No. 05-1562-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,

Plaintiff-Appellant

v.

JAMES A. RATTOBALLI,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES

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PRELIMINARY STATEMENT

The United States appeals from that part of the final judgment, entered by U.S. District Judge Thomas P. Griesa, imposing sentence on defendant James Rattoballi. There is no written or reported district court decision.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The judgment of the district court was entered on February 18, 2005. The United States filed a notice of appeal on March 17, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b).

ISSUE PRESENTED

Whether a sentence imposing neither a jail term nor a fine for offenses that carry an advisory guidelines sentence of 27 to 33 months' imprisonment and a $20,000 to $350,000 fine is unreasonable.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On October 23, 2002, the government filed a two-count Information against James Rattoballi charging him with conspiring to rig bids in violation of the Sherman Act, 15 U.S.C. § 1, and conspiring to commit mail fraud in violation of

18 U.S.C. § 371. A-7.[1] The offenses involved the payment of kickbacks and the submission of rigged bids in connection with printing services supplied to Grey Global Group, Inc. (Grey).

Rattoballi pled guilty to both counts, and was sentenced on February 10, 2005. A-129. The district court calculated an offense level of 18 under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") (2000 edition), A-175, which, for criminal history category I, carries a sentence of 27 to 33 months' imprisonment and a $20,000 to $350,000 fine. The court, however, imposed no fine and no imprisonment. It sentenced Rattoballi to five years' probation, including one year of home confinement, and it ordered Rattoballi to pay $155,000 in restitution. A-183.

B. STATEMENT OF FACTS

1. The Offenses

James Rattoballi was President and a co-owner of Print Technical Group, Inc. ("PTG"), a printing company in Manhattan, New York. A-7. PTG supplied printing services to Grey from the early 1990's to 2001, earning approximately $1 million in revenues annually from Grey. A-53. Rattoballi was also a

[1] "A-#" references are to page numbers in the Joint Appendix filed with this Brief.

commissioned sales representative for two other graphic services businesses that sold products and services to Grey. A-7; A-28.

Grey is one of the largest advertising agencies in the world, providing advertising, marketing, public relations, and media services to its clients. A-7-8. Through its graphics services department, Grey contracts with third-parties to provide graphic services in connection with the advertising and marketing campaigns Grey develops for its clients. A-9-10. During the period at issue in this case, Mitchell Mosallem was an executive vice president and director of graphic services at Grey. He was responsible for selecting and supervising printing and graphics suppliers. He also reviewed and authorized their bills for payment. A-10, 14. Grey's clients reimbursed Grey for the out-of-pocket costs of those services. Brown & Williamson Tobacco Co. (B&W) was a Grey client from 1994 to 2001. Pursuant to B&W's contract with Grey, Grey was required to obtain competitive bids on contracts over $25,000 for goods or services purchased on B&W's behalf. A-10, 11.

Count One of the Information charged that, from approximately late 1994 until approximately 2001, Rattoballi and others conspired to rig bids and allocate contracts for the supply of printing and graphics services to Grey on behalf of B&W. A-12-13; A-28. Rattoballi agreed to submit "cover" bids for the supply of

those services to Grey's clients, knowing that the companies he represented on those bids would not be awarded the jobs. He did this to help create the appearance of true competition for the jobs, and to ensure that his companies would be awarded business for other Grey clients. A-13; A-28-29.

Count Two of the Information charged that, from approximately 1990 to 2001, Rattoballi conspired to defraud Grey and its clients by providing fraudulent invoices to Grey. A-15-16. The invoices contained inflated quantities and prices to allow Rattoballi to recoup the cost of goods and services that he provided for the personal benefit of senior employees and executives of Grey, including substantial kickbacks to Mosallem. Several such invoices were sent through the United States mail. A-15-18; A-29-30.

2. The Plea Agreement

Rattoballi entered into a Fed. R. Crim. P. 11(e)(1)(B) plea agreement which required him "to provide full, complete, and truthful cooperation" to the government by, *inter alia*, meeting with government attorneys and agents and "disclos[ing] fully, completely, and truthfully all information concerning any matters about which he may be asked." A-19-20. He also agreed to appear as a witness, if necessary, in any case brought by the government in connection with the charges. A-20. In exchange, the government agreed not to prosecute

Rattoballi further for any crimes arising out of the same conduct, or to prosecute his company. A-20-21. The government also agreed that, if it "determine[d] that Rattoballi has provided substantial assistance in any investigations or prosecutions, and has otherwise fully complied with all of the terms of this Agreement," the government would file a motion for the court to consider a downward departure pursuant to U.S.S.G. § 5K1.1. A-23-24.[2]

Over the next two years, Rattoballi was interviewed on five occasions, from March 21, 2002 to March 24, 2004, and was asked about payments he made to Mosallem and other purchasing agents with whom he dealt. Rattoballi admitted that he had given Mosallem clothing from an expensive Manhattan clothing store, personal use of a car service, airline tickets for family vacations, tickets to various sporting events, and expensive lunches and dinners for Mosallem and his family. All these items were either expenses for which the government already had documentation or that could be documented through corporate records PTG had produced in response to a grand jury subpoena *duces tecum*. Rattoballi persistently denied ever giving Mosallem cash, or anything else of significant value. A-106; A-113; A-115, 117. And, although he was specifically questioned

[2] Rattoballi was aware of the maximum sentences for bid rigging and fraud, A-22-23, and he understood that the sentence ultimately rested with the discretion of the sentencing judge. A-23.

about it, Rattoballi denied giving cash to a purchasing agent at another advertising agency ("CC-1") that was a PTG customer. A-108-09; A-112; A-115.

In the course of preparing Rattoballi to testify at the trial of Mosallem, the government became concerned that Rattoballi was not providing "full, complete, and truthful cooperation" to the government, as required by the plea agreement. A-19. His testimony was inconsistent with that of other witnesses who admitted paying cash to Mosallem and CC-1. In addition, his testimony was inconsistent with other witnesses and documents describing the generation of fraudulent invoices used to conceal a diamond and platinum watch that was given to Mosallem. The government believed B&W (through Grey) was overcharged by $96,000 for that watch. Rattoballi also had originally failed to inform the government about the true nature of $69,000 in checks paid out to CC-1. *See* A-36-39. Rattoballi initially had claimed that the checks were for legitimate consulting services provided by CC-1, rather than kickbacks. Because the government believed Rattoballi was not being truthful, it decided not to call him as a witness at the Mosallem trial.

Shortly before Rattoballi's originally-scheduled sentencing hearing, the government confronted him with new documentary evidence concerning the diamond-and-platinum watch. On April 1, 2004, Rattoballi finally admitted that

he had indeed concealed information in an attempt to mislead the government. A-118, 127. He said that, despite his repeated earlier denials, he had in fact regularly given Mosallem substantial cash payments over several years. Rattoballi admitted for the first time that these payments were intended to add up to five percent of the total contracts awarded by Mosallem to Rattoballi's companies. *See* A-52. Rattoballi also for the first time admitted that he had provided half of the money for the diamond-and-platinum watch given to Mosallem, which had been purchased wholesale for $55,000 (A-136), but which had a list price of $87,000. Rattoballi also revealed that he had agreed with Mosallem that they would not disclose the watch or the cash payments to investigators, because they believed the government would be unable to trace those payments. A-123. In addition, Rattoballi then admitted for the first time that he had given substantial kickbacks to CC-1 as well. These kickbacks included the $69,000 in checks that he originally had said were for consulting fees, and substantial cash payments as well. A-160-62; A-122.

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, would oppose a downward adjustment for acceptance of responsibility,

and would recommend a two-level upward adjustment for obstruction of justice.

3. The Sentence

The Probation Office and the government concurred in the calculation of an offense level of 21 under the sentencing guidelines. PSR 12-13.[3] With a criminal history category I, this produced a guidelines sentence of 37 to 46 months' imprisonment.[4]

Rattoballi conceded that he had not been truthful with the government when he failed to disclose the watch and other kickbacks to Mosallem, and the kickbacks to CC-1, but claimed these omissions were not material. He, therefore, asked for a reduction in the offense level for "acceptance of responsibility," and no increase for "obstruction." A-58-64; A-151-52. He asked that he not be sent to jail on the grounds that he is a 62-year old grandfather who has shown a

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[3] The Presentence Investigation Report is submitted under separate cover.

[4] The PSR and government guidelines offense level was based on a fraud loss of $796,000. Although Rattoballi initially argued for an offense level of 10 based on a fraud loss of $20,000-$30,000 for the years 1998-2001 alone (A-64-65), he admitted at sentencing that "[g]oing to 1991 [the full period of the conspiracy] maybe it comes to $100,000 or thereabouts." A-138-39. He failed to include kickbacks he admittedly paid for uncharged relevant conduct (the kickbacks to CC-1), however, and also claimed that the total amount of the kickbacks to Mosallem should not be included in the fraud loss. He argued that only those kickbacks that were directly overbilled should be included in the fraud, and not the kickbacks that came out of the 20-30 percent profits he earned on the jobs he was awarded by Mosallem. A-139-40; *see also* A-144.

commitment to his family, employees and the community. A-152-53. Rattoballi claimed a net worth of $1 to $1.5 million, said that "he has accumulated some modest wealth," and admitted he "is capable of paying a modest fine." A-66. He also acknowledged an obligation to pay restitution in the amount he overbilled Grey. *Id.* Although he initially claimed this amounted to "approximately 25-30 thousand dollars," based only on the years 1998 to 2001, he conceded at sentencing that it was as much as $100,000-$150,000. A-67; A-140.

Although Rattoballi had never claimed in either his sentencing memorandum or in his argument to the court at sentencing that his business would be placed in jeopardy by his serving a prison sentence, the court asked defense counsel about the state of Rattoballi's business at the hearing. Counsel replied that the "company is still going but it's teetering." A-154. According to counsel, the company had seven employees; it had lost several accounts in the wake of the criminal charges, but it still had one major client, and other small accounts. A-155-56. Rattoballi and his partner were "taking a modest salary," and were trying to keep the company going. A-154-57.

The district court first calculated an offense level based on the sentencing guidelines.[5] Starting with the PSR and government's calculation of level 21, the

[5] The 2000 edition of the sentencing guidelines was used.

court agreed that a two-level increase for obstruction (U.S.S.G. § 3C1.1) was appropriate because Rattoballi initially lied to the government and withheld other important information. A-167.

The court reduced the PSR calculation two levels, however, 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. A-168. The court also disagreed with the PSR calculation of the fraud loss, placing it at $396,000 rather than $796,000.[6] This resulted in one additional offense level reduction, to level 18 (*see* U.S.S.G. § 2F1.1(b)(1)), with a guidelines sentence of 27 to 33 months' imprisonment. A-174-75.

The court then sentenced Rattoballi to five years' probation, including one year of home confinement, notwithstanding the court's statement that "I have considered the guidelines very, very seriously," (A-180), its recognition that the charges "are substantial crimes and require appropriate penalties," and its own calculation of a guidelines sentence carrying a minimum of 27 months in prison. A-180, 183. The court imposed no fine, but ordered $155,000 in restitution. A-183, 187.

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[6] The PSR's loss calculation included uncharged relevant conduct (PSR 7-10), *see* U.S.S.G. § 1B1.3, which Rattoballi admitted (A-160-62), but which the court nevertheless failed to include. A-170-75.

At the sentencing hearing, the court gave several reasons for the sentence it imposed. First, the court said, "[d]espite the difficulty and the delay in coming clean . . . [the] defendant has [now] . . . admitted the full range of his criminal conduct. He did not persist in denying, he did not force the government to go to trial, and that has always been regarded by courts as a very substantial matter." A-181. "Moreover," the court reasoned, "if nothing else were done to Mr. Rattoballi, this case has inflicted punishment. It has been hanging over him for a period of three years. Now, there were reasons for that, and part of it was the idea that he might cooperate and testify. But be that as it may, the case has been hanging over him for three years . . . [H]e has been convicted of two federal crimes. That is not without meaning as far as punishment." A-181.

The court also concluded that Rattoballi's "business has been, although not completely destroyed, . . . severely harmed;" that "society and those closer to [defendant] would be legitimately benefited by having [him] continue in his small business;" that "[h]e employs people, he has a partner, and I have no doubt that a prison sentence would absolutely end that business." A-181-82.

In addition, the court reasoned that Mosallem had "exerted an enormous amount of pressure upon other people and got them in trouble." A-182. Although defendant "should have resisted," and "there is certainly no excuse for the crimes

he committed," Mosallem is "part of the picture." *Id.* (noting that there were kickbacks paid to others and Mosallem was "not the entire excuse"). Based on these factors, and the fact that the statute does not forbid probation, the court imposed five years' probation, including a year of home confinement. This would permit Rattoballi to engage in employment and "do his best to keep his business going." A-183.

Finally, the court reasoned that, "if there is any chance of Mr. Rattoballi paying a substantial amount in restitution, it rests on him continuing to earn money. If he does not earn money, obviously – maybe he can sell a home or something, but mainly it will assist greatly in the restitution picture if [sic] continues to earn money." A-183. The court did not discuss the possibility of requiring Rattoballi to pay a fine at the sentencing hearing, or suggest any reason for not imposing one.

The court did not provide written reasons, either in the Judgment of Conviction or elsewhere, for the sentence it imposed. The Judgment of Conviction merely provides that "[t]he court deems the Guidelines to be advisory," and that the fine is waived "because of inability to pay." A-192.

SUMMARY OF ARGUMENT

Under *United States v. Booker*, 125 S. Ct. 738 (2005), and this Court's post *Booker* decisions, the district court is required to "consult [the Sentencing] Guidelines and take them into account when sentencing." *Booker*, 125 S. Ct. at 767. The court is also required to "impose a sentence sufficient" to "provide just punishment," "afford adequate deterrence to criminal conduct," and "promote respect for the law." 18 U.S.C. §§ 3553(a), (a)(2)(A), (a)(2)(B); *Booker*, 125 S. Ct. at 765; *United States v. Crosby*, 397 F.3d 103, 111-12 (2d Cir. 2005) (courts must "consider" the guidelines along with the other 18 U.S.C. § 3553(a) factors). Finally, the district court is required to set forth its reasons for a given sentence in writing when that sentence departs from the guidelines range. 18 U.S.C. § 3553(c)(2).

The sentence in this case does not adhere to any of these requirements. First, the court failed to provide any written statement of reasons for the imposition of a sentence that so dramatically departed from the guidelines range. Second, the reasons the court provided orally at the sentencing hearing are insufficient as a matter of law to justify the failure to impose any prison term or fine. Even assuming that Rattoballi has suffered because of the government's investigation of his crimes and his ultimate conviction, Rattoballi's circumstances

do not distinguish him from any other criminal defendant and do not justify a refusal to impose any further meaningful punishment. And even though Rattoballi admitted his crimes, did not force the government to go to trial, and may have been less culpable than other individuals involved in the offenses, these facts cannot justify a sentence of probation. These factors are taken into consideration under the sentencing guidelines when calculating an appropriate offense level (*e.g.*, adjustments for acceptance of responsibility and amount of fraud). Accordingly, it is improper double-counting for the court to then rely on the very same factors to justify a downward departure from the guidelines range. The court also erred in refusing to impose a prison term on Rattoballi simply because his business had suffered as a result of his criminal conduct. Indeed, Rattoballi had never asked to be spared a prison term on the ground that his presence in the business was needed to keep the business float. It was his criminal conduct, not the prospect of a prison term, that had already caused Rattoballi's business to lose major clients and be placed in financial jeopardy. Rattoballi never attempted to show that there was no one else – either Rattoballi's business partner, or Rattoballi's son, who worked in the business, or someone else who could be hired – to perform Rattoballi's responsibilities while he served a prison sentence. Because the court has failed to justify, even minimally, a sentence that departs by

at least eight levels from the guidelines level, the sentence of probation is unreasonable.

With respect to the fine, the court's finding of "inability to pay" is refuted by both defendant's own admission that he is capable of paying a fine, and the court's own conclusion that Rattoballi has sufficient assets to pay $155,000 in restitution. Thus, the finding of "inability to pay" is clearly erroneous and also results in an unreasonable sentence.

Finally, the district court did not – and could not – suggest that the sentence imposed, apart from the order of restitution, gives appropriate consideration to the factors in 18 U.S.C. § 3553(a), which the courts are required to consider in sentencing. The court's dramatic departure from an advisory Zone D sentence of 27 to 33 months' imprisonment to a probationary sentence in Zone A fails to ensure that Rattoballi receives a sentence similar to those imposed on other fraud offenders with similar backgrounds, *see* 18 U.S.C. § 3553(a)(4); fails to avoid "unwarranted sentence disparities," *see* 18 U.S.C. § 3553(a)(6); and is not "sufficient . . . to comply with the purposes of [section 3553(a)(2)]" to deter crime and promote respect for the law. 18 U.S.C. § 3553(a)(2)(A),(B). To the contrary, a probationary sentence, particularly in the face of the court's acknowledgment that Rattoballi breached his cooperation agreement with the government, sends a

message to others that they may violate the law and ignore cooperation agreements with minimal consequences.

In reviewing a sentence, this Court must set aside any sentence that deviates "to an unreasonable degree" from the relevant guidelines range, 18 U.S.C. § 3742(f)(2), or is otherwise "unreasonable[]" because it does not appropriately balance the sentencing factors listed in section 3553(a). *Booker*, 125 S. Ct. at 765-67. For both these reasons, the sentence in this case should be vacated.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a sentence for "unreasonableness" – a standard that has been applied in "the past two decades of appellate practice in cases involving departures" from the sentencing guidelines. *Booker*, 125 S. Ct. at 765, 767 (2005); *Crosby*, 397 F.3d at 110. In determining "reasonableness," the courts have examined the "amount and extent of the departure," and the district court's "stated reasons," to decide whether those reasons are "sufficient to justify the magnitude of the departure." *Williams v. United States*, 503 U.S. 193, 203-04 (1992); *United States v. Reis*, 369 F.3d 143, 152 (2d Cir. 2004).

"This Court reviews the district court's interpretation of the Sentencing Guidelines *de novo* . . . and reviews the district court's findings of fact for clear

error." *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005) (citations omitted).

II. THE SENTENCE IS UNREASONABLE

A. The Sentence Ignores the *Booker/Crosby* Framework

In *Booker*, 125 S. Ct. 738, 764 (2005), the Supreme Court invalidated, as violative of the Sixth Amendment, two provisions of the Sentencing Reform Act (SRA), 18 U.S.C. §§ 3553(b)(1) and 3742(e), that had the effect of making the United States Sentencing Guidelines mandatory in sentencing determinations. These excisions now mean that the Sentencing Guidelines are "effectively advisory," "requiring a sentencing court to consider Guidelines ranges . . . but permitting [the court] to tailor the sentence in light of other statutory concerns [as well under] § 3553(a) [Supp. 2004]." *Booker*, 125 S. Ct. at 743, 757.[7]

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[7] 18 U.S.C. § 3553(a) provides in pertinent part:

> The court, in determining the particular sentence to be imposed, shall consider --
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> * * * *

As *Booker* makes clear, the guidelines "remain[] in effect." 125 S. Ct. at 766; *see* § 3553(a)(4),(5). The district court must "consult [the] Guidelines and take them into account when sentencing." *Id.* at 767. Indeed, *Booker* "*requires* judges to take account of the Guidelines together with other sentencing goals" listed in § 3553(a) of the SRA. *Id.* at 764 (emphasis added). For, as *Booker* explained, the reason for deleting the mandatory provisions of the SRA, but otherwise retaining the § 3553(a) factors to guide a sentencing determination, is to "maintain[] a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." 125 S. Ct. at 757.[8]

> (4) the kinds of sentence and the sentencing range established for --
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
>
> * * * *
>
> (5) any pertinent policy statement [issued by the Sentencing Commission]
>
> . . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

[8] *Accord United States v. Mashek*, 406 F.3d 1012, 1015 (8th Cir. 2005) ("Guiding the Supreme Court's [*Booker*] decision was, among other things, the

Thus, "a district court [] sentenc[ing] [] today, [is] bound to consider the Guidelines range . . . and all other factors in Section 3553." *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005).

Booker also emphasized that the sentencing guidelines and the other factors in § 3553(a) will play a part in the *review* of sentencing decisions. Sentences will now be reviewed for "unreasonableness." *Booker*, 125 S. Ct. at 765, 767. All of the § 3553(a) factors that remain in effect and are to guide the courts in sentencing "in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Id.* at 766; *see also, United States v. Mathijssen*, 406 F.3d 496, 498 (8th Cir. 2005) ("federal courts of appeal should review federal sentences 'for "unreasonableness" 'in light of the factors set out in section 3553(a)") (citation omitted).

Thus, the "reasonableness" standard of review in *Booker* is governed by the factors set out in § 3553(a) of the Sentencing Reform Act. And under this standard of review, the guidelines are not "a body of casual advice, to be consulted

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desire to retain Congress's basic statutory goal of creating 'a [sentencing] system that diminishes sentencing disparity,'" quoting *Booker*); *United States v. Townsend*, No. 04-3110, 2005 WL 1083467, at *2 (8th Cir. May 10, 2005) ("Congress has the constitutional authority for establishing and implementing sentencing goals. The guidelines reflect the will of Congress and a Congressional desire for uniform and fair sentencing . . . . Thus, our court must give the will of Congress, as represented in the Guidelines, due deference").

or overlooked at the whim of a sentencing judge." *Crosby*, 397 F.3d at 113; *accord United States v. Godding*, 405 F.3d 125, 126 (2d Cir. 2005). Accordingly, "it would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum . . . . the Supreme Court expects sentencing judges *faithfully* to discharge their statutory obligation to 'consider' the Guidelines and all of the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 113-14 (emphasis added); *accord Godding*, 405 F.3d at 126; *United States v. Milstein*, 401 F.3d 53, 73 (2d Cir. 2005) (per curiam) ("court is . . . *required to* consider the relevant guidelines provisions in determining a reasonable sentence") (emphasis added); *United States v. Sharpley*, 399 F.3d at 127 ("district court [is] . . . *bound to* consider the Guidelines range . . . and all other factors in Section 3553") (emphasis added).[9]

B. The Court Erred in Failing to Provide a Written Statement of Reasons for Imposing a Sentence Below the Guidelines Range

Among the provisions of the SRA that remain in full force and effect after *Booker* is section 3553(c)(1), which requires the court to "state in open court the

[9] Thus, although this Court has not yet "endeavor[ed] to determine what degree of consideration is required . . . [instead] permit[ting] the concept of 'consideration' . . . to evolve," it expects that "district judges will *faithfully* perform their statutory duties." *Crosby*, 397 F.3d at 113, 114 (emphasis added).

reasons for its imposition of the particular sentence," and, if the court imposes a sentence outside the sentencing guidelines range, the court must state "*the specific reason for the imposition of a sentence different from [the guidelines range]*" and state the reasons again "*with specificity in the written order of judgment and commitment.*" § 3553(c), (c)(2) (emphasis added). *See Crosby*, 397 F.3d at 116. Thus, "[w]hen a district court exercises its discretion to depart or vary from the appropriate guidelines range, it must continue to provide the reasons for its imposition of the particular sentence." *United States v. Mashek*, 406 F.3d 1012, 1016 n.4 (8th Cir. 2005) (citing 18 U.S.C. § 3553(c)(2)); *United States v. Webb*, 403 F.3d 373, 385 n.8 (6th Cir. 2005) ("Post-*Booker* we continue to expect district judges to provide a reasoned explanation for their sentencing decisions in order to facilitate appellate review" (citing § 3553(c)).

This Court instructed in *Crosby* that "[d]istrict judges will, of course, appreciate that whatever they say or write in explaining their reasons for electing to impose a Guidelines sentence or for deciding to impose a non-Guidelines sentence will significantly aid this Court in performing its duty to review the sentence for reasonableness." *Crosby*, 397 F.3d at 116; *see also United States v. Leung*, 360 F.3d 62, 73 (2d Cir. 2004) (whether district court departed to an "unreasonable degree" from Guidelines range, depends on the "'amount and extent

of the departure in light of the grounds for departing' and 'examine[s] the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence'") (citations omitted).

In this case, the district court did not "state in open court" its reasons for refusing to impose a fine (§ 3553(c)), and it ignored the requirement of § 3553(c)(2) to state in writing with specificity its reasons for imposing a sentence below the guidelines range. The Judgment of Conviction states merely that "[t]he court deems the Guidelines to be advisory and imposes sentence notwithstanding it's [sic] determinations." A-192. While this may explain why the court believed it could ignore the guidelines, it does not explain why the court chose the particular sentence it did, or how a sentence of probation comports with any of the section 3553(a) factors. It thus falls far short of what this Court has said the courts must do to justify a sentence as "reasonable." *See also Godding*, 405 F.3d at 126 (agreeing to government's request for a limited remand "to give the district court the opportunity to re-evaluate the sentence with appropriate attention to the provisions of 18 U.S.C. § 3553(a), and to state in open court, and in writing, the reasons why a sentence outside the calculated Guidelines range adheres to those

provisions").[10]

Without a written explanation, this Court cannot conclude that the sentence is reasonable.

C. The Court's Failure to Impose Any Prison Term Was Unreasonable

Even apart from the district court's failure to provide written reasons for its sentence, none of the district court's oral pronouncements provide a sufficient basis to conclude that the sentence of probation, with a year of home confinement, is "reasonable."

"The appropriate guidelines range, though now calculated under an advisory system, remains the critical starting point for the imposition of a sentence under § 3553(a)." *Mashek*, 406 F.3d at 1016 n.4. The sentence of probation in this case departs by at least eight levels from the guideline offense level that the court itself initially calculated.[11] The court's action does not fulfill the *Booker* requirement

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[10] *Compare United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005), and cases cited therein, where "[t]he District Court's explanation was sufficient to facilitate appellate review," and a "sentence imposed was reasonable in light of judge's explanation."

[11] The court calculated an offense level of 18. Because the applicable guideline range is in Zone D of the Sentencing Table, the guidelines require a sentence of imprisonment for at least the minimum term in the sentencing range. U.S.S.G. §§5B1.1 & cmt. n. 2, 5C1.1(f) & cmt. n.8. Under the guidelines, only an offense level of 10 or less would justify imposition of probation and home confinement in lieu of prison. U.S.S.G. § 5B1.1(a); *see* U.S.S.G. ch. 5, pt. A,

that the courts, not only "consult" the guidelines, but also "take them into account when sentencing." *Booker*, 125 S. Ct. at 767; *accord Milstein*, 401 F.3d at 73 (court is "*required to consider* the relevant guidelines provisions in determining a reasonable sentence"); *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005) ("the Guidelines sentence will be a *benchmark or a point of reference or departure*") (emphasis added).

The district court made no serious effort to explain how it got from a guidelines sentence of at least 27 months in prison to no prison at all, after conceding that Rattoballi had committed "substantial crimes [that] require appropriate penalties." A-180-81. The only factors that the court cited for its abandonment of the guidelines are insufficient to justify *any* reduction in sentence. *See United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) ("[a] discretionary sentencing ruling . . . may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that

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sentencing table (sentence range of 6-12 months). Hence, the court departed at least 8 levels from the advisory guideline range.

lies outside the limited range of choice dictated by the facts of the case").[12]

The district court cited the following factors in the course of imposing sentence: (l) Rattoballi ultimately admitted his guilt and did not force a trial (A-181); (2) the case has already "inflicted punishment" because it "has been hanging over him for a period of three years," it has hurt his business, and "he has been convicted of two federal crimes [which] is not without meaning as far as punishment" (*id.*); (3) a prison sentence would "end" Rattoballi's business, and those close to Rattoballi, as well as "society" as a whole, would benefit by his "attempt to continue in his small business" (A-182); (4) although Rattoballi might have resisted, Mosallem "exerted an enormous amount of pressure upon other people and got them in trouble;" (*id.*) and, (5), Rattoballi would be better able to pay restitution if he did not go to jail (A-183). None of these findings, alone or in combination, justify the sentence imposed.

First, some of the factors relied on by the district court to *avoid* the guidelines sentence had already been *taken into consideration* when the guidelines sentence was first calculated. Thus, the sentence was the result of improper

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[12] *See also Mashek*, 406 F.3d at 1017 (the "reasonableness" standard of review includes an "examination . . . whether the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance or guidelines departure is reasonable").

double-counting of these factors. The fact that Rattoballi "did not force the government to go to trial" (which, the court believed, "has always been regarded by courts as a very substantial matter"), A-181, had already been taken into account when the court calculated a guidelines offense level and gave Rattoballi a two-level reduction for "acceptance of responsibility" under U.S.S.G. § 3E1.1.[13] *See also United States v. El-Gheur*, 201 F.3d 90, 94 (2d Cir. 2000) (after defendant breached his cooperation agreement by lying to the government, government properly refused to move for U.S.S.G. § 5K1.1 departure, and it was error for the district court to grant U.S.S.G. § 5K2.0 downward departure based on defendant's purported assistance to the government).

The guidelines also provide enhancements or reductions based on the degree of a defendant's culpability. In contrast to Mosallem, Rattoballi did not receive an enhancement as a "leader" or "organizer" of the criminal activity (*see* U.S.S.G. § 3B1.1). And Rattoballi's offense level under the fraud guideline was based on the amount of loss attributable to his conduct, thus giving him a more lenient sentence than Mosallem. *See* U.S.S.G. § 2F1.1. So when the court calculated the guidelines offense level, it took into account the loss resulting from

[13] In our view, the two-level reduction for acceptance of responsibility was contrary to the guidelines commentary. *See* U.S.S.G. § 3E1.1, cmt. nn. 3-4.

the fraud and other factors that the court deemed relevant in tailoring Rattoballi's sentence to reflect his degree of culpability. By then relying on the very same factors to reduce the sentence below the guidelines level, the court essentially, and improperly, gave multiple weight to these factors.

Apart from this erroneous double-counting, the court relied on other factors that plainly do not justify a sentence of probation: the belief that Rattoballi had been punished enough because the investigation had been hanging over him for three years; the fact that he had been convicted of two federal crimes; and the fact that his business had suffered as a result of his conduct. The first two factors, of course, do not distinguish Rattoballi from any other criminal defendant, or indeed from innocent parties, who must endure a government investigation of their conduct; or from other criminal offenders who may ultimately be charged and found guilty. Rattoballi brought upon himself the suffering that concerned the district court by committing the crimes that were the subject of the investigation and his conviction, and which were also the cause of his business losses. Moreover, as the court recognized, it was Rattoballi himself who obstructed the investigation by his "delay in coming clean with the whole range of criminal conduct." A-181. Had Rattoballi been more forthcoming with the government in his interviews, the investigation might not have "been hanging over him for three

years." Had he fully cooperated, the investigation might have ended, and the investigative cloud lifted, sooner. Indeed, had he fully cooperated, the government itself would have moved the court for a downward departure based on Rattoballi's substantial assistance. More importantly, the court erred in finding as a justification for the sentence that "he has been convicted of two federal crimes. That is not without meaning as far as punishment." A-182. The suggestion that a conviction – indeed, a two-count conviction – is, of itself, sufficient punishment ignores both the guidelines and 18 U.S.C. § 3553(a).

The district court's conclusion that "I have no doubt that a prison sentence would absolutely end [Rattoballi's] business," A-182, is also inappropriate and inadequate to justify the 8-level downward reduction from the guidelines level (*see supra* n.11) in this case. In fact, neither Rattoballi nor his business partner, Robert Katz, claimed that the survival of their business hinged on whether or not Rattoballi was sent to jail for a limited term. Speaking in his own behalf, Rattoballi said only that, "[a]s a company, *we* are trying to survive. *We* have one or two accounts left that *we* are trying to nurture and grow." A-177 (emphasis added). Robert Katz wrote in a letter to the court that he and Rattoballi had worked in the business together for 25 years and that "I would not be in business, nor would I stay in business, if Jim were not there next to me. We need each other

to run The Print Technical Group, Inc." A-76. None of these statements supports a finding that Rattoballi has unique skills essential to his business and that the business would be destroyed if he had to serve even the briefest of prison sentences. Katz gave no details of the work Rattoballi did, and did not suggest that others (either Katz, or Rattoballi's son who was also employed in the business, or a manager or salesman hired by the business) could not perform Rattoballi's duties in his absence.[14] *Cf. United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995) ("ownership of a vulnerable small business, does not make downward departure appropriate").[15]

Moreover, even if PTG were to fail while Rattoballi went to prison, the failure would be due to factors other than Rattoballi's having to serve a prison term. Rattoballi conceded that "[t]he technology part of this business has indeed hurt us. Computers etc. have certainly hurt us." A-177. More importantly, it was Rattoballi's own criminal conduct that had already resulted in the loss of PTG's

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[14] Defense counsel told the court that Rattoballi was the "contact" or "sales person. Mr. Katz is the inside person." A-155.

[15] In *Milikowsky*, the Court approved a downward departure because the record was replete with detailed, unrefuted, evidence that Milikowsky was "indispensab[le]" to his two businesses on a daily basis, and that, in the absence of his personal involvement, both companies would fail, and more than 200 employees would lose their jobs. 65 F.3d at 8-9.

largest clients, like Grey, and caused his business to suffer long before the district court imposed sentence. Rattoballi's counsel stated that "[t]hey have lost a tremendous amount of business *because of this whole investigation*, and they really don't have the kind of clients that they used to have," and only seven employees remain. A-155-56 (emphasis added). Indeed, the court itself recognized that it was *the investigation and criminal convictions* that had put Rattoballi's business in jeopardy – not the prospect of a prison term. A-181-82 (Rattoballi's business "*has been,* although not completely destroyed . . . *severely harmed*") (emphasis added). To exempt Rattoballi from punishment to try to save a business that was largely built on corrupt relationships in the first place, and then nearly destroyed simply because that corruption came to light, would not be consistent with the goals of 18 U.S.C. § 3553(a).

The court's decision to depart from the guidelines based on the court's perceived need to save Rattoballi's business from failing also violated Fed. R. Crim. P. 32(h). Rule 32(h) requires the sentencing court to give the government reasonable notice that the court is contemplating a departure from the sentencing guidelines on a ground not identified for departure either in the presentence report or in the defendant's prehearing submission. Although the court seized on the purported failure of Rattoballi's business as a basis for refusing to impose even the

minimum guidelines sentence – when neither the PSR nor the defendant's own sentencing memorandum had suggested such a basis for departure – the government was never given notice or an opportunity to respond or present evidence on this issue.

The final factor on which the court relied to justify the sentence of probation – Rattoballi's supposed need to earn money – is similarly unsupportable. The court reasoned that "if there is any chance of Mr. Rattoballi paying a substantial amount in restitution, it rests on him continuing to earn money. If he does not earn money, obviously – maybe he can sell a home or something, but mainly it will assist greatly in the restitution picture if [sic] continues to earn money." A-183. As a factual matter, Rattoballi admitted his net worth to be between $l and $1.5 million, including a retirement account, the family home, and a vacation home. A-66. The court acknowledged that Rattoballi could sell some of this property, but did not explain why it was ignoring those assets to keep Rattoballi from serving even a single day in prison. Moreover, if PTG brought in business while Rattoballi was away, he presumably would share in any profits as part owner. The court also ignored Rattoballi's earning potential after his release from prison. Courts routinely provide for jail terms, along with restitution, for criminal defendants in far greater financial straits than Rattoballi. Indeed, defendants are

often ordered to pay restitution and fines out of money earned while in prison. *See, e.g.*, *Montano-Figueroa v. Crabtree*, 162 F.3d 548, 549 (9th Cir. 1998) (prison wages may be used to pay court-ordered fines and restitution orders); *United States v. Sanchez-Estrada*, 62 F.3d 981, 989 (7th Cir. 1995); 28 C.F.R. 545.10 (Inmate Financial Responsibility Program (IFRP)). No reason has been offered for treating Rattoballi differently.

Moreover, it was plainly error for the court to suggest that restitution could be a substitute for a prison sentence. 18 U.S.C. § 3663A(a)(1) provides that the court "*shall* order, *in addition to, or in the case of a misdemeanor, in addition to or in lieu of,* any other penalty authorized by law, that the defendant make restitution to the victim of the offense" (emphasis added).[16] Rattoballi was convicted of a felony; thus restitution must be "in addition to," and cannot be "in lieu of" other penalties prescribed by law. Accordingly, a court cannot refuse to imprison a defendant simply to ensure payment of restitution. *United States v. Rivera*, 994 F.2d 942, 955-56 (1st Cir. 1993) (Breyer, J.) (downward departure to sentence of probation for embezzler in order to permit payment of restitution was

[16] The mandatory restitution provisions of 18 U.S.C. 3663A apply to "an offense against property under this title . . . including any offense committed by fraud or deceit." § 3663A(c)(1)(A)(ii); *United States v. Lucien*, 347 F.3d 45, 53 (2d Cir. 2003).

not "reasonable," *id.* at 947); *cf. United States v. Blackburn*, 105 F. Supp. 2d 1067, 1068 (D. S.D. 2000) ("[t]he 'simple facts that restitution is desirable and that a prison term will make it harder to achieve' are 'ordinary restitution circumstances' . . . and usually do not warrant a downward departure," (quoting *Rivera*, 994 F.2d at 955, 956). As Judge Breyer explained in *Rivera*, "[i]t would seem obvious . . . that the embezzlement guidelines are written for ordinary cases of embezzlement, that restitution is called for in many such cases, and that prison terms often make restitution somewhat more difficult to achieve." 994 F.2d at 955. Yet, "'a rule permitting greater leniency in sentencing in those cases in which restitution is at issue *and* is a meaningful possibility (i.e., generally white collar crimes) would . . . nurture the unfortunate practice of disparate sentencing based on socio-economic status, which the guidelines were intended to supplant.'" *Id.* (quoting *United States v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991)). Thus, the First Circuit joined other circuits "in holding that *ordinary* restitution circumstances of this sort do not . . . warrant a downward departure." *Rivera*, 994 F.2d at 956, citing cases.[17] A

[17] Fines and imprisonment serve different purposes from restitution, and both purposes are important in the sentencing scheme. While a fine and a prison term are penal and serve the purposes of deterrence and punishment that benefit society as a whole, restitution is primarily compensatory and aims to make the victims of a crime whole. Thus, for instance, while fines and imprisonment abate on a felon's death pending appeal, restitution may not. *See generally United States v. Parsons*, 367 F.3d 409, 413-15 (5th Cir. 2004) (*en banc*); *United States v.*

refusal to impose any prison sentence in order make the restitution obligation surer, or easier for the defendant, is therefore error.

D. A Sentence That Differs Substantially From the Advisory Guidelines Range Without a Reasoned Explanation is Unreasonable

The district court imposed a term of probation on a defendant whose offenses under the guidelines merited a sentence of 27 to 33 months' imprisonment. In *Booker*, the Supreme Court likened the new "reasonableness" standard of review to that historically employed in other sentencing contexts. *Booker*, 125 S. Ct. at 765; *see also Crosby*, 397 F.3d at 115-17. Thus, for example, under the former mandatory sentencing guidelines regime, a district court decision to depart from the guideline range was reviewed for "reasonableness." 18 U.S.C. § 3742(e), (e)(3)(C) ("court of appeals shall determine whether the sentence . . . departs to an unreasonable degree from the applicable guidelines range . . . "). In that context, courts were instructed to consider "the amount and extent of the departure in light of the grounds for departing," and "to examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the

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Christopher, 273 F.3d 294, 297-99 (3d Cir. 2001); *United States v. Dudley*, 739 F.2d 175, 176-78 (4th Cir. 1984).

imposition of the particular sentence." *Williams*, 503 U.S. at 203-204. "The determinative question [was] whether the 'reasons given by the district court . . . [were] sufficient to justify the magnitude of the departure.'" *United States v. Reis*, 369 F.3d 143, 152 (2d Cir. 2004) (quoting *Williams*); *accord Leung*, 360 F.3d at 73; *United States v. Barressi*, 316 F.3d 69, 72 (2d Cir. 2002); *see also United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (finding downward departure unreasonable under *Booker* because "[a]n extraordinary reduction must be supported by extraordinary circumstances").[18]

As discussed above, the reasons given by the district court at sentencing do not justify a sentence of probation, which deviates from the advisory guidelines by at least eight levels. In *Godding*, 405 F.3d at 125, the district court in a pre-*Booker* decision had granted the defendant a downward departure of seven levels to impose a sentence of one day's imprisonment and five years' supervised release. This Court remanded the case in light of *Booker* "to give the district court the opportunity to re-evaluate the sentence with appropriate attention to the

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[18] *See also United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998) (the "district court's . . . 'broad discretion in tailoring conditions of supervised release to meet the specific circumstances of a given case' [is not] 'untrammelled"); *Crosby*, 397 F.3d at 116 ("The parallel between advisory policy statements" – which governed revocation of supervised release and were reviewed under a "plainly unreasonable" standard – "and non-binding, and therefore advisory, Guidelines seems clear").

provisions of 18 U.S.C. § 3553(a), and to state in open court, and in writing, the reasons why a sentence outside the calculated Guidelines range adheres to those provisions." *Id.* at 126. In remanding the case, moreover, the Court expressed two concerns with the district court's sentence: the "brevity of the sentence," and the mention of an improper factor weighing in the defendant's favor. Those concerns are present in this case as well.

In *Godding*, the sentencing court had mentioned – although it purported not to rely on – the fact that the bank had failed to maintain sufficient controls to detect defendant's substantial embezzlement and suggested "that the significance of the pilferage could be attributed to the bank's failure to act sooner." 405 F.3d at 126. This Court said that "consideration of such a factor and the conclusion that it, and not the defendant's volitional acts, rendered the sum embezzled in this case more significant than it otherwise would have been, would lead us to question the reasonableness of a non-guidelines sentence." *Id.* at 126-27. Similarly, in this case, the district court stated that Mosallem "exerted an enormous amount of pressure upon other people and got them into trouble," A-182, suggesting that this excused Rattoballi's fraud or minimized it. The court went on to say that this was "certainly no excuse for the crimes [Rattoballi] committed," but did suggest that Mosallem was "an important part of the picture." A-182. Indeed, the court

suggested that Mosallem was only "part of the picture," not because Rattoballi himself was equally "part of the picture," but because there were kickbacks paid to a second advertising agent and, apparently it was that other agent, not Rattoballi, who was the other "part of the picture." *Id.* As in *Godding*, the district court's suggestion that other actors were responsible for Rattoballi's conduct, "and not the defendant's volitional acts," call into "question the reasonableness of [the] non-guidelines sentence." *Godding*, 405 F.3d at 127.

Of even greater significance, in *Godding* this Court was "more broadly concerned that the brevity of the term of imprisonment imposed . . . [did] not reflect the magnitude of the theft of nearly $366,000 over a five-year period." *Id.* Here, Rattoballi's term of imprisonment is not merely brief – it is non-existent. And the magnitude of his fraud – $396,000 by the district court's own calculation, and $796,000 according to the PSR (*see supra* nn.4, 6), over 11 years – is not reflected in a probationary sentence. The court's decision to impose probation instead of even minimal jail time is unwarranted and unreasonable.

E. The Court's Finding of Inability to Pay a Fine is Clearly Erroneous and the Failure to Impose Any Fine is Unreasonable

The Judgment of Conviction states that no fine was imposed because of defendant's "inability to pay." A-192. That finding is clearly erroneous, and the

failure to impose a fine is thus unreasonable.

"The burden of establishing inability to pay rests on the defendant." *United States v. Salameh*, 261 F.3d 271, 276 (2d Cir. 2001). But Rattoballi himself conceded that he was *able* to pay a fine, and did not ask the court to forego imposition of a fine. He admitted he had a net worth of over $1 million, that "he has accumulated some modest wealth and that he is capable of paying a modest fine." A-66.[19] This admission of an ability to pay a fine, moreover, was apart from, and in addition to, his understanding that he would be required to pay restitution. A-66-67; *see also Salameh*, 261 F.3d at 276 ("the court may consider both defendant's present financial resources and those that may become available in the future"). A finding of "inability to pay" on this record is clearly erroneous.

Indeed, the court's finding of inability to pay is unexplained. The court did not discuss imposing a fine as part of the sentence at the sentencing hearing. It made no findings, articulated no reasons, and made no reference to its ultimate decision to depart from a guidelines range of "$20,000 to 1,142,586" (*see*

[19] Rattoballi listed his "primary assets," held jointly with his wife, as "a retirement account worth approximately $700,000.00; the family home in West Hempstead, New York; and a vacation home in upstate, New York." A-66.

Judgment of Conviction[20]) to no fine at all. And if, as the court recognized, Rattoballi is able to pay $155,000 in restitution, he should be able to pay at least a "modest fine," as he conceded. A-66; *see United States v. Ahmad*, 2 F.3d 245, 248 (7th Cir. 1993) ("express finding of present and future inability to pay is inconsistent with the implied finding that Ahmad can make restitution").[21]

For all these reasons, the court's failure to impose a fine based on inability to pay is unexplained, unsupportable, and unreasonable.

F. The Court Ignored Other Important § 3553(a) Factors

In the wake of *Booker*, sentencing courts have the "obligation[] to consider [the] relevant factors [] required by 18 U.S.C. §3553(a)." *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005); *Crosby*, 397 F.3d at 111-112. First,

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[20] In *United States v. Chusid*, 372 F.3d 113, 117 (2d Cir. 2004), this Court held that the alternative fine provisions of 18 U.S.C. § 3571(d), providing for a fine of twice the pecuniary loss or gain (on which the $1.1 million was based in this case), cannot be used if the resulting fine would be greater than the statutory maximum – unless the court states reasons for an upward departure. In this case the statutory maximum is $350,000. *See* 15 U.S.C. § 1.

[21] The order of restitution cannot substitute for a fine. *Ahmad*, 2 F.3d at 248 ("Priority for victims does not excuse a fine" and "[r]estitution is not a reason to waive the fine or depart downward, although the court may consider restitution when selecting a fine within the range"); *United States v. Malpeso*, 943 F. Supp. 254, 260 (E.D. N.Y. 1996) ("a court must impose a fine in all cases, except where the defendant establishes that a fine cannot be paid presently or in the future"), *aff'd*, 126 F.3d 92 (2d Cir. 1997).

18 U.S.C. § 3553, "*requires* judges to consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' § 3553(a)(4)," along with "the pertinent Sentencing Commission policy statements," *Booker*, 125 S. Ct. at 764 (emphasis added). But § 3553 also requires the court to consider "the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004)," *Booker*, 125 S. Ct. at 764-65, and it "*requires* judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, [and] afford adequate deterrence." *Id.* at 765 (citing § 3553(a)(2) (main ed. and Supp. 2004)) (emphasis added). Thus, the court must consider the sentencing guidelines, but it is also "permit[ted] . . . to tailor the sentence *in light of other [§ 3553(a)] concerns as well.*" *Id.* at 756. *See also United States v. Christenson*, 403 F.3d 1006, 1008 (8th Cir. 2005) ("The standard guiding unreasonableness is 18 U.S.C. § 3553(a)"); *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) ("a sentence is unreasonable [under *Booker*] when the district judge fails to 'consider' the applicable Guidelines range or neglects to 'consider' the other factors listed in 18 U.S.C. § 3553(a)").

Here, in deciding not to follow the advisory guidelines sentence, the district

court did not "tailor the sentence" "in light of" section 3553. Indeed, most of the § 3553(a) factors are both unaddressed by the court, and directly contravened by the sentence the court imposed. First, by departing so dramatically from the guidelines sentence range, the district court's sentence does not "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6). *See Booker*, 125 S. Ct. at (reliance on the sentencing guidelines is generally an important means of avoiding those unwarranted disparities). Second, the sentence does not mete out just punishment, provide adequate deterrence, or promote respect for the law. § 3553(a)(2). A sentence of probation does not promote respect for the law because it sends a message to defendants like Rattoballi who purport to cooperate fully with a government investigation, but then, through obstruction, stymie it, that they can still reap the benefits of "cooperation." The sentence does not mete out just punishment because a year of home confinement, without any jail term, is inadequate punishment for a decade of fraud and bid-rigging. Moreover, Rattoballi's lies and failure to fully disclose his illegal activities had an adverse effect on several other government investigations. His failure to disclose kickbacks to CC-1 severely hampered the government's ability to further investigate, and perhaps prosecute, CC-1. Rattoballi's failure to disclose the full

extent of his kickbacks to Mosallem prevented the government from charging Mosallem with the full amount of his fraud. And Rattoballi's failure to disclose, when initially questioned, his agreement with Mosallem to conceal from the government the watch and cash payments to Mosallem also prevented the government from charging Mosallem with obstruction.[22] Thus, Rattoballi's sentence is inadequate to punish him for obstructing these other investigations as well.

Finally, the sentence undermines the critical purpose of the criminal laws to deter unlawful conduct. "Business crimes are particularly suitable to deterrence. The certainty of a jail term appropriate to [] cheaters like the [defendant] deters others who might otherwise be tempted to cheat." *See United States v. Kloda*, 133 F. Supp. 2d 345, 347 (S.D. N.Y. 2001). The same applies to Rattoballi, not only because of his criminal conduct, but because he agreed to cooperate with the government's investigation, but then lied and withheld information that stalled the investigation. Failure to impose appropriate punishment in this case encourages others to ignore obligations of cooperation agreements with impunity.

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[22] Finally, because the government realized that Rattoballi was not being fully truthful, it did not call him as a witness at another trial, as it had originally planned. This may have contributed to the acquittal of one of the defendants in that trial.

CONCLUSION

The sentence should be vacated and the case remanded to the district court for re-sentencing that fully complies with this Court's post-*Booker* precedent.

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CERTIFICATE OF COMPLIANCE

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_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2005, I served two copies of the accompanying Brief for United States, and one copy of the Joint Appendix, by overnight express mail on:

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