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'Crosby,' 'Fernandez,' 'Rattoballi': Second Circuit's Mixed Messages

Shortly after the U.S. Supreme Court decided *United States v. Booker*,¹ the U.S. Court of Appeals for the Second Circuit issued its opinion in *United States v. Crosby*,² in which it provided guidance to district courts concerning sentencing procedures in the post-*Booker* world and set forth some basic principles concerning the appellate review of sentences for "reasonableness."

More recently, the Second Circuit decided *United States v. Fernandez*,³ in which it specifically addressed many of the appellate sentencing issues left open by *Crosby*.



mandatory guidelines that *Booker*'s remedial opinion invalidated. Finally, describing the guidelines as more than "just another factor" in the 18 USC §3553(a) statutory scheme is contrary to both *Crosby* (which held that "the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to 'consider' the Guidelines and all of the other factors listed in §3553(a)") and *Fernandez* (in which the Second Circuit "decline[d] to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable").

The 'Rattoballi' Decision

On June 15, 2006, however, the Second Circuit issued its decision in *United States v. Rattoballi*,⁴ in which it set forth certain general principles concerning sentencing in the post-*Booker* world that arguably conflict with the core holdings of *Booker*, *Crosby* and *Fernandez* as well as the 18 USC §3553(a) statutory scheme. Because *Rattoballi* was written on a slate that already included *Booker*, *Crosby* and *Fernandez*, practitioners and district courts in the Second Circuit now face a thicket of mixed messages from the Second Circuit as to the appropriate procedures and standards for determining and imposing sentences.

Below are the primary legal principles concerning post-*Booker* sentencing as set forth by the Second Circuit in *Rattoballi*, and details concerning how they seemingly conflict with *Booker*, *Crosby* and *Fernandez* as well as the 18 USC §3553(a) statutory scheme:

Principle 1. [T]he Guidelines cannot be called just 'another factor' in the statutory list, 18 USC §3553(a), because they are the only integration of the multiple factors and, with important exceptions,

their calculations were based upon the actual sentences of many judges.

Initially it bears noting that neither *Booker* nor 18 USC §3553(a) recognize the Guidelines or any other 18 U.S.C. §3553(a) factor as being a "super-factor" or a first-among-statutory-equals. Indeed, the U.S. Sentencing Commission Guidelines themselves are "just another factor" in the 18 USC §3553(a) statutory scheme. To read 18 USC §3553(a) any other way is to read language into that statute that simply does not exist. In addition, the guidelines are not "the only integration of the multiple factors" contained in 18 USC §3553(a).

In fact, the guidelines do not "integrate the multiple factors" contained in 18 USC §3553(a). If they did, the balance of 18 USC §3553(a) would be superfluous. Rather, 18 USC §3553(a) identifies (but does not weigh) numerous factors that district courts are required to consider at sentencing, including the guidelines and other factors that the guidelines specifically and affirmatively assert are not relevant at sentencing (such as the history and characteristics of the defendant and the defendants' rehabilitative potential).

Moreover, weighing the guidelines more heavily than the other 18 USC §3553(a) sentencing factors cannot be squared with *Booker* because it effectively forces sentencing courts back into a sentencing paradigm of

'Unique' to Particular Defendant

Principle 2. [W]e will view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants.

Requiring findings of facts that are "unique or personal to a particular defendant" prior to the imposition of a non-guidelines sentence is tantamount to grafting the requirements of downward departure analysis under the guidelines onto the post-*Booker* requirement to consider all 18 USC §3553(a) factors. Put another way, requiring the presence of factors that are "unique or personal to a particular defendant" and that are not "attributes common to all defendants" to justify imposition of a non-guidelines sentence parallels the guidelines' downward departure paradigm, which requires the presence of "an aggravating or mitigating factor of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines." Neither *Booker* nor the plain language of 18 USC §3553(a) provides any support for this proposition.

Moreover, viewing any non-guidelines sentence "as inherently suspect" regardless of the factors upon which it is based is inconsistent with *Fernandez*'s "commitment to avoid the formulation of per se rules to govern our review of sentences for reasonableness"

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and refusal to “establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable.”

A ‘Persuasive Explanation’

Principle 3. A non-Guidelines sentence that a district court imposes in reliance on factors incompatible with the [Sentencing] Commission’s policy statements may be deemed substantively unreasonable in the absence of persuasive explanation as to why the sentence actually comports with the §3553(a) factors.

This pronouncement by the Second Circuit—that non-guidelines sentences found to be incompatible with guidelines policy statements risk reversal unless a “persuasive explanation” is provided as to why the sentence imposed comports with 18 USC §3553(a)—is problematic for reasons similar to those described above.

Specifically, this proposition improperly elevates the guidelines to a stature as a first-among-statutory-equals within the 18 USC §3553(a) sentencing framework. Moreover, this proposition essentially presumes that guidelines sentences are reasonable (which is contrary to both *Crosby* and *Fernandez*). And, this proposition is directly contrary to the Second Circuit’s policies concerning the obligations of district courts to consider the guidelines and all of the other 18 USC §3553(a) factors as set forth in *Crosby* (“[W]e will not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to ‘consider’ the Guidelines”) and *Fernandez* (“[W]e presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors. In other words, no ‘robotic incantations’ are required to prove the fact of consideration”).

Principle 4. [W]e note that several other circuits have endorsed a rule that requires district courts to offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range.... While we have yet to adopt this standard as a rule in this circuit, and do not do so here, we emphasize that our own ability to uphold a sentence as reasonable will be informed by the district court’s statement of reasons (or lack thereof) for the sentence that it elects to impose. Indeed, a district court may be able to justify a marginal sentence by including a compelling statement of reasons that reflect consideration of §3553(a) and set forth why it was desirable to deviate from the Guidelines. In the absence of such a compelling statement, we may be forced

to vacate a marginal sentence where the record is insufficient, on its own, to support the sentence as reasonable.

Greatest Inconsistency

This passage is the most inconsistent of all of *Rattoballi*’s statements concerning reasonableness review. Specifically, imposition of such a rule (or at least the threat of such a rule, which arguably has the same effect on the conduct of district courts lest such a rule be imposed on them) is wholly inconsistent with the Second Circuit’s finding in *Crosby* that it “will no more require ‘robotic incantations’ by district judges” concerning their consideration of the 18 USC §3553(a) factors “than [it] did

In ‘Rattoballi,’ the Second Circuit set forth certain general principles concerning sentencing in the post-‘Booker’ world that arguably conflict with the core holdings of ‘Booker,’ ‘Crosby’ and ‘Fernandez’ as well as the 18 USC §3553(a) statutory scheme..

when the Guidelines were mandatory.” Moreover, this pronouncement does not square with *Fernandez*, in which the Second Circuit held that it would impose no:

requirement that a sentencing judge precisely identify either the factors set forth in §3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the §3553(a) factors along with the applicable Guidelines range. Consideration of the §3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts. That context calls for us to ‘refrain[] from imposing any rigorous requirement of specific articulation by the sentencing judge.’

In addition, *Booker* provides no basis for requiring a more “compelling accounting” of a sentence that is, say, a 20 percent deviation from an advisory guidelines range than a sentence that is a 10 percent deviation from an advisory guidelines range. Indeed, requiring such a more “compelling accounting” is tantamount to forcing closer compliance with the guidelines—a directive that violates *Booker*’s core holding. Put another way, linking the amount of detail required in a sentencing decision to the degree of deviation from the guidelines sends a strong signal to

district courts that compliance with the guidelines is expected more often than not. Finally (and like the discussion above), there is arguably no difference between a rule that requires a “compelling accounting” for a non-guidelines sentence and the guidelines requirement that “exceptional circumstances” be present as a precondition to the granting of a downward departure.

Analysis

So, what accounts for the opposing views in *Crosby* and *Fernandez* as compared to *Rattoballi*? Perhaps it was the degree of departure from the guidelines in *Rattoballi* that drew the Second Circuit’s ire. (Mr. Rattoballi received a non-guidelines sentence of one year of home confinement despite having an offense level of 18 and a guidelines range of 27 to 33 months imprisonment.) Or perhaps it was the nature of Mr. Rattoballi’s offense (he was involved in a kickback scheme) or Mr. Rattoballi’s conduct after entering into a plea and cooperation agreement with the government (he lied to the government about certain cash payments after agreeing with the person he had paid not to mention those cash payment, and thereby apparently violated the terms of his plea and cooperation agreement). Or perhaps it was a perception (largely unfounded) by the Second Circuit that district courts have been imposing an inordinate number of non-guidelines sentences.⁵

Or, perhaps, it was just disparate views expressed by different panels of the Second Circuit as to the appropriate standards for the appellate review of sentences after *Booker*—panels for *Crosby*, *Fernandez* and *Rattoballi*. If so, perhaps the Second Circuit will hear an appropriate future sentencing appeal en banc to clear up the confusion and mixed messages that exist today concerning the appropriate standards by which district courts should determine and impose sentences and by which the Second Circuit will review such sentences.

1. 543 US 220, 125 S.Ct. 739 (2005).

2. 397 F3d. 103 (2d Cir. 2005).

3. 443 F3d 19 (2d Cir. 2006).

4. 452 F3d 127 (2d Cir. June 15, 2005, amended June 21, 2006).

5. See United States Sentencing Commission’s “Post-*Booker* Sentencing Update” (published July 11, 2006) (http://www.ussc.gov/Blakely/PostBooker_060106.pdf).