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SUPREME COURT GIVES JUDGES MORE LEEWAY TO DEPART FROM SENTENCING GUIDELINES

(Gall v. United States)

The Washington Legal Foundation (WLF) scored a major victory yesterday when the U.S. Supreme Court ruled that federal district court judges have greater leeway to depart from the unduly harsh Sentencing Guidelines when imposing a sentence for those convicted of a federal offense. This ruling will have a significant impact on federal sentencing decisions that affect businesses, their owners, and executives, particularly with respect to regulatory offenses where the Guidelines call for excessive prison terms for minor infractions.

"This is a major victory for the business community. The Supreme Court has reinforced their prior ruling that the Sentencing Guidelines are advisory only and need not be applied in an inflexible and unjust manner," said WLF's Senior Executive Counsel, Paul Kamenar.

In its brief filed in *Gall v. United States*, WLF had argued that Congress intended that punishments should fit the crime and the offender, but that the defective Sentencing Guidelines do neither. For the last 20 years, the Guidelines dictated mandatory sentences that regularly called for severe prison sentences, some ranging from three to nine years or even more, for minor regulatory infractions, including environmental offenses where no harm occurred. In 2005, 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.

Since the *Booker* decision, however, many courts of appeals reversed sentences imposed by district court judges that were below the Guideline level as unreasonable. In doing so, they ruled that the Guidelines should be given a presumption of reasonableness and special weight. In 2006, the Supreme Court ruled in *Rita v. United States* that courts of appeals *may* give a Guideline sentence a presumption of reasonableness, but that district courts were not bound to do so. A companion case of *Claiborne v. United States* was also heard to decide the issue of whether a district court must show "extraordinary circumstances" whenever it imposes a sentence outside the Guideline range. However, because Claiborne died before the Court issued any decision, it dismissed the case and instead granted review of the *Gall* case decided yesterday.

In its 7-2 opinion, the Court ruled that courts of appeals must review a sentence, whether inside or outside of the Guidelines, under a deferential "abuse of discretion" standard, even if the appeals court would have imposed a different sentence than the one imposed by the district judge.

WLF argued in its brief that the sentencing judge is only required to consider the particular Guideline applicable to the case without giving it any special weight. Indeed,

Congress mandated that the courts consider six other factors when imposing a sentence. For example, Congress intended that the sentencing courts consider factors 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* comport with Congress's expressed goal that any sentence "be sufficient, *but not greater than necessary*" to meet the sentencing goals of deterrence and just punishment.

WLF's brief, filed on behalf of itself and the Allied Educational Foundation, pointed out examples of excessively severe prison terms for first offenders. For example, in one WLF-supported case, *McNab/Blandford v. U.S.*, three small businessmen were sent to prison for eight years under the Guidelines for importing frozen seafood because they were packed in plastic bags instead of cardboard boxes. In another WLF-supported case, *Thurston v. U.S.*, a businessman is facing at least additional three years in prison under the Guidelines for an offense where the more culpable co-defendant was given probation as part of a plea bargain with the approval of the Justice Department. WLF pointed out in its *Gall* brief that these sentences are not only unreasonably severe and produce unwarranted disparities, but they are triply harsh when one considers that before the Guidelines were promulgated, federal prisoners were usually released on parole after serving one-third of their time. Because parole has been abolished, a prison term of three years today is functionally equivalent to prison term of nine years before the Guidelines came into effect.

WLF has long been in the forefront of opposing criminalization of business activities and critical of the U.S. Sentencing Guidelines. WLF participated in the *Booker* and *Rita* cases, and many other Guideline cases in lower federal courts. WLF's brief was filed as part of its CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, which is designed to oppose governmental policies that unfairly target businesses and businessmen for minor regulatory infractions where more appropriate administrative and civil remedies are available.

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