

SECOND CIRCUIT REVIEW

Expert Analysis

Substantive Reasonableness Review Finally Getting Teeth in the Second Circuit

The main doctrinal source of the modern federal sentencing regime is *United States v. Booker*, 543 U.S. 220 (2005). The U.S. Supreme Court in *Booker* famously ruled that the U.S. Sentencing Guidelines, which had been binding, must be advisory to be constitutional. A lesser-known feature of *Booker* is its provision for a check on the discretion of sentencing courts: appellate review of sentences for unreasonableness. Justice Antonin Scalia, writing in dissent, wondered whether this review would be “a mere formality,” and, for many years after *Booker*, that appeared largely to be the case in the U.S. Court of Appeals for the Second Circuit. But there have been recent changes: the court has vacated all or part of a sentence as substantively



By
Martin
Flumenbaum



And
Brad S.
Karp

unreasonable three times in the last six months, and five times in the last 18 months, suggesting that substantive reasonableness review in the Second Circuit is finally getting teeth.

Early Post-'Booker' Years

Appellate review of federal sentences post-*Booker*, as the Supreme Court clarified in *Gall v. United States*, 552 U.S. 38, 51 (2007), proceeds in two parts: procedural reasonableness—that is, whether the district court properly calculated the guidelines range, considered the statutory factors, and adequately explained the sentence; and substantive reasonableness, which considers the severity of the sentence taking into account the

totality of the circumstances under an abuse-of-discretion standard.

In the years following *Booker*, the Second Circuit rarely found a sentence substantively unreasonable, and only did so on the government's motion when the sentence was light. In *United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006), the court vacated a one-year sentence of home confinement for bid-rigging and mail fraud as procedurally and substantively unreasonable (the guidelines range was

The court has vacated all or part of a sentence as substantively unreasonable three times in the last six months, and five times in the last 18 months, suggesting that substantive reasonableness review in the Second Circuit is finally getting teeth.

27 to 33 months of incarceration) and remanded the case for resentencing. In *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008), the

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, focusing on complex commercial and white-collar defense litigation. ROBERT M. POLLACK, a litigation associate at the firm, assisted in the preparation of this column.

court similarly vacated as procedurally and substantively unreasonable one defendant's year-and-a-day sentence (the guidelines range was 78 to 97 months) and his co-defendant's probationary sentence (the guidelines range was 108 to 135 months of incarceration) for various frauds, tax evasion, and false statements. Both cases focused on the procedural infirmities, and Judge Rosemary Pooler in *Cutler* concurred in the holding but opined that the issue of substantive reasonableness should not have been reached.

Contemporaneously with *Cutler*, another panel vacated an above-guidelines sentence as substantively unreasonable, but was reversed by the en banc court, which vacated the panel opinion and affirmed the sentence. *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc). The en banc court held that the "substantive determination" of the sentencing court should be set aside "only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions," and announced that "to the extent that our prior cases may be read to imply a more searching form of substantive review, we today depart from that understanding." A subsequent panel, recognizing the circularity of the within-the-range-of-permissible-decisions standard, interpreted *Cavera* to mean that substantive reasonableness review

permits setting aside a sentence only when it represents a "manifest injustice" or "shocks the conscience," see *United States v. Rigas*, 583 F.3d 108, 122 (2d Cir. 2009). In the years that followed, the court seldom found that any sentences satisfied that stringent standard.

Shifting Attitudes

There was, however, an influential exception. For perhaps the first time (at least in the advisory-guidelines era) the Second Circuit vacated a sentence as unreasonably severe—a statutory-maximum 240-month sentence for distribution of child pornography was vacated in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010). The court, in an opinion written by Judge Barrington Parker and joined by Judge José Cabranes and District Judge Stefan Underhill, of the U.S. District Court for the District of Connecticut, sitting by designation, faulted the sentencing court's "apparent assumption" about the defendant's likely future conduct as "unsupported by the record evidence" and "in the face of expert record evidence to the contrary." As well as its uncritical reliance on an "eccentric" provision of the guidelines, which the appellate court criticized at length. While the court also found procedural errors that rendered substantive review unnecessary to reach the outcome of vacatur and remand,

the opinion nevertheless dwelled primarily on the question of substantive reasonableness and concluded that "it would be manifestly unjust to let the sentence stand."

For some time, *Dorvee* stood alone as the high-water mark of the Second Circuit's substantive reasonableness review, despite signs of dissatisfaction among certain judges. In *United States v. Broxmeyer*, 699 F.3d 265 (2d Cir. 2012), a divided panel affirmed a 30-year sentence for child pornography and Judge Dennis Jacobs, in dissent, identified no procedural error but found this sentence substantively unreasonable for what he termed "attempted sexting." He dissented again from the denial of en banc review, this time joined by Judge Pooler, and more plainly criticized the moribund state of substantive reasonableness review: "The majority opinion limits our substantive reasonableness doctrine so as to all but foreclose useful review of sentences that, while technically within the Guidelines' range, are nonetheless grossly disproportionate to the harm attributable to the offense of conviction," see *United States v. Broxmeyer*, 708 F.3d 132, 140 (2d Cir. 2013) (Jacobs, J., dissenting from denial of rehearing *en banc*).

The Recent Trend

The *Broxmeyer* dissent was accurate as a description of substantive reasonableness review

at the time, but as a prediction, it held for only a few years: in the past eighteen months, the Second Circuit has found a sentence (or some part of a sentence) substantively unreasonable five times in four cases. The first two of these cases, relying heavily on *Dorvee*, involved sentences for child pornography: First, in a nonprecedential summary order, the court found no procedural error but vacated as substantively unreasonable a 30-year sentence in *United States v. Sawyer*, 672 F. App'x 63 (summary order, Dec. 2, 2016); five months later, the court again found no procedural error and (this time over a dissent) vacated as substantively unreasonable a 225-month sentence in *United States v. Jenkins*, 854 F.3d 181 (2d Cir. 2017). *Sawyer* returned to the Second Circuit after the district judge resentenced the defendant to 25 years rather than 30. In an opinion issued this week, on June 19, the circuit court again vacated the sentence as substantively unreasonable and directed the clerk of the district court to reassign the case to a new judge for resentencing on remand, see *United States v. Sawyer*, 15-2276-cr (2d Cir. June 19, 2018)

Last December, this newly invigorated substantive reasonableness review branched out into a new area of the criminal law in *United States v. Singh*, 877 F.3d 107 (2d Cir. 2017), where the

district court had sentenced the defendant to 60 months of imprisonment—almost triple the top of the guidelines range—for illegally reentering the United States after having been removed. In a decision written by Judge Denny Chin, joined by Judges Amalya Kearse and Peter Hall, the court emphasized the magnitude of the upward variance and the consequent need for a more significant justification, the weakness of the district

It may still be early (although more than a decade after *Booker*) to predict whether these recent cases presage a shift in the Second Circuit's sentencing jurisprudence.

court's conclusion that the sentence was justified by a likelihood of recidivism, as well as Sentencing Commission statistics showing that the sentence exceeded national norms. The court discussed "areas of concern with respect to procedural reasonableness," and identified procedural errors that should be addressed on remand, but in any case vacated the sentence as substantively unreasonable.

And then last month, the Second Circuit again found a sentence unreasonable, but this time only in part. In *United States v. Brooks*, 889 F.3d 95 (2d Cir. 2018) (*per curiam*), the defendant failed a drug test while on a three-year

term of supervised release. He pleaded guilty to the violation and was sentenced to one year in prison followed by a life term of supervised release. On appeal, the Second Circuit, in a *per curiam* opinion decided by Judges Parker, Lynch and Chin, reasoned that "a lifetime of supervised release is an extreme and unusual remedy," and held that the "significant justification" necessary to support it was lacking, and vacated that part of the sentence.

It may still be early (although more than a decade after *Booker*) to predict whether these recent cases presage a shift in the Second Circuit's sentencing jurisprudence, but as more circuit judges show their willingness to evaluate the substantive reasonableness of sentences, district judges are on notice that reasonableness review—contra Justice Scalia's concern in his *Booker* dissent—may no longer be a "mere formality" in the Second Circuit.