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An Evaluation of the Need for and  
Functioning of the Federal Sentencing  
Guidelines in the United States and  
Nigeria

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## INTRODUCTION

The issue of sentencing is one that every criminal justice system has to deal with because upon conviction or a plea of “guilty” by the defendant, the state by law has to impose some kind of punishment for conduct it declares to be unlawful. The question of what punishments are fair and the issue of uniformity in sentencing led to the enactment of the federal sentencing guidelines in the USA. In this paper we will look at the US sentencing guidelines, their history and their constitutionality or otherwise. The paper also examines the Nigerian system of sentencing, pointing out essential features that have made it possible for Nigeria to avoid the various criticisms of the US federal sentencing guidelines and ends by making recommendations on how the USA can learn from the Nigerian experience.

### HISTORY OF THE FEDERAL SENTENCING GUIDELINES

#### IN THE UNITED STATES OF AMERICA.

The federal sentencing guidelines have been in use in the United States since 1987. Before that time, there was no uniform sentencing policy for federal courts in the USA though the USA had experimented with different sentencing schemes such as early release on parole, rehabilitation in place of incarceration and unfettered judicial discretion<sup>1</sup>. Consequently, there was disparity in the range of punishment passed by different judges to different defendants for similar offenses. This disparity was so wide that while many senators referred to it as “shameful,”<sup>2</sup> others referred to it as a situation in which sentencing was based on factors such as race, geography and the predilections of the sentencing judge.<sup>3</sup> Justice Steven Brewer<sup>4</sup> gives an example of a well known 1974 second circuit study involving

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1 Christopher A. Wray H.R. Jud. Comm. Sub. Comm. On Crime, Terrorism and Homeland Security, *Implications of the Booker/ Fanfan Decisions for the Federal Sentencing Guidelines*. 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Feb. 10, 2005).

2 Brief of Amici Curiae Senators Kennedy, Feinstein, and Hatch, *United States v. Booker*, 125 S.Ct. 738 (2005). (Nos. 04-104, 04-105).

3 Senator Patrick Leahy, *Blakey v. Washington and the future of the Federal Sentencing Guidelines*: Hearings before the senate judicial Comm, 108<sup>th</sup> Cong. 8573 (2004), available at <http://judiciary.senate.gov/testimony.cfm?id=1260&wit-id=2629>.

fifty-one judges sentencing offenders for the same offense on the same pre-sentence report. He states that where one judge sentenced a defendant to three years imprisonment, the other sentenced the defendant to twenty years. It was therefore based upon this wide range of disparity that policy holders in the late 1970's and early 1980's decided to pass the sentencing Act which created the National Sentencing Commission with a mandate to create a set of uniform sentencing guidelines for the federal court system.

### Original aims of the Federal Sentencing Guidelines.

The Federal Sentencing Guidelines were set up for many reasons. These include the following:

- To reduce disparity and enhance uniformity in sentencing. Justice Brewer<sup>5</sup> states that congress did this by creating a system that was to categorize offenders through the use of “offense” and “offender” characteristics, with each category having a guideline sentencing range of not more than 25% where imprisonment was to be involved. The sentencing range was narrowed to ensure that defendants with similar characteristics, similar criminal histories and who had committed similar offenses received similar punishments upon conviction.
- To ensure greater accuracy in sentences the defendant served. In the days before the Federal Sentencing Guidelines, the parole officers had enormous powers to determine the length of time an offender actually served. The result was that when a court imposed a sentence there was no way of actually knowing how much time the offender was going to serve because he could be released after a few years or months for what ever the parole officer felt was “good behavior.” Therefore actual sentences were not determined by either the public or the judge but by the parole officers. Hence, Congress sought to make sentencing more definite. Under the guidelines, the solution was to abolish parole with minor exceptions, making the time imposed

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4 Steven Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180 (1999).

5 Id at 180.

the actual time an offender will serve.

- Proportionality: One of the main reasons for the guidelines was to create categories within specific offenses to better manage sentencing so that defendants who committed a more serious category of an offense received greater punishment.

### FEDERAL SENTENCING GUIDELINES IN NIGERIA.

In Nigeria, the issue of sentencing is a little less complex than in the USA. This is primarily because of the type of federalism practiced in Nigeria where there is no jury in the judicial system. In my studies I have discovered that in the USA by the sixth amendment every US citizen charged with an offense has a right to a jury trial and while the jury determines guilt on the standard of beyond a reasonable doubt in criminal cases and on the preponderance of evidence in civil cases, the judge determines the sentence based on considerations of several factors on a standard of a preponderance of the evidence in both civil and criminal cases. The only exception is where the death penalty is to be imposed. In this case, the jury determines both guilt and the sentence to be imposed. In Nigeria, because of the absence of juries, the judge determines both guilt and the sentence in both civil and criminal cases.

It is also noteworthy that Nigeria does not have either a Federal Sentencing Act, a Federal Sentencing Commission or specific Federal Sentencing Guidelines. What comes closest to Federal Sentencing Guidelines in Nigeria are statutorily prescribed penalties for the violation of any conduct prohibited as an offense. Laws are made in Nigeria just like in the USA by the federal and state legislatures and where a law is passed prohibiting certain conduct then such a law will contain within itself the prescribed punishment for violation. A good example of this is the law prohibiting stealing in Nigeria. While §§ 382 to 389 of the Criminal Code<sup>6</sup> describe the offense of stealing in detail stating what is capable of being stolen and the different ingredients of the offense of stealing, § 390 states as follows:

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6 CAP 77 Laws of the federation of Nigeria (LFN) 1990.

“any person who steals any thing capable of being stolen is guilty of a Felony and is liable if no other punishment is provided to imprisonment for three years.”

Section 390 (1) to (11) describes the special circumstances where the sentence may be more than three years, providing specific punishments in each case. For example, § 390 (5) provides:

“if the offender is a person employed in the public service and the thing stolen is property of the state or came into possession of the defendant by virtue of his employment, he is liable to imprisonment for seven years.”

From the foregoing it is clear that the laws in Nigeria are very specific on punishment and all a judge really has to do is determine guilt and then look to the statutes for the prescribed punishment. Of course there are certain statutes that allow the judges discretion in sentencing. Where this is the case, specific ranges are provided and unlike the USA, the ranges are short so that there is no issue of wide disparity in sentencing.

One other difference between sentencing in Nigeria and the USA is that judges in the USA determine sentences based on certain factors inclusive of a defendant's past criminal conduct. This is totally illegal in Nigeria. By section 31 of the Evidence Act<sup>7</sup> bad character of an accused person is not admissible either in trial or in sentencing except where the defendant gives evidence of his good character, attacks the character of the prosecution or where bad character is an essential element of the offense charged. In Nigeria a judge thus imposes a sentence not based on a person's past conduct but as punishment for the present crime in which case, he only has to look to the statute creating the offense.

From the foregoing, it is easy to see that Federal Sentencing Guidelines in Nigeria (If they could be called that) are straight forward and specific and unlike the USA have not undergone as many criticisms. Since its inception in 1987 the US federal sentencing guidelines have faced severe criticisms

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<sup>7</sup> CAP 117 LFN 1990.

which will be addressed shortly. There have however been protagonists who feel that the guidelines have been successful and we will also take a look at their opinions.

### **CRITICISMS OF MANDATORY GUIDELINES IN THE USA.**

There are four basic criticisms of the federal sentencing guidelines and these include the following:

- The Federal Sentencing Guidelines take away sentencing from the judges and put it in the hands of the prosecutors.
- The mandatory guidelines are too complex and inflexible. Because Judges are compelled to impose them this leads to unjust punishment for many defendants with minor roles in offenses.
- The guidelines are racially biased especially in their distinction of drug- related offenses. Ulmen<sup>8</sup> points out that although the guidelines do not distinguish between white and black offenders, it sets the base offense levels for various categories of drugs. For example, they call for a one hundred to one ratio between “crack “cocaine and ordinary cocaine. He states that sociologists and criminologists identify that crack cocaine is more likely to be found in the inner cities with high levels of minorities. Thus, defendants of color are more susceptible to higher punishments under the guidelines.

In addition, The Federal Courts Study Committee<sup>9</sup> reports additional criticisms including an increase in time required for pleas and sentencing, reduction in incentives to enter guilty pleas, limitations on the concessions prosecution can offer in plea bargaining and a distortion in the role of probation officers.

### **ARGUMENTS IN SUPPORT OF THE FEDERAL SENTENCING GUIDELINES.**

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8 Gerald F. Ulmen, Federal Sentencing Guidelines : A Cure Worse Than the Disease, 29 Am .Crim. L. Rev. 899 (1991 - 1992).

9 A committee set up by the U.S. congress headed by Judge Joseph F. Weis of the US court of appeals for the third circuit to make recommendations for the future of the federal judiciary.

Though few in number, there are legal scholars who react to critics with arguments that the Guidelines have been successful. Amongst them are Michael Goldsmith and James Gibson.<sup>10</sup> They react to the first criticism by stating that the powers given to the prosecutors over sentencing by the guidelines are only limited to the fact that prosecutors can choose whether or not to bring a case, whether or not to discontinue a case that is pending in court and what facts to reveal or not reveal which will be used to determine sentences. They retain the ability to cut deals and offer defendants a lesser sentence for “substantial assistance.” In a real sense these are powers that the prosecution has always had even before the Guidelines. They also argue that the defendant's attorney and the judge are learned people who do not allow the Prosecution to bring in evidence that is inadmissible or adverse to the defendant's case and that to take these powers from the prosecution will only lead to higher sentences. They argue that in a real way, the guidelines keep sentences lower than what they will be if every Judge is allowed to sentence according to his discretion.

On the issue of complexity, they argue that because the guidelines replaced “a vacuum” where there was nothing governing sentencing, complexity is unavoidable. Although they agree that the guidelines are bulky and hard for defendants to understand on their own, not every part of the Guidelines applies in every case. It provides a structure, a system of uniformity and a guide to judges in determining sentences so as to avoid disparity. In the words of Professor Bowman “The workings of the Guidelines are complicated but they are visible ... and open.”<sup>11</sup>

Perhaps the best argument put forth by those who support the guidelines is that they have been successful in reducing disparity among sentencing judges and have thus enhanced uniformity across the nation which is the main reason they were made into law in the first place.

After looking at the arguments for both sides, the question is: Who are we to believe? Is the

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10 Micheal Goldsmith & James Gibson, *The U.S. Sentencing Guidelines: A Surprising Success* 9-14 ( Jorome H. Skolnick, The Ctr. For Research in Crime and Just. 1998).

11 A committee set up by the U.S. congress headed by Judge Joseph F. Weis of the US court of appeals for the third circuit to make recommendations for the future of the federal judiciary at 707-708, 720.

application of the Guidelines to every case constitutional? And should the Guidelines be allowed to remain mandatory? The Court has tried to answer these questions in judicial decisions. To therefore understand how the Courts have interpreted the Federal Sentencing guidelines, we will take a look at what has perhaps become the most important case decided by the US Supreme Court on the matter. This is the twin cases of *United States v. Booker* and *United States v. Fanfan*<sup>12</sup>

### **An analysis of the United State v. Booker and United States v. Fanfan cases.**

In *U.S. v. Booker*, respondent Freddie J. Booker was charged with possession with intent to distribute at least 50 grams of crack cocaine base. Having heard evidence that he had 92.5 grams in his duffel bag, the jury found him guilty of violating 21 U.S.C. §841(a)(1). That statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life for that offense. Based upon Booker's criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a “base” sentence of not less than 210 and not more than 262 months in prison. The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings mandated that the judge select a sentence between 360 months and life imprisonment; the judge imposed a sentence at the low end of the range. Thus, instead of the maximum sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30 year sentence. Booker appealed and the Court of Appeals for the Seventh Circuit held that this application of the Sentencing Guidelines conflicted with the decision in *Apprendi v. New Jersey*<sup>13</sup> that

“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

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<sup>12</sup> 125 S.Ct. 738.

<sup>13</sup> 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2005).

The majority relied on the holding in another US supreme court case, *Blakeley v. Washington*<sup>14</sup> that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant”.

The court held that the sentence violated the Sixth Amendment, and remanded with instructions to the District Court either to sentence respondent within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury.

In the Fanfan case, the respondent Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B)(ii). He was convicted by the jury after it answered “Yes” to the question “Was the amount of cocaine 500 or more grams?” Under the Guidelines, without additional findings of fact, the maximum sentence authorized by the jury verdict was imprisonment for 78 months. A few days after the decision in the *Blakely* case the trial judge conducted a sentencing hearing at which he found additional facts that, under the Guidelines, would have authorized a sentence in the 188-to-235-month range. Specifically, he found that respondent Fanfan was responsible for 2.5 kilograms of cocaine powder, and 261.6 grams of crack. He also concluded that respondent had been an organizer, leader, manager, or supervisor in the criminal activity. Both findings were made by a preponderance of the evidence. Under the Guidelines, these additional findings would have required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone. The judge relied on *Blakely* and concluded that he could not follow the particular provisions of the Sentencing Guidelines “which involve drug quantity and role enhancement”. Expressly refusing to make “any blanket decision about the federal guidelines,” he followed the provisions of the Guidelines that did not implicate the Sixth Amendment by imposing a sentence on respondent “based solely upon the jury verdict in this case.” Dissatisfied, the government appealed the decision.

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<sup>14</sup> 542 U.S. 296, 124 S.Ct., 2531, 159 L.Ed 2d 403 (2004).

The Supreme Court held in both cases that other than the fact of a prior conviction any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt and that the application of the Washington Sentencing Scheme violated the defendants right to have the jury find the existence of “any particular fact that the law makes essential to his punishment” since the jury never heard any evidence of the additional drug quantity and the judge found it true by a preponderance of the evidence. The court then held that just as in *Blakely*, the jury's verdict alone does not authorize the sentence. Thus, the application of the Guidelines in that case was declared unconstitutional. To remedy this problem, the Court eliminated two sections<sup>15</sup> of the Federal Sentencing Guidelines. These were the sections that made it mandatory for a judge to use the guidelines in sentencing a defendant and gave the defendant a right of appeal where his sentence was outside the prescribed sentence range. By eliminating those provisions, the court thus removed the mandatory nature of the Federal Sentencing Guidelines and made them advisory.

It is important to know that although the guidelines are now advisory, many Courts still look to them to determine sentences. The tenth circuit has stated that district courts must still consider the guidelines and where they depart from the prescribed sentencing range, they must give reasons for imposing a sentence outside the sentencing range prescribed. Thus, appellate review usually consists of a review of the district court's interpretation and application of the guidelines.

The next question worthy of consideration is: What exactly are advisory guidelines? According to Frank O. Bowman III<sup>16</sup> “some have read “advisory” to mean that the guidelines are no longer legally binding on trial judges... but are now merely useful advice to sentencing courts. However, a closer reading of the opinion [in *Booker*] suggests something quite different. First, because the opinion

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15 18 U.S.C. § 3553(b)(1). and 18 U.S.C. § 3742(e.).

16 Special Counsel U.S Sentencing Commission (1995-96) H.R, Jud. Comm. Sub. Comm. On Crime, Terrorism and Homeland Security, *Implications of the Booker/ Fanfan Decisions for the Federal Sentencing Guidelines*. 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Feb. 10, 2005).

leaves... virtually all of the Guidelines intact the requirement that judges find facts and make guidelines calculations based on those facts survive. Second, because the opinion retains a right of appeal of sentences and imposes a reasonableness standard of review, appellate courts will have to determine what is reasonable ...The opinion [also] left undisturbed 18 U.S.C. § 3553(a) which lists the factors a judge must consider in imposing sentences... thus, the determination of ‘reasonableness’ under the statute will necessarily involve considerations of whether a sentence conforms to the guidelines”. In this light it seems the line between advisory and mandatory is indeed very slim.

### THE PROBLEM OF ADVISORY GUIDELINES.

There have been various criticisms of making the guidelines advisory and predictions that they are doomed to failure. Such criticisms include the following:

First, because the guidelines are intended to cover the country as a whole making them advisory rather than mandatory means that the primary reason for which they were enacted in the first place which is, to reduce disparity in sentencing, is likely to be unrealized. A system that allows judges to choose whether or not to apply the guidelines depending on an individual judge’s discretion can not produce the same sentences for similar offenses thus leading to greater disparity in sentencing.

Mandatory guidelines are important to achieve the aim of congress to reduce disparity. Perhaps this is best expressed by Professor Stephanos Bibas<sup>17</sup> in the following words:

“...given the fact that congress has repeatedly expressed its commitment to uniformity, advisory guidelines ignore the will of the ultimate decision maker in the area...”

His views are shared by the Practitioner Advisory Group.<sup>18</sup> In their view:

“Rules that are mandatory are valuable in controlling unwarranted

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17 In his testimony submitted before the Sentencing commission 5 (Nov. 17, 2004), available at <http://www.ussc.gov/hearings/11-16-04/porter1.pdf>.

18 Letter from Practitioners Advisory Group to the U.S. Sentencing Commission <http://www.uscpag.com/index.asp>.

disparity and in providing certainty so that defendants can make rational decisions in negotiating plea agreements and in trial strategy.”

The honorable Chris A. Wray<sup>19</sup> points out another problem of advisory guidelines. He states that it may lead to a reduction in plea bargains between defendants and the government because they feel they can request those benefits from a judge at trial. The problem with this is that where there is no plea bargaining, all of its benefits will also be absent. What this means is that it may lead to overcrowding of the courts with cases that would have never gone to trial had defendants cooperated with the government. It also leads to a waste in public funds and resources used in such trials. All of the above are avoided with mandatory guidelines where defendants are more likely to seek and accept plea bargains.

A third problem of advisory guidelines stems from the fact that judges are likely to consider “prohibited factors” in determining sentences. With the mandatory Sentencing Guidelines although judges could look at factors like past convictions and past criminal conduct of the defendant in sentencing hearings they were expressly prohibited from considering factors like age, sex, race and financial status of the offender in determining the sentence. Recent cases show that after Booker judges are looking to these prohibited factors to determine sentences. For example in *United States v. Ranum*<sup>20</sup> a white bank official was convicted of bank fraud. The Federal Sentencing Guidelines prescribed a sentence of thirty- six to forty- seven months but the judge considered the defendant's financial distress and the defendant's decision to keep his business afloat and sentenced him to twelve months and a day. From the foregoing, it is clear that where judges are allowed to consider factors prohibited by mandatory guidelines the result is almost always greater disparity, lack of uniformity and fairness in sentencing.

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19 Christopher A. Wray H.R. Jud. Comm. Sub. Comm. On Crime, Terrorism and Homeland Security, *Implications of the Booker/ Fanfan Decisions for the Federal Sentencing Guidelines*. 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Feb. 10, 2005).

20 2005 WL 161223 (E.D. Wis Jan, 19, 2005).

## RECENT LOOK AT THE FEDERAL SENTENCING GUIDELINES.

Recently the United States Supreme Court looked at the federal sentencing guidelines issue again in *United States v. Gall*.<sup>21</sup> In this case the defendant, Brian Michael Gall had entered into a conspiracy to sell the drug known as MDMA or ecstasy. He participated in the business for a period of seven to eight months and made about thirty thousand dollars (\$30,000) and then decided to stop because his partner was telling too many people about the business. He reformed himself, went to college at the University of Iowa and graduated in 2002. A few months later Gall was arrested following the arrest of his former co-conspirators and charged with conspiracy to distribute MDMA. He was convicted and on the issue of sentencing it was stipulated that because Gall had withdrawn from the conspiracy in 2000, the November 1, 1999 version of the US sentencing guidelines applied to his offense conduct. It was also stipulated that for the purpose of calculating a Guidelines sentence he would be held accountable for 2,500 grams (that is, 10,000 tablets) of ecstasy. Under the guidelines, this was equal to 87.5 kilograms of marijuana. Gall's criminal history included a conviction for failure to maintain control of his vehicle, underage alcohol possession, and improper storage of a firearm on a public highway. Consequently, his advisory guidelines range was thirty to thirty-seven months imprisonment. At the sentencing hearing his parents testified that he had changed and was making positive use of his life. The trial court noted that all his prior offenses were committed before he reached the age of twenty one, took into consideration the fact that he voluntarily quit the conspiracy and also placed emphasis on his "exemplary" post-offense behavior including earning a degree and owning his own home and sentenced him to thirty- six months probation "as a reflection of the seriousness of joining a conspiracy to distribute MDMA or ecstasy."

The government appealed arguing that the sentence was unreasonable because among other reasons the district court gave unreasonable weight to Gall's withdrawal from the conspiracy and his post offense behavior and improperly relied on studies showing that adolescents are less culpable for their actions

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<sup>21</sup> 446 F.3d 884,(C.A.8 (Iowa), May 12, 2006).

than adults and incorrectly concluded that the sentence of probation reflects the seriousness of an offense. The appellate court reversed the sentence holding that:

“while it does not follow that a sentence outside the guidelines range is unreasonable... it may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.”

Dissatisfied, Gall appealed to the Supreme Court. The main issue here is that although merely advisory, the Federal Sentencing Guidelines have prohibited certain factors from consideration in sentencing and such were the factors the district court relied upon in determining Gall's sentence; hence the appeal. The decision in Booker requires that before a defendant is sentenced, the guidelines range for that offense must first be calculated. Following the calculation, the district court may impose a sentence outside the range calculated in consideration of other statutory concerns. However, “a sentence imposed outside of the sentencing guidelines range may be unreasonable if the sentencing court fails to consider a relevant sentencing factor that should have received significant weight, gives significant weight to an irrelevant factor or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.”<sup>22</sup> And where a district court goes outside the sentencing range, the court must clearly explain why it imposed a sentence outside the Sentencing Guidelines range.<sup>23</sup> The statute further provides that “sentences varying from the sentencing guidelines are reasonable so long as the judge offers appropriate justification under the relevant statutory factors and the farther the court varies

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<sup>22</sup> 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

<sup>23</sup> Id.

from the guidelines the more compelling the justification based on the statutory sentencing factors must be.”<sup>24</sup> Consequently, the Supreme Court was called upon in this case to determine whether or not the district court erred in law in the factors it relied upon while departing from the guidelines prescribed sentence, whether or not the reasons given for such departure is enough justification for the sentence of 3 years probation and whether or not the sentence was “reasonable.”

One is therefore tempted to wonder, if the guidelines are supposed to be advisory only why then is the government so concerned that the prohibited factors were relied upon? In my view, although the Supreme Court's decision came out in favor of Gall, the issue is not whether the guidelines are mandatory or advisory, what is important is that the constitutional rights of citizens are protected and that sentences are uniform, promote fairness and provide justice to victims of offenses whether such victim is the state or individuals. In light of this, I will proceed to offer a few recommendations on how to achieve these goals.

### RECOMMENDATIONS.

First, in Booker, the Supreme Court decided that the guidelines were unconstitutional because they violated a defendant's right to jury trial. The court then had two options. The first was to make the guidelines advisory and the other was to keep the guidelines intact but to require that sentencing be heard and determined by the jury. They chose the former option which has no doubt led, as we have seen above to more disparity in sentencing. It is my recommendation that the second option be considered. The Guidelines can be made mandatory and but just as is done in death sentence cases the jury, not just the judge should be the one to determine sentences. This will not only avoid the problem of constitutional rights violation but will ensure fairness to the defendant also. I am aware that some critics feel that this is giving too much to the jury to do but in my view, a jury that is capable of determining a defendant's guilt is also able to determine the punishment that fits that guilt.

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<sup>24</sup> Id.

In addition, many critics of mandatory guidelines base their arguments on the fact that defendants with minor involvement in cases got punishment that was too harsh based on prior convictions. A good example of this is Ulmen's<sup>25</sup> example of a case involving three co-defendants in a cocaine distribution scheme, Adam (the supplier), Baker (the distributor) and Carter (the messenger). In the course of the arrest, a car is seized and a loaded pistol is found in the glove compartment. Adams is a twenty-eight year old college student who has supported a luxurious lifestyle through dealing in drugs. He cuts a deal to plead guilty to possession of 500 or more grams of cocaine for distribution and provides information about his source of supply and gets the prosecution to move for a sentence below mandatory minimum and the Guidelines and he gets 18 months imprisonment. Baker who is a twenty one year old street addict goes to trial and is convicted by a jury. He has three prior convictions for minor offenses including adjustments for possession of a weapon and he faces a guidelines sentence of level thirty and gets between nine and eleven years imprisonment. Carter a twenty year old addicted prostitute whose only role in the offense was limited to conveying messages over the telephone pleads guilty to the transaction involving 56 grams of cocaine and because of her prior prostitution conviction falls into criminal history category IV and receives a sentence of between five years, three months to six years six months even if she is given reduction for “minimal participation” and “acceptance of responsibility.” It is easy to see how unfair it is that Adam gets the least punishment.

Thus, in my opinion, laws allowing a judge to rely on prior convictions to increase the weight of a sentence are not only unfair to the defendant but are also bad law. I see no arguments in favor of them and recommend that a law be enacted that requires sentences to be based on the offense committed and none other. This will not only silence critics but will also protect the constitutional rights of convicts.

Finally, perhaps the Nigerian experience can be considered here in the USA. As earlier stated, the laws are simple in Nigeria and they contain the punishments within them. Consequently, the question

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25 Gerald F. Ulmen, Federal Sentencing Guidelines : A Cure Worse Than the Disease, 29 Am .Crim. L. Rev. 899 (1991 - 1992).

of whether a punishment is constitutional does not even arise. My recommendation is that the United States legislature should revisit statutes that declare certain conduct a violation of the laws, make them as detailed as possible taking into account various different circumstances and then prescribe specific punishment for the offenses. This will make it easy for either judge or jury in imposing punishment after convictions.

### CONCLUSION.

The US Congress has done a laudable job in setting up the Federal Sentencing Guidelines. Although there are many who feel that the guidelines have not been very successful in achieving the aim for which they were set up and that there is no need for them, I believe that sentencing guidelines are important because uniformity and justice are so important. The Nigerian system is not perfect but it has been able to avoid the many criticisms of the United States Federal Sentencing Guidelines and I hope that with the application of the recommendations made in this paper sentencing in the United States will become easier.