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## What Doesn't Work in Federal Court

By David S. Zapp

I just worked a case that reminded me how chillingly divorced from reality the criminal justice system can be. The judge thought he was doing a defendant a favor by reducing his sentence from 22 to 18 years on the ground that his brother, the ringleader, had received only 10 years from another judge. As if eighteen years were a modest inconvenience; as if families and friends – forget the defendant – wouldn't be forever affected.

Sometimes you get lulled into taking the “justice” in “criminal justice” at face value, into believing in the omniscience of a system that convicts the guilty and frees the innocent, that hands down sentences the guilty deserve. More or less. Then something like this shocks some truth into you.

And the worst part is how clinically this random cruelty is meted out. It has gotten so that sentencing the convicted to incarceration has become just another item on judges' “to do” lists: “10 a.m. -- pick up laundry; 11a.m. -- get haircut; 12.10 p.m. -- give defendant 18 years; 1 p.m. -- meet friends for lunch.” What is truly distressing is that severe punishment is not by any means the preserve of the very worst offenders. It is just as likely to be imposed on people who are not venal at all and pose no threat to society. The harshest sentences are dished out to the least informed, most helpless defendants with disproportionate regularity. Unwilling to accept a plea and face the prospect of serious jail time, they put themselves at risk of far longer terms, And get them!

As an attorney – as a defendant – you need to handle a case with a fine tactical touch that has little to do with justice just to avoid a potential eight or ten years, say (no picnic by anyone's standards), turning into eighteen or twenty.

Most accused have no notion of how things operate here in New York. The Eastern District is tough, but the system in the Southern District can be almost whimsically vindictive. In the EDNY, prosecutors have at least some discretion to fashion a sentence that promotes respect for the law without consigning the convicted to an eternity behind bars. Not so in the Southern District. There, prosecutors prosecute the case rather than the individual. Whatever the guidelines indicate is the appropriate sentence is what they are committed to the accused receiving. They think of themselves as We and defendants as impersonal They's. If you don't take a plea, and lose at trial, you are liable to get hit with an amount of additional time you won't believe. You are not just going to get an increment for the “offense” of not

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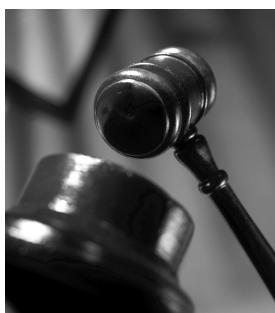
accepting a plea -- you are going to get double time, or even triple time. You are going to get leveraged, so to speak, from a range that you can hope to live with, and eventually move on from, to one that will utterly destroy your life and that of everyone to whom you mean something.

## Reasonableness in Sentencing?

### The Court Finally Speaks -- *U.S. vs. Rattoballi*

By David Zapp

A recent decision, out of the Court of Appeals for the Second Circuit, finally addressed the question of “reasonableness” of a post-*Booker* sentence. Since *Booker*, sentencing Guidelines have not been mandatory, and judges have been able to take other factors into account. As set out in 18 U.S.C. § 3553(a), these include:



- The nature and circumstances of the offense; and that the sentence:
- reflect the seriousness of offense;
- promote respect for law;
- represent just punishment;
- provide deterrence;
- protect the public; and
- avoid unwarranted sentencing disparities

There has been some debate as to whether the sentencing Guidelines are now no more important than any other factor judges may consider, or whether they remain the pre-eminent factor. Judge Sifton of the Eastern District of New York acknowledged the issue in *Jackson v. U.S.*, 2005 U.S. Dist. LEXIS 4551 (EDNY Mar. 17, 2005), noting that “the Second Circuit had yet to rule on the ‘degree of consideration’ of the Guidelines that is required, or . . . weight . . . to be given.” He cited *U.S. v. Wilson*, 350 F.Supp.2d 910, 925 (D. Utah 2005) (“heavy weight,” with non-Guideline sentences only in “unusual cases”); *U.S. v. Peach*, 356 F.Supp.2d 1018 (D.N.D.2005) (“substantial weight,” “presumptively reasonable”); *U.S. v. Ranum*, 353 F.Supp.2d 984 (E.D.Wis.2005) (“equal weight”); *U.S. v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005) (“equal weight”). Judge Sifton adopted the “equal weight” standard, believing that anything else might run afoul of the *Booker* prohibition against sentencing defendants on facts not found beyond a reasonable doubt.

Well, he won’t be doing that again! Despite *Booker*, courts in the Second Circuit (New York, Connecticut, Vermont) must now give the Guidelines the highest deference. According to the Second Circuit Court of Appeals, the Guidelines are, as a matter of law, first among equals.

After *Booker*, we defense lawyers assumed judges would start flexing their “discretion muscles” and impose sentences they believed to be just and fair, no matter what the Guidelines indicated. Drug and money-laundering defendants are particularly victimized by the Guidelines, which are quantity-driven. But we were wrong. In the event, judges have tended to follow the Guidelines meekly, and when they have strayed from them they have rarely strayed far.

In *U.S. v. Rattoballi*, Judge Grisea of the Southern District of New York did stray some distance. He sentenced a defendant to probation rather than the 27 months indicated by the Guidelines, basing his decision on factors that were relevant to the particular defendant, though by no means unique to him: loss of prestige, loss of business, family problems, and so on. In all the circumstances, Judge Grisea considered probation the proper sentence. My guess is, this judge would have continued to look for the fair and appropriate sentence, case by case — something he had done in the days before the Guidelines became mandatory. He read *Booker* the way I did, as a brief to consider the sentencing Guidelines — to use them as a starting point, if you will — and then make adjustments in line with the facts, so as to arrive at a reasonable and fair disposition of each particular case. That would be the inclination of judges with a moderate and/or independent streak; Judge Grisea is a moderate.

Mr. Rattoballi was part owner of a printing company who resorted to bribery as a way of generating business. A crime? Sure. The crime of the century? Hardly. Being prosecuted upended Mr. Rattoballi's life. Business suffered. Twelve employees looked to him for their livelihoods, and the collapse of the firm would have hurt them and their dependents. Rattoballi's standing in the industry was destroyed. He had been living with this case for years, and he was not a young man. What Judge Grisea saw was a disgraced and broken defendant who had already suffered greatly. The judge took the view that the harm to this particular defendant, his family and employees outweighed any good that could come from a prison sentence, and so gave him probation instead.

The appeals court reversed. It played up the history and lofty ideals behind the Guidelines, made a song-and-dance about the reverence with which they should be treated. “[They] cannot be called just another factor,” the court said of the Guidelines. “[They] represent approximately two decades of close attention to federal sentencing policy” and are the “product of years of careful study.” It called the Guidelines Commission “an expert agency.”

Hopefully, this case — or one like it — will reach the U.S. Supreme Court, and the Second Circuit's belief in the primacy of the Guidelines will be struck down. No one expects judges to lead an insurrection against the rule of law. They never have, and they shouldn't. But they should have the ability to bring their consciences, wisdom and life experience into play in the sentencing process. *Booker* does not require us to treat the Guidelines as sacrosanct, nor to elevate them above other factors relevant to the matter of sentencing in a given case. The Second Circuit may have interpreted *Booker* that way, but with luck it will be shown to have been mistaken.

Until that happens, though, no judge can simply do what he or she thinks is right. Thanks to the terrible appeals decision in *Rattoballi*, at least temporarily order trumps justice yet again.