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TO THE POINT

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How Important is My Guideline?

David Zapp and Johanna Zapp

Guidelines are like politics. Depends on where you are. In "Red" (Republican-Conservative) federal districts, guidelines will apply more frequently. In "Blue" (Democratic-Liberal) districts, "below-guideline" sentences will be the order of the day.

Let's take New York City and Miami/Tampa. New York City is blue, blue, blue. Trump didn't even bother to campaign there and he is a New Yorker. He received 7 per cent of the vote. Hillary got 93 percent. Miami if not red is reddish, and Tampa is as red as they come. Thus guidelines are routinely followed there. And prosecutors there and in Miami have the run of the place. Tampa is so eager to get drug dealers that they literally fish them out of the water thousands of miles away from its district. They have made catching lowly crewmembers a cottage industry. I guess there is not enough traditional industry down there.

Even when Miami and Tampa depart from the Guidelines they still use the guidelines as their point of departure. In Brooklyn (Eastern District of New York) and Manhattan (Southern District of New York) judges are free to impose any sentence they want to except, of course, for the mandatory minimum sentences imposed by law. A first time offender in New York with no major role has an excellent chance of being given a below-guideline sentence or no jail time at all. In Miami, prosecutors "recommend" sentences and they most often get what they want even when defendants cooperate.

So when you ask whether guidelines will be followed the correct answer is "depends where you are." And if you are cooperating your guideline means nothing at all in New York.

Prosecutors Nix Deal with Star Witness in Federal Drug Trial

Associated Press, November, 15, 2016.

"NEW YORK —With Manhattan federal court jurors watching, an Assistant U.S. Attorney confronted a government informant after a defense attorney played the audio of recorded prison phone calls that the lawyer said proved that the informant in recent weeks engaged in drug trafficking from prison and lied about communicating with his son.

"The defense lawyer presented the evidence to the surprise of prosecutors who had grown increasingly disappointed with the informant and his son, another informant, after discovering last spring they were engaging in drug trafficking for years while earning up to $2 million working for the Drug Enforcement Administration and others to help capture suspected drug dealers.

"Both recently pleaded guilty to drug trafficking charges in the hopes of reducing potential prison sentences by cooperating with U.S. authorities.

"The Manhattan prosecutor, furious that a star witness compromised himself by lying, lash[ed] into him in front of the jury:

The prosecutor:

"Sir, you were told repeatedly that if you lied, your cooperation agreement would be ripped up?" the prosecutor said to the informant.

"Yes sir," The informant responded.

"And you now understand that your cooperation agreement is getting ripped up, correct?" the prosecutor asked.

"No sir," The informant said.

"You understand that you are not getting a 5K letter, correct?" referring to the letter that the government writes to a sentencing judge to request leniency in return for substantial cooperation.

"No sir," The informant said.

"You should," the prosecutor snapped.

"The revelation gave the defense reason for hope by unearthing the jailhouse conversations and confronting the informant."

Commentary:

So what do you make of it?

David Zapp: Nothing. It doesn't surprise me.

Why? Didn't you think that the revelation was explosive and would compromise the case?

David Zapp: No.

Why?

David Zapp: Because the government is risk averse so it always has back up evidence especially when an informant is involved. No prosecutor would ever base his case on an informant. That is why cooperating defendants seeking to get their friends to surrender and cooperate mislead them by saying that because so and so is talking about you, you are going to be indicted. No prosecutor will ever indict anyone based solely on the word of one informant no matter how much the prosecutor believes the informant is telling the truth. An informant has a motive to lie, and a jury knows that. So there had to be other and better evidence to support their case, testimony from the agents, tape-recorded conversations, post arrest statements, and overtures by defendants who typically try to curry favor with the agents and make damning admissions. And since defendants typically don't take the stand or present other evidence, the defense generally comes down to "liar liar pants on fire," and you're not going anywhere with that defense.

So why did the defendants go to trial then?

David Zapp: Because they probably had to. A defendant has only three choices: go to trial, plead guilty, or plead guilty with cooperation. Cooperating was out of the question because it would be too explosive given who these defendants are (relatives to the president of Venezuela's wife), and pleading guilty without more would expose them to enormous amounts of time in prison, although in retrospect it might not have been a bad idea. From what I know it seemed pretty clear that these folks were not major players and the judge who is known to be fair would have taken that into consideration. But the defendants would have had to declare themselves guilty and they may not have wanted to do that even though going to trial exposed them to great risks both as to conviction and sentence. So I guess it seemed to these defendants the lesser of *three* evils.

Well do you think the defense lawyers told them all that.

David Zapp: Oh sure. These defense lawyers are well-respected lawyers from well-respected law firms, former prose-

cutors in that office, in fact, and probably prosecuted defendants just like their clients when they were in office, and that office nurtures integrity. So I have no doubt they acted honorably and ethically.

So you're saying nothing surprised you?

David Zapp: Well I was surprised that the prosecutors were caught off guard.

Why?

David Zapp: Because I would have expected them to have obtained the telephone recordings themselves and have reviewed them. They are certainly going to do that now! I can assure you! And secondly the Bureau of Prisons ("BOP") could have and should have let the prosecutors know that the defense attorneys had requested them. They are on the same team, and as soon as the prosecutors would have gotten wind of the demand for the tapes, they would have asked for their own copies. It was a nice bit of showmanship on the part of the defense attorneys, but they knew they were far from victory.

The whole thing is a shame, really. In an ordinary case like this where there would be little risk of cooperating, these young defendants with no previous records would have cooperated and have been given "time served." They were never the real targets.

And for all the storm and stress it was an open and shut case: two inexperienced defendants meeting with undercover seasoned agents who were probably taping every word they said and manipulating the conversation to get the most incriminating remarks on tape along with seasoned prosecutors prosecuting the case. A garden-variety drug case for the Southern District of New York. If you expected high drama (except for the double-dealing informant), and a long drawn out affair you would be disappointed. It took a week to try the case, if that, and they were convicted. Really, no surprises.

Well thank you, Mr. Zapp

David Zapp: My pleasure.

The "Second Opinion"

NYTimes, Front Page, July 31, 2016

"Steve Cara expected to sail through the routine medical tests required to increase his life insurance in October 2014. But the results were devastating. He had lung cancer. Doctors told him it was inoperable.

His oncologist recommended an experimental treatment: immunotherapy. Uncertain, Mr. Cara sought a second opinion. A doctor at another major hospital read his scans and pathology report, and then asked what his doctor had advised. When the doctor heard the answer, Mr. Cara recalled, "he closed up the folder, handed it back to me and said, 'Run back there as fast as you can.'"

Commentary: Just once I'd like to hear a criminal defense lawyer telling a defendant the same thing. If we want to be treated as professionals, let's act like professionals.

David Zapp and Johanna Zapp

Trial is a Bad Word

By Johanna Zapp

This is part of an article that appeared in the New York Times recently. It talks about the decline of jury trials in our courts. I was recently on National Public Radio talking about this exact issue. I was commenting on how defendants are terrified at the notion of going to trial. An educated defendant has heard the stories of what happens when some people go to trial. Instead of the 4, 5, or 6, year deals they could have received, they end up with 25, 30, 35 year sentences. It's a sad reality.

Trial by Jury, a Hallowed American Right, Is Vanishing

By Benjamin Weiser NYTimes Aug, 2016

The criminal trial ended more than two and a half years ago, but Judge Jesse M. Furman can still vividly recall the case. It stands out, not because of the defendant or the subject matter, but because of its rarity: In his four-plus years on the bench in Federal District Court in Manhattan, it was his only criminal jury trial.

He is far from alone.

Judge J. Paul Oetken, in half a decade on that bench, has had four criminal trials, including one that was repeated after a jury deadlocked. For Judge Lewis A. Kaplan, who has handled some of the nation's most important terrorism cases, it has been 18 months since his last criminal jury trial.

"It's a loss," Judge Kaplan said, "because when one thinks of the American system of justice, one thinks of justice being administered by juries of our peers. And to the extent that there's a decline in criminal jury trials, that is happening less frequently."

The national decline in trials, both criminal and civil, has been noted in law journal articles, bar association studies and judicial opinions. But recently, in the two federal courthouses in Manhattan and a third in White Plains (known collectively as the Southern District of New York), the vanishing of criminal jury trials has never seemed so pronounced.

The Southern District held only 50 criminal jury trials last year, the lowest since 2004, according to data provided by the court. The pace remains slow this year.

"It's hugely disappointing," said Judge Jed S. Rakoff, a 20-year veteran of the Manhattan federal bench. "A trial is the one place where the system really gets tested. Everything else is done behind closed doors."

Legal experts attribute the decline primarily to the advent of the congressional sentencing guidelines and the increased use of mandatory minimum sentences, which transferred power to prosecutors, and discouraged defendants from going to trial, where, if convicted, they might face harsher sentences.

Julia L. Gatto, a federal public defender, recalled the case of Oumar Issa, a Malian arrested in Africa in a 2009 sting operation on charges of narco-terrorism conspiracy, which carried a mandatory minimum 20-year sentence, and conspiring to support a terrorist organization, which had no minimum.

Although Ms. Gatto and her client believed that elements of the case were weak and that there were strongly mitigating circumstances, Mr. Issa concluded that the risk of going to trial was too high. He pleaded guilty in 2012 to material support, with prosecutors dropping the other charge. He received 57 months in prison. "It was the only thing he could do," Ms. Gatto said. "His hands were tied."

Judge Gleeson wrote that because most pleas are negotiated before a prosecutor prepares a case for trial, the "thin presentation" of evidence needed for indictment "is hardly ever subjected to closer scrutiny by prosecutors, defense counsel, judges or juries."

"The entire system loses an edge," he added, "and I have no doubt that the quality of justice in our courthouses has suffered as a result."

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