Post-*Booker* Sentencing Law In The Second Circuit: A Caselaw Primer

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1. The Second Circuit Speaks On Post-*Booker* Sentencing Procedures

A. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)

"Thus, at this point, we can identify several essential aspects of *Booker*/*Fanfan* that concern the selection of sentences. First, the Guidelines are no longer mandatory. Second, the sentencing judge must consider the Guidelines and all of the other factors listed in section 3553(a). Third, consideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. Fourth, the sentencing judge should decide, after considering the Guidelines and all the other factors set forth in section 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, *i.e.*, a sentence within the applicable Guidelines range, or within permissible departure authority, or (ii) to impose a non-Guidelines sentence. Fifth, the sentencing judge is entitled to find all of the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence."

2. What It Means To "Consider" The Guidelines And The 18 U.S.C. § 3553(a) Factors

A. *United States v. Fleming*, 397 F.3d 95 (2d Cir. 2005)

"[W]e continue to believe that no specific verbal formulations should be prescribed to demonstrate the adequate discharge of the duty 'consider' matters relevant to sentencing. As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred."

B. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)

"We need not on this appeal endeavor to determine what degree of consideration is required, or, to put it another way, what weight the sentencing judge should normally give to the applicable Guidelines range. We think it more consonant with the day-to-day role of district judges in imposing sentences and the episodic role of appellate judges in reviewing sentences, especially under the now applicable standard of 'reasonableness,' to permit the concept of 'consideration'

in the context of the applicable Guidelines range to evolve as district court judges faithfully perform their statutory duties. Therefore, we 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. In other words, we will no more require 'robotic incantations' by district judges than we did when the Guidelines were mandatory."

"[T]he Supreme Court expects sentencing judges faithfully to 'consider' the Guidelines and all of the other factors listed in section 3553(a)."

C. *United States v. Fernandez*, 443 F.3d 19 (2d Cir.), *cert. denied*, --- U.S. ---, 127 S.Ct. 192 (2006)

"[Although a sentencing judge is required to put the Guidelines calculation on the record, w]e have imposed no similar 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 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.'"

"Accordingly, we 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, and we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced."

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

"In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress. '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.' It bears noting that the Sentencing Commission is an expert agency whose statutory charge mirrors the § 3553(a) factors that the district courts are required to consider."

E. *United States v. Jones*, 460 F.3d 191 (2d Cir. 2006)

"Although the sentencing judge is obliged to consider all of the sentencing factors outlined in section 3553(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judges, and it may continue to be exercised, subject to the reviewing court's ultimate authority to reject any sentence that exceeds the bounds of reasonableness."

F. *United States v. Ministro-Tapia*, 470 F.3d 137 (2d Cir. 2006)

"Plainly, if a district court were explicitly to conclude that two sentences equally served the statutory purpose of § 3553(a), it could not, consistent with the parsimony clause, impose the higher."

G. *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006)

"Surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religious, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, 'the history and characteristics of the defendant.'"

3. Appellate Review For "Reasonableness"

A. *United States v. Fleming*, 397 F.3d 95 (2d Cir. 2005)

"'[R]easonableness' in the context of review of sentences is a flexible concept. The appellate function in this context should exhibit restraint, not micromanagement."

B. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)

"Because 'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any *per se* rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. Indeed, such *per se* rules would risk being invalidated as contrary to the Supreme Court's holding in *Booker*/*Fanfan*, because they would effectively reinstitute mandatory adherence to the Guidelines."

C. *United States v. Fernandez*, 443 F.3d 19 (2d Cir.), *cert. denied*, --- U.S. ---, 127 S.Ct. 192 (2006)

"We recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances. Nonetheless, we have expressed a commitment to avoid the formation of *per se* rules to govern our review of sentences for reasonableness. We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable."

D. *United States v. Fairclough*, 439 F.3d 75 (2d Cir.), *cert. denied*, --- U.S. ---, 126 S.Ct. 2915 (2006)

"We have also stated that our inquiry will 'focus primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).'"

E. *United States v. Fernandez*, 443 F.3d 19 (2d Cir.), *cert. denied*, --- U.S. ---, 127 S.Ct. 192 (2006)

"[W]hile we review a sentence for reasonableness, that review involves consideration not only of the sentence itself, but also of the procedures employed in arriving at the sentence. Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion."

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

"We review a district court's sentencing decisions for reasonableness. Reasonableness review has two components: (1) procedural reasonableness, whereby we consider such factors as whether the district court properly (a) identified the Guidelines range supported by the facts found by the court, (b) treated the Guidelines as advisory, and (c) considered the Guidelines together with the other factors outlined in 18 U.S.C. § 3553(a); and (2) substantive reasonableness, whereby we consider whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a)."

"Our own review for reasonableness, though deferential, will not equate to a 'rubber stamp.' We are also under a duty to consider § 3553(a)."

"[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. Disparate sentences prompted the passage of the Sentencing Reform Act and remain its principle concern."

"A non-Guidelines sentence that a district court imposes in reliance on factors incompatible with the 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."

G. *United States v. Jones*, 460 F.3d 191 (2d Cir. 2006)

"If we are to be deferential when the Government persuades a district judge to render a non-Guidelines sentence somewhat above the Guidelines range, we must be similarly deferential when a defendant persuades a district judge to render a non-Guidelines sentence somewhat below the Guidelines range. Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up."

4. Standards Of Proof For Sentencing Factors After *Booker*

A. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)

"[A]lthough the [Supreme] Court . . . prohibits a sentencing judge from finding any facts that enhanced a Guidelines sentence above the range that is based solely on the facts found by the jury in its verdict or admitted by the defendant, the [Supreme] Court . . . contemplates that, with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection. Thus, the sentencing judge will be entitled to find all facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence."

B. *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, --- U.S. ---, 126 S.Ct. 1665 (2006)

"We reiterate that, after *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment."

5. Consideration Of Acquitted Conduct At Sentencing After *Booker*

A. *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, --- U.S. ---, 126 S.Ct. 1665 (2006)

"We emphasize that there is no logical inconsistency in determining that a preponderance of the evidence supports a finding about which there remains a reasonable doubt and join the Seventh, Tenth, and Eleventh circuits in rejecting a claim that, after *Booker*, district courts may no longer consider acquitted conduct when sentencing within the statutory range authorized by the jury's verdict."

6. The Crack/Powder Ratio And Policy Considerations After *Booker*

A. *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006)

> "We hold that district courts do not have the authority to reject unilaterally the 100:1 ratio on policy grounds . . . ."
>
> "[W]e are compelled to conclude that we see nothing in § 3553(a) or in *Booker* more generally that authorizes district courts to sentence defendants for offenses involving crack cocaine under a ratio different from that provided in the Sentencing Guidelines. That is not to say that district courts must always sentence within the ratio provided by the Guidelines; that would indeed be error under *Booker*. But we join the First, Fourth, and Eleventh Circuits in holding that district courts may give non-Guidelines sentences only because of case-specific applications of the § 3553(a) factors, not based on policy disagreements with the disparity that the Guidelines for crack and powder cocaine create."

7. Non-5K Cooperation As A Basis For A Non-Guidelines Sentence

A. *United States v. Fernandez*, 443 F.3d 19 (2d Cir.), *cert. denied*, --- U.S. ---, 127 S.Ct. 192 (2006)

> "We agree that in formulating a reasonable sentence a sentencing judge must consider the 'history and characteristics of the defendant' within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that a defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1 ('non-5K cooperation')."

8. "Fast-Track" Disparity As A Basis For A Non-Guidelines Sentence

A. *United States v. Mejia*, 461 F.3d 158 (2d Cir. 2006)

> "[A] district court's refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable."

9. State-Federal Sentencing Disparity As A Basis For A Non-Guidelines Sentence

A. *United States v. Brennan*, No. 96-CR-793 (JBW), 2007 WL 14590 (E.D.N.Y. Jan. 2, 2007)

> "Federal courts have recognized that moderating changes in state criminal drugs laws can have an ameliorative effect on harsh federal sentences.

In the area of sentencing, the combination of overlapping state and federal laws and limited federal resources exacerbate the disparity between state and federal sentences. 'A . . . criticism of the federalization of criminal law is that the possibility of so many crimes now being subject to both federal and state prosecution creates a large pool of defendants who could be tried in either court.'

Since the Supreme Court's decision in *United States v. Booker*, 542 U.S. 220 (2005), made the federal sentencing guidelines largely advisory, the issue of whether it is appropriate for federal sentencing judges to consider the disparity between state and federal sentences becomes critical in some cases. . . .

Federal courts are recognizing post-*Booker* that it may be appropriate to take state sentencing practices into account when sentencing federal defendants. . . .

The disparity referred to [in 18 U.S.C. § 3553(a)(6)] has usually been interpreted to apply horizontally to comparisons among federal defendants. Yet, section 3553(a)(6) can also be interpreted to require consideration of vertical disparities between local state and federal sentences. Criminal law and sentences in the past and today have been crafted by the states not the federal government; federal sentences have had little impact on most crimes.

From the point of view of the impact of sentencing on specific and general deterrence and reducing recidivism rates, state-vertical coordination is more important than national-horizontal uniformity. The public and criminals generally consider the local federal and state courts as part of a single protective institution. Too great a disparity between state and federal prosecution and sentencing decisions will be seen by the public as creating unjustified disparities.

Section 3553(a)(6) should be construed as covering disparities in state-federal as well as federal-federal comparative sentencing."

10. Co-Defendant Disparity As A Basis For A Non-Guidelines Sentence

A. *United States v. Wills*, Docket No. 06-0115-cr., 2007 WL 366071 (2d Cir. Feb. 5, 2007)

"We do not, as a general matter, object to district courts' consideration of similarities and differences among co-defendants when imposing a sentence.

Under the advisory Guidelines scheme explicated in *Booker*, it is appropriate for a district court, relying on its unique knowledge of the totality of the circumstances of a crime and its participants, to impose a sentence that would better reflect the *extent* to *which* the participants in a crime are similarly (or dissimilarly) situated and tailor the sentences accordingly. It would be anomalous to grant a district court 'broad discretion in imposing a sentence within a statutory range,' but deny the court the ability to consider the sentence in its complete relevant context."

11. The ACCA And State Convictions

A. *United States v. Hammons,* 438 F. Supp. 2d 125 (E.D.N.Y. 2006)

"The parties dispute what date should be used to calculate the maximum sentence for the state law felonies. Three options are possible: (1) the law applicable at the time of the actual state law conviction; (2) the law applicable at the time of the new alleged federal crime; or (3) the law applicable at the time of the sentencing for the federal offense.

It is the State's present policy ACCA seeks to implement and, therefore, that should control, especially . . . when this interpretation of ACCA accords with its plain language."

12. Economic Offenses And The Calculation Of Loss

A. *United States v. Adelson,* 441 F. Supp. 2d 506 (S.D.N.Y. 2006)

"This is one of those cases in which calculations under the Sentencing Guidelines lead to a result so patently unreasonable as to require the Court to place greater emphasis on other sentencing factors to derive a sentence that comports with federal law."

Since "successful public companies typically issue millions of publicly traded shares . . . the precipitous decline in stock price that typically accompanies a revelation of fraud generates a multiplier effect that may lead to guideline offense levels that are, quite literally, off the chart."

"The problem is further exacerbated by the fact that the ordinary measure of loss in a criminal securities fraud case is the decline in the price of stock when the fraud is revealed. Since this occurs at the end of the conspiracy, even someone like [the defendant] who had no role in originating the conspiracy but only joined it in its latter stages will still be legally responsible under the guidelines for the full loss amount that he could reasonably foresee."

"[T]he utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."

"In the case of financial fraud . . . an important kind of retribution may be achieved through the imposition of financial burdens."

"[T]here is [] considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."

"To put this matter in broad perspective, it is obvious that sentencing is the most sensitive, and difficult, task that any judge is called upon to undertake. Where the Sentencing Guidelines provide reasonable guidance, they are of considerable help to any judge in fashioning a sentence that is fair, just, and reasonable. But where, as here, the calculations under the guidelines have run so amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences."