THE NATIONAL
LAW JOURNAL
DAILY UPDATES ON WWW.NLJ.COM NEWS FOR THE PROFESSION MONDAY, MARCH 24, 2008
An incisivemedia publication

IN FOCUS

WHITE-COLLAR CRIME

'Gall' gives defendants real option to stand trial

Fewer will plead, as judges can depart from guidelines more often.

By Steven H. Sadow
SPECIAL TO THE NATIONAL LAW JOURNAL

"THANK YOU FOR calling the Department of Justice. Please listen carefully as your federal sentencing menu options have changed."

Until December 2007, white-collar criminal defendants didn't need to listen to the full menu of options when they dialed into the federal criminal justice system. That's because the options really never changed. Trial was not a true option; the substantial risk of a much longer sentence of incarceration, if unsuccessful, far outweighed the near certainty of a negotiated guideline sentence pursuant to a plea of guilty. A defendant's conceived best bet for procuring a palatable resolution was to hire former federal prosecutors, experienced at prosecuting white-collar cases, who might "cut a good deal" because of their former relationships or associations with prominent, well-connected law firms.

This scenario is not the case anymore since *U.S. v. Gall*, 128 S. Ct. 586 (2007), issued on Dec. 10. Sentencing has finally moved from the hands of the prosecutors and the harshness of the Federal Sentencing Guidelines back to the discretion of the district court judges. The federal sentencing menu options have changed, and white-collar criminal defendants can, and should, consider retaining veteran trial lawyers. Attorneys who fit this mold have real experience defending criminal cases in the courtroom, will not be dissuaded to go to trial when the facts and legal issues demand it and will not settle out of fear of a presumed harsher guideline sentence.

For more than 20 years, the Federal Sentencing Guidelines have served as the basis for all sentences given to criminal defendants convicted in the federal court system. The guidelines create an elaborate system for imposing sentences by placing a numeric value on the offense, and then allowing for addition of levels for aggravating factors such as use of a firearm, subtraction of levels for mitigating factors such as accepting responsibility and departure factors such as cooperation.

The practical reality of the guidelines had a profoundly chilling effect upon a defendant's decision to go to trial. The guidelines skewed the risk/reward analysis for going to trial overwhelmingly in favor of accepting a guilty plea and cooperating, regardless of the facts and circumstances of the case.

Prosecutors were given the upper hand in implementing the guidelines. The same consideration was not given to criminal defendants who went to trial and lost compared to those who accepted pleas. At a sentencing hearing after a conviction at trial, a defendant would not have the benefit of a downward adjustment for acceptance of responsibility that comes with accepting a pretrial guilty plea. Even more significantly, prosecutors were more likely to massage the guidelines by not arguing close issues of enhancement.

Sentencing authority has gone back to the discretion of judges.

For example, if a defendant entered a guilty plea, the government would agree not to dispute lower loss amounts, or it would forgo aggravated-role or obstruction-of-justice adjustments to prevent an increased sentence under the guidelines. Moreover, as long as an agreement between the defendant and prosecutor appeared reasonable on its face and recommended a sentence within the guideline range, the

Steven H. Sadow works with Atlanta-based Schulten Ward & Turner as special counsel for white-collar and high-profile criminal defense matters. He has been a criminal defense attorney for more than 25 years and has never been a prosecutor.

district courts were unlikely to question the factual or legal underpinnings of the recommendations.

If an accused lost after having been brazen enough to exercise his or her Sixth Amendment right to trial by jury, prosecutors would literally throw the guidelines at the remorseless defendant by seeking every possible enhancement. In white-collar cases, defendants could routinely expect to receive two to three times a negotiated guideline sentence if they lost at trial.

The U.S. Supreme Court recognized the chilling effect the guidelines were having upon criminal defendants by holding in *U.S. v. Booker*, 543 U.S. 220 (2005), that the guidelines, as originally constituted, violated a defendant's Sixth Amendment right to trial by jury. In doing so, the court explained that the guidelines were just that—guidelines— which were advisory to the district court when making its decision.

The court ruled that the district courts should be free to consider 18 U.S.C. 3553(a) factors, which provide factual and legal justification for the sentence requested by the party, regardless of whether the sentence is within the guideline range. While *Booke*r seemed to restore parity to the guideline system by allowing facts and circumstances of the individual case to play a larger role in sentencing, its limited practical effect frustrated defense attorneys.

No longer is there a down side to refusing to negotiate a plea.

Almost immediately after *Booker*, federal appellate courts started to chip away at its holding. The appellate courts required extraordinary circumstances for any variance sentence substantially below the guidelines. See *U.S. v. Livesay*, 484 F.3d 1324 (11th Cir. 2007); *U.S. v. Davis*, 458 F.3d 491 (6th Cir. 2006); *U.S. v. Cage*, 451 F.3d 585 (10th Cir. 2006); *U.S. v. Claiborne*, 439 F.3d 479 (8th Cir. 2006). District courts were again prevented from treating the guidelines as truly advisory—knowing that they would be summarily overturned for any significant downward variance from the guideline range.

In December 2007, the Supreme Court decided *Gall* and set the stage for a new approach to defending criminal defendants in federal courts. The defendant was a reformed drug dealer who pleaded guilty and

Defendants can risk a trial and still argue for lenient sentences.

received a lenient, probationary sentence from the district court, which it explained was justified by the defendant's current good conduct. The 8th U.S. Circuit Court of Appeals overturned his sentence because it constituted an unreasonable deviation from the applicable guideline range of 30 to 37 months. *Gall*, 128 S. Ct at 594. The Supreme Court granted certiorari to address "whether, when determining the 'reasonableness' of a district court's sentence under *Booker*, it is appropriate to require the district courts to justify a deviation from the [guidelines] with a finding of extraordinary circumstances."

Justice John Paul Stevens, writing for the majority, answered with a resounding "no." In his decision he stated, "Extraordinary circumstances should not be the only justification for a variance or departure from the Guidelines. Facts and circumstances should be considered and weighed on a case-by-case basis." The court re-emphasized that the guidelines are not de facto mandatory. They are, and should be, advisory to the district courts.

Three-step procedure

Under *Gall*, district courts have a three-step procedure to follow when determining an appropriate sentence. First, they must calculate the applicable guideline range and, second, identify and consider all of the § 3553(a) factors to determine if there is support for the sentence requested by a party. If the applicable guideline range is appropriate, then the district court must make an individualized assessment based on the facts presented. If the applicable guideline range is not appropriate and the sentence being imposed is a deviation from the guidelines, then the district court must ensure that there are adequate facts presented to support the variance. Finally, the district court must explain the basis for the imposed sentence. Id. at 596-597.

The last step in the *Gall* analysis is critical because it lays the foundation for the departure from the *Booker* era. Appellate courts now must yield to the judgment of the district court so long as the sentence is not an abuse of discretion.

Judicial review under an abuse of discretion standard makes sentences harder to overturn because the facts no longer must show an extraordinary circumstance. Reversal is warranted only when the district court erred in its methodical application of the three-step analysis or in the substantive reasonableness of the sentence imposed. In reviewing district courts' sentences, the appellate courts may presume sentences within the guidelines are reasonable. Id. at 597. However, appellate courts may not presume the reverse implication, finding that a deviation or variance from the guidelines is per se unreasonable. What's more, the appellate courts must give due deference to the district court's decision that the § 3553(a) factors justified the imposed sentence.

All signs indicate that the appellate courts are playing by the new rules. *Gall* now functions as the linchpin for evaluating and determining sentences. Post-*Gall* appellate decisions show a real trend toward strictly following its three-step analysis. As the 6th Circuit stated in *U.S. v. Bolds*, which was decided after *Gall*, "We no longer apply a form of proportionality review to outside-Guidelines sentences." No. 07-5062, 2007 WL 4440403, at *10 (6th Cir. Dec. 20, 2007); see also *U.S. v. McGhee*, No. 07-1064, 2008 WL 141168 (8th Cir. Jan. 16, 2008); *U.S. v. McBride*, No. 06-16544, 2007 WL 4555205 (11th Cir. Dec. 28, 2007); *U.S. v. Pauley*, 511 F.3d 468 (4th Cir. 2007).

The state of the guidelines seems finally set as advisory only, and district courts have begun to sentence accordingly. See *U.S v. McCormick*, No. 8:04CR218 (D. Neb. Jan. 29, 2008); *U.S. v. Baird*, No. 8:07CR204, 2008 WL 151258 (D. Neb. Jan. 11, 2008).

A good illustration involves Thomas Coughlin, a Wal-Mart executive charged with tax evasion and wire fraud. The guideline range for his crime was 27 to 33 months' imprisonment. Pre-*Gall*, the district court sentenced Coughlin to 27 months of home detention, five years of probation, a $50,000 fine and $400,000 restitution. On appeal, the 8th Circuit tagged the sentence as too lenient and an abuse of discretion. *U.S. v. Coughlin*, 500 F.3d 813, 819 (8th Cir. 2007). On remand but post-*Gall*, the district court handed Coughlin the exact same sentence with an additional 1,500 hours of community service. The district court justified the new sentence in a lengthy memorandum that explained how it was based on sufficient facts that included Coughlin's age, health, lack of a criminal record, history of community service and the negative post-conviction stigma. The memorandum specifically noted that prison would endanger the life of a nonviolent offender. *U.S. v. Coughlin*, No. 2:06CR20005 (W.D. Ark. Feb. 1, 2008) (Sent. Memo. at 20).

More choices for defendants

What this means to the white-collar defendant is that *Gall* offers more choices than were available in the past. First and foremost, because the prosecutors have less power to force guideline sentences on criminal defendants, white-collar defendants can decide whether to go to trial based upon the strength of their facts and defense. There is no longer a need to fear unreasonable negative repercussions for refusing to negotiate a plea. With district courts now looking to the facts and circumstances of each case to determine what an appropriate sentence is, white-collar defendants don't have to worry that losing at trial will automatically give them an enhanced sentence, unless, of course, the sentencing court is convinced that the defendant committed perjury at trial.

Consider this hypothetical: A young real estate closing attorney comes to a criminal defense lawyer for representation. She has been practicing law for less than 10 years, and from 2001 to 2003, she performed a large number of commercial real estate closings both for individuals and entities. Although as the closing attorney she knew that some of the property had been refinanced only a few months earlier, she did not disclose that to the lender because she had no actual knowledge that the sellers, buyers or appraisers were illegitimate or that fraudulent representations were being made.

When the closing attorney attended a continuing legal education program focusing on mortgage fraud, she became concerned that the refinancing closings fit the pattern of fraud. The attorney immediately notified the lenders and changed her practice by refusing to do refinance closings without full disclosure to the lender and/or if the initial closing occurred within a year of the refinancing. But it was already too late and the "flipped" properties went into foreclosure, costing the lenders millions of dollars. In 2008, the closing attorney was indicted for conspiracy to commit mortgage fraud because the government prosecutors believed she should have known of the alleged co-conspirators' actions under a theory legally referred to as "deliberate ignorance" or "conscious avoidance of knowledge." See *U.S v. Stone*, 9 F.3d 934 (11th Cir. 1993); *U.S. v. Barbee*, 968 F.2d 1026 (10th Cir. 1992); *U.S. v. Chen*, 913 F.2d 183 (5th Cir. 1990).

Pre-*Gall*, the risk of going to trial would have been prohibitive. The indicted attorney most likely would have decided to forgo a solid factual and legal defense due to the prosecutor's threat of ratcheting up her sentence under the guidelines if she chose not to plead guilty. Now, knowing that the sentencing judge has considerable discretion to impose a below-guidelines, reasonable sentence even after a conviction, she can risk a trial and still present a compelling argument for a non-guideline sentence. The sentencing presentation would rely upon such § 3553(a) factors as the defendant being young and inexperienced at the time, the loss of her law license, the harsh effects of the criminal conviction upon her future livelihood, the voluntary termination of her participation and her warning to the victims, and the fact that the activities occurred long before mortgage woes were at the forefront of the public consciousness.

Secondarily, white-collar criminal defendants may well come to understand that *Gall* has worked a positive change on the nature of criminal representation. In the past, under the harsh and unforgiving light of the guidelines, those accused of white-collar offenses typically sought out ex-federal prosecutors at larger, more influential law firms because these firms effectively marketed relationships over trial defense skills. Potential clients were led to believe that since trial posed a huge risk, it was not a viable option, and conversely, that since the former prosecutors/now defense attorneys had the best connections, they could negotiate the best deals.

White-collar defendants no longer need to look for an attorney whose main claim to fame is dealmaking. They can now retain a true trial lawyer who has earned the respect of his or her government adversary in the courtroom by actually defending rather than prosecuting those accused of a crime, and thus can both negotiate and try cases equally well.

In the post-*Gall* world, the federal sentencing menu options indeed have changed. The white-collar client needs to listen to all of the options carefully and attentively before making a selection. But the true criminal defense attorney may now be the quintessential choice. NLJ