

## **Fact Sheet: The Commission’s Proposal to Require Proportional Justifications Has Been Rejected by the Supreme Court, and Would Not Address the Reason Given for It.**

As one of its proposals for more “robust” appellate review, the Commission asks Congress to “direct sentencing courts to provide greater justification for sentences imposed the further the sentence is from the . . . applicable advisory guidelines sentence.” This requirement would be enforced by the courts of appeals and would apply to “variances,” but not “departures.”<sup>1</sup>

The Supreme Court rejected a rule like that proposed by the Commission in *Gall v. United States*, 552 U.S. 38 (2007). In that case, the court of appeals held 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.”<sup>2</sup> Under this appellate rule, the court of appeals reversed a variance from a guideline range of 30-37 months’ imprisonment to 36 months’ probation, viewing it as “extraordinary” and therefore requiring “extraordinary circumstances” to support it, and deeming the district court’s reasons insufficient.<sup>3</sup>

The Supreme Court reversed. Although the Court found it “uncontroversial that a major departure should be supported by a more significant justification than a minor one,”<sup>4</sup> it made clear that any “rule requiring ‘proportional’ justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005).”<sup>5</sup> Because the court of appeals’ decision required proportionally greater justifications for a non-guideline sentence, it “[did] not reflect the requisite deference and [did] not support the conclusion that the District Court abused its discretion.”<sup>6</sup> Application of “a heightened standard of review to sentences outside the Guidelines range . . . 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,”<sup>7</sup> and “comes too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”<sup>8</sup>

Thus, the court of appeals “*may consider* the extent of the deviation, but *must give due deference* to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance,” and *may not* substitute its own judgment for that of the district court.<sup>9</sup> The court of appeals “engaged in an analysis that more closely resembled *de novo* review of the facts presented and determined that, in its view, the degree of variance was not warranted.”<sup>10</sup> “But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.”<sup>11</sup>

A statute requiring courts of appeals to reverse if the district court did not provide sufficiently “greater” justification for a variance “the further the sentence is from the . . . guidelines” would be flatly inconsistent with *Gall*’s holdings.

**The Commission’s proposal would not address the reason given for it.** The Commission asserts that a proportional justifications requirement would provide it with information to “help the Guidelines constructively evolve over time.”<sup>12</sup>

The Commission provides no evidence that district courts provide insufficient reasons now. Section 3553(c) remains in effect, requiring district courts to state reasons for sentences outside the guideline range with specificity in open court and in the written judgment and commitment form. The Supreme Court has made clear that all sentences must be adequately explained, and the courts of appeals readily reverse when the reasons are inadequate.<sup>13</sup>

If the Commission seeks greater information to help it review and revise the guidelines, it should either review sentencing transcripts or revise the statement of reasons form. The Commission does not review sentencing transcripts, but looks only at sentencing data, *i.e.*, how many sentences are outside the range for a particular guideline, and reasons located on the statement of reasons form. The statement of reasons form is not designed to capture detailed reasons. It provides one check box for each broad paragraph of § 3553(a), a small space for “facts justifying a sentence outside the advisory system,” and a multitude of check boxes corresponding to the Commission’s policy statements regarding “departures authorized by the advisory sentencing guidelines,” which encourage many upward departures and discourage most downward departures.

A Commissioner recently stated that the Commission was seeking legislative change because judges sometimes just check boxes on the form. When questioned whether the form should therefore be revised, the Commissioner provided no answer.<sup>14</sup> Rather than revise the form to better capture the reasons judges vary, the Commission now seeks a rule that has been rejected by the Supreme Court, which would theoretically result in more extensive reasons appearing in sentencing transcripts, which the Commission does not review.

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<sup>1</sup> Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 56 (Oct. 12, 2011) (hereinafter Commission Testimony).

<sup>2</sup> 552 U.S. at 45 (internal punctuation omitted).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 50.

<sup>5</sup> *Id.* at 46.

<sup>6</sup> *Id.* at 52-53.

<sup>7</sup> *Id.* at 49, 41.

<sup>8</sup> *Id.* at 47.

<sup>9</sup> *Id.* at 51, 59 (emphasis supplied).

<sup>10</sup> *Id.* at 56.

<sup>11</sup> *Id.* at 59-60.

<sup>12</sup> Commission Testimony at 56.

<sup>13</sup> See Appellate Decisions After *Gall* (Nov. 10, 2011), [http://www.fd.org/pdf\\_lib/app\\_ct\\_decisions\\_list.pdf](http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf).

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<sup>14</sup> American Bar Association, Fourth Annual Sentencing & Reentry Institute and Criminal Justice Legal Educators Colloquium on Friday, Update on Federal Sentencing Policy (Oct. 28, 2011).