, but it is still too early to determine exactly how much of an impact that will have in actual plea negotiations. Prosecutors still control the ultimate weapon in the plea bargaining arsenal—mandatory minimum sentences. They also have considerable influence with judges with their recommendations based upon defendants' cooperation.

Perhaps the most significant change to plea bargaining in the post-*Gall* era will be the more directed focus on the individual defendant than on general Department of Justice policies. By requiring that the court consider the seven factors of 18 U.S.C. § 3553, the Supreme Court has changed the dynamic of plea bargaining from a focus on DOJ policies to how the sentence of an individual defendant is fair to both the prosecution and defendant. *Gall* invites a dialogue about the defendant and his or her crime, regardless of how those factors might have been considered by the guidelines.

Because judges are not tethered to the guidelines, it may be prudent for counsel to participate in Rule 11(c)(1) pleas until the sentencing pattern of the courts can be established. However, ultimately, as in the past, judges will develop reputations for how close to the guidelines they like to sentence. Then, the most significant factor in plea bargaining will no longer be—as it was before *Booker* and *Gall*—who the prosecutor is, but instead who the sentencing court will be. In preparing for plea bargaining, defense counsel must thus go beyond what the guidelines provide to what arguments the individual judge is receptive to when he or she considers sentencing.

Commentators have praised plea bargaining as a way to tailor our criminal justice system to provide individualized consideration of cases and defendants. This is even more accurate in light of the *Booker* and *Gall* decisions. The guidelines no longer impose arbitrary limits. The only limits on plea deals are those that come from a lawyer's lack of creativity and initiative. ■