
Memorandum

To: [Topic Access and Recruitment Editor]
From: [Topic Access Candidate]
Date: 9/14/2012
Re: Topic Proposal on the use of percentage deviation calculations in appellate review of criminal sentencing

I. ISSUE

Can percentage deviations be used in determining the “reasonableness” of a criminal sentence?

II. DISCUSSION

Following the Supreme Court’s decision in United States v Booker,¹ appellate review has focused on the “reasonableness” of sentencing decisions.² In an attempt to clarify its Booker holding, the Supreme Court offered guidance for its “reasonableness” standard in United States v Gall.³ The Gall opinion provided several instructions regarding permissible factors for consideration during the review of sentencing decisions.⁴ Notably, and central to this topic proposal, the Court rejected “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 specific sentence.”⁵ The Court, however, allowed lower courts to “take the degree of variance into account and consider the extent of a deviation from the [Sentencing] Guidelines.”⁶ This conflicting language has caused a rift among the circuit courts as to whether percentage calculations for departures from the Sentencing Guidelines, as opposed to absolute calculations in terms of months or years, can be considered in appellate review.

A. Percentage Deviations Allowed

The Second, Seventh, Ninth, and Eleventh Circuits hold that percentages can and do matter in reviewing sentencing decisions. In United States v Castillo,⁷ the Seventh Circuit most recently espoused this view.⁸ In Castillo, the court held that not only are percentages significant in sentencing review but that “the relative is generally more important than the absolute.”⁹ Grappling with the Court’s language in Gall, the Seventh Circuit justified its holding by noting that district courts must give “sufficiently compelling” justification for any “degree of variance” from the Sentencing

¹ 543 US 220 (2005) (making the United States Sentencing Guidelines advisory).

² See *Id* at 260–62.

³ 552 US 38 (2007).

⁴ See *id* at 46 (holding, for example, that “the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions”).

⁵ *Id* at 47

⁶ *Id*.

⁷ 2012 WL 3590860 (7th Cir).

⁸ See *id* at *2–3 (calculating and using a district court’s 30 percent departure as grounds for reversal of a criminal sentence).

⁹ *Id* at *2.

Guidelines and that the term “degree” itself is “a relative rather than absolute measure.”¹⁰ It logically follows, for the Seventh Circuit, that consideration of the percentage deviation is warranted.¹¹

The Seventh Circuit—the first to recognize the split over this issue—pointed to both the Ninth and Eleventh Circuits in support of its position.¹² In United States v Ressam,¹³ the Ninth Circuit similarly justified its reversal of a defendant’s sentence through (at least partial) reliance on the “more than three-fourths” downward departure from the Sentencing Guidelines.¹⁴ The court’s reasoning appeared to mirror that of the Castillo court. While mentioning the Supreme Court’s rejection of “the use of a rigid mathematical formula that uses the percentage of a departure,”¹⁵ the Ninth Circuit asserted that courts should still take into account “the extent of the deviation” and “the degree of variance” in assessing a sentence departure for reasonableness.¹⁶ Similarly cited by the Seventh Circuit in Castillo, the Eleventh Circuit reiterated this understanding of the Supreme Court’s use of the phrase “degree of variance.”¹⁷ The Eleventh Circuit used this language to justify its 42 percent calculation of a district court’s downward variance.¹⁸

The Second Circuit is the last court to consider percentage calculations in support of its conclusion regarding a sentence’s “reasonableness.” In United States v Stewart,¹⁹ the Second Circuit applied the percent deviation calculation to its review but did so by qualifying its use.²⁰ The court reasoned:

That percentages cannot always accurately measure a variance's significance does not, however, mean that percentages are always irrelevant. When, as here, a variance from the recommended Guidelines range is extraordinarily large both in terms of the actual reduction of time to be served (a 232–month reduction) and the percentage of the reduction (92 percent), these facts taken together strongly signal the need for careful review of the justifications advanced for the challenged sentence.²¹

The Second Circuit thus allowed for percentage considerations in sentencing review, but seemingly only when coupled with adequate absolute terms of departure.

B. Percentage Deviations Not Allowed

Still, the Third, Fourth, and Eighth Circuits interpret Gall to preclude just what the other circuits think the decision accepts—application of percentage deviations in determining the “reasonableness” of criminal sentences. In United States v Tomko,²² the Third Circuit adopted a position that effectively rejected percentage deviations from use in appellate sentencing review.²³ In

¹⁰ *Id.*

¹¹ Castillo, 2012 WL 3590860 at *2.

¹² *Id.*

¹³ 679 F3d 1069 (9th Cir 2012).

¹⁴ *Id.* at 1089–90.

¹⁵ Gall, 552 US at 47.

¹⁶ Ressam, 679 F3d at 1090, citing Gall, 552 US at 50.

¹⁷ United States v Irely, 612 F3d 1160, 1186 (11th Cir 2010).

¹⁸ See *id.* at 1196.

¹⁹ 590 F.3d 93 (2d Cir 2009).

²⁰ See *id.* at 165–66.

²¹ *Id.* at 65 n 3.

²² 562 F3d 558 (3d Cir 2009).

²³ See *id.* at 573.

Tomko, the government argued that a district court committed a 100 percent variance from the recommended “Guidelines range” of twelve to eighteen months when it sentenced a defendant to probation.²⁴ The Third Circuit described the government’s percentage calculation of the district court’s sentencing departure as “misleading.”²⁵ In defense of this conclusion, the court cited the Supreme Court’s language in Gall, which reads “deviations from the Guidelines range will always appear more extreme—in percentage terms when the range itself is low.”²⁶ As an alternative to percentage calculations, the Third Circuit analyzed the district court’s sentence “in absolute terms” and did so through a comparison with other sentences affirmed by sister appeals courts.²⁷

The Eighth Circuit appears to hold similarly. In United States v Burns,²⁸ the court stated the issue before it as “whether, after putting aside all notions of . . . departure percentages . . . the reduction granted to [the defendant] is substantively reasonable.”²⁹ Taking a broad view of the Supreme Court’s decision in Gall, the Eighth Circuit characterized the opinion as “concerned about the heightened standard of review that appellate courts had imposed through application of concepts such as . . . departure percentages.”³⁰ The Burns dissent also noted that, even before Gall, the Eighth Circuit had recognized “the shortcomings of considering reductions in terms of percentages.”³¹

The Fourth Circuit—the first and also the most recent court to weigh in on the issue—has rejected the use percentage deviations in considering the “reasonableness” of criminal sentences. In two decisions, the court refused to entertain arguments from both defendants and the government related to percentage computations.³² In United States v Evans,³³ the Fourth Circuit stated plainly, “Gall [] forecloses [the defendant’s] heavy reliance on the fact that the 125-month sentence that the district court imposed is over 300 percent above the high end of the advisory Guidelines range.”³⁴ Even more pointedly, in United States v Morace,³⁵ the court held, “[D]escribing variance probation sentences in mathematical terms is not very helpful.”³⁶ Again, on both occasions, the Fourth Circuit outright rejected percentage calculations in its sentencing analysis. Instead, the Fourth Circuit in Morace evaluated the “reasonableness” of the defendant’s sentence based on Sentencing Guideline offense levels, thus providing an alternative to percentage considerations in appellate review.³⁷

²⁴ See *id.*

²⁵ *Id.*

²⁶ See *id.*, citing Gall, 552 US at 48. The Court’s Gall decision also states, “[Q]uantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the ‘substantial restriction of freedom’ involved in a term of supervised release or probation.” Gall, 552 US at 48 (citation omitted).

²⁷ Tomko, 562 F3d at 1196.

²⁸ United States v Burns, 577 F3d 887 (8th Cir 2009).

²⁹ *Id.* at 896.

³⁰ *Id.* at 894.

³¹ *Id.* at 905 n 8 (Colloton dissenting) (remarking further that instead of percentages the Eighth Circuit “turned to a focus on offense levels as a method more in keeping with the structure and theory of the sentencing guidelines”).

³² See United States v Morace, 594 F3d 340 (4th Cir 2010); United States v Evans, 526 F3d 155 (4th Cir 2008).

³³ 526 F3d 155 (4th Cir 2008)

³⁴ *Id.* at 166 n 5.

³⁵ 594 F3d 340 (4th Cir 2010).

³⁶ *Id.* at 345, quoting United States v Pyles, 482 F3d 282, 289 (4th Cir 2007), vacd 552 US 1089 (quotation marks omitted).

³⁷ Morace, 594 F3d at 345.

III. PROPOSAL IDEAS

This topic is compelling for a number of reasons. First, a Commentator would have a large amount of flexibility in crafting an appropriate line of analysis, as the Seventh Circuit has been the only court to recognize or provide any detailed examination of the issue. Second, arguments could be made cutting both ways on the issue. If percentage deviations are included in “reasonableness” review, this would seem to undercut much of the impetus behind the Court’s decision to make the Sentencing Guidelines advisory. The mathematical aspect of these calculations may bear too close a resemblance to the former, more computational application of the Guidelines. Yet at the same time, percentages may be a helpful measure of “the degree of variance” that sentencing courts are told to consider when assessing a sentence’s “reasonableness.” Third, criminal sentencing issues relating to the Guidelines change made in Booker are both topical and pertinent to almost every criminal sentencing.

A Commentator could approach this issue in a variety of ways. To inform discussion, an analysis of the split could consider the method of appellate review that was explicitly rejected by the Gall court. Prior to Gall, the majority of circuit courts used a “proportional justification” standard that gave “weight to the length of the sentence relative to the Guidelines range.”³⁸ Under this standard, “the larger a sentence’s variance from the Guidelines, the more extraordinary the circumstances must be for the sentence to be considered reasonable.”³⁹ As previously mentioned, the Court unequivocally disallowed this mathematical approach. Given the fact that justifications for Guidelines departures now need not be precisely proportionate, what relevance do percentages have? Also, to what extent does the Court’s rejection preclude the wholesale use of percentage deviations in “reasonableness” review? The consequences of the percentage use could also be questioned. Will the simple numerical character of percentages lend itself to a rehashing of the proportional justification disallowed by the Court?

A Commentator could evaluate the use of percentages through a cross-comparison with other areas of law. In antitrust law, the Supreme Court’s “quantitative substantiality” test focuses liability determinations on the percentage of the market foreclosed by exclusive dealing arrangements.⁴⁰ Or, for example, in the award of attorney’s fees in class-actions involving a common-fund, several courts have “established benchmarks, either a specific [percentage] or a range, subject to upward or downward adjustment depending on the circumstances of the case.”⁴¹ Torts claims, too, assign liability based on percentage assignments of fault. Do percentages in the sentencing realm bear any of the useful qualities of these tests? Does the analysis provided under these tests look at the magnitude reflected in percentage calculations without applying some variation of a mathematical formula to reach the legal outcome?

³⁸ Anne Louise Marshall, How Do Federal Courts of Appeals Apply Booker Reasonableness Review After Gall, 45 Am Crim L Rev 1419, 1428–29 (2008).

³⁹ Id at 1422.

⁴⁰ See Tampa Electric Co v Nashville Coal Co, 365 U.S. 320 (1961) (analyzing the percentage of the market foreclosed as well as “the probable effect of the [exclusive dealing] on the relevant area of effective competition”).

⁴¹ Department of Justice, 2 § [4-5.000] Manual for Complex Litigation at 14.121 (Aspen Publishers 2012) (discussing “percentage-fee awards”).

Finally, an empirical study could be considered examining the Court’s inimical view of the mathematical approach. The central question would focus on the effect that the use of percentages has on criminal sentencing. The Court itself noted that a mathematical analysis “suffers from infirmities of application.”⁴² It went on to provide the following example:

On one side of the equation, deviations from the Guidelines range will always appear more extreme—in percentage terms—when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the substantial restriction of freedom involved in a term of supervised release or probation.⁴³

An empirical study could thus examine the relevance of percentages and whether they perpetuate the problems associated with this mathematical approach. Does the application of percentage deviations post-Booker create a higher incidence of appellate reversals? In other terms, is the use of percentages a cause for reversal or is it simply correlated with an appellate court’s larger assessment of a sentencing departure? Yet, if a percentage calculation merely compliments an appellate court’s review and was, in and of itself, unpersuasive, courts would likely not even mention the calculation. Also, do percentages only skew the analysis when a sentencing court departs “south” of the Guidelines? The answers to these questions would provide interesting context for whether courts can use percentage deviations in “reasonableness” review.

IV. EXISTING COMMENTARY

Although legal literature has extensively covered both Booker and Gall, no article could be found directly addressing this issue. Two articles have noted in passing the “somewhat contradictory” directions provided by the Gall Court with respect to appellate sentencing review.⁴⁴ Also, one article focusing on the white-collar defense practice also briefly mentions the use of percentages and simply recommends that “counsel should not hesitate to point out that, post-Gall, this type of math has been frowned upon.”⁴⁵ But again, no existing commentary has gone into any depth regarding this topic.

V. BIBLIOGRAPHY

Cases

- United States v Booker, 543 US 220 (2005).
- United States v Burns, 577 F3d 887 (8th Cir 2009).
- United States v Castillo, 2012 WL 3590860 (7th Cir).

⁴² Gall, 552 US at 47.

⁴³ Id at 47–48 (quotation marks omitted).

⁴⁴ Craig D Rust, When “Reasonableness” Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions After Rita, Gall, and Kimbrough, 26 *Touro L Rev* 75, 87 (2010) (describing the Court’s analysis in Gall with respect to sentences). See also, David C. Holman, Death by A Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment, 50 *Wm & Mary L Rev* 267, 285 (2008) (examining the purpose behind the Court’s rejection of a mathematical formula).

⁴⁵ Matthew T. Newcomer, Fighting for Downward Sentencing Variances for White Collar Defendants: Useful Post-Booker and Post-Gall Trends, 34 *Champion* 42, 45 (2010).

- United States v Evans, 526 F3d 155 (4th Cir 2008).
- United State v Gall, 552 US 38 (2007).
- United States v Irely, 612 F3d 1160 (11th Cir 2010).
- United States v Morace, 594 F3d 340 (4th Cir 2010).
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- United States v Tomko, 562 F3d 558 (3d Cir 2009).

Academic Sources

- Craig D. Rust, When “Reasonableness” Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions After Rita, Gall, and Kimbrough, 26 *Touro L Rev* 75 (2010).
- David C. Holman, Death by A Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment, 50 *Wm & Mary L Rev* 267 (2008).
- Matthew T. Newcomer, Fighting for Downward Sentencing Variances for White Collar Defendants: Useful Post-Booker and Post-Gall Trends, 34 *Champion* 42 (2010).

VI. RESEARCH PATH

Professor Siegler forwarded the Seventh Circuit’s United States v Castillo opinion to me as it related to an earlier proposed topic. The opinion, however, also identified the issue raised above, noting several cases weighing on the ambiguity. I then researched cases citing those mentioned in the Castillo opinion. I also ran a search of cases citing United States v Gall combined with the term “percent!” to pull up relevant case law.