No. 06-5881-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES A. RATTOBALLI,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The amended judgment of the district court was entered on December 15, 2006. Defendant filed a notice of appeal on December 21, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

ISSUES PRESENTED

l. Whether the district court erroneously believed that it was *compelled* by this Court's prior decision in *United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006) (*Rattoballi I*), to impose a term of imprisonment.

2. Whether the district court believed that "no sentence of prison was necessary" when it imposed a below-Guidelines sentence of 18 months' imprisonment.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Defendant James Rattoballi pled guilty to a two-count information charging him with conspiring to rig bids (15 U.S.C. § 1) and conspiring to commit mail fraud (18 U.S.C. § 371). A.10, JA-19.[1] He was originally sentenced on February 10, 2005, to a sentence of probation and a year of home confinement rather than a

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[1] "A." references are to the Appendix filed by Rattoballi on this appeal. "JA-" references are to the Joint Appendix filed in *Rattoballi I*.

sentence within the Sentencing Guidelines range of 27 to 33 months. The government appealed the sentence and, in an amended decision dated June 21, 2006, this Court reversed, holding that the sentence was unreasonable. *United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006) (*Rattoballi I*).

On remand, the district court sentenced Rattoballi to 18 months' imprisonment, a sentence below the minimum Guidelines range. Rattoballi appeals that sentence as unreasonably high.[2]

B. STATEMENT OF FACTS

1. Background and Prior Sentencing

a. James Rattoballi, President and co-owner of Print Technical Group, Inc. (PTG), pled guilty to conspiracies involving the payment of kickbacks and the submission of rigged bids for printing services supplied to Grey Global Group, Inc. (Grey). JA-7, 53. He agreed to a Fed. R. Crim. P. 11(e)(1)(B) plea agreement,[3] which required him "to provide full, complete, and truthful cooperation" to the government by, *inter alia*, "disclos[ing] fully, completely, and truthfully all information concerning any matters about which he may be asked."

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[2] The court imposed a minimum $20,000 fine which Rattoballi does not challenge.

[3] In 2002, Fed. R. Crim. P. 11(e)(1)(B) became Fed. R. Crim. P. 11(c)(1)(B).

JA-19-20. In exchange, the government agreed not to prosecute Rattoballi or his company for any other crimes arising out of the same conduct. JA-20-21. The government also agreed that, if Rattoballi provided substantial assistance in the government's investigations and prosecutions, and otherwise fully complied with the terms of the plea agreement, the government would move for a downward departure pursuant to U.S.S.G. § 5K1.1. JA-23-24.

Despite this agreement, for over two years Rattoballi lied to government investigators and withheld information about substantial additional kickbacks and gifts to Grey executive Mitchell Mosallem and others. On April 1, 2004, Rattoballi finally conceded that he had concealed information and had attempted to mislead the government, but only after he was confronted with compelling documentary evidence that the government had obtained from other sources. JA-118, 123, 127, 136. Rattoballi then admitted that he had agreed with Mosallem not to disclose this information in the belief that the government would not otherwise be able to discover it. JA-123.

b. Because of Rattoballi's failure to provide complete and truthful information, and his deliberate intent to mislead the government, the government notified Rattoballi that it would not recommend a downward departure for substantial assistance and instead would recommend a two-level upward

adjustment for obstruction of justice. The Probation Office and the government concurred in the calculation of an offense level of 21 under the Sentencing Guidelines ("PSR calculation"), which yielded a Guidelines sentence of 37 to 46 months' imprisonment.

The district court reduced the PSR calculation two levels for acceptance of responsibility (*see* U.S.S.G. § 3E1.1) on the ground that Rattoballi had pled guilty and not forced the government to go to trial. JA-168. The court also cut in half the PSR calculation of the fraud loss,[4] which resulted in a Guidelines offense level of 18, *see* U.S.S.G. § 2F1.1(b)(1), and a Guidelines sentence range of 27 to 33 months' imprisonment. JA-174-75.[5]

Notwithstanding the court's statement that "I have considered the guidelines very, very seriously," (JA-180), its recognition that the charges "are substantial crimes and require appropriate penalties," and its calculation of a Guidelines sentence carrying a minimum of 27 months in prison, JA-180, 183, the court sentenced Rattoballi to five years' probation, including one year of home confinement. The district court did not provide a written statement of reasons, but

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[4] The PSR's loss calculation included uncharged relevant conduct (PSR 7-10), *see* U.S.S.G. § 1B1.3, which Rattoballi admitted (JA-160-62), but which the court did not include. JA-170-75.

[5] The 2000 edition of the Sentencing Guidelines was used.

suggested that the following factors influenced the sentence: (1) despite his initial lies, Rattoballi had ultimately admitted all his conduct and did not force the government to go to trial; (2) the case had inflicted punishment by hanging over him for three years and he had been convicted of two federal crimes; (3) "society and those closer to [defendant] would be legitimately benefited by having [him] continue in his small business" and "a prison sentence would absolutely end that business." JA-181-82. Finally, the court reasoned that Mosallem had "exerted an enormous amount of pressure upon other people and got them in trouble." JA-182.

c. This Court reversed, holding that the sentence was unreasonable because it did not adequately reflect consideration and weighing of all the factors set forth in 18 U.S.C. § 3553(a). *Rattoballi I*, 452 F.3d at 135, 137. Specifically, the Court held that the district court's "marginal sentence" improperly relied on factors that are common to all defendants. In addition, the district court had overlooked or ignored the Sentencing Commission's policy statement in U.S.S.G. § 2R1.1, cmt. n.5 "'that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.'" *Id.* at 135-36. While this Court recognized that "a sentencing court may consider – in extraordinary cases – the strains that a criminal investigation places on a defendant's business," it found that "such

circumstances are not present here." *Id.* at 136. Finally, the district court gave improper weight to the fact that Rattoballi pled guilty and (ultimately) accepted responsibility for his crimes, and that he was less culpable than some of his co-defendants. These factors, the Court observed, were already taken into consideration in calculating the Guidelines offense level and could not outweigh the seriousness of Rattoballi's offenses and the fact that he had obstructed the government's investigation for more than two years. *Id.* at 136-37.

Thus, the Court concluded that "[t]he sentence imposed by the district court 'exceeded the bounds of allowable discretion,'" and the "failure to impose a term of imprisonment was unreasonable." *Id.* at 137.[6]

2. Resentencing

The court held a two-day hearing during which Rattoballi, his partner Robert Katz, and PTG's accountant testified about the current status of his print brokerage business. At the time of the hearing, the business had six employees: Rattoballi and his partner, Rattoballi's son Richard, who is a salesperson (A.99), a receptionist-assistant, and two traffic managers who oversee the progress of the jobs performed by other companies that do the technical work. A.101-02.

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[6] The district court had also failed to comply with 18 U.S.C. § 3553(c), requiring a written statement of reasons for a sentence that is not within the Guidelines range. *Rattoballi I*, 452 F.3d at 138-39.

Rattoballi is PTG's primary salesman and brings in most of the business; Katz's responsibilities are primarily administrative. A.98-99, A.116-17.[7] But both Katz and Richard Rattoballi, who has been in the business for 10 years, are competent salesmen, bring in some clients, and help to service them. A.34, A.77-78, A.80, A.112-13, A.116-17. Katz testified that "I do the administrative. He does the sales. Not that he can't do what I do, and not that I can't do what he does, but that's the way it's been." A.117.

In response to the court's question about what he would do to preserve the company if he were given a prison sentence, Rattoballi replied that "[i]t's a tough question." A.108-109. He did not know how he could explain to his customers that the company's owner was off to jail, and he thought he would lose clients if they found out about his past conduct. A.109. "We've kind of suppressed that information with our vendors, with our clients." A.110. Robert Katz also said that the business would not survive if Rattoballi were imprisoned and PTG's customers found out. A.118-119. Neither Rattoballi nor Katz said that the business would fail because Rattoballi was needed to run the business day-to-day. And, notwithstanding the government's request, the court did not require Rattoballi to

[7] While the printing industry has suffered financially in recent years, PTG has 15 clients and grosses over $3 million in annual sales. A.72, 85.

produce business records, or allow the government access to witnesses to confirm or refute Rattoballi's evidence. A.46-48, A.82-83, A.88-92.

Finally, in addition to presenting evidence, Rattoballi also argued that, because he had now completed his year of home confinement and had otherwise strictly complied with the conditions of probation in the original sentencing order, this "in and of itself . . . provides . . . a ground for a statutory departure or a statutory variance" from the Guidelines. A.53-54.[8]

The district court concluded that the business would fail if Rattoballi were sent to prison for a term at or near the length set forth in the Sentencing Guidelines. Nevertheless, the court held that this was not the "conclusive consideration" (A.35) (emphasis added):

> The sad fact is that Mr. Rattoballi had the opportunity to go through this criminal process and have the opportunity for a sentence which would not have been any threat to the business whatever. He entered into a cooperation agreement with the government and he agreed to tell the full truth about the criminal situation . . . . He did not do so . . . . Thus, *he, himself, I am sorry to say, forfeited the possibility*, a clear possibility under the

[8] Defense counsel also said that, because Rattoballi's business has been "clean," with no more kickbacks, he had been rehabilitated. A.54. The court responded that "I don't think that gets at what the Court of Appeals is really talking about." *Id.* At the close of sentencing, however, the court relied on this "rehabilitation" to support a below-guidelines sentence of 18 months. A.33-34, 37.

> law, of receiving the so-called 5K1 letter from the government and the possibility *of receiving probation without a prison sentence* . . . . It is sad to say *this was his doing*. It wasn't the doing of the antitrust division or anybody else, *it was his doing*.

The court explained that it had considered a short prison sentence, served on weekends or in the summer, to preserve the business, *but decided that "this would not be appropriate*," because a sentence "still so much less than the guideline range [would require] powerful considerations . . . to justify it [and] I do not believe there are such powerful considerations." A.36 (emphasis added). The court noted (A.37, emphasis added):

> sentences in criminal cases often and inevitably have consequences going beyond the defendant himself. While there are times that we try very hard to avoid this, there are times when this is not possible, *consistent with the proper administration of justice under the prevailing law*. And I'm afraid that the latter is the circumstance here. And again, I have in mind as one factor, the circumstance that *Mr. Rattoballi could, by truthfully cooperating with the government, could have avoided this problem altogether*.

In deciding on the specific sentence to impose, the court said that "I start with the view that a prison sentence is virtually, although not explicitly, required by the Court of Appeals opinion [and] . . . it is my duty as a district judge in this case, to comply fully with the direction of the Court of Appeals." A.31. But the court emphasized that it was not "*simply blindly following some dictate of the*

Court of Appeals . . . not only do I feel bound to impose a prison sentence, but . . . I am now persuaded in my own mind as a matter of my own discretion that such a thing is right." A.31-32 (emphasis added).

The Court also addressed other sentencing factors while noting that some of the factors it had relied on in originally sentencing Rattoballi to probation "were not sufficient to justify" that sentence because they were "things that will be true of many defendants." A.55. For example, "Rattoballi's good works" were not "sufficient to overcome the factors which the Court of Appeals felt were quite compelling in favor of a prison sentence," because "[t]here are many people who have very good lives, and they do a great deal of charitable activity; they're good to their families; and, yet, something goes wrong and they commit crimes. And nobody suggests that the commission of a crime means you're a totally evil person. Not at all. But it means that there is a crime *that has to have a sanction."* A. 56-57 (emphasis added). The court also recognized that Rattoballi "is not entirely a bad person and, indeed, has some very great goodness to him," (A.33); that his business is now in compliance with the law and Rattoballi "is rehabilitating himself" so that "[a]ny punishment which is inflicted in this case is entirely unnecessary as far as deterring [Rattoballi's] future criminal conduct" (A.33-34); and that "a substantial prison sentence will . . . destroy [Rattoballi's]

business (A.35).[9] But these factors did not change the fact that Rattoballi had repeatedly lied and stymied the government's efforts to prosecute fully all of Rattoballi's co-conspirators. A.142-45.

While the Sentencing Guidelines range was 27 to 33 months' imprisonment, the government conceded that the court could give Rattoballi credit for six of the twelve months he had served in home confinement, and thus reduce the Guidelines range to 21 to 27 months. A.32; *see United States v. Carpenter*, 320 F.3d 334, 346 (2d Cir. 2003). The trial court then imposed a sentence of 18 months' imprisonment. It believed "that this is so close to what the government has conceded with regard to the application of the Guidelines as to be substantially in compliance with the guidelines [and] this small variation from the 21 months is justified by the positive factors I mentioned at the beginning of my statement." A.37.

SUMMARY OF ARGUMENT

1. The district court's below-Guidelines sentence is not unreasonable. The court computed the applicable Guidelines range, treated the Guidelines as

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[9] The court found that the record "has been made more definite during this resentencing" that a prison sentence would mean the end of Rattoballi's business. A.34. But the record was made without permitting the government an opportunity to rebut Rattoballi's evidence. A.46-47, A.82-83, A.88-92.

advisory, and appropriately considered the Guidelines in conjunction with the factors listed in 18 U.S.C. § 3553(a). The 18-month sentence it imposed, which is below the applicable Guidelines range, is supported by the court's consideration of the relevant sentencing factors and the record in this case. *Id.*

2. Rattoballi's claims on appeal rest on a misreading of the factual record and ignore the district court's statement of reasons in the judgment of conviction. Contrary to Rattoballi's claim, the district court did not misinterpret *Rattoballi I.* The court correctly recognized (A.31-32, A.36-37, A.159) that *Rattoballi I* did not require the imposition of any particular sentence. Thus, the district court understood that it had discretion to impose whatever sentence it believed was appropriate in this case. A.50-51. In deciding on the appropriate sentence, the district court considered a variety of factors including that Rattoballi was a "good person," had performed good works in the community, and that Rattoballi's business would likely fail if Rattoballi goes to prison. The court also considered imposing no prison sentence (A.121), or a minimal one (A.36). Ultimately, the court concluded that an 18-month sentence, below the minimum Guidelines range, properly took into account all of the sentencing factors, including the significant fact that Rattoballi himself had forfeited his right to a sentence of probation by breaching his plea agreement with the government and obstructing justice. A.35.

The court's belief that a sentence "substantially outside the guidelines" range could not be viewed as reasonable given the record in this case (A. 164) is fully supported by the record.

3. Most of the factors that Rattoballi now claims should have been used to reduce his sentence even further were factors that this Court found inadequate to justify a sentence of probation in *Rattoballi I*: the prospect of Rattoballi's business failing, Rattoballi's family and community ties, and the comparative culpability of Rattoballi and his co-conspirators. The only new factor on which Rattoballi relies is that he has completed his year of home detention and has thus far "strictly" complied with the conditions of probation in his original sentence. But because *Rattoballi I* held that Rattoballi's original sentence was *inadequate* to serve the purposes of 18 U.S.C. 3553(a) and thus *unreasonable*, Rattoballi's compliance with that inadequate sentence cannot foreclose further, *adequate and reasonable*, punishment.

4. Contrary to Rattoballi's assertions, the "parsimony rule" of 18 U.S.C. § 3553(a)(2) was not violated. The district never said that a sentence lower than the 18 months it imposed would be "*sufficient*" "but no greater than necessary" to comply with § 3553(a). Indeed, the court recognized that a lesser sentence would *fail* to comply with § 3553(a) and this Court's reasoning in *Rattoballi I*.

ARGUMENT

I. STANDARD OF REVIEW

Review of a sentence for reasonableness considers whether the trial court properly followed the law and whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a). *Rattoballi I*, 452 F.3d at 131-32; *United States v. Capanelli*, 479 F.3d 163, 164-65 & n.1. (2d Cir. 2007). Factual determinations are reviewed for clear error, legal conclusions are reviewed de novo, and exercises of discretion in imposing sentence are reviewed for abuse of discretion. *United States v. Fuller*, 426 F.3d 556, 562 (2d Cir. 2005); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also Rattoballi I*, 452 F.3d at 132 (reasonableness review is "deferential").

II. THE DISTRICT COURT DID NOT ERRONEOUSLY BELIEVE THAT A PRISON SENTENCE WAS COMPELLED BY *RATTOBALLI I*

Rattoballi argues (Br. 20-36) that the district court erroneously believed that it was required by this Court's decision in *Rattoballi I* to impose a jail sentence, that the district court gave too much weight to the Sentencing Guidelines, and that the record was sufficient to justify a lesser sentence such as the no jail sentence he sought in the district court. These arguments ignore the district court's reasoning, Rattoballi's failure to fulfill the conditions of his plea bargain agreement by

intentionally withholding relevant evidence from the government, and the record on remand. Since this Court's decision in *Rattoballi I* governed the proceedings on remand in the district court and Rattoballi argues that the district court misunderstood that decision, we begin with it.

A. *Rattoballi I*

In *Rattoballi I*, this Court both explained the role of the advisory Sentencing Guidelines, and its commentary, post *Booker* (*United States v. Booker*, 543 U.S. 220 (2005)), and explained why the sentence initially imposed by the district court – probation and a year of home confinement – was unreasonable. It did not, however, require the district court on remand to impose any particular sentence.

In *Rattoballi I* and other post-*Booker* decisions, this Court noted that the advisory Sentencing Guidelines play an important role in sentencing, and that they "'*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 [3553(a)] factors.'" 452 F.3d at 133, quoting *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2001) (*en banc*) (emphasis added); *accord, e.g., United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006); *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007), quoting *Rattoballi I*, 452 F.3d at 133. They "were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study;"

and they "represent the collective determination of three governmental bodies – Congress, the Judiciary, and the Sentencing Commission – as to the appropriate punishments for a wide range of criminal conduct." *Rattoballi I*, 452 F.3d at 133, quoting cases. Thus, in *Capanelli*, 479 F.3d at 165, this Court rejected a defense claim that the trial court had relied too heavily on the Guidelines to the exclusion of other § 3553(a) factors. It held that "[t]he recommended guideline range '*should* serve as a benchmark or a point of reference or departure for a sentencing court,'" quoting *United States v. Fernandez*, 443 F.3d 19, 28 (2d Cir. 2006), and *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005); *accord*, *Rattoballi I*, 452 F.3d at 133; *Ministro-Tapia*, 470 F.3d at 142.

This deference to the Sentencing Guidelines, moreover, is entirely consistent with *Booker*, which emphasized the important role that the Guidelines and the Sentencing Commission continue to play at sentencing: to foster "Congress' initial and basic sentencing intent . . . to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'" 543 U.S. at 264 (citation omitted).[10]

[10] Moreover, 18 U.S.C. § 3553(c), which was not affected by *Booker* (*see* 543 U.S. at 261), distinguishes between Guidelines and non-Guidelines sentences. Only sentences that fall outside of the Guidelines range are required to be

"[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly," and "[t]he district courts, while not bound to apply the Guidelines, *must* consult those Guidelines and take them into account when sentencing." *Id.* at 264 (emphasis added); *see also id.* at 263 ("The Sentencing Commission will . . . continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process").

This Court also observed that the commentary to a particular Sentencing Guideline can contain policy statements that district judges are required to consider at sentencing. *Rattoballi I*, 452 F.3d at 135-36. For example, the Antitrust Guideline, U.S.S.G. § 2R1.1, contains a policy statement expressing the Sentencing Commission's belief "that *alternatives such as community confinement [should] not be used to avoid imprisonment of antitrust offenders*." U.S.S.G. § 2R1.1, cmt. n.5 (emphasis added). But district judges generally are not required to

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supported by "specific," "written" reasons. § 3553(c)(2). If those reasons lack "substance" (*cf.* Deft. Br. 28), they will not withstand "reasonableness" review. *See also Rattoballi I*, 452 F.3d at 134 ("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)").

follow policy statements in every case and can impose a non-Guidelines sentence if the judge can provide a "persuasive explanation as to why the sentence actually comports with the § 3553(a) factors." *Rattoballi I*, 452 F.3d at 134. Thus, while "imprisonment is *generally* warranted for antitrust offenders," *id*. at 136 (emphasis added), a court can consider alternatives to imprisonment if such a sentence would be reasonable in light of all of the section 3553(a) factors and the judge provides a persuasive justification for the sentence.

Accordingly, post *Booker*, this Court requires the sentencing judge first to calculate a sentence based on the Sentencing Guidelines and policy statements of the Sentencing Commission. An error in that calculation or misapplication of the Guidelines may require reversal. *E.g.*, *Rattoballi I*, 452 F.3d at 131; *Fuller*, 426 F.3d at 562; *Capanelli*, 479 F.3d at 164-65; *United States v. Sindima*, 478 F.3d 467, 471 n.7 (2d Cir. 2007) ("For a sentence to be procedurally reasonable, the district court must have correctly . . . identified the guidelines range"). For the remaining §3553(a) factors, "no robotic incantations are required to prove the fact of consideration." *Fernandez*, 443 F.3d at 30 (citation omitted). There is no requirement that they be reviewed in a specific manner, or that the court explain how they weigh into the sentencing determination in every case. It is assumed that the trial court has properly considered the remaining § 3553(a) factors in the

absence of evidence to the contrary. *Id.*; *United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006).

Finally, as we have already noted (*see* pp. 5-6, *supra*), this Court carefully considered the reasons given by the district court for its initial sentence and concluded that "Rattoballi's sentence is unreasonable when assessed against the balance of the § 3553(a) factors." 452 F.3d at 137. The case was remanded for re-sentencing, but this Court did not direct the imposition of any particular sentence.

B. The District Court Exercised Its Discretion In Imposing A Below-Guidelines Sentence

The record on remand establishes that the district court did not believe that it was *compelled* by this Court's decision in *Rattoballi I* to impose a prison sentence. Rather, the district court understood that it had the discretion to impose whatever sentence it believed was appropriate and it concluded that a below the Sentencing Guidelines range sentence of 18 months was an appropriate sentence in this case after considering all of the 18 U.S.C. § 3553(a) factors. Its decision is fully supported by the record.

1. The district court's "statement of reasons" appended to the Judgment explicitly states that the court exercised its "own discretion" based on its consideration of the record when it imposed sentence in this case and was "not

simply blindly following some dictate of the Court of Appeals." A.31-32. While the court recognized that it could not repeat the mistakes this Court noted in *Rattoballi I* (A.31, A.51), it understood that this Court's decision left it free to impose a sentence that it believed was "fair." A.50-51. Consistent with its view that it was free to exercise its own discretion in imposing sentence on remand, the court told defense counsel that "if you feel that either the factors that I relied on or some new factors can be supported factually better than they were at the original sentence, well, you're free to argue that, and you're free to present additional facts." A.53. Moreover, the court indicated at one point that it was "seriously considering not imposing a prison sentence," saying "I want to give that very very thorough consideration." A.121. And it also indicated that it was willing to consider a short prison sentence to be served intermittently. A.159-160.

After carefully considering all the arguments and evidence presented by counsel in an attempt to persuade the court that it should not impose any jail sentence, the court decided to impose an 18-month jail sentence. The court imposed that sentence not because it believed it had to in light of *Rattoballi I*, but rather because the court believed that an 18-month sentence was reasonable in light of the relevant sentencing factors and the record. A.36-37. To be sure, the court was worried about the potential impact of such a sentence on PTG and heard

evidence on that point. But it also recognized that a no-jail sentence or even a short jail sentence would be well outside the Guidelines range and ultimately concluded that such a sentence could not be viewed as reasonable after considering all the relevant sentencing factors. Finally, as the court recognized, Rattoballi was largely responsible for the 18-month sentence imposed by the court. Rattoballi entered into a plea agreement with the government that might have resulted in the lesser sentence he now seeks if he had only told the truth and fully revealed all the relevant facts as required by that agreement. Thus, given the facts of this case, the below-Guidelines sentence of 18 months imposed by the court is reasonable and should be affirmed.

2. Rattoballi claims that the district court gave disproportionate weight to the Sentencing Guidelines. Deft. Br. 27-31. He argues that "[n]either Booker nor 18 U.S.C. § 3553(a) recognize the Guidelines range or any other 18 U.S.C. § 3553(a) factor as being a 'super-factor' or a first-among-statutory-equals and there is no requirement that there must be 'reasons of substance' for going below the Guidelines range." Deft. Br. 28.[11] In fact, how the district court applied the

[11] Rattoballi relies primarily on the dissenting opinions in *Booker*, the dissenting opinion in a First Circuit case, and decisions of various other courts that do not accurately reflect the law of this Circuit or the *Booker* majority to support his argument. *Compare* Deft. Br. 28 *with* pp. 15-19, *supra*.

Sentencing Guidelines is consistent with how this Court has held the Guidelines should be applied post-*Booker*. *See* pp. 15-19, *supra*.

In this case, the district court did exactly what both *Booker* and this Court have held it should do. It first calculated the relevant Sentencing Guidelines range and then considered other factors, as provided by 18 U.S.C. § 3553(a). It concluded that a sentence of 18 months was the appropriate sentence in this case. That the court carefully considered imposing an even lesser sentence and eventually imposed a below-Guidelines range sentence is further proof that it did not give the Guidelines undue weight.

2. Rattoballi also mistakenly claims that the district court erred in believing that "weightier reasons" were required to support a substantial departure from the Guidelines range. Deft. Br. 33-35. In *Rattoballi I*, this Court declined to follow other circuits that have held that "'the farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer.'" 452 F.3d at 134 (citation omitted). Rather, this Court emphasized that its "ability to uphold a sentence as reasonable will be informed by the district court's statement of reasons (or lack thereof) for the sentence." *Id.* "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." *Id.* (emphasis added). While "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[,] [i]n 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." *Id.* at 135 (emphasis added); *Sindima*, 478 F.3d at 472-74 (statement of reasons found inadequate to support sentence).

In this case, the reasons given by the district court support its decision to impose a below-Guidelines range sentence of 18 months. That the court was not persuaded by Rattoballi's arguments to impose an even less severe sentence is not evidence that the court placed too much of a burden on him.

C. The District Court's Below-Guidelines Sentence of 18 Months Reflects Due Consideration of the Factors On Which Rattoballi Relies

As Rattoballi recognizes, Deft. Br. 20, this Court found the original sentence unreasonable in *Rattoballi I* because the reasons given by the trial court for a sentence of probation were insufficient in light of the record and the 18 U.S.C. § 3553(a) factors. With respect to most of the arguments Rattoballi makes

in this Court, the record now is not meaningfully different from the record this Court reviewed in *Rattoballi I.* In any event, on remand, the district court considered the factors on which Rattoballi relies, *see pp.* 10-11, *supra*, and cited them in support of the below-Guidelines 18-month sentence the court imposed. The court did not abuse its discretion in failing to impose an even lower sentence based on those factors.

l. Rattoballi alleges an "exceptional and unique record of community service and charitable giving" as a basis for a lower sentence. Deft. Br. 21. But the record on this point is essentially the same as the one before the court in *Rattoballi I,* which did not find "any extraordinary circumstances particular to Rattoballi and not common to other similarly situated defendants." *Id.* at 452 F.3d at 136 n.4; *compare* JA-70-100 *with* Letter of October 16, 2006, from Steve Zissou to Judge Griesa on resentencing ("October 16 Letter"), at pp. 12-16 (attached as Addendum A to this brief).[12]

Rattoballi I held that the Guidelines and policy statements "'reflect the general inappropriateness of considering . . . family ties and responsibilities, and community ties of the defendant,'" 452 F.3d at 134, and that a "non-Guidelines

[12] Two letters that Rattoballi wrote to the district court concerning sentencing were not included in Rattoballi's Appendix, and are appended to this brief as Addenda A and B.

sentence that rests primarily upon factors that are not unique or personal to a particular defendant" is "inherently suspect." *Id.* at 133; *accord, United States v. Trupin*, 475 F.3d 71, 75-76 (2d Cir. 2007) (reversing eighty percent reduction from Guidelines sentence because undue weight given to defendant's age (69) and family ties (need to care for wife), considerations not unique to the defendant).

Rattoballi's position is hardly "exceptional and unique." Like many, perhaps most, white collar defendants, Rattoballi is committed to his family, friends, and employees. A.52; October 16 Letter (Addendum A), pp. 12-16. While he coached his sons' sports teams, attended their school plays, and went on scouting trips with them years ago (*see id.*; A.57; JA-73, 79, 99), his sons are long since grown. JA-73. *See* A.57 (court asks "but what he's done since then . . . ?"). And while Rattoballi and his partner set up a small trust fund to help with the education of a child of one of their employees who had died of cancer (A.81-82 (no time frame given)), that act, while commendable, does not establish that Rattoballi is an "exceptional and unique" defendant, particularly in a white collar crime case. *Cf*. Deft. Br. 21. As the district court recognized, "[t]here are many people who have very good lives, and they do a great deal of charitable activity; they're good to their families; and, yet, something goes wrong and they commit crimes. And nobody suggests that the commission of a crime means you're a

totally evil person. Not at all. But it means that there is a crime *that has to have a sanction*." A.56-57 (emphasis added). *See also United States v. Jones*, 2006 WL 3687530 (2d Cir. Dec. 12, 2006) (non-Guidelines sentence resting on factors that are not unique to a particular defendant is inherently suspect) (Summary Order) (attached). Thus, as in *Rattoballi I*, Rattoballi's good works and family ties do not warrant a lesser sentence.

2. Rattoballi also cites "post-offense rehabilitation of himself and his company" as grounds for "a sentence below the Sentencing Guidelines range." Deft. Br. 22. What Rattoballi seeks, however, is not a "below" Guidelines sentence (for that is what he was given, but still challenges), but a no jail sentence. He argues that, simply because he has complied with all of the conditions of a sentence of home detention that this Court held to be inadequate, and has ceased the criminal activities of which he stands convicted, he should not be required to pay any further penalty.

Rattoballi's claim that he is rehabilitated might be viewed with some skepticism since his guilty plea and plea bargain agreement did not deter him from lying to the government and withholding information about his crimes. In any event, the district court accepted Rattoballi's claim that he has been rehabilitated and is unlikely to commit another crime. A.33-34. This belief was one reason

why the district court imposed a sentence *below* the Guidelines range. *See* A.37 (referring to "positive factors" as justifying 18-month sentence). There certainly was no abuse of discretion in refusing to reduce the sentence even further. *See* A.153-55.

Moreover, whether or not Rattoballi has been rehabilitated misses the point that the "deterrence" factor of 3553(a) does not seek to deter only the criminal defendant himself from committing future crimes. Rather, a sentencing court must also consider whether a sentence will deter others from engaging in the same kind of criminal conduct. This sort of deterrence is particularly important in antitrust cases:

> Deterrence is the goal most pertinent to the antitrust guideline. Indeed, the background commentary says that "the controlling consideration underlying this guideline is general deterrence." ("*General" deterrence means deterrence of others besides the offender,* "specific" deterrence means deterring this offender from repeating his offense.) Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it.

United States v. Heffernan, 43 F.3d 1144, 1149 (7th Cir. 1994) (emphasis added); *See Rattoballi I,* 452 F.3d at 136 ("[j]ail terms were urged on the [Sentencing] Commission as the most effective deterrent by both the Antitrust Division of the

Department of Justice and the private bar because imprisonment, even in a minimum security prison, is a terrifying and degrading experience for otherwise law-abiding businessmen,'" and "'jail terms are ordinarily necessary for antitrust violations because they 'reflect the serious nature of and the difficulty of detecting such violations'") (citations omitted).

Under these circumstances, Rattoballi's claim that he was rehabilitated is entitled to no more weight than the district court gave it. [13]

3. Rattoballi claims he is entitled to a sentence of probation because the "devastating loss of jobs by Mr. Rattoballi's employees" is a "time-honored basis for downward departure." Deft. Br. 22. In fact, the district court gave Rattoballi the benefit of a below-Guidelines sentence, despite the fact that it recognized that Rattoballi could have protected his business by living up to his plea agreement and cooperating with the government's investigation. In any event, in *Rattoballi I* this Court stated that "we are disinclined to accord the prospect of business failure

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[13] Rattoballi relies on *United States v. Clay*, ___ F.3d ___, 2007 WL 968837 at *6-7 (11th Cir. April 3, 2007), Deft. Br. 22, wherein the Eleventh Circuit affirmed a sentence of 60 months, which was substantially below the Guidelines minimum of 188 months. The court held that "extraordinary circumstances" existed that justified the sentence noting, among other things, the defendant's "rehabilitation." Here, on the other hand, for the reasons discussed above, the record simply does not support Rattoballi's claim that he should receive a no-jail sentence.

decisive weight when it is a direct function of a criminal investigation that had its origins in the defendant's own unlawful conduct." 452 F.3d at 136. This record does not afford any basis to depart from that finding.

Rattoballi's principal argument against imprisonment was not that the business needed him to oversee it on a daily basis,[14] but that his clients would find out about his criminal conduct and the "ill repute" of that might cause the loss of clients. A.161, A.109-110 (admitting that his criminal conduct was deliberately kept secret from vendors and new clients). Rattoballi is not entitled to avoid prison just to keep his crimes a secret from his customers. In any event, many small businesses would be adversely, if not fatally, affected if the owner of the business is sent to jail. That sort of inevitable hardship does not demonstrate the kind of circumstance unique to Rattoballi that would warrant the no-jail, or limited-jail, sentence Rattoballi seeks. *See Rattoballi I*, 452 F.3d at 136 (strains on a defendant's business might be considered in "extraordinary cases"); *see also*

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[14] The court acknowledged that both Rattoballi's son and his partner bring in business, although Rattoballi is currently "by far, the principal business getter." A.34. However, by his own admission, Rattoballi "would otherwise be contemplating retirement" if he did not have to continue to work to pay off the fine, restitution order, and legal fees incurred by his prosecution and conviction. *See* Letter of December 3, 2006, from Steve Zissou to district court, Addendum B, p. 3. Rattoballi's retirement, of course, would mean closing the business or turning it over to his partner or son.

U.S.S.G. § 5K2.12 ("The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence").

While this Court affirmed a one-level downward departure in *United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995), because imprisoning that defendant would have had an extraordinary effect on the 150-200 people his business employed, this Court was also careful to say "business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate." Rattoballi has already received the benefit of a below-Guidelines sentence based in part on concerns about his business, and *Milikowsky* does not support Rattoballi's attempt to avoid any imprisonment. Indeed, if Rattoballi had wanted to protect his business and employees by avoiding a prison sentence, then he should not have lied and withheld information from the government in violation of his plea agreement.

Finally, Rattoballi and his partner have "made no efforts" to form a contingency plan for the company if Rattoballi is sent to prison. A.99-100, A.121 (partner does not want to "think about that"). This is further evidence that the partners' reasons for staying in business are unrelated to concerns that their employees may be put out of work. This is not the situation contemplated by this

Court in *Milikowsky*. *See also* n.14, *supra* (Rattoballi would otherwise be contemplating retirement at this time anyway).

4. Rattoballi argues that his sentence should be compared to the sentences imposed on his "co-defendants" and that such a comparison supports a no-jail sentence. Deft. Br. 24. However, in *Rattoballi I*, this Court held that "[a]lthough a defendant's culpability is always relevant in imposing sentence, we fail to see how Rattoballi's lesser culpability could justify the sentence that was imposed in this case, and no sufficient justification was offered by the district court. Rattoballi engaged in criminal conduct for more than a decade, to the profit of both himself and his business." 452 F.3d at 137. Other co-defendants who had greater involvement in the conspiracy and derived greater benefits from it were punished much more severely. *See Rattoballi I* at 137, A.167. The one co-defendant who, like Rattoballi, owned a small business and had comparable culpability, but who profited less from the conspiracy, received a within-Guidelines 15-month sentence. A.166-67. The only defendant who received a sentence of probation in lieu of imprisonment was an 82-year-old man whose heroin-addicted son required the defendant's personal attention and support. A.180-81. Rattoballi does not rely on any similar extraordinary circumstances that might justify a no jail sentence. *See also United States v. Rahman*, 189 F.3d 88, 159 (2d Cir.1999) (per curiam) (a

defendant is not entitled to a reduced sentence simply because he played a lesser role than his co-conspirators).

III. THE DISTRICT COURT DID NOT CONCLUDE THAT THE SENTENCE IT IMPOSED WAS "GREATER THAN NECESSARY" TO SATISFY THE REQUIREMENTS OF SECTION 3553(a)

Rattoballi claims – without any citation to the record – that the district court "believe[d]" and "stated" that a sentence of imprisonment was not necessary in this case. Deft. Br. 1, 3, 26, 37. The record in fact does not support this claim.

The district court plainly said that it had considered, *but rejected*, the possibility of a lesser sentence (A.187-88). Thus, contrary to defendant's assertion, the court never concluded that a lesser sentence would have equally served the purposes of § 3553(a). *Cf.* Deft. Br. 39 and cases cited. Moreover, the court was well aware of the "parsimony" clause on which Rattoballi relies because counsel had relied on it in arguing for a lesser sentence in the district court. A.156-58. Rather than suggesting that a sentence less than 18 months would be sufficient under 18 U.S.C. § 3553(a), however, the court held that the 18-month sentence conformed *both* to what this Court said in *Rattoballi I* and to what the court believed was proper. A.31-32, pp. 10-11, *supra*. *See also Ministro-Tapia*, 470 F.3d at 142 ("For us to hold that a sentence at the bottom of the Guidelines range is invalid under the parsimony clause, we will require a showing

considerably clearer than that presented here of the district court's belief that, after taking into account the Guidelines and the 'considered judgment' that they represent, *Rattoballi*, 452 F.3d at 133, a lower sentence would be equally effective in advancing the purposes set forth in § 3553(a)(2)."); *Pereira*, 465 F.3d at 523 (failure to "discuss explicitly the sentencing factors, or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account").

Indeed, a lesser sentence would have violated the parsimony rule, as well as other § 3553(a) factors: it would not have been "sufficient" to promote the policies of punishment, deterrence, and avoidance of unwarranted disparities among similar white collar antitrust violators; and it would have failed adequately to consider the Sentencing Guidelines and policy statements concerning the need for imposing jail terms on antitrust offenders. 18 U.S.C. §§ 3553(a), (a)(2)(A), (a)(2)(B); *see Booker*, 543 U.S. at 259-60; *see also Jones*, 2006 WL 3687530 at *1-2 (remanding for failure properly to consider critical policy statement).

The district court's below-Guidelines sentence is not unreasonably high.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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