



FEDERAL CIRCUIT COURTS SEND MIXED MESSAGES ON SENTENCING

by
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A backlash against the U.S. Supreme Court's *U.S. v. Booker*¹ decision seems to be rapidly advancing in federal Circuit Courts. *Booker* held the U.S. Sentencing Guidelines² unconstitutional, thus allowing federal courts to deviate from their previously mandatory sentencing dictates. Professor Douglas A. Berman of Ohio State's Moritz School of Law expressed the dismay felt by many when he wrote:

Disappointingly, circuit courts have not fully appreciated the importance of reasoned judgment at sentencing and have insisted upon a Guideline-centric approach to post-*Booker* sentencing. Every circuit has declared that district judges must still calculate Guideline sentencing ranges and must provide a detailed justification for deviating from the Guidelines.³

One current reflection of the national debate over federal sentencing arose this past June, when the U.S. Court of Appeals for the Second Circuit decided *United States v. Rattoballi*⁴. The ruling reversed the district court's sentence for a white collar defendant found guilty of violating the Sherman Antitrust Act. The Second Circuit reasoned that the district court's judgment was an unreasonable deviation from the Sentencing Guidelines. By doing so, the Second Circuit chose to ignore the high degree of deference traditionally granted to district courts, a standard affirmed by the Supreme Court in *Booker*.

Rattoballi was the owner of a printing company that targeted advertising agencies for business. In 2002, Rattoballi was found guilty of conspiracy under the Sherman Act for bid rigging. He was providing kickbacks in the form of luxury goods to advertising agency executives. In exchange, the executives would steer their respective agency's printing business to Rattoballi's printing company.

The federal prosecutors recommended 27-33 months imprisonment and a \$20,000 to \$350,000 fine, which included a two-level reduction under the Guidelines for acceptance of responsibility. Instead Southern District of New York Judge Griesa sentenced Rattoballi to one year home confinement, \$155,000 in restitution and no obligation to pay any fine. Judge Griesa's rationale for granting the lesser sentence was Rattoballi's acceptance of responsibility and that the three-year investigation and prosecution had taken a toll on the defendant and his business. In addition, Judge Griesa cited concerns that Rattoballi would not be able to pay his restitution if he was imprisoned.

¹*U.S. v. Booker*, 543 U.S. 220, 259 (2005).

²18 U.S.C. § 3553.

³<http://www.thepocketpart.org/2006/07/berman.html>.

⁴*United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006).

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The Second Circuit disagreed with Judge Griesa's sentence and concluded that the district court did not place enough importance on the Guidelines. Instead the Second Circuit asserted that "The guidelines cannot be called *just another factor* in the statutory list, 18 U.S.C. § 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."⁵ By doing so the court failed to recognize that the plain language of 3553(a) gives no priority to the Guideline range. In fact, the Supreme Court believed that too much weight placed upon the Guideline range would be unconstitutional. According to Professor Berman:

After all, district judges had significant (though cabined) discretion to depart from the guidelines before *Booker*, but the Supreme Court did not think that the discretionary authority provided by traditional departures preserved the system's constitutionality. Put another way, after *Booker*, the influence of the Guidelines has to be diluted to avoid the constitutional problems that led to the *Booker* ruling.⁶

Seeming to forget *Booker*, the Second Circuit places the Sentencing Guidelines as the overwhelming critical factor, if not the only factor, for a district judge to consider.

In addition, the Second Circuit faulted the district court for relying too much on Rattoballi's history and characteristics, stating that "a sentence must reflect consideration of the *balance* of the 3553(a) factors *unjustified reliance upon any one factor* is a symptom of an unreasonable sentence."⁷ This statement seems to conflict with earlier statements in the opinion that expressed the great importance of the Sentencing Guidelines as compared to the other sentencing factors. This rule also does not seem to follow the holding in another Second Circuit case, *United States v. Fernandez*'s⁸, which stated that the district court was to have greater discretion over analyzing the factors and the reliance placed upon them.

The court continued to distance itself from its own precedent by stating, "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."⁹ The court further hints that it might follow the lead of other circuits when it noted that "several other circuits have endorsed the rule that requires district courts to offer a more *compelling accounting* the *farther the sentence* deviates from the advisory Guidelines range."¹⁰ Thus, in essence, the court is suggesting a move towards a policy where the greater the difference between the sentence and the sentencing guidelines range, the stronger the reasoning and rationale a district court must provide. However, *Booker* provides no basis for requiring a more "compelling accounting" of a sentence. For example, a 50 percent deviation from an advisory Guidelines range should require no greater explanation than a sentence that is for example, a 5 percent deviation from an advisory Guidelines range.

As *Rattoballi* suggests, there is still confusion over sentencing well over a year after *Booker*. Harlan J. Protass, a Second Circuit analyst, writes, "Reading sentencing decisions from the Second Circuit these days is a lot like dating a girl who maybe-sort-of-just-might-like you – you get very mixed messages. *Rattoballi* sends just such a mixed message."¹¹ Since *Rattoballi*, the United States Court of Appeals for the Eleventh Circuit decided *U.S. v. Martin*¹² and *U.S. v. Crisp*¹³, cases which also seem to follow *Rattoballi* and reject the precedent of the *Booker* decision. The Supreme Court should clarify its *Booker* decision as to what weight the Guidelines deserve in order to end the debate that is taking place among the circuit courts. It is essential that District Courts be given the due deference granted to them by the Supreme Court in *Booker*.

⁵*Id.* at 133.

⁶http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/important_booker.html.

⁷*Rattoballi*, 452 F.3d at 137.

⁸*United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2005).

⁹*Rattoballi*, 452 F.3d at 134.

¹⁰*Id.*

¹¹http://federalssentencing.typepad.com/developments_in_federal_s/2006/06/very_mixed_mess.html.

¹²*United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006).

¹³*United States v. Crisp*, 454 F.3d 1285 (11th Cir. 2006).