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**SENTENCING**

Two attorneys at Patterson Belknap discuss the recent decision from the Second Circuit in which the court considered nationwide sentencing trends in evaluating the substantive reasonableness of the sentence. The authors also note how the case shows the important role of mercy and compassion in such proceedings.

**In Rare Ruling Vacating Sentence as Procedurally, Substantively Unreasonable, Second Circuit Expounds on the Role of Mercy**



In *United States v. Singh*, No. 16-1111-cr (Dec. 12, 2017), the Second Circuit, in an opinion by Judge Denny Chin, 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 on the grounds that it was both procedurally and substantively unreasonable. This opinion stands out as a rare ruling striking down a sentence as substantively unreasonable. It is also notable for the Court’s musings on the role of mercy in the sentencing process.

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**Background**

The defendant—Latchman Singh—was born in Guyana, but has lived in the United States since he was a child. His parents and siblings live in the United States, as do Singh’s wife and teenage daughter. More than 20 years ago, Singh 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. (8 U.S.C. § 1326). Between 1993 and 2014, Singh was also convicted of at least seven other larceny-related offenses. In December 2004, an immigration judge ordered Singh removed from the United States, and he was eventually deported in 2010. After his first deportation, Singh illegally reentered the country and was arrested by the New York Police Department in February 2012. Based on his earlier removal order, Singh was again deported in May 2012. Sometime thereafter, Singh reentered the country a second time and in June 2014, he was again arrested by the New York Police De-

partment and was charged with one count of illegal reentry into the United States after having been removed following a conviction for an aggravated felony.

## The Guilty Plea and Pre-Sentence Report

In December 2015, Singh pleaded guilty to this offense without a plea agreement. According to the pre-sentencing investigation report submitted prior to sentencing, Singh's Guidelines range was 15 to 21 months' imprisonment. Both his offense level and his criminal history were relatively low. With respect to his offense level, Singh received a three-point offense level reduction based on his acceptance of responsibility in pleading guilty. The less serious nature of his prior offenses and the fact that they had occurred decades prior to the instant offense led to his relatively low Criminal History Category. The Probation Office recommended that Singh receive a within-Guidelines sentence of 21 months and the government similarly requested a within-Guidelines sentence.

## The Sentencing

A few weeks before his sentencing hearing, Singh wrote a letter to the sentencing judge—District Judge Katherine Forrest. In the letter Singh wrote: "Your Honor I'm So Sorry For my Action or wrongdoing. I've Realise my Action were wrong (sic)." Singh also explained that at the time of his prior convictions he had "Bad Friend[s] and Company" and that he had returned to the United States after his second deportation because he "Fear[ed] for [his] life" and had been beaten, threatened, and robbed in Guyana. Singh closed his letter by "Begging for another chance" and promising not to break the law again.

The morning of the sentencing hearing, Judge Forrest issued an order explaining that she was "seriously considering an upward variance" in connection with Singh's sentencing. During the hearing, Judge Forrest noted that she was not inclined to grant the three-point reduction for acceptance of responsibility because she felt that Singh's letter was an attempt to avoid responsibility for his actions. At this point, defense counsel explained that Singh had always been clear that his motivation for returning to the United States was partially based on his fear for his safety in Guyana. Defense counsel noted that he had not focused on these claims in connection with sentencing, because they were uncorroborated, but also pointed out that Guyanese of Indian descent like Singh were frequent targets upon returning to Guyana from the United States.

Judge Forrest accepted this explanation and ultimately granted the three-point reduction. She noted, however, that she would consider the issue of acceptance of responsibility in connection with the Section 3553(a) factors. Upon consideration of those factors, Judge Forrest noted that she was "convinced" Singh would reenter the United States and commit additional crimes and that he had an "unusually high likelihood of recidivism." She further explained that she did not believe this was a "heartland" reentry case in light of Singh's prior convictions, noting that she did not think that Singh could "live here honestly" and that he had "no right to be present on U.S. soil." Ultimately, she

concluded that an upward variance to a sentence of 60 months' imprisonment—nearly triple the sentence the government requested and the Guidelines recommended—was necessary to prevent Singh's "nearly immediate reentry." She also refused a request made shortly after the sentencing hearing to designate Singh 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 Circuit Reverses the Sentence

The panel began its discussion by setting forth the standard for procedural and substantive reasonableness, noting that especially with respect to substantive reasonableness, the Court's review is particularly deferential, and that it will set aside a sentence for substantive unreasonableness only in "exceptional cases." The Court also took the unusual step of starting its analysis with Singh's substantive challenge because it "informs our analysis of the procedural arguments."

In concluding that the sentence imposed by Judge Forrest was substantively unreasonable, the Court placed particular emphasis on the size of the variance, and the fact that it drastically exceeded nationwide norms in sentencing defendants for similar offenses. The Court noted that Judge Forrest had imposed a sentence that was nearly three times the top of Singh's Guideline range, even though the Probation Office and the government agreed that a within-Guidelines sentence was appropriate. The Court also analyzed the nationwide statistics with respect to reentry sentences. The Court noted that the average sentence for illegal reentry offenders in fiscal year 2013 was 18 months, and the median sentence was 12 months. Furthermore, only 1.2 percent of the sentences imposed for aggravated felony reentry had been above the Guidelines range.

The panel also rejected Judge Forrest's asserted rationale for imposing such an undeniably large variance—Singh's consistent history of criminal conduct. The Court reviewed Singh's prior convictions and noted that none of them involved violence or narcotics trafficking. Many of them had occurred decades ago, when Singh was relatively young, which the Court explained was a relevant factor in assessing the seriousness of these convictions. The Court also noted that several of Singh's prior convictions had ended in conditional discharge, indicating that the sentencing court for those crimes did not believe that any punishment was warranted for those offenses. The Court again turned to nationwide sentencing statistics, noting that 57.2 percent of defendants sentenced for reentry crimes were in a higher criminal history category than Singh, which further called into question Judge Forrest's decision to impose a sentence that was more than triple the national average. Ultimately, based on these statistics, the panel concluded that Judge Forrest's purported justification for the large variance in this case—Singh's criminal history—was insufficient to support a variance of such magnitude.

The Court next turned to its analysis of procedural reasonableness. First, the panel noted that Judge Forrest appeared to have made several factual errors during the sentencing hearing. She implied that Singh had reentered the United States three times, instead of two, which may have impacted her analysis of Singh's likeli-

hood to recidivate. Furthermore, Judge Forrest noted during sentencing that Singh had spent his life “back and forth” between the United States and Guyana, when in fact he had spent the majority of his life in the United States. Finally, the Court noted that Judge Forrest’s characterization of Singh’s criminal history as being extensive was inconsistent with the factual record related to his prior convictions. Because a sentenced based on factual inaccuracies is procedurally unreasonable, the Court ultimately determined that remand for clarification of the facts was appropriate in this case.

The panel went on to discuss a second grounds for procedural unreasonableness—Judge Forrest’s analysis of Singh’s acceptance of responsibility. The Court noted that considered as a whole, Singh’s letter to Judge Forrest, which kicked off the controversy regarding the three-point reduction of Singh’s offense conduct, was “a plea for mercy and an attempt to explain his motivations.” The Court explained that “a defendant’s acceptance of responsibility and his assertion of mitigating circumstances are not necessarily inconsistent or incompatible.” Indeed, the Court noted that a defendant has an “absolute right” to be heard at sentencing to offer mitigating circumstances and that the “opportunity to plead for mercy” enables courts “to mete out punishment in the most equitable fashion possible.” The panel reiterated that Singh’s comments that he had acted foolishly while running with a bad crowd in his youth were not incompatible with his acceptance of responsibility in other passages of his letter. The Court noted that a defendant’s motivation for engaging in criminal conduct is a proper consideration at sentencing, and that mitigating factors might reduce a defendant’s moral culpability for sentencing purposes. Ultimately, the Court held that to the extent Judge Forrest increased Singh’s sentence because of a perception that in pleading for mercy he did not fully accept responsibility, the sentence imposed was procedurally unreasonable.

Near the conclusion of its opinion, the Court expounded on the judicial qualities most important for sentencing, and emphasized the important role of mercy in sentencing proceedings. For example, the panel noted that a judge must have “some understanding of the diverse frailties of humankind,” “compassion,” and a “generosity of spirit” when she renders a sentence. In closing, the Court quoted *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.” (Edward J. Devitt, *Ten Commandments for a New Judge*, 65 A.B.A. J. 574 (1979), reprinted in 82 F.R.D. 209 (1979). Judge Devitt was a district judge for 37 years and the American Judicature Society has named its annual award for distinguished service to justice in his honor.)

Despite this extraordinary reversal based on the Circuit’s conception of the role of a district judge at sentencing, the Court denied Singh’s request for reassignment upon remand. The panel noted that such relief is granted only in unusual circumstances and expressed its confidence that Judge Forrest would satisfy all procedural requirements in conducting a full resentencing and would ultimately impose a fair sentence.

## Commentary

This case is likely one to which defense attorneys will return often in preparing for sentencing proceedings. First, the opinion highlights the Second Circuit’s willingness to consider nationwide sentencing trends in evaluating substantive reasonableness. When preparing for sentencing in the district court or when making a substantive sentencing challenge on appeal, defense counsel should make use of any available statistics regarding nationwide sentencing for similar crimes, as the Court found such evidence particularly persuasive in this case. These are available on the Sentencing Commission’s website. (Such data reports can be found at <https://www.ussc.gov/topic/data-reports>. The Commission also publishes an annual sourcebook of federal sentencing statistics, found at <https://www.ussc.gov/topic/data-reports>). While some district judges have expressed a lack of interest in such data, it seems like the trend is in favor of such statistics being given consideration at sentencing or on appeal. (Alan Ellis, Law 360, “Views From The Bench on Sentencing Representation: Part I,” March 1, 2016 (“Data and statistics from the court, the other federal courts in the state, the circuit and nationwide, mean ‘zilch’ to Judge Rakoff.”))

The Circuit recently relied on such statistics in reversing a sentence in *United States v. Jenkins*, 854 F.3d 181, 193 (2d Cir. 2017) (“Statistics from the Sentencing Commission validate our concern.”).

Furthermore, beyond being a rare example of substantive unreasonableness, the Court’s opinion essentially functions as a manifesto on the appropriate judicial temperament with which to approach sentencing—one that emphasizes the important role of mercy and compassion in such proceedings. As such, the opinion should be a useful tool for counsel attempting to balance clients’ understandable desire to explain their actions with the benefits to be gained from the prompt acceptance of responsibility. Here, it seems that the district court may have misunderstood Singh’s comments as an effort to avoid blame for his crime, or to justify his criminal activity as appropriate. In reality, he only sought to explain the series of events that led him to this place.

The decision will be of particular use in illegal reentry cases. Illegal reentry cases are frequently the subject of downward departures because the crime itself—mere presence in the United States after deportation—is *malum prohibitum*, something that is illegal because it is prohibited, and not because it is inherently wrong. Even some of the aggravated felony cases do not involve prior crimes that seem especially “aggravated.”

(See, e.g., *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002) (holding that a second state misdemeanor conviction for marijuana distribution can be an aggravated felony conviction)).

Downward variances are commonplace, and this decision will not change the trend.

Finally, while it is possible that the government may attempt to generalize from this opinion to persuade the Circuit to engage in more searching review of downward variances, it seems unlikely that such arguments will have much traction. The decision’s focus on the need for mercy and proportionality in sentencing seem aimed at discouraging dramatic upward departures and not at limiting the district court’s authority to grant a

downward variance where appropriate on the facts presented.