

Views From The Bench On Sentencing Representation: Part 10

By **Alan Ellis** (January 24, 2018, 12:11 PM EST)

U.S. District Judges Frederic Block of the Eastern District of New York and Charles R. Breyer of the Northern District of California in San Francisco are legendary sentencing judges.

Judge Block is the author of two best-selling books, "Race to Judgment" and "Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge." In a remarkable decision, laying out all the ways our criminal justice system hurts ex-offenders, Judge Block sentenced Chevelle Nesbeth, a convicted low-level drug courier who tried to smuggle 602 grams of cocaine into the United States from Jamaica, to probation. Judge Block determined that the multitude of "collateral consequences" that Nesbeth would be subjected to as a convicted felon was severe punishment in itself; jail time on top of this would be excessive.

In a 42-page opinion, Judge Block called for reform, arguing that federal and state laws imposing restrictions on people who have been convicted of felonies can amount to a "civil death." He outlined the sweeping breadth of collateral consequences and their likely impact on Nesbeth's life, including her likely inability to pursue her lifelong dream of a teaching career. Quoting extensively from the influential book "The New Jim Crow" by Michelle Alexander, Judge Block expressed moral indignation throughout his opinion at all the ways in which the American criminal justice system makes it harder for people with felony convictions to achieve stability in life.

Judge Breyer has been vice chair of the U.S. Sentencing Commission since 2013. One of his noteworthy rulings involved the trial and sentencing of Ed Rosenthal, an iconic cannabis activist in the San Francisco Bay area. Rosenthal was growing marijuana for medicinal purposes, which is legal under California state law; however, he was charged with three federal counts of conspiracy and cultivation. Breyer refused to allow defense attorneys to mention the state law because Rosenthal was indicted under federal law, which does not allow the growing of marijuana for any purpose. Rosenthal, who lived in Oakland, was growing marijuana in his official capacity as "an officer of the city" under Oakland's medical marijuana ordinance. In a news conference outside the courthouse, five of the jurors who convicted him issued a statement saying that they would not have voted to convict if they had been allowed to consider the California law. The five jurors subsequently apologized to Rosenthal and his family. The jurors were joined in the apology by the San Francisco district attorney and two members of the San Francisco Board of Supervisors.



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U.S. District Judge
Frederic Block

Judge Breyer sentenced Rosenthal to one day in prison and a \$1,000 fine, the most lenient sentence allowed under law. He said that it was reasonable to conclude that Rosenthal had believed he was acting legally.



U.S. District Judge
Charles R. Breyer

Judge Breyer notes that one of his pet peeves is a lawyer's failure to file a sentencing memorandum. "It makes me think, 'What's happening here?'" Some lawyers explain that they wanted to wait until the sentencing hearing," which he finds to be much too late. Judge Breyer points out that the government's sentencing memorandum generally begins with a statement of the case and a discussion of the offender, followed by a recommendation of the sentence. A defendant's sentencing memorandum, on the other hand, should focus on the history and characteristics of the defendant, his role in the offense, the role of any co-defendants and the sentences they received. If a defendant has co-defendants, lawyers should go to court to watch their sentencing and see how the judge views the offense, the co-defendants and the defendant, if his name comes up.

Judge Breyer welcomes sentencing recommendations from both sides. He explains that lawyers build credibility over the years with him, which is an important factor in how he values their recommendations. If the lawyer comes in too low, he loses credibility and Judge Breyer will often disregard not only the sentencing recommendation, but also other arguments that the lawyer might make. He says lawyers should always include in their sentencing recommendation why a higher sentence would be inappropriate and why the sentence they are recommending would be more appropriate.

Judge Block requires the U.S. probation officer in the presentence report, defense counsel and the government to discuss collateral civil consequences in their sentencing submissions. He wants a well-crafted sentencing memorandum. Asked what a lawyer can add at sentencing if he has provided the court with a top-notch sentencing memorandum, Judge Block says that he still wants counsel at the sentencing hearing to be assertive, strong and passionate. "If the family is in court, let me know. If there is any supportive law enforcement officer present, have them address me. If employers are there to speak on a defendant's behalf, this, too, can be very impactful."

He also likes character letters. "The more, the merrier," he declares. If a defendant's lawyer does not provide any character letters, the judge wonders whether the defendant has any kind of support system that will help him to not reoffend.

Allocution is important to both judges. Judge Breyer cautions, however, that it can be very tricky. "A defendant should absolutely not come off as the victim. He should not apologize to the court or the government; rather only to the victim. Apologize to the people whom you've hurt. Show me what you are going to be doing in the future."

Judge Breyer puts special value on character letters that show how the defendant has turned his life around. He doesn't want character letters that are duplicative, nor does he care for ones that say, "I can't believe he did what he did." Those kinds of letters demonstrate that the writer doesn't know the defendant well. If the defendant has a job waiting for him when he comes out of prison, this is meaningful. "I want quality, not quantity," he added.

Not surprisingly, as a long-time member of the Sentencing Commission and mindful of the need to avoid unwarranted disparity, Judge Breyer welcomes sentencing statistics from the commission, particularly

those from the Northern District of California. Inasmuch as he maintains that “it’s the luck of the draw” as to which judge the defendant pulls at sentencing, it is helpful to him to know what other judges in his district have done in similar cases. He finds statistics from outside the district and more so outside the Ninth Circuit to be less helpful.

Judge Block also finds sentencing statistics to be compelling, particularly because 18 U.S.C. §3553 mandates that a judge avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct. In his decision in *United States v. Parris*, 573 F.Supp.2d 744 (2008), he asked counsel to search for and provide him with nationwide similarities in securities fraud cases. He reached out to the Sentencing Commission and learned that, while it did not use such statistics at the time, it did provide the Second Circuit statistical information packet for fiscal year 2006. He found that in contrast to the 360-months-to-life guideline range for the defendant’s crimes, the mean terms of imprisonment in months imposed by district courts nationwide for nearly all other crimes were less serious than for securities fraud guidelines in this case.

Like Judge Block, Judge Breyer allows just about anyone to talk in court. While he doesn’t find it necessary to bring mental health experts to court, he does consider it helpful for the defendant’s lawyer to indicate that an expert will be made available, should the judge have any questions.

If the defendant is going to trial, testifies on his own behalf and sincerely believes that he is not guilty, Judge Block will not necessarily hold it against him. Asked what a defense lawyer should do when his client has gone to trial and lost, and he finds has testified falsely, Judge Block feels these cases are when a lawyer’s role is even more important because “he has a much harder job to do for his client.”

Judge Block shares the preference of most federal judges in not wanting canned briefs with Booker and its progeny cites. While he welcomes sentencing recommendations, he doesn’t find it helpful if the defendant’s lawyer recommends a specific sentencing; he would rather have the lawyer ask for a nonincarcerative sentence or “not a significant prison sentence.” However, if a lawyer is making a sentencing recommendation that is higher than what he intends to impose, Judge Block, like most judges I’ve interviewed, will nevertheless impose a lower sentence if he thinks it is called for.

Regarding sentencing data, it is particularly important where there are co-defendants. Unwarranted disparity is one of the key 3553 factors, he notes.

Asked what to do when the government argues for a general deterrence sentence, Judge Breyer responds that it depends on the type of case. In a typical drug case, it’s not all that important. On the other hand, he cites a case where a Transportation Security Administration officer in an airport pled guilty to allowing drug smuggling to occur. In that case, he thought a strong sentence important so that other TSA agents would think twice before doing this. Thus, he imposed a substantial prison sentence to drive the point home.

Judge Breyer finds some sentencing videos helpful. He gave an example of a woman who grew marijuana and extensively damaged national forest land. He was going to impose a substantial sentence until he was presented with “a day in the life” video showing the woman taking care of a special needs child. If she were incarcerated, the child would probably be turned over to the state. He thought that this was punishment enough and gave her a lower sentence than he had intended before seeing the video.

My Take

- Lawyers are oftentimes concerned that, if they ask for a higher sentence, the judge will impose that even if he or she would have otherwise intended to impose a lower sentence. I've never found this to be the case with any of the 25 judges that I've interviewed so far for this series.
- More and more judges are interested in sentencing statistics. Indeed, there are a large number of cases from the appellate courts holding that sentencing statistics should play a role in sentencing.
- So, too, I am finding more and more judges familiar with sentencing videos and finding them highly persuasive at times.
- Finally, when asking for probation or a short sentence followed by supervised release conditioned upon treatment, community service, restitution, etc., spell out a plan for the judge. Just don't ask for probation or supervised release conditioned upon treatment. Outline your treatment plan as specifically as possible.

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