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 2008.

United States Supreme Court Cases on Sentencing Issues

Decisions

In *Gall v. United States*,[1] the Supreme Court held that the abuse of discretion standard of review applies to all sentences, rejecting the form of proportionality review employed by the court of appeals in the case. Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts, Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. Justices Scalia and Souter filed concurring opinions, and Justices Thomas and Alito filed dissenting opinions.

The Court held that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, the court of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse of discretion standard."[2] The Court further held that the appellate rule "requiring 'proportion' justifications for departures from the Guidelines range is not consistent with"[3] its earlier decision in *United States v. Booker*.[4]

The Court emphasized the continuing importance of the sentencing guidelines, reiterating that "[a]s we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[5]

The Court stated that the proper analysis for sentencing courts is to begin with the proper calculation of the guideline range, followed by consideration of the section 3553(a) factors, and if the court determines that a sentence outside the guideline range is appropriate, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[6] In so doing, the Court stated: "We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."[7] After making this determination, the Court said, the sentencing court must adequately explain the reasons for the sentence.

The Court then described the two steps for appellate review of all sentences, whether within the guidelines or not: procedural review and substantive review for reasonableness under an abuse-of-discretion standard. Examples of procedural errors, the Court said, were "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including

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1 __ U.S. __, 128 S. Ct. 586 (Dec. 10, 2007).

2 *Id.* at 591.

3 *Id.* at 594.

4 543 U.S. 220 (2005).

5 *Gall*, 128 S. Ct. at 596.

6 *Id.* at 597.

7 *Id.*

an explanation for any deviation from the Guidelines range."[8]

If no procedural error occurred, the Court said, "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[9] In so doing, the Court acknowledged, reviewing courts "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range," and "may consider the extent of deviation, but must give due deference to the district court's decision that the 3553(a) factors, on a whole, justify the variance."[10]

The Court, however, rejected certain methods of proportionality review employed by some courts of appeals when considering the substantive reasonableness of a sentence imposed. First, the Court stated that appellate courts are not permitted to require extraordinary circumstances to justify a sentence outside the guideline range. Second, the Court disapproved a standard that used the percentage of variation from the guideline range as a metric for how compelling the factors in favor of a sentence outside the guideline range was required to be. The Court stated that these tests "reflect a practice . . . of applying a heightened standard of review to sentences outside the Guidelines range," which, the Court said, "is inconsistent with the rule that the abuse of discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range."[11]

The Court concluded that, in the case at bar, the Eighth Circuit failed to give the proper deference to the district court's decision, and reversed the judgment. The district court, it said, committed no procedural error, and the facts surrounding the defendant's offense, including his withdrawal from the drug conspiracy and pre-arrest rehabilitation, justified the below-guidelines sentence.

In *Kimbrough v. United States*,[12] the Court held that a sentencing judge may consider the disparity between the guidelines' treatment of crack and powder cocaine when considering the factors in 18 U.S.C. § 3553(a). Justice Ginsburg delivered the opinion in which Chief Justice Roberts, Justices Stevens, Scalia, Kennedy, Souter, and Breyer joined. Justice Scalia also filed a concurring opinion; Justices Thomas and Alito filed dissenting opinions.

The Court summarized the history of the crack/powder disparity, noting the circumstances surrounding its inclusion in the Anti-Drug Abuse Act of 1986 (the "1986 Act") and the assumptions that underlay the conclusion that crack offenders should be punished significantly more severely than powder cocaine offenders. The Court observed that, in creating the drug guidelines, the Commission adopted the quantity-driven scheme used in the 1986 Act, maintaining the 100-to-1 quantity ratio from the 1986 Act throughout the drug table. The Court also noted the Commission's subsequent criticisms of the ratio, and discussed Congress's previous responses to Commission actions and recommendations in the area of crack cocaine sentencing.

The Court concluded that Congress's decision not to speak to the appropriate length of sentences other than those dictated by the mandatory minima and maxima in the 1986 Act itself did not imply a directive to treat such sentences as the Commission ultimately did. The Court noted that it had implicitly applied this same principle in *Neal v. United States*.[13]

The Court rejected the government's arguments that consideration of the 100-to-1 ratio would result in unwarranted sentencing disparities in violation of 18 U.S.C. § 3553(a)(6). The Court discussed two kinds of disparities: those arising from "cliffs" in the guideline ranges near and at the mandatory minima,

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8 *Id.*

9 *Id.*

10 *Gall*, 128 S. Ct. at 597.

11 *Id.* at 596.

12 __ U.S. __, 128 S. Ct. 558 (Dec. 10, 2007).

13 516 U.S. 284 (1996).

and those arising from different sentencing judges' opinions regarding the proper relationship between crack offenders and powder cocaine offenders. The Court observed that both are inherent in the guidelines system and that "advisory Guidelines combined with appellate review for reasonableness will . . . not eliminate variations between district courts, but . . . *Booker* recognized that some departures from uniformity were a necessary cost of the remedy [*Booker*] adopted."[14] The Court finally noted that, if an unwarranted disparity arises, the district court is obligated to address it under 18 U.S.C. § 3553(a)(6).

The Court held that "it would not be an abuse of discretion for a district court to 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."[15] Applying these principles, the Court determined that the sentence in the instant case did not constitute an abuse of discretion, and reversed the Fourth Circuit's order vacating the sentence.

In *Greenlaw v. United States*,[16] the Court held that an appeals court was not permitted to order an increase in a defendant's sentence where the government did not appeal the sentence. Justice Ginsburg wrote for the majority, in which Chief Justice Roberts and Justices Scalia, Kennedy, Souter, and Thomas joined. Justice Breyer wrote separately, concurring in the judgment. Justice Alito dissented; Justice Stevens joined the dissent in full, and Justice Breyer joined it in part.

The petitioner was convicted of seven counts of an eight-count indictment arising out of his participation in a crack cocaine trafficking scheme. The charges included two counts under 18 U.S.C. § 924(c); the district court, in contravention of prior Supreme Court precedent, held over government objection that the second count was not considered a "second or subsequent conviction" because the two counts were charged in the same indictment. As a result, the district court erroneously imposed a sentence of 442 months' imprisonment, which fell below the required mandatory minimum of 622 months' imprisonment. Nevertheless, the defendant appealed the sentence. In defending the sentence, the government noted that the sentence was erroneously low but did not file a cross-appeal of the error. The Eighth Circuit, relying on the "plain error" rule set forth in Fed. R. Crim. P. 52(b), vacated the sentence and remanded to the district court with instructions that it impose the statutorily mandated sentence. The defendant then sought rehearing and rehearing *en banc*, and the petitions were summarily denied.

The defendant and the United States agreed that the appeals court erred in vacating and remanding the sentence; therefore, the Court invited an *amicus* brief in support of the Eighth Circuit's position.

The majority opinion began by noting the general principle of party presentation that characterizes the United States' adversarial system in which courts "rely on the parties to frame the issues for decision" and play "the role of neutral arbiter of matters the parties present."[17] Derived from this principle is the cross-appeal rule, which the Court described as an "unwritten but longstanding rule" that "an appellate court may not alter a judgment to benefit a nonappealing party."[18] The Court noted the split among the circuits regarding the question of whether this rule is "jurisdictional," and therefore not subject to exception, or a "rule of practice" to which courts may create exceptions. As in previous cases, the Court declined to resolve the circuit split, concluding that resolving the issue was not necessary to deciding the case at bar.

The Court discussed 18 U.S.C. § 3742(b), which provides that the government may not proceed with an appeal of a criminal case "without the personal

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[14] *Kimbrough*, 128 S. Ct. at 573-74.

[15] *Id.* at 575.

[16] __ U.S. __, 128 S. Ct. 2559 (June 23, 2008).

[17] *Id.* at 2564.

[18] *Id.*

approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." The Court concluded that "[i]t would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion . . . to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed."[19] The Court then addressed the relationship between Fed. R. Crim. P. 52(b) and the cross-appeal rule, concluding that no plain-error exception to the cross-appeal rule existed where the error was to the detriment of the government in a criminal appeal.

The Court concluded that, since the cross-appeal rule was well-settled at the time of the Sentencing Reform Act, "Congress was aware of the cross-appeal rule, and framed § 3742 expecting that the new provision would operate in harmony with the 'inveterate and certain' bar to enlarging judgments in favor of an appellee who filed no cross-appeal."[20]

In *Irizarry v. United States*,[21] the Court held that a district court was not required to provide advance notice to the parties when imposing a sentence that represents a variance from the guideline range. Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissent in which Justices Kennedy, Souter, and Ginsburg joined.

The case required the Court to resolve a split among the circuits regarding whether, in light of the guidelines' advisory nature after *Booker*, the district court was required under Federal Rule of Criminal Procedure 32(h) to give advance notice of an intent to impose a sentence outside the guidelines based on the factors in 18 U.S.C. § 3553(a), commonly called a "variance." The Eleventh Circuit affirmed the district court's conclusion that it was not required to provide such notice, holding that "[a]fter *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum."[22]

The Court affirmed this conclusion, resting its holding on its decision in *United States v. Booker*,[23] which rendered the guidelines advisory. According to the Court, "[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule."[24]

In *Burns v. United States*,[25] the Court had held that the text of Rule 32 required notice of any contemplated departure. The Court in this case stated that its decision in *Burns* "applied in a narrow category of cases," namely, departures "authorized by 18 U.S.C. § 3553(b) which required 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'"[26] Such departures had to be based on the guidelines, policy statements, and the guidelines' commentary. Further, the notice requirement set forth in *Burns* "only applied to the subcategory of those departures that were based on 'a ground not identified as a ground . . . for departure either in the presentence report or in a pre-hearing submission.'"[27]

Because, post-*Booker*, "there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges,"[28] the Court held

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19 *Id*. at 2565.

20 *Id.* at 2568.

21 __ U.S. __, 128 S. Ct. 2198 (June 12, 2008).

22 *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006).

23 543 U.S. 220 (2005).

24 *Irizarry*, 128 S. Ct. at 2202.

25 501 U.S. 129 (1991).

26 *Irizarry*, 128 S. Ct. at 2202.

27 *Id.*

28 *Id*. at 2203.

that Rule 32(h) does not apply to variances. The Court also voiced more practical concerns that a special notice requirement in such circumstances might cause unnecessary delays in sentencing. The Court stated that the proper approach to cases in which "the factual basis for a particular sentence will come as a surprise to a defendant or the Government" is for the "district court to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial."[29]

The Supreme Court also decided four cases requiring interpretation of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. §§ 924(e) *et seq*. In *Logan v. United States*,[30] an unanimous opinion authored by Justice Ginsburg, the Supreme Court held that a violent felony offense for which the defendant's civil rights were never revoked is not excluded from qualifying as a predicate for an enhanced sentence. Such a prior offense, the Court ruled, does not fall into the category of those offenses "for which a person . . . has had civil rights restored."[31]

In *Logan*, the petitioner pleaded guilty to a violation of 18 U.S.C. § 922(g)(1), the felon-in-possession statute. His sentence was enhanced pursuant to the ACCA, and the district court imposed the relevant 15-year mandatory minimum. The court based the enhancement on the petitioner's three Wisconsin misdemeanor battery convictions, each punishable by up to three years' imprisonment. Although these convictions would otherwise count as "violent felonies" for ACCA purposes pursuant to 18 U.S.C. § 921(a)(20)(B), the petitioner argued that, because none of them caused the revocation of his civil rights, they were exempt pursuant to 18 U.S.C. § 921(a)(20). That statute excludes from the relevant definition of a qualifying predicate offense:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The Court examined congressional intent, and summarized it as follows:

> Congress framed § 921(a)(20) to serve two purposes. It sought to qualify as ACCA predicate offenses violent crimes that a State classifies as misdemeanors yet punishes by a substantial term of imprisonment, *i.e.*, more than two years. Congress also sought to defer to a State's dispensation relieving an offender from disabling effects of a conviction. Had Congress included a retention-of-rights exemption, however, the very misdemeanors it meant to cover would escape ACCA's reach.[32]

The Court further observed that the petitioner's reading of the statute would also produce absurd results, noting that Maine does not revoke any offender's civil rights, and so offenders who committed the most dangerous offenses in Maine would receive less punishment than offenders who committed less serious offenses in other states. The Court also noted that Congress must have been aware that allowing state laws, which vary, to dictate application of the ACCA would produce some anomalous results.

In another unanimous opinion, *Watson v. United States*,[33] authored by Justice Souter, the Supreme Court held that, for purposes of 18 U.S.C. § 924(c)(1)(A), a person who receives a firearm in a drugs-for-firearms transaction does not "use" the firearm "during and in relation to . . . [a] drug trafficking crime." The Court observed that a circuit conflict had arisen regarding the construction of the term "use" in this context, and reversed the Fifth

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[29] *Id.*

[30] __ U.S. __, 128 S. Ct. 475 (Dec. 4, 2007).

[31] 18 U.S.C. § 921(a)(20).

[32] *Logan*, 128 S. Ct. at 485 (citations omitted).

[33] __ U.S. __, 128 S. Ct. 579 (Dec. 10, 2007).

Circuit's ruling in this case, remanding for proceedings consistent with the opinion.

The Court began by noting that section 924(c)(1)(A) prescribes a mandatory minimum sentence for a defendant who "during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm," but does not define the term "uses." The court further observed that it had addressed the definition of the term in section 924(c)(1)(A) in two of its earlier cases, *Smith v. United States*, 508 U.S. 223 (1993), and *Bailey v. United States*, 516 U.S. 137 (1995). In *Smith*, the Court held that a person who trades a firearm for drugs does "use" the firearm for purposes of the statute; the *Watson* Court observed that this ruling relied mostly on the "ordinary or natural meaning" of the term "use" in the context of the statute. In *Bailey*, the Court held that possessing a firearm when the firearm was stored near the scene of drug trafficking did *not* constitute "use" for purposes of section 924(c)(1). The *Watson* Court again observed that this construction relied on the "ordinary or natural" meaning of the term, and "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense."[34]

The Court observed that neither *Smith* nor *Bailey* answered the question presented in the case at bar, and stated—

> With no statutory definition or definitive clue, the meaning of the verb "uses" has to turn on the language as we normally speak it; there is no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader.[35]

The Court concluded that "regular speech would not say that" the person in these circumstances had "used" the item received in the barter.[36] In other words, the Court stated, "[a] seller does not 'use' a buyer's consideration."[37]

In *United States v. Rodriquez*,[38] the Supreme Court reversed the Ninth Circuit's decision below, holding that a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the ACCA.[39] Justice Alito wrote the opinion for the majority, which included Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Breyer. Justice Souter authored a dissenting opinion, in which Justices Stevens and Ginsburg joined.

The defendant in *Rodriquez* had two California burglary convictions and three convictions in Washington state for delivery of a controlled substance. The district court, in sentencing the defendant on a federal felon-in-possession charge, declined to apply the ACCA enhancement because the defendant was subject to the ten-year maximum in Washington state only because he was a repeat offender; in Washington, first offenders face only a statutory maximum of five years. The Ninth Circuit agreed, but noted that its holding on this issue was in conflict with law from the Seventh Circuit and "in tension" with precedent from the Fourth and Fifth Circuits.

The Court held that the government's interpretation of the ACCA was correct, focusing on the statute's definition of three terms: "offense," "law," and "maximum term." The Court stated that—

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[34] *Id*. at 581-82 (quotation omitted).

[35] *Id*. at 583.

[36] *Id*.

[37] *Id*. (quotation omitted).

[38] __ U.S. __, 128 S. Ct. 1783 (May 19, 2008).

[39] Pursuant to the ACCA, a "serious drug offense," one type of predicate offense listed in the ACCA, is a controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2).

> The "offense" in each of the drug-delivery cases was a violation of § 69.50.401(a)(ii)–(iv). The relevant "law" is set out in both that provision, which prescribes a "maximum term" of five years for a first "offense," and § 69.50.408(a), which prescribes a "maximum term" of 10 years for a second or subsequent "offense." Thus, in this case, the maximum term prescribed by Washington law for at least two of respondent's state drug offenses was 10 years.[40]

The Ninth Circuit's approach, the Court stated, "contorts ACCA's plain terms" and was "inconsistent with the way in which the concept of the 'maximum term of imprisonment' is customarily understood by participants in the criminal justice process."[41]

Addressing the respondent's arguments, the Court rejected the argument that the term "offense" as used in the ACCA should be defined as the elements of the offense, of which a recidivism enhancement (at least of the kind in this case) is not one. The Court held that this reading added a limitation to the ACCA that was not part of the plain language of that statute. Additionally, the Court rejected the respondent's argument that the government's reading contradicted the "manifest purpose" of the ACCA. The respondent argued that, since the sentence length was used essentially as a proxy for the seriousness of the offense (thus limiting application of the ACCA enhancement to those convicted of more serious prior offenses), including recidivism enhancements skews this measurement.

The Court stated that "[t]his argument rests on the erroneous proposition that a defendant's prior record of convictions has no bearing on the seriousness of an offense," instead noting that "an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment" and that "a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."[42] Additionally, the Court observed that "the ACCA itself is a recidivist statute," concluding that this fact "bolster[ed]" its reading of the statute in that "Congress must have had such provisions in mind and must have understood that the 'maximum penalty prescribed by [state] law' in some cases would be increased by state recidivism provisions."[43]

Finally, in *Begay v. United States*,[44] the Court held that a conviction for felony driving under the influence ("DUI") is not a "violent felony" that can trigger the mandatory 15-year minimum under the Armed Career Criminal Act ("ACCA"). Justice Breyer wrote for the majority, and Chief Justice Roberts and Justices Stevens, Kennedy, Souter, and Ginsburg joined. Justice Scalia, writing separately, concurred in the judgment; Justice Alito, joined by Justices Souter and Thomas, dissented.

The Court was asked to construe the "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii), which defines a "violent felony" as, *inter alia*, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The petitioner challenged the enhancement of his sentence on the basis of two prior DUIs, arguing that the "otherwise" clause of the above provision was not intended to encompass DUI. The government argued that, because DUI presents a serious potential risk of physical injury to another, it falls within the scope of the statute and therefore qualified the petitioner for the enhanced sentence. The district court agreed with the government's view of the statute and applied the enhancement, and the court of appeals upheld the sentence.

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40 *Rodriquez*, 128 S. Ct. at 1787-88.

41 *Id*.

42 *Id*. at 1789.

43 *Id*. at 1798-90.

44 __ U.S. __, 128 S. Ct. 1581 (Apr. 16, 2008).

The Supreme Court concluded that the lower courts had erroneously construed the statute, holding that a prior conviction for DUI should not expose a defendant to the 15-year mandatory minimum. The Court began with the presumption that DUI involves conduct that "presents a serious potential risk of physical injury to another." The Court then addressed the issue of why Congress included the enumerated offenses (burglary, arson, extortion, and offenses involving "use of explosives") in the provision. The Court rejected the government's argument that the examples were intended "to demonstrate no more than the degree of risk sufficient to bring a crime within the statute's scope," concluding that "the examples are so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them."[45] Rather, the Court concluded, "we should read the examples as limiting the crimes . . . to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves."[46] The Court held that the legislative history of the ACCA supported this conclusion.

Applying this standard, the Court concluded that DUI does not sufficiently resemble the enumerated crimes to bring it within the ambit of the statute. The most significant distinction, according to the Court, is the fact that DUI offenses are essentially strict liability crimes, whereas the enumerated offenses typically involve "purposeful, violent, and aggressive conduct . . . [which] makes it more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim."[47]

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in *Chambers v. United States*,[48] which presents the question of whether a defendant's failure to report for confinement constitutes a "violent felony" for purposes of the ACCA. Additionally, the Court granted review in *Oregon v. Ice*[49] to address the issue of whether the Sixth Amendment requires that a jury, not a sentencing judge, find facts (other than prior convictions) that are necessary to impose sentences consecutively under the pertinent Oregon state statute.

Decisions of the United States Courts of Appeals

Many of the significant sentencing cases decided by the various courts of appeals during the year responded to the Supreme Court's opinions in *Gall* and *Kimbrough*. The courts reviewed sentences both within and outside the guidelines in light of those cases. Some sentences below the guideline range were affirmed, and some were remanded. For example, the First Circuit affirmed a sentence imposed below the guideline range based on "the support the defendant stood to receive from his family, personal qualities indicating his potential for rehabilitation, and a perceived need to avoid disparity arising out of the length of the defendant's sentence relative to coconspirators' sentences."[50]

In contrast, the Sixth Circuit vacated a below-guideline sentence in a health care fraud case that it determined was based on an impermissible factor; specifically, that the district court determined that the defendant had acted without intent to defraud, contrary to the jury's verdict on this point.[51] Likewise, the Eleventh Circuit reversed a sentence of probation for a plea of knowingly possessing child pornography. The court held that the "probationary sentence utterly failed to adequately promote general deterrence, reflect the seriousness of [the defendant's] offense, show respect for the law, or address in any

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45 *Id.* at 1585.

46 *Id.*

47 *Id*. at 1586.

48 __ U.S. __, 128 S. Ct. 2046 (Apr. 21, 2008).

49 __ U.S. __, 128 S. Ct. 1657 (Mar. 17, 2008).

50 *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008).

51 *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008).

way the relevant Guidelines policy statements and directives."[52]

Sentences above the guideline range were also both affirmed and remanded. For example, the Ninth Circuit affirmed an above-range sentence in an arson case because the district court properly concluded that the defendant's personal characteristics and the especially serious nature of his offenses merited a longer sentence.[53] In contrast, the First Circuit reversed an above-range sentence in a drug conspiracy that was based on the defendant's possession of weapons and involvement in violence because it concluded that, although these factors could support *some* upward variance, they did not support the large variance imposed by the district court.[54]

The circuits split over the application of these cases to one specific issue: whether a district court may impose a downward variance in an immigration case where a district court determines that the lack of an early disposition, or "fast track," program in that district creates an unwarranted disparity between the defendant's guideline range and those of similarly-situated defendants in districts where such programs do operate. The First Circuit held that a district court *may* consider this fact among all the relevant sentencing factors.[55] The Fifth and Eleventh Circuits took the opposite view, concluding that *Kimbrough* does not permit a district court to take into account the absence of a fast track program.[56]

Another issue that faced courts of appeals arose from crack cocaine offenders seeking sentence reductions as a result of the Commission's retroactive reduction of crack cocaine sentences. Specifically, courts were asked to interpret 18 U.S.C. § 3582(c)(2), which grants district courts authority to reduce an otherwise final term of imprisonment when the Commission reduces a guideline range and gives retroactive effect to that reduction. The Commission's 2007 crack cocaine amendment reduced the guideline range for certain crack cocaine offenders.[57] Some offenders who were convicted of crack cocaine offenses but whose sentences were imposed pursuant to §4B1.1 because they qualified as "career offenders" filed motions seeking sentence reductions under 18 U.S.C. § 3582(c)(2). The Eighth and Eleventh Circuits concluded that such an offender is not eligible for a reduced sentence under the terms of 18 U.S.C. § 3582(c)(2) because the sentence was based on the career offender guideline, not the drug guideline.[58]

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[52] *United States v. Pugh*, 515 F.3d 1179, 1183 (11th Cir. 2008).

[53] *United States v. Warr*, 530 F.3d 1152, 1160-61 (9th Cir. 2008).

[54] *United States v. Ofray-Campos*, 534 F.3d 1, 43-44 (1st Cir. 2008).

[55] *United States v. Rodriguez*, 527 F.3d 221, 231 (1st Cir. 2008).

[56] *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008); *United States v. Gomez-Hererra*, 523 F.3d 554, 561-63 (5th Cir. 2008).

[57] *See supra*, Ch. 2, page 7.

[58] *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008); *United States v. Tingle*, 524 F.3d 839, 840 (8th Cir. 2008) (per curiam).