

⁵ Press Release, U.S. Justice Department, Antitrust Division, Two Executives Of French Manufacturer Of Marine Hose Agree To Plead Guilty To Participating In Worldwide Bid-Rigging Conspiracy (Nov. 6, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/27435.htm.

⁶ Whittle Plea Agreement paras. 15, 18; Allison Plea Agreement paras. 15, 18; Brammar Plea Agreement paras. 15, 18.

⁷ Press Release, U.K. Office of Fair Trading, British Airways to pay record £121.5m penalty in price fixing investigation (Aug. 1, 2007), available at <http://www.of.gov.uk/news/press/2007/113-07>.

⁸ Information, United States v. Bristol-Myers Squibb Company, Crim. No. 07-140 (D.D.C. 2007), available at <http://www.usdoj.gov/atr/cases/f223800/223808.htm>.

⁹ Ian Norris v. United States of America [2007] EWHC 71 (Admin), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/71.html&query=Norris&method=all>.

¹⁰ In February 2006, the High Court rejected an appeal by Norris which challenged the designation of the United States under the U.K. Extradition Act of 2003 due to the lack of ratification by the United States of the 2003 U.S./U.K. Extradition Treaty and the alleged lack of consistency between extraditions requested by the United States and by the United Kingdom. Ian Norris v. The Secretary of State for the Home Department, [2006] EWHC 280 (Admin), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2006/280.html&query=%22Ian+and+Norris%22&method=boolean>. Norris was denied leave to appeal that decision to the House of Lords.

¹¹ 452 F.3d 127 (2d Cir. 2006).

¹² *Id.* at 129-130.

¹³ *Id.* at 130-131. Both the Division and the Probation Office recommended a Guidelines' offense level of 21 (37-46 months) for Rattoballi. *Id.* at 130.

¹⁴ *Id.* at 130-131, 135.

¹⁵ *Id.* at 137, 140.

¹⁶ *Id.* at 136. ■

SUPREME COURT'S RITA AND GALL DECISIONS: LIKELY EFFECT ON ANTITRUST DEFENDANTS

By Christopher H. Casey*

Three years after the United States Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which made the United States Sentencing Guidelines advisory rather than mandatory, one question confounds lawyers, judges, and legal scholars: how much weight should a district court give the now-advisory Guidelines? The Supreme Court considered this question in two recent cases.

In *Rita v. United States*, 551 U.S. ____, 127 S. Ct. 2456 (June 21, 2007), the Supreme Court held that an appellate court may apply a presumption of reasonableness to sentences that are within the sentencing range set forth in the Guidelines. In *Gall v. United States*, -- S. Ct. --, 2007 WL 4292116 (December 10, 2007), the Court held that an appellate court may not employ a "rigid mathematical formula" when assessing the strength of the district court's justifications for an outside-Guidelines sentence.

Since the *Booker* decision, circuit courts have taken different approaches in applying it. Despite these variations, United States Sentencing Commission data indicate that there has been little overall effect on the outcome of cases at the district court level. The *Rita* decision, which can be seen as a reaffirmation of the centrality of the Guidelines to the federal sentencing system, at least with respect to

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sentences within the Guidelines parameters, will not upset this balance. But the *Gall* decision, with its emphasis on a “deferential abuse of discretion” standard for reviewing sentences, may lead to more sentences outside the Guidelines range. It is also likely that *Gall* will have more practical effect on antitrust sentences than *Rita*.

WHAT THE COURT MEANT IN BOOKER

In *Booker*, the Supreme Court stated that the Guidelines, although no longer mandatory, remain an important part of the sentencing process. *Booker* struck down two statutory provisions but left intact 18 U.S.C. § 3553(a), which enumerates factors to be considered in imposing sentence. The § 3553(a) factors include the Guidelines and the Sentencing Commission’s commentary to the Guidelines. The *Booker* Court glossed over how much weight should be given to the Guidelines, stating only that district courts must consult them and take them into account when sentencing, subject to review by appellate courts for “unreasonableness.”

But courts have been wrestling with questions in *Booker*’s wake: Was the Court instructing appellate courts that a sentence falling within the Guidelines sentencing range is presumptively reasonable? Must the district court explicitly analyze the § 3553(a) factors and any other factors that might justify a lesser sentence? What justifications must a court offer when imposing a sentence outside the Guidelines parameters?

A POST-BOOKER CIRCUIT SPLIT

Prior to *Rita*, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits held that a sentence is presumed reasonable if it falls within the Guidelines sentencing range. Those courts have further held that when a sentence varies from the Guidelines range, the district court must articulate a justification related in degree to the extent of the variance.

The First, Second, Third, and Eleventh Circuits have declined to adopt a presumption of reasonableness to Guidelines sentences. Instead,

those courts look at whether the sentence adequately takes into account the § 3553(a) factors. But even in the circuits that have declined to adopt a presumption of reasonableness for Guidelines sentences, the Guidelines range remains an important factor in the sentencing decision.

Statistically, whether a circuit court has adopted a presumption of reasonableness for Guidelines sentences appears to have no significant effect on the sentencing practices within those circuits. The Sentencing Commission’s amicus brief filed in *Rita* states that the Commission found that “the rate at which sentencing judges impose a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure in circuits that apply a presumption of reasonableness (87.5 percent) is quite close to the rate (83.9 percent) in circuits that apply no presumption. And the difference in those rates has remained virtually unchanged since those circuits adopted the respective presumption rules. Even when the data are broken down by individual circuit, no meaningful trends are observable.”

ANTITRUST SENTENCES SINCE BOOKER

While the number of antitrust sentences is too small to reach definitive conclusions, courts—often at the request of the government—have tended to depart from the Guidelines more frequently in antitrust cases than in other types of cases since the *Booker* decision. Overall, courts have sentenced within the Guidelines 61.4 of the time since *Booker*. For antitrust defendants, the number is much smaller. Of the 38 antitrust sentences since *Booker*, only 6, or approximately 15.9%, were within the Guidelines range. The other 32 were all below the range, the vast majority as a result of government-sponsored motions, primarily for downward departure based upon the defendant’s substantial assistance to the government. (United States Sentencing Commission data, available at www.ussc.gov/bf.htm). The frequency of downward departures for substantial assistance in antitrust cases has increased since *Booker*. See Jeffrey S. Jacobovitz and Brian J. Neff, *Antitrust*

Sentencing Post-Booker: What We Know So Far (July 2006), at www.antitrustsource.com.

There is scant evidence of the view of circuit courts on antitrust sentencing since *Booker*. In *United States v. Rattoballi*, 452 F.3d 127 (2nd Cir. 2006), the Second Circuit reversed a sentence of home confinement for a defendant convicted of conspiracy to rig bids in violation of Section 1 of the Sherman Act and conspiracy to commit mail fraud. The Guidelines called for between 27 and 33 months of imprisonment and a minimum fine of \$20,000, but the district court sentenced the defendant to one year of home confinement followed by five years of probation, \$155,000 in restitution, and no fine. The Second Circuit, citing the Guidelines policy favoring imprisonment along with substantial monetary penalties for antitrust offenders, vacated the sentence as unreasonable. There are no other reported cases in which a circuit court has reversed an antitrust sentence as unreasonable under *Booker*.

THE SUPREME COURT TAKES UP RITA AND GALL

Rita v. United States

In *Rita*, the defendant was charged with lying to a grand jury about the purchase of a machine gun kit. He was convicted by a jury of perjury, obstruction of justice, and making false statements. Because the underlying crime was a violation of the machine-gun registration laws, the Guidelines treated Rita as an accessory after-the-fact to that crime, resulting in a Guidelines range of 33 to 41 months of imprisonment. The district court sentenced him to 33 months.

On appeal, the Fourth Circuit affirmed in an unpublished *per curiam* opinion. The court held that a sentence imposed within the properly calculated Guidelines range is presumptively reasonable. *United States v. Rita*, 177 Fed.Appx. 357 (4th Cir. 2006) (unpublished opinion). On November 3, 2006, the Supreme Court granted *certiorari* and posed three questions to counsel: (1) Was the district court's choice of a within-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *Booker* to accord a presumption of reasonableness to

within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the § 3553(a) factors and any other factors that might justify a lesser sentence?

The Supreme Court affirmed in an 8-1 decision. In its opinion, authored by Justice Breyer, the Court held that a court of appeals may apply a presumption of reasonableness to a sentence that reflects a proper application of the Guidelines. The Court's rationale was that such a presumption (1) is not binding, and (2) does not offend the Sixth Amendment's right to a jury trial. With respect to its non-binding nature, the Court reasoned that the presumption, "rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." 127 S. Ct. at 2465. Citing its remedial holding in *Booker*, the Court held that the presumption presents no Sixth Amendment concerns because it is not mandatory. *Id.* at 2467. With respect to the "explicit analysis" of the § 3553(a) factors, the Court stated that "when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation," although the judge "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." *Id.* at 2468.

As to sentences that are outside the Guidelines range, eight circuits have held that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the extent of the variance. The Court considered that approach in *Gall*.

Gall v. United States

The defendant in *Gall* joined a conspiracy to distribute a drug known as MDMA, or "ecstasy," as a college student. He distributed ecstasy pills for several months before withdrawing from the conspiracy. He then went on to graduate from college and became employed in the construction industry. He stopped selling or using drugs.

Upon being indicted three and a half years after his withdrawal from the conspiracy, he pled guilty, admitting that he was responsible for distributing at least 2,500 grams of ecstasy. The Guidelines range was 30-37 months of imprisonment.

The district court sentenced Gall to probation for a term of 36 months. In its statement of reasons for the sentence, the court cited the defendant's withdrawal from the conspiracy almost four years before the indictment, his post-offense conduct, including obtaining a college degree and starting his own successful business, the support of his family and friends, his lack of criminal history, and his age at the time of the offense. The Eighth Circuit reversed and remanded, holding that a sentence outside the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed." *Gall*, 2007 WL 4292116 at *5. The Eighth Circuit held that this particular sentence, a 100% variance from the Guidelines range, must be supported by extraordinary circumstances, which it found did not exist.

The Supreme Court rejected the Eighth Circuit's reasoning and reversed, 7-2. In an opinion authored by Justice Stevens, the Court stated that *Booker* made clear that appellate review of sentences was limited to determining whether they were "reasonable," and that the standard of review is "deferential abuse of discretion." *Id.* at *8. Although it stated that it was "uncontroversial that a major departure should be supported by a more significant justification than a minor one," *id.* at *7, the Court rejected both an appellate rule that requires "extraordinary" circumstances to justify an outside-range sentence, and the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a sentence. Such approaches, the Court held, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id.* at *6. The Court upheld the probationary sentence as reasonable under all the circumstances laid out by the district court.

CONCLUSION

Ever since *Mistretta v. United States*, 488 U.S. 361 (1989), in which the Supreme Court upheld the constitutionality of the Sentencing Commission, the Court has sought to define and, more recently, curtail the application of the Sentencing Guidelines. In *Rita*, the Court reaffirmed the centrality of the Guidelines by approving a presumption of reasonableness to within-Guidelines sentences. But in *Gall*, the Court approved district courts' discretion to impose outside-Guidelines sentences and rejected a rigid proportionality rule for such sentences. While the majority of sentences in antitrust cases fall outside the Guidelines as a result of government motions for substantial assistance, the deferential standard of review articulated in *Booker* and reaffirmed in *Gall* may result in district courts applying the Guidelines with a freer hand. ■

AUSTRALIAN ANTITRUST DEVELOPMENTS: THE ACCC'S NEW SEARCH & SEIZURE POWERS

By Bruce Lloyd and Fred Prickett*

INTRODUCTION

As of 1 January 2007, the Australian Competition and Consumer Commission ("ACCC") gained new search and seizure powers, set out in the new Part XIX of the *Trade Practices Act 1974* ("the Act").

The new provisions provide the ACCC with extensive powers to enter premises, search for, and seize evidentiary material either voluntarily¹ or by search warrant² and replace the ACCC's previous administrative powers to enter premises and obtain copies of documents probative to its

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