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SUPREME COURT RULES THAT SENTENCING GUIDELINES ARE PRESUMPTIVELY REASONABLE

(*Rita v. United States*)

The Supreme Court ruled last week that a sentence imposed within the range set by the harsh federal sentencing guidelines may be regarded as presumptively reasonable by a reviewing court of appeals. The 8-1 decision written by Justice Stephen Breyer emphasized, however, that courts of appeals are not mandated to regard a guideline sentence as presumptively reasonable. District courts, while they must consider the guidelines in imposing a sentence, need not regard them as presumptively reasonable either. Rather, district courts can consider other factors, such as the defendant's background or nature of the offense, to impose a sentence outside the guideline range.

"Counsel defending businesses and company employees charged with minor regulatory infractions will be well advised to demonstrate to the sentencing judge why a sentence below the guidelines is justified, as well as to attack the reasonableness of the particular guideline itself that the court is applying in the case," said Paul Kamenar, WLF's Senior Executive Counsel. "Otherwise, an unduly harsh sentence may be rubber-stamped on appeal if the court of appeals were to follow the Supreme Court's advice and regard the guideline sentence as presumptively reasonable," Kamenar added.

In its brief filed in *Rita v. U.S.* and the companion case of *Claiborne v. U.S.* (which has since been dismissed as moot due to the recent death of Mr. Claiborne), WLF argued that Congress intended for punishments to fit the crime and the offender, but that the guideline sentences do neither. For the past 20 years, the guidelines dictated mandatory sentences that regularly called for severe prison terms, some from three to nine years or more, for minor regulatory infractions, including environmental offenses where no harm occurred. In early 2005, however, the Supreme Court in *Booker v. United States* struck down the mandatory feature of the guidelines as unconstitutional under the Sixth Amendment right to jury trial. While the guidelines were only to be advisory, and thus, true guidelines, both district courts and courts of appeals have heretofore regarded them as presumptively reasonable.

WLF demonstrated in its brief that the guidelines have serious design flaws. For example, Congress intended that the sentencing courts consider other factors in imposing a sentence, such as the defendant's history and characteristics, disparity in sentencing, and the nature of the offense, all of which the guidelines do not adequately take into account. Congress also directed that the guidelines allow for probation for first offenders in non violent cases, yet in some cases, the guidelines call for the statutory maximum prison sentence for a first offender. Overall, the guidelines simply do not follow Congress's primary goal that any sentence "be sufficient, *but not greater than necessary*" to meet the sentencing goals of deterrence and just punishment.

Justice Breyer defended the work of the Sentencing Commission in *Rita*, stating that the guidelines were based on an "empirical approach" where the Commission examined "10,000 presentence reports setting forth what judges had done in the past...." However, *pre*sentence reports are only recommendations by the probation office to the judge as to what sentence to impose. More importantly, as WLF argued in its brief, the sentences imposed by the judges in those 10,000 case histories do not reflect the actual sentence served, due to parole policies in effect at the time that generally allowed prisoners to be released on parole after serving only one-third of their time. Indeed, with parole now abolished, Congress mandated that the Commission look at the average length of sentences *actually served* as the baseline for the guidelines. Viewed from that perspective, the 33-month sentence given to Mr. Rita for perjury was effectively an unduly harsh pre-guideline sentence of 99 months, or approximately eight years, since he would have been released on parole after serving one-third of his time.

WLF's brief, filed on behalf of itself and the Allied Educational Foundation, also pointed out examples of excessively severe prison terms for first offenders. For example, in one case that WLF litigated (*McNab/Blandford v. U.S.*), three small businessmen were sent to prison for eight years under the guidelines for importing frozen seafood that was packed in plastic bags instead of cardboard boxes. In another WLF supported case (*Thurston v. U.S*), a businessman is facing at least three years in prison for an offense where the more culpable co-defendant was given probation as part of a plea bargain. WLF pointed out in its brief that these sentences are not only unreasonably severe and produce unwarranted disparities, but they are unreasonably harsh when one considers that parole has been abolished.

WLF has long been in the forefront of opposing criminalization of business activities and has been a vocal critic of the U.S. Sentencing Guidelines. WLF participated in the *Booker* case and many other guideline cases, in addition to suing the Sentencing Commission for not conducting its business in an open and transparent manner. WLF will also file a brief next month in *Gall v. United States*, a case which the Court selected to take the place of the *Claiborne* case that it recently dismissed as moot. The *Gall* case will decide a very important issue not addressed by the *Rita* decision, namely, whether a sentencing court that imposes a sentence *below* the guidelines must articulate extraordinary reasons for doing so, the further the actual sentence imposed deviates from the recommended guideline sentencing range.

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