



# TO THE POINT

PRINT EDITION

89

## In Rare Ruling Vacating Sentence as Unreasonable, Second Circuit Expounds on the Role of Mercy in Sentencing

*An article by Jacqueline L. Bonneau and Harry Sandick, December 20, 2017, edited by David Zapp & Johanna Zapp*

In *United States v. Singh*, 16-1111-cr (Kearse, Hall, *Chin*), the Second Circuit vacated the defendant's 60-month prison sentence—which was nearly three times the top of his Guidelines range—for illegally reentering the United States after the commission of an aggravated felony. The Court's declaration stressed the role of mercy and the proper judicial temperament to have when approaching the sentencing process.

### *"Background"*

"The defendant was born in Guyana, but lived in the United States since he was a child. His parents and siblings lived in the United States, as did his wife and teenage daughter. More than twenty years ago, defendant was convicted of larceny and postal theft, which qualifies as an "aggravated felony" within the meaning of the statute criminalizing the reentry to the United States of previously removed immigrants. But between 1993 and 2014, defendant had illegally reentered the U.S. at least three times, was deported at least two times, and by the time he re-entered the country illegally for this third time, he had been convicted of at least seven other larceny-related offenses. In June 2014, arrested by the NYPD, he was charged with one count of illegal reentry into the United States.

### *The Guilty Plea and Presentence Report*

Defendant pleaded guilty to this of-

fense without a plea agreement. Defendant's Sentencing Guideline range was 15 to 21 months imprisonment. Defendant received a 3-point offense level reduction based on his acceptance of responsibility. The Probation Office recommended that Defendant receive a within-Guidelines sentence of 21 months and the Government similarly requested a within-Guidelines sentence.

### *The Sentencing*

"Before his sentencing hearing, Defendant wrote a letter to the sentencing judge—**District Judge Katherine Forrest**. In the letter Defendant admitted to his wrongdoing, blamed "Bad Friend[s] and Company" and had returned to the United States. . . because he "Fear[ed] for [his] life" having been beaten, threatened, and robbed in Guyana. Defendant closed his letter by "Begging for another chance" and promising not to break the law again.

"The morning of the sentencing, Judge Forrest issued an order explaining that she was "seriously considering an upward departure" in connection with Defendant's sentencing. During the hearing, Judge Forrest noted that she was not inclined to grant the 3-point reduction for acceptance of responsibility, although she ultimately did grant the 3-point reduction. She concluded, however, that an upward departure to a sentence of 60 months' imprisonment—nearly triple the sentence the Government requested and the Guidelines recommended—was necessary to prevent Defendant's "nearly immediate reentry." She also refused a request to designate Defendant to a prison in Pennsylvania that would have been relatively close to where his wife and daughter lived in the Bronx. These types of requests are customary at sentencing, and are granted in virtually all cases.

### *The Law*

Courts will set aside a sentence for substantive unreasonableness *only* in

"exceptional cases." The Court placed particular emphasis on **the size of the departure** from the Guideline recommendation that drastically exceeded nationwide norms in sentencing defendants for similar offenses. Judge Forrest had imposed a sentence that was nearly three times the top of Defendant's Guideline range, even though the Probation Office and the Government agreed that a within-Guidelines sentence was appropriate.

The panel also rejected Judge Forrest's view of the **history of criminal conduct**. None of them **involved violence or narcotics trafficking**. Many of them had occurred **decades ago**, when **Defendant** was **relatively young**; itself a mitigating factor, and several of Defendant's **prior convictions** had **ended in conditional discharges**, indicating that the sentencing courts did not believe that any punishment was warranted for those offenses.

The Court next turned to Judge Forrest's factual errors. Defendant had not reentered the United States three times but *two* times. Defendant had *not* spent his life "back and forth" between the United States and Guyana. He had spent the majority of his life in the United States. And Defendant's criminal history was *not* extensive as discussed above.

The panel also rejected Judge Forrest's conclusion that "a defendant's acceptance of responsibility and his assertion of mitigating circumstances are inconsistent or incompatible with *acceptance*." The Court noted that a **defendant** has an "**absolute right**" at sentencing to offer mitigating circumstances and plead for mercy without undermining his acceptance of responsibility.

Finally the Appeals Court had the opportunity to address the **appropriate judicial temperament for approaching sentencing** emphasizing the important role of "**mercy**," "**proportionality**," "**the 'diverse frailties of humankind**," "**compassion**," and "**generosity of spirit**." The court closed with a quote from an article entitled, *Ten Commandments for a New Judge*:

**"Be kind. If we judges could possess but one attribute, it should be a kind and understanding heart. The bench is no place for cruel or callous people, regardless of their other qualities and abilities."**

**\*\*Update in this case: on January 18, this defendant was resentenced by Judge**

Forrest to Time Served. By the time of his sentencing he had been incarcerated for approximately 30 months.

## Guilty Pleas Plea Bargain vs. No Plea Bargain

By David Zapp & Johanna Zapp

“Eric Carpenter, a former Army lawyer who teaches law at Florida International University, said a naked plea can be advantageous by allowing the defense to refrain from agreeing to certain facts that it might otherwise have to concede to under a plea agreement.”

This remark was made in connection with the plea of guilty by Sgt Bergdahl, the soldier who left his post in Afghanistan to the detriment of his fellow soldiers. It is a perfect explanation of the advantages of pleading guilty to the entire indictment *without* a plea bargain known as a “Pimentel” plea in New York, named for the defendant in whose case it was discussed. With a “Pimentel” every issue is in play.

You are better off being sentenced by a mature judge whose job is to mete out justice rather than a young ambitious, testosterone-driven prosecutor lacking maturity and experience who sees life in black and white instead of the more beautifully complicated gray that life generally is.

I once had a case where the prosecutor believed that the facts did not support a “minor” role reduction for the defendant. I proposed that we leave the issue to the judge to decide. She agreed.

Well, came the day of sentencing and the judge gave him the “role” reduction we were seeking. As we were leaving the courthouse the prosecutor asked me why I was so sure that the judge was going to give the defendant the role reduction. I said, “Because the judge is my age, an older man with an older man’s experience. He was going to see the evidence as I saw it.”

Obviously in all case you have to use common sense, but as I say all things being equal I would rather take my chances with a wise judge than a smart prosecutor.

By the way, Bergdahl received no jail time.

## Second Circuit Vacates Sentence that Erroneously Denied Acceptance of Responsibility Credit

By Stephanie Teplin and Harry Sandick on July 6, 2017, edited by David Zapp & Johanna Zapp

In *United States v. Delacruz* the Second Circuit the Second Circuit emphasized its previous ruling that a Sentencing Guidelines reduction for “acceptance of responsibility” is appropriate where the defendant truthfully admits the conduct comprising the offense of conviction. It would violate the Fifth Amendment’s Due Process Clause to withhold an acceptance of responsibility adjustment because the defendant denied other conduct that was not proved beyond a reasonable doubt. Thus, a **“good-faith objection to material [presentence report] statements . . . does not provide a proper foundation for denial of the acceptance-of-responsibility credit.”**

Defendant pleaded guilty pursuant to a plea agreement stating at his plea allocution that he was the getaway driver in a robbery. Defendant, however, objected to two findings in the presentence report: that he had sold drugs in the past, and that he said he would cause physical harm to the drug couriers who were the target of the robbery. The district court, (Forrest, J.) on her own, ordered a hearing to evaluate the evidence on these contested issues, and agreeing with the presentence findings relevant to sentencing found that Defendant was not entitled to an acceptance of responsibility credit.

The Court of Appeals disagreed. The Court explained that the “paramount” factor in determining whether to grant an offense level reduction is “whether the defendant truthfully admits *the conduct comprising the offense or offenses of conviction.*” (Emphasis in original). The Court concluded that a mere good-faith objection to other facts in the presentence report is not a basis for denying credit for “acceptance of responsibility.”

But “good faith” are the operative words. A defendant cannot hope to

win on a “good faith” basis when the evidence contradicting his claim is overwhelming, and thus it is not surprising that the court spent significant time discussing why the evidence offered at the hearing and elsewhere did not overcome the claim. The case likely would have come out entirely differently if the defendant had testified falsely at the hearing.

Recognizing the importance to the defendant of being sentenced on true facts, the Circuit has **encouraged defendants to object to the presentence report without fear** that this—standing alone—will lead the defendant to lose the credit for acceptance of responsibility that he earned by virtue of his timely guilty plea and (in this case, the benefit of his plea agreement).

## District Court Lacks Jurisdiction to Expunge Valid Record of Conviction

By Elena Steiger Reich and Harry Sandick on August 11, 2016 edited by David Zapp & Johanna Zapp

Here’s a case that definitively answers a question that many defendants *and* lawyers have had.

In *Jane Doe v. USA*, 15-1967, the Second Circuit vacated the granting of petitioner’s motion to expunge all records of her criminal conviction holding that the District Court lacked subject matter jurisdiction to entertain the motion.

The petitioner was convicted in 2001 for her participation in a health care fraud scheme and sentenced to five years’ probation by the District Court. In October 2014, the petitioner filed a motion to expunge her conviction because, despite leading an exemplary life since 2001, she had been unable to retain employment due to her record of conviction. Relying on two appellate cases the District Court held that it had jurisdiction to decide the motion and granted it.

On appeal, the Second Circuit held that the District Court lacked jurisdiction to consider the motion. It distinguished its decision in *Schnitzer*, in which it held that a court had ancillary jurisdiction to expunge an arrest record following an order of dismissal

of the criminal case, emphasizing that the holding was limited to arrest records and did not extend to records of a valid conviction. See *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977). Judge Livingston in his concurrence expressed skepticism that the decision in *Schnitzer* is still good law after the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375 (1994). So be prepared for a challenge to expunge arrest records as well.

The Second Circuit did note its sympathy with the petitioner's situation and observed that Congress could grant courts jurisdiction to entertain such a motion under these circumstances.

## A Defendant Can Still Qualify For A Reduction Even If He Played An "Essential Or Indispensable Role In The Criminal Activity"

By Elena Steiger Reich & Harry Sandick

Defendant, a former member of the Polish armed services, was recruited in 2013 to provide security and counter-surveillance services by individuals posing as Colombian drug traffickers. The individuals who recruited Defendant were in fact confidential sources running a sting operation for the United States government. Defendant pled guilty in February 2015 and was ultimately sentenced to 108 months' imprisonment, which reflected a downward variance from the Guidelines calculation.

The Second Circuit rejected as "weak" Defendant's argument on appeal that the government "manipulated" his base offense level by constructing a sting operation that involved large amounts of fictional cocaine, noting that he willingly participated in a scheme that he thought involved "hundreds of kilos" of drugs.

Nonetheless, the court was persuaded that the district court committed plain error related to a minor-role reduction. Under § 3B1.2 of the Guidelines, a defendant's offense level is reduced by two levels if he was a "minor participant," four levels if

a "minimal participant," and three levels if falling somewhere between those two categories.

Amendment 794 added to the Guidelines a non-exhaustive list of factors a sentencing court should consider in analyzing whether a minor-role reduction is warranted and clarified that **a defendant can still qualify for a reduction even if he played an "essential or indispensable role in the criminal activity."** Amendment 794 also that the defendant's culpability should be determined by reference to the culpability of his or her co-conspirators in *that* criminal activity, not in comparison to *all* defendants who committed similar crimes.

Although the terms "minor" and "minimal" would lose all meaning if they were applied with great frequency, (Sentencing Commission statistics reflect that 2016 only 8% of defendants received mitigating role reductions), one hopes that with the amendment and this remand that district courts will be more willing to consider mitigating role reductions in future cases. A published opinion would have helped with this "minor role publicity campaign" but the panel decided not to publish this decision.

## District Court Must Consider Significant Disparity Between Plea Offer and Ultimate Sentence When Assessing Ineffective Assistance Claims

By Elena Steiger Reich & Harry Sandick

In *Reese v. United States*, the Second Circuit vacated the order of the U.S. District Court for the Southern District of New York (Marrero, J.) denying Reese's petition to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. Reese claimed that his counsel had provided ineffective assistance. The district court rejected the claim on the grounds that Reese could not establish prejudice because the evidence of guilt presented at trial was "overwhelming."

Although the Second Circuit

agreed, it concluded that the district court had committed error by failing to consider the significant disparity between the plea offer made to Reese (57-71 months) and the sentence after conviction (108 months). The Second Circuit remanded to the district court to develop a fuller record on the question of what Reese's attorney communicated to him with respect to the government's plea offer.

In general, the absence of prejudice can be demonstrated by reference to the strength of the government's case. That is not the case, however, when the defendant can show a reasonable probability that he would have accepted a plea offer had he been properly advised. On remand, the district court will need to test Reese's claims and seek testimony from Reese's counsel in order to determine whether to grant the writ.

## Circuit Reverses Conviction & Dismisses Indictment in Case Where Defendant Waited Seven Years for Trial

By Jared S. Buszin and Harry Sandick on November 17, 2017

In *United States v. Tigano*, No. 15-3073 the Second Circuit issued a short order reversing the conviction and dismissing the indictment with prejudice.

The case has drawn attention for the speedy trial claim that the defendant had raised on appeal, and it appears that this was the basis for reversal. Mr. Tigano was arrested in July 2008 and charged with various counts related to operating a marijuana farm near Buffalo, New York; however, he was not tried until May 2015—nearly seven years later—based on a variety of factors. One of the most significant factors contributing to the delay was the notorious **backlog of cases in the Western District of New York**. The backlog was not the only apparent reason for the extraordinary delay in trying Mr. Tigano. Other factors included delayed plea negotiations, a court reporter taking four months to prepare the transcript for a daylong hearing, and an extended competency hearing.



Although he was sentenced to a 20-year mandatory minimum sentence, the Court's order resulted in Mr. Tiganio's release after he had spent seven years in jail during the pretrial process and two years in prison after his conviction.

#### **Commentary:**

Did the fact that it was a marijuana case and the defendant had been incarcerated for seven years a factor in the decision? I can't help but believe it did. The reversal would be the first time in decades that the Circuit has reversed a conviction on speedy trial grounds. The case thus serves as a reminder of the importance of marshaling a compelling factual narrative, which can go a long way in advancing legal arguments that are ordinarily difficult to win. Although the facts here are extraordinary, it seems likely that other defendants have waited too long for their day in court. Only additional resources for our criminal justice system will address this systemic problem. It also teaches that court congestion and plea-bargaining will not always toll the Speedy Trial clock.

*David Zapp & Johanna Zapp*

## **Second Circuit Remands for Resentencing to Consider Post-Sentencing Rehabilitation**

*By Jacqueline L. Bonneau and  
Harry Sandick on July 20, 2016*

In *United States v. White*, 15-229-cr the Second Circuit ordered a remand for resentencing via summary order, instructing the lower court to consider the defendant's post-sentencing rehabilitation. Although the order cannot be cited as precedent, it represents an important reminder that practitioners can raise new factual arguments at resentencing based on changes in the defendant's circumstances since the time of the initial sentencing proceedings.

In 2013, White was convicted of several counts of making false claims against the United States and was sentenced to thirty-three months' imprisonment. After an initial successful appeal, White was resentenced to time

served. In connection with her resentencing, White sought a shortened term of supervised release based on her rehabilitation during her ongoing incarceration. During the resentencing hearing, the lower court erroneously concluded that it was not required to consider White's post-sentencing rehabilitation and declined to shorten her term of supervised release.

In deciding to remand the case for a second resentencing, the Circuit explained that district courts are "obliged at resentencing to take into account such material changes in [the] circumstances [of the defendant] as have arisen since the original proceeding." Based on this principle, the lower court erred in concluding that White's post-sentencing rehabilitation need not be considered in fashioning her new sentence.

White highlights the opportunities available to practitioners during resentencing proceedings. Even where a case is remanded for resentencing solely on the basis of a legal error, during resentencing, practitioners can and should raise new factual arguments that highlight any changes in their clients' circumstances that might mitigate the penalties to be imposed. This rule provides an appropriate benefit for those defendants who have endeavored to change their lives after being convicted.

#### **Commentary**

This is not only a good case for the defendant it is an important case because I would bet that most lawyers and judges believe that the law is settled in these resentencing cases that *only* the legal error can be addressed. Prosecutors always make that argument and judges always seem to accept it. This case makes it clear that this is not the case.

*David Zapp & Johanna Zapp*

## **Circuit Vacates Sentence for Failure to Correctly Apply Acceptance of Responsibility Guideline**

*By D. Brandon Trice and Harry  
Sandick on January 9, 2018*

In a summary order on January 2, 2018 in *United States v. Reyes*, the Court vacated and remanded a life sentence as procedurally unreasonable on the ground that the district court failed to properly apply a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The decision reiterates that a three-level reduction is mandatory under certain circumstances if the district court has already imposed a two-level reduction and that the government must formally move for a three-level reduction in order to bind the court's hands. The third point of acceptance of responsibility under the Guidelines is not a matter of grace or kindness by the district court. When a defendant is entitled to receive the third point, the district court is obliged to award it.



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