

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2005

5 (Argued: November 23, 2005 Decided: June 15, 2006)

6 Docket No. 05-1562-cr

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8 UNITED STATES OF AMERICA,

9 Appellant,

10 -- v. --

11 JAMES RATTOBALLI,

12 Defendant-Appellee.

13 -----x

14 B e f o r e : WALKER, Chief Judge, WINTER and JACOBS,
15 Circuit Judges.

16 Appeal from a judgment of the United States District Court
17 for the Southern District of New York (Thomas P. Griesa, Judge)
18 sentencing the defendant to a non-Guidelines term of one year of
19 home confinement and five years' probation and requiring that the
20 defendant pay \$155,000 in restitution; the district court did not
21 impose a fine. On appeal, the government challenges the sentence
22 on three principal grounds: (1) the sentence differs
23 substantially from the advisory Guidelines range and is
24 unreasonably low; (2) the district court failed to include a
25 written statement setting forth its reasons for imposing a non-

1 Guidelines sentence below the advisory Guidelines range; and (3)
2 the district court's finding of an inability to pay a fine is
3 clearly erroneous and the failure to impose any fine is
4 unreasonable.

5 VACATED AND REMANDED FOR RESENTENCING.

6 ANDREA LIMMER, Attorney, U.S.
7 Department of Justice, Washington,
8 D.C. (R. Hewitt Pate, Assistant
9 Attorney General; Thomas O.
10 Barnett, Acting Assistant Attorney
11 General; Makan Delrahim, Scott D.
12 Hammond, and Gerald F. Masoudi,
13 Deputy Assistant Attorneys General;
14 John J. Powers, III, and Robert B.
15 Nicholson, Attorneys, U.S.
16 Department of Justice, Washington,
17 D.C.; Rebecca Meiklejohn and
18 Elizabeth Prewitt, Attorneys, U.S.
19 Department of Justice, Antitrust
20 Division, New York, N.Y., on the
21 brief), for Appellant.

22
23 RANDALL D. UNGER (Steve Zissou, on
24 the brief), Bayside, N.Y., for
25 Defendant-Appellee.

26
27 JOHN M. WALKER, JR., Chief Judge:

28 This appeal raises several important post-Booker issues,
29 including the bounds of reasonableness review, United States v.
30 Booker, 543 U.S. 220, 261 (2005), and the requirement that a
31 district judge provide a written statement of reasons for
32 imposing a non-Guidelines sentence¹ outside the advisory

¹ A non-Guidelines sentence is a sentence that is "neither within the applicable Guidelines range nor imposed pursuant to the departure authority in the [Sentencing] Commission's policy statements." United States v. Crosby, 397 F.3d 103, 111 n.9 (2d Cir. 2005).

1 Guidelines range, 18 U.S.C. § 3553(c)(2). The appeal is taken
2 from a February 18, 2005, judgment of the United States District
3 Court for the Southern District of New York (Thomas P. Griesa,
4 Judge) sentencing defendant-appellee James Rattoballi to one year
5 of home confinement and five years' probation. The district
6 court required that Rattoballi pay \$155,000 in restitution; it
7 did not impose a fine, citing Rattoballi's inability to pay. We
8 hold that Rattoballi's non-Guidelines sentence, which represents
9 a substantial deviation from the recommended Guidelines range of
10 27 to 33 months' imprisonment, is unreasonable. We also hold
11 that if a district court elects to impose a non-Guidelines
12 sentence outside the applicable Guidelines range, it has a
13 statutory obligation to include a statement in the written
14 judgment setting forth "the specific reason for the imposition of
15 a sentence different from" the recommended Guidelines sentence.
16 18 U.S.C. § 3553(c)(2). Finally, we find clear error in the
17 district court's conclusion that Rattoballi lacked the ability to
18 pay a fine. Accordingly, we vacate and remand for resentencing.

19 **BACKGROUND**

20 James Rattoballi is a forty-year veteran of the printing
21 industry; for roughly the past twenty years, he has served as
22 president and co-owner of Print Technical Group, Inc., a printing

1 brokerage firm that performed about \$7 million in annual sales
2 and employed approximately twelve people. In recent years,
3 Rattoballi also has served as a commissioned sales representative
4 for two graphic services companies, Master Eagle Graphic
5 Services, Inc. and LTC Fusion, Inc.

6 Between 1990 and 2001, Rattoballi paid substantial kickbacks
7 to executives at advertising agencies, including Mitchell
8 Mosallem at Grey Global Group, Inc. ("Grey"), in return for these
9 agencies placing their business with his companies. The
10 kickbacks included cash, made-to-order Italian clothing, a
11 \$55,000 diamond-encrusted platinum watch, limousine services,
12 meals, airline tickets, and personal printing services. For
13 their part, the agencies' executives would steer contracts to
14 Rattoballi and keep his companies on their approved-vendor lists.
15 Rattoballi managed to offset some of the costs associated with
16 these kickbacks by submitting inflated invoices to the
17 advertising agencies; the agencies would then pass these inflated
18 invoices along to their clients.

19 Starting in 1994, Rattoballi also submitted exaggerated
20 "cover" bids to Grey in order to help Mosallem create the
21 illusion of competition among potential suppliers to a lucrative
22 client account. Mosallem used Rattoballi's bids, along with

1 those of others, to help steer contracts to other preferred
2 vendors, all at above-market prices. In exchange for his
3 cooperation, Rattoballi continued to enjoy favored status at
4 Grey; his companies earned approximately \$1 million annually from
5 Grey.

6 In 2002, Rattoballi was charged in an information with one
7 count of conspiracy to rig bids in violation of § 1 of the
8 Sherman Act, 15 U.S.C. § 1, and one count of conspiracy to commit
9 mail fraud in violation of 18 U.S.C. § 371; the information
10 focused exclusively on Rattoballi's dealings with Mitchell
11 Mosallem at Grey.

12 Rattoballi entered into a plea agreement with the
13 government. Under the terms of the agreement, Rattoballi agreed
14 "to provide full, complete, and truthful cooperation" to the
15 government and to "disclose fully, completely, and truthfully all
16 information" related to the government's investigation.

17 Rattoballi also agreed to appear as a witness for the government
18 in any case brought in connection with the charges. In exchange,
19 the government agreed not to prosecute Rattoballi further for any
20 crimes arising out of the same conduct. In addition, the
21 government agreed that if Rattoballi abided by the terms of the
22 plea agreement and provided "substantial assistance in any

1 investigations or prosecutions," it would file a § 5K1.1 letter
2 advising the sentencing judge to take Rattoballi's cooperation
3 into account during sentencing. See U.S.S.G. § 5K1.1.

4 Over the next two years, the government interviewed
5 Rattoballi on five occasions, and each time he was asked about
6 the payments he made to Mosallem and other purchasing agents.
7 Rattoballi readily admitted that he gave Mosallem and other
8 purchasing agents clothing and additional goods and services; he
9 denied ever having given Mosallem, or any of the other purchasing
10 agents, cash or items of significant value.

11 In the course of preparing for Mosallem's trial, the
12 government became suspicious that Rattoballi had been less than
13 fully cooperative with its investigation. The government's
14 suspicions proved accurate. After the government confronted
15 Rattoballi with information obtained from other witnesses,
16 Rattoballi admitted for the first time that he made substantial
17 cash payments to Mosallem and other purchasing agents.
18 Rattoballi also admitted that he helped to provide Mosallem with
19 a diamond and platinum watch that listed for \$87,000 but was
20 purchased wholesale for \$55,000. Finally, Rattoballi admitted
21 that he had spoken with Mosallem about the investigation, and had
22 agreed not to mention the cash or the watch to the government.

1 As a result of Rattoballi's mendacity and its obvious effect on
2 his credibility as a witness, the government determined that it
3 could not call him as its witness at Mosallem's trial, which
4 later was avoided when Mosallem pled guilty. The government
5 asserts that Mosallem's restitution order was undervalued because
6 the government was not made aware prior to Mosallem's sentencing
7 of the full extent of the kickback scheme.

8 In its sentencing memorandum, the government argued that
9 Rattoballi's total offense level under the Guidelines was 21,
10 producing a range of 37 to 46 months' imprisonment; the Probation
11 Office concurred in this calculation, which rested on that
12 office's assessment of the fraud loss and included a two-level
13 upward adjustment for obstruction of justice and no reduction for
14 acceptance of responsibility. Rattoballi sought, in his
15 sentencing memorandum, a non-Guidelines sentence consistent with
16 the district court's discretionary authority following United
17 States v. Booker, 543 U.S. 220 (2005), and United States v.
18 Crosby, 397 F.3d 103 (2d Cir. 2005). He challenged the
19 government's fraud-loss calculations and its proposed
20 adjustments, and he argued for a sentence that did not include a
21 term of imprisonment. At the same time, Rattoballi admitted that

1 he had "accumulated some modest wealth" and was "capable of
2 paying a modest fine."

3 At sentencing, the district court accepted the government's
4 recommendation for a two-level enhancement for obstruction of
5 justice but concluded that Rattoballi still was entitled to a
6 two-level reduction for acceptance of responsibility, based
7 primarily on the fact that Rattoballi did not force the
8 government to go to trial. The district court also adjusted the
9 fraud-loss calculation from \$796,000 to \$396,000, which led to an
10 additional one-level reduction. These rulings resulted in an
11 adjusted offense level of 18 and a Guidelines range of 27 to 33
12 months' imprisonment; the rulings and the resulting range are not
13 contested on appeal. After listening to the defendant, the
14 district court stated that it had "considered the guidelines
15 very, very seriously," and it acknowledged that Rattoballi stood
16 convicted of "substantial crimes" that "require appropriate
17 penalties." Nevertheless, the district court stated that it had
18 a problem with giving Rattoballi a "prison sentence." It then
19 set forth its reasons for imposing a non-Guidelines sentence:

20 The problem I have with a prison sentence is as
21 follows: Despite the difficulty and the delay in
22 coming clean with the whole range of criminal conduct,
23 this defendant has pleaded guilty, and he has now, I
24 believe, admitted the full range of his criminal
25 conduct. He did not persist in denying, he did not

1 force the government to go to trial, and that has
2 always been regarded by courts as a very substantial
3 matter.

4 Moreover, if nothing else were done to Mr.
5 Rattoballi, this case has inflicted punishment. It has
6 been hanging over him for a period of three years.
7 Now, there were reasons for that, and part of it was
8 the idea that he might cooperate and testify. But be
9 that as it may, the case has been hanging over him for
10 three years. Without any doubt, it has taken a severe
11 toll on his business, although it is not completely
12 destroyed, his business, fortunately, but he has been
13 convicted of two federal crimes. That is not without
14 meaning as far as punishment, and as I say, his
15 business has been, although not completely destroyed,
16 has been severely harmed.

17 It seems to me that both society and those closer
18 to Mr. Rattoballi would be legitimately benefited by
19 having Mr. Rattoballi attempt to continue in his small
20 business. He employs people, he has a partner, and I
21 have no doubt that a prison sentence would absolutely
22 end that business. It is in the interests of society
23 that he try the best he can to be from here on out a
24 law-abiding and productive member of society.

25 I also have in mind that, although there is
26 certainly no excuse for the crimes he committed, the
27 evidence in this whole litigation picture is that
28 Mosalle[m] and was [sic] a person who exerted an
29 enormous amount of pressure upon other people and got
30 them in trouble. They, of course, should not have
31 gotten into trouble. They should have resisted. They
32 should have done other things.

33 But Mosalle[m]'s determination, his demands, his
34 insatiable insistence were very difficult to deal with.
35 Again, as I have said, no excuse, but he's part of the
36 picture.

37 Now, there were kickbacks paid to another agency,
38 and it did not involve Mr. Mosalle[m], so what I say
39 about Mr. Mosalle[m] is not the entire excuse, but it's
40 part of the picture and an important part of the
41 picture.

1 district court properly (a) identified the Guidelines range
2 supported by the facts found by the court, (b) treated the
3 Guidelines as advisory, and (c) considered the Guidelines
4 together with the other factors outlined in 18 U.S.C. § 3553(a)²;

² Section 3553(a) provides, in pertinent part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established [and recommended by the Sentencing Guidelines] . . .
- (5) any pertinent policy statement . . . issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

1 and (2) substantive reasonableness, whereby we consider whether
2 the length of the sentence is reasonable in light of the factors
3 outlined in 18 U.S.C. § 3553(a). Crosby, 397 F.3d at 113-15.
4 After Booker, we still review a district court's interpretation
5 of the Sentencing Guidelines de novo and evaluate its findings of
6 fact under the clearly erroneous standard. United States v.
7 Selioutsky, 409 F.3d 114, 119 (2d Cir. 2005).

8 The government lodges three separate claims of error on this
9 appeal: (1) the sentence imposed by the district court differs
10 substantially from the advisory Guidelines range and is
11 unreasonably low; (2) the district court failed to include a
12 written statement setting forth its reasons for imposing a non-
13 Guidelines sentence below the advisory Guidelines range; and (3)
14 the court's finding of an inability to pay a fine is clearly
15 erroneous and the failure to impose any fine is unreasonable. We
16 address these arguments in turn.

17 **I. The Reasonableness of the District Court's Non-Guidelines**
18 **Sentence.**

19 Booker worked a fundamental change in federal sentencing.
20 No longer are the Sentencing Guidelines mandatory; district
21 courts are now simply under a duty to consider them, along with

(7) the need to provide restitution to any victims of the offense.

1 the other factors set forth in 18 U.S.C. § 3553(a). Booker, 543
2 U.S. at 261; Crosby, 397 F.3d at 110. At the same time, we have
3 emphasized that Booker did not signal a return to wholly
4 discretionary sentencing. Crosby, 397 F.3d at 113 (stating that
5 “it would be a mistake to think that, after Booker/Fanfan,
6 district judges may return to the sentencing regime that existed
7 before 1987 and exercise unfettered discretion to select any
8 sentence within the applicable statutory maximum and minimum”).
9 While district courts enjoy discretion following Booker, that
10 discretion must be informed by the § 3553(a) factors; a district
11 court cannot “import [its] own philosophy of sentencing if it is
12 inconsistent” with the § 3553(a) factors. United States v. Dean,
13 414 F.3d 725, 729 (7th Cir. 2005); see also United States v.
14 Smith, 445 F.3d 1, 3 (1st Cir. 2006) (stating that “[t]he
15 sentencing court’s discretion remains constrained by 18 U.S.C. §
16 3553(a)”).

17 Our own review for reasonableness, though deferential, will
18 not equate to a “rubber stamp.” United States v. Moreland, 437
19 F.3d 424, 433 (4th Cir. 2006). We are also under a duty to
20 consider § 3553(a). Booker, 543 U.S. at 261. Thus, while
21 reasonableness admits to “a range, not a point,” United States v.
22 Cunningham, 429 F.3d 673, 679 (7th Cir. 2005), it also is a

1 concept that implies boundaries, even if those boundaries provide
2 for some latitude, United States v. Canova, 412 F.3d 331, 350 (2d
3 Cir. 2005) (noting that reasonableness review is necessarily
4 “deferential”); United States v. Fleming, 397 F.3d 95, 100 (2d
5 Cir. 2005) (“Although the brevity or length of a sentence can
6 exceed the bounds of ‘reasonableness,’ we anticipate encountering
7 such circumstances infrequently.”).

8 In calibrating our review for reasonableness, we will
9 continue to seek guidance from the considered judgment of the
10 Sentencing Commission as expressed in the Sentencing Guidelines
11 and authorized by Congress. See United States v. Cage, --- F.3d
12 ---, ---, 2006 WL 1554674, at *7 (10th Cir. 2006) (stating that
13 “the Guidelines are an expression of popular political will about
14 sentencing that is entitled to due consideration when we
15 determine reasonableness”). “[T]he guidelines cannot be called
16 just ‘another factor’ in the statutory list, 18 U.S.C. § 3553(a),
17 because they are the only integration of the multiple factors
18 and, with important exceptions, their calculations were based
19 upon the actual sentences of many judges.” United States v.
20 Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc)
21 (citation altered) (emphasis removed) (citing Booker, 543 U.S. at
22 261; 28 U.S.C. § 994(o)); see also United States v. Johnson, 445

1 F.3d 339, 342 (4th Cir. 2006) ("By now, the Guidelines represent
2 approximately two decades of close attention to federal
3 sentencing policy."); United States v. Claiborne, 439 F.3d 479,
4 481 (8th Cir. 2006) ("The Guidelines were fashioned taking the
5 other § 3553(a) factors into account and are the product of years
6 of careful study."); United States v. Cooper, 437 F.3d 324, 331
7 n.10 (3d Cir. 2006) ("The federal sentencing guidelines represent
8 the collective determination of three governmental bodies -
9 Congress, the Judiciary, and the Sentencing Commission - as to
10 the appropriate punishments for a wide range of criminal
11 conduct.") (citations omitted); United States v. Mykytiuk, 415
12 F.3d 606, 607 (7th Cir. 2005) ("The Sentencing Guidelines
13 represent at this point eighteen years' worth of careful
14 consideration of the proper sentence for federal offenses."). It
15 bears noting that the Sentencing Commission is an expert agency
16 whose statutory charge mirrors the § 3553(a) factors that the
17 district courts are required to consider. 28 U.S.C. §§ 991(b),
18 994.

19 We appreciate that "the guidelines are still generalizations
20 that can point to outcomes that may appear unreasonable to
21 sentencing judges in particular cases." Jiménez-Beltre, 440 F.3d
22 at 518 (emphasis removed). Accordingly, we have declined to

1 adopt per se rules, opting instead to fashion the mosaic of
2 reasonableness through case-by-case adjudication. Crosby, 397
3 F.3d at 115. Nevertheless, on appellate review, we will view as
4 inherently suspect a non-Guidelines sentence that rests primarily
5 upon factors that are not unique or personal to a particular
6 defendant, but instead reflects attributes common to all
7 defendants. Disparate sentences prompted the passage of the
8 Sentencing Reform Act and remain its principal concern. See
9 Booker, 543 U.S. at 263-64; 18 U.S.C. § 3553(a)(6); 28 U.S.C. §
10 991(b)(1)(B); see also S. Rep. No. 98-225, at 52 (1983) ("A
11 primary goal of sentencing reform is the elimination of
12 unwarranted sentencing disparity."), reprinted in 1984
13 U.S.C.C.A.N. 3182, 3235.

14 Further, in discharging our duty to review sentences for
15 reasonableness, we are required to consider any pertinent policy
16 statements issued by the Sentencing Commission or the Congress
17 (just as the district courts are required to consider those
18 policy statements when imposing sentence). See Booker, 543 U.S.
19 at 261; 18 U.S.C. § 3553(a)(5); see also 28 U.S.C. § 994(e)
20 (stating that the Commission, in promulgating the Guidelines and
21 its policy statements, shall assure that they "reflect the
22 general inappropriateness of considering the education,

1 vocational skills, employment record, family ties and
2 responsibilities, and community ties of the defendant"). The
3 Commission derives its authority to issue these policy statements
4 from an express congressional mandate. 28 U.S.C. § 994(a)(2),
5 (d). Although the district courts are not required to follow
6 these statements in every case, they must consider them - even
7 when imposing a non-Guidelines sentence. See Crosby, 397 F.3d at
8 112-13 (stating that district courts must consider applicable
9 policy statements).³ A non-Guidelines sentence that a district
10 court imposes in reliance on factors incompatible with the
11 Commission's policy statements may be deemed substantively
12 unreasonable in the absence of persuasive explanation as to why
13 the sentence actually comports with the § 3553(a) factors. See
14 18 U.S.C. § 3553(a)(5); Moreland, 437 F.3d at 434 ("A sentence
15 may be substantively unreasonable if the court relies on an
16 improper factor or rejects policies articulated by Congress or
17 the Sentencing Commission.").

³ As we recognized in Crosby, however, "in some contexts, a policy statement is more than advisory." 397 F.3d at 116 n.15. For example, if a district court rejects authoritative policy statements in imposing a Guidelines sentence, this procedural error may require that we vacate that sentence as unreasonable. See Crosby, 397 F.3d at 115.

1 Finally, while we have refused to “prescribe any formulation
2 a sentencing judge will be obliged to follow in order to
3 demonstrate discharge of the duty to ‘consider’ the Guidelines,”
4 Crosby, 397 F.3d at 113, and putting aside for the moment the
5 “specific statement” requirement in 18 U.S.C. § 3553(c)(2), see
6 infra, we note that several other circuits have endorsed a rule
7 that requires district courts to offer a more compelling
8 accounting the farther a sentence deviates from the advisory
9 Guidelines range, United States v. Dean, 414 F.3d 725, 729 (7th
10 Cir. 2005) (stating that “the farther the judge’s sentence
11 departs from the guidelines sentence (in either direction – that
12 of greater severity, or that of greater lenity), the more
13 compelling the justification based on factors in section 3553(a)
14 that the judge must offer”); accord United States v. Smith, 445
15 F.3d 1, 4 (1st Cir. 2006); United States v. Smith, 440 F.3d 704,
16 707 (5th Cir. 2006); United States v. Moreland, 437 F.3d 424, 434
17 (4th Cir. 2006); United States v. McMannus, 436 F.3d 871, 874
18 (8th Cir. 2006); cf. United States v. Simpson, 430 F.3d 1177,
19 1187 n.10 (D.C. Cir. 2005). While we have yet to adopt this
20 standard as a rule in this circuit, and do not do so here, we
21 emphasize that our own ability to uphold a sentence as reasonable
22 will be informed by the district court’s statement of reasons (or
23 lack thereof) for the sentence that it elects to impose. Crosby,

1 397 F.3d at 116; see also United States v. Fairclough, 439 F.3d
2 76, 80 (2d Cir. 2006) (per curiam) (evaluating the district
3 court's sentence in light of the reasons that it offered,
4 including its statement that "the Guidelines range was inadequate
5 to address the 'nature and circumstances' of the offense");
6 United States v. Green, 436 F.3d 449, 456 (4th Cir. 2006)
7 (recognizing that reasonableness review is informed by the
8 statement of reasons articulated by the district court). Indeed,
9 a district court may be able to justify a marginal sentence by
10 including a compelling statement of reasons that reflect
11 consideration of § 3553(a) and set forth why it was desirable to
12 deviate from the Guidelines. In the absence of such a compelling
13 statement, we may be forced to vacate a marginal sentence where
14 the record is insufficient, on its own, to support the sentence
15 as reasonable. Cf. United States v. Castro-Juarez, 425 F.3d 430,
16 433 (7th Cir. 2005) (stating that a court of appeals must "assess
17 whether the district court's choice of sentence is adequately
18 explained given the record" on appeal). With these thoughts in
19 mind, we turn to Rattoballi's non-Guidelines sentence.

20 The Guidelines, after adjustments, contemplated a range
21 between 27 and 33 months' imprisonment. Notwithstanding this
22 recommendation, the district court rejected a prison sentence in

1 favor of a non-Guidelines sentence of one year of home
2 confinement and five years' probation. It should go without
3 saying that the district court's sentence represents a
4 substantial deviation from the recommended Guidelines range.

5 The district court attempted to substantiate its non-
6 Guidelines sentence through a statement that essentially rested
7 on four points of support: (1) despite the difficulty and delay
8 in coming clean, Rattoballi eventually admitted to all wrongdoing
9 and pled guilty; (2) Rattoballi suffered significant punishment
10 based on the fact that he was charged and stood convicted of two
11 federal crimes; (3) a term of imprisonment would end Rattoballi's
12 business; and (4) Rattoballi's unlawful conduct was brought
13 about, in part, by Mosallem's insatiable appetite for luxurious
14 goods and services. We find at least five problems with the
15 points advanced by the district court.

16 First, the district court's statement relies, in part, on
17 factors that are common to all defendants. Every convicted felon
18 suffers the indignity and ill-repute associated with a criminal
19 conviction. Such a reliance is contrary to 18 U.S.C. §
20 3553(a)(6), which calls for a reduction in unwarranted
21 disparities among similarly situated defendants.

1 Second, the district court appears to have overlooked or
2 ignored the Commission's policy statements in violation of 18
3 U.S.C. § 3553(a)(5). As we have previously noted, in assessing a
4 sentence for reasonableness, we are required to consider any
5 applicable policy statements issued by the Commission or
6 Congress. Booker, 543 U.S. at 261; 18 U.S.C. § 3553(a)(5). The
7 district court's sentence fails to take into account the
8 Commission's view "that alternatives such as community
9 confinement not be used to avoid imprisonment of antitrust
10 offenders." U.S.S.G. § 2R1.1, cmt. n.5. The Guidelines reflect
11 a considered determination by the Commission that jail terms are
12 the most effective deterrent for antitrust violations. See id. §
13 2R1.1 cmt. background (stating that "in very few cases will the
14 guidelines not require that some confinement be imposed");
15 Amendments to the Sentencing Guidelines for United States Courts,
16 56 Fed. Reg. 22,762, 22,775 (May 16, 1991) (explaining that the
17 offense levels for antitrust violations were increased "to make
18 them more comparable to the offense levels for fraud with similar
19 amounts of loss"); see also 1 Practice Under the Federal
20 Sentencing Guidelines § 13.02, at 13-4 (Phylis Skloot Bamberger &
21 David J. Gottlieb eds., 4th ed. 2004 Supp.) (noting that "[j]ail
22 terms were urged on the Commission as the most effective

1 deterrent by both the Antitrust Division of the Department of
2 Justice and the private bar because imprisonment, even in a
3 minimum security prison, is a terrifying and degrading experience
4 for otherwise law-abiding businessmen" (footnotes omitted). The
5 Sentencing Commission also has explained that jail terms are
6 ordinarily necessary for antitrust violations because they
7 "reflect the serious nature of and the difficulty of detecting
8 such violations." Amendments to the Sentencing Guidelines for
9 United States Courts, 56 Fed. Reg. at 22,775. Although the
10 district court is not required to adhere to the policy statements
11 promulgated by the Commission, we do consider them in reviewing a
12 sentence for reasonableness, and the policy statements make plain
13 that imprisonment is generally warranted for antitrust
14 offenders.⁴

⁴ It is unclear from the record whether the district court also took into account factors that the Commission and Congress have deemed "not ordinarily relevant" in imposing sentences. See, e.g., U.S.S.G. § 5H1.2 (vocational skills); id. § 5H1.5 (employment record); id. § 5H1.10 (socio-economic status); see also 28 U.S.C. § 994(e) (stating that the Commission, in promulgating the Guidelines and its policy statements, shall assure that they "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant"). To the extent that the district court relied upon these factors, however, it did not point to any extraordinary circumstances particular to Rattoballi and not common to other similarly situated defendants, and our own review of the record reveals none. While this alone does not render Rattoballi's

1 Third, the district court stated that Rattoballi's business
2 would "absolutely end" if Rattoballi was sentenced to a term of
3 imprisonment. We have previously held that a sentencing court
4 may consider - in extraordinary cases - the strains that a
5 criminal investigation places on a defendant's business. See
6 United States v. Milikowsky, 65 F.3d 4, 9 (2d Cir. 1995). But
7 such circumstances are not present here. The record does not
8 support the district court's finding that a term of imprisonment
9 would cause Rattoballi's business to "absolutely end"; neither
10 Rattoballi nor his business partner predicted such an outcome.
11 Moreover, we are disinclined to accord the prospect of business
12 failure decisive weight when it is a direct function of a
13 criminal investigation that had its origins in the defendant's
14 own unlawful conduct.

15 Fourth, the district court cited the fact that Rattoballi
16 agreed to plead guilty and eventually admitted to all wrongdoing.
17 The district court already had rejected the government's argument
18 that Rattoballi was not entitled to a two-level reduction under

sentence unreasonable, it means that the improper factors cannot be weighed in support of reasonableness in our review of a non-Guidelines deviation. See Fairclough, 439 F.3d at 81 (suggesting that a district court's authority to depart from the Guidelines can be considered in support of the reasonableness of a non-Guidelines deviation).

1 Guideline § 3E1.1 to his calculated Guidelines range for
2 “acceptance of responsibility.” To eliminate Rattoballi’s term
3 of imprisonment altogether based on this reason would give him
4 credit for cooperation twice, which was especially unwarranted
5 under the circumstances of this case. Giving such significant
6 weight to this factor would effectively ignore, indeed reward,
7 the defendant’s deliberate withholding of information and his
8 agreement with Mosallem to obstruct justice by not disclosing the
9 full extent of the kickback scheme to the government.

10 Finally, the district court relied upon Rattoballi’s lesser
11 culpability, at least in relation to Mosallem, to support a
12 sentence that did not include a term of imprisonment. Although a
13 defendant’s culpability is always relevant in imposing sentence,
14 we fail to see how Rattoballi’s lesser culpability could justify
15 the sentence that was imposed in this case, and no sufficient
16 justification was offered by the district court. Rattoballi
17 engaged in criminal conduct for more than a decade, to the profit
18 of both himself and his business. We also note that the
19 recommended Guidelines sentence of 27 to 33 months’ imprisonment
20 was substantially lower than the 70-month term of imprisonment
21 that Mosallem received.

1 After considering the record as a whole, we conclude that
2 Rattoballi's sentence is unreasonable when assessed against the
3 balance of the § 3553(a) factors. See 18 U.S.C. § 3553(a)(2)-
4 (6). To the extent that the district court relied upon the
5 history and characteristics of the defendant, see 18 U.S.C. §
6 3553(a)(1), we conclude that, on this record, those
7 considerations are neither sufficiently compelling nor present to
8 the degree necessary to support the sentence imposed, cf. United
9 States v. Givens, 443 F.3d 642, 646 (8th Cir. 2006) (holding that
10 the district court "gave too much weight" to the defendant's
11 "history and characteristics" and "not enough to the other
12 portions of section 3553(a)"). A sentence must reflect
13 consideration of the balance of the § 3553(a) factors;
14 unjustified reliance upon any one factor is a symptom of an
15 unreasonable sentence. See United States v. Hampton, 441 F.3d
16 284, 288 (4th Cir. 2006) (stating that "'excessive weight' may
17 not be given to any single factor" under § 3553(a) (citation
18 omitted)); see also Cage, --- F.3d at ---, 2006 WL 1554674, at *9
19 ("The problem with the [district court's] sentencing decision
20 [was] not in the consideration of [valid sentencing] factors; it
21 [was] in the weight that the district court placed on [these
22 factors].").⁵

⁵ After this case was argued, we issued an opinion in Fairclough, in which we upheld a non-Guidelines sentence that amounted to

1 The district court's failure to impose a term of
2 imprisonment was unreasonable. Accordingly, we vacate and remand
3 for resentencing.

4 **II. The Failure to Include a Statement of Reasons in the Written**
5 **Judgment.**

6 The Supreme Court's decision in Booker "left unimpaired
7 section 3553(c)." Crosby, 397 F.3d at 116. That provision
8 provides, in pertinent part:

9 The court, at the time of sentencing, shall state in
10 open court the reasons for its imposition of the
11 particular sentence, and, if the sentence--

- 12
13 (1) is of the kind, and within the range, described in
14 subsection (a)(4) [i.e., a Guidelines sentence]
15 and that range exceeds 24 months, the reason for
16 imposing a sentence at a particular point within
17 the range; or
18

nearly twice the high-end of the recommended Guidelines range. United States v. Fairclough, 439 F.3d 76 (2d Cir. 2006) (per curiam). Fairclough does not stand for the proposition that a fifty-percent deviation from the high- or low-end of the Guidelines range is inherently reasonable. That view of Fairclough, and of reasonableness review generally, would be far too simplistic. In Fairclough, we relied upon three bases for upholding the substantial deviation from the Guidelines range as reasonable: (1) the district court stated the specific reason why a Guidelines sentence would not properly reflect one of the § 3553(a) factors, id. at 80 (stating that the district court "felt that the Guidelines range was inadequate to address the 'nature and circumstances' of the offense"); (2) the district court's sentence reflected consideration of the balance of the § 3553(a) factors, id. at 80-81; and (3) the district court's deviation from the Guidelines range might have been sustained by its departure authority, id. at 81. None of those bases is present here.

1 (2) is not of the kind, or is outside the range,
2 described in subsection (a)(4), the specific
3 reason for the imposition of a sentence different
4 from that described, which reasons must also be
5 stated with specificity in the written order of
6 judgment and commitment

7 18 U.S.C. § 3553(c).

8 It is inescapable that § 3553(c)(2) imposes a statutory
9 obligation on the district court to state, in open court, “the
10 specific reason for the imposition of a sentence different from”
11 the advisory Guidelines sentence, should it elect to impose a
12 sentence outside the applicable Guidelines range. See id. Under
13 the statute, the district court also must set forth its reasons
14 “with specificity in the written order of judgment and
15 commitment.” Id. We reiterate that these obligations are
16 binding on the district courts.⁶

17 Section 3553(c) distinguishes between the obligations for a
18 sentence within and without the advisory Guidelines range.
19 Whereas § 3553(c)(1) only requires that the district court state,
20 in open court, the reason for the sentence imposed at the
21 particular point within the advisory Guidelines range, §

⁶ Although the district court’s order of restitution has not been challenged on this appeal, we also note that § 3553(c) provides that “[i]f the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor.” 18 U.S.C. § 3553(c).

1 3553(c) (2) goes further; it requires that the district court both
2 (1) state in open court the "specific" reason for the imposition
3 of a sentence "different from" the advisory Guidelines sentence
4 and (2) state the reasons for that sentence "with specificity in
5 the written order of judgment and commitment." 18 U.S.C. §
6 3553(c) (2); see also United States v. Miqbel, 444 F.3d 1173, 1179
7 (9th Cir. 2006) (explaining that the legislative history behind §
8 3553(c) "differentiates between the requirements for sentences
9 that are inside the guideline range and sentences that are
10 outside that range" (citing S. Rep. No. 98-225, reprinted in 1984
11 U.S.C.C.A.N. at 3262)). Because we are hesitant to require the
12 district court to utter any specific incantation, a simple, fact-
13 specific statement explaining why the Guidelines range did not
14 account for a specific factor or factors under § 3553(a) should
15 suffice. Cf. Fairclough, 439 F.3d at 80 (noting that "[t]he
16 District Court felt that the Guidelines range was inadequate to
17 address the 'nature and circumstances' of the offense"); see also
18 Miqbel, 444 F.3d at 1179 (stating that the district court was
19 required to explain both "the specific reasons why a [sentence
20 within the Guidelines range] would not be sufficient and why [the
21 sentence imposed, which fell outside the range,] was
22 appropriate").

1 While the fact that § 3553(c) imposes obligations on the
2 district court is plain, it is an open question in this circuit
3 whether the failure to abide by § 3553(c) provides an independent
4 cause for remand where the district court imposed a non-
5 Guidelines sentence outside the advisory Guidelines range. Cf.
6 United States v. Fuller, 426 F.3d 556, 567 (2d Cir. 2005)
7 (holding that, in a departure case within the structure of the
8 Guidelines, the failure to abide by § 3553(c) did not provide an
9 independent cause for remand). Because we find that Rattoballi's
10 sentence is unreasonable and therefore provides an adequate cause
11 for remand, 18 U.S.C. § 3742(f)(1) (requiring remand where a
12 sentence is "imposed in violation of law"); cf. United States v.
13 Fernandez, 443 F.3d 19, 25-26 (2d Cir. 2006) (holding that we
14 have jurisdiction to review a properly calculated Guidelines
15 sentence for unreasonableness under § 3742(a)(1) because the
16 defendant is effectively claiming that the sentence was "'imposed
17 in violation of law'"), we need not decide today whether remand
18 is also compelled by the district court's non-compliance with the
19 written judgment requirements of § 3553(c)(2).

20 **III. The District Court's Finding of an Inability to Pay a Fine**
21 **and its Failure to Impose a Fine.**

22 Because Booker rendered the whole of the Guidelines
23 advisory, it stands to reason that the Guidelines' fine

1 requirements were likewise rendered advisory. Booker, 543 U.S.
2 at 245 (excising 18 U.S.C. § 3553(b)(1)). In the absence of the
3 mandatory Guidelines scheme, the Sentencing Reform Act leaves to
4 the discretion of the district court the question whether to
5 impose a fine. See 18 U.S.C. § 3571(a) (“A defendant who has
6 been found guilty of an offense may be sentenced to pay a fine.”
7 (emphasis added)). Accordingly, a district court is not under an
8 obligation to impose a fine post-Booker, except where the failure
9 to do so would offend the underlying criminal statute or amount
10 to an abuse of discretion.

11 Even though the decision whether to impose a punitive fine,
12 like the decision whether to impose a particular term of
13 imprisonment, lies within the discretion of the district court,
14 that does not mean that a district court can simply ignore a
15 Guidelines recommendation calling for the imposition of a fine.
16 To the contrary, a district court must engage in the same type of
17 analysis it applies in determining the appropriate term of
18 imprisonment: After consulting the Guidelines recommendation,
19 the district court should consider the § 3553(a) factors,
20 including any pertinent policy statement issued by the
21 Commission; it should then consult the standards outlined in 18

1 U.S.C. §§ 3571 and 3572 to determine whether the imposition of a
2 fine is appropriate.⁷

⁷ Subsection (a) of 18 U.S.C. § 3572 provides:

In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)--

- (1) the defendant's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
- (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
- (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

1 In this case, the district court never mentioned the
2 imposition of a fine during the sentencing hearing and, with the
3 record devoid of any suggestion of consideration, it appears to
4 have ignored the Guidelines recommendation of a \$20,000 minimum
5 fine. Following the hearing, the district court decided not to
6 impose a fine, citing Rattoballi's inability to pay. We hold
7 that this finding is clearly erroneous in light of the
8 defendant's admission (that he had "accumulated some modest
9 wealth" and was "capable of paying a modest fine") and his
10 considerable assets (between \$1 and \$1.5 million). Thus, it is
11 not necessary for us to decide today the standard by which we
12 review a district court's considered decision to impose or not
13 impose a fine.

14 On remand, the district court must consider whether the
15 imposition of a fine would further the goals reflected in the §
16 3553(a) factors and the standards outlined in §§ 3571 and 3572.
17 We note that the Commission has expressed the belief that
18 "[s]ubstantial fines are an essential part of the sentence" for
19 antitrust offenders. U.S.S.G. § 2R1.1, cmt. background. It also
20 has stated that "[i]f the court concludes that the defendant
21 lacks the ability to pay the guideline fine, it should impose
22 community service in lieu of a portion of the fine." Id. §

1 2R1.1, cmt. n.2. The district court must consider these and any
2 other pertinent policy statements on remand.⁸

3 **CONCLUSION**

4 For the foregoing reasons, the judgment of the district
5 court is VACATED as to the sentence and the case is REMANDED for
6 resentencing consistent with this opinion.

⁸ We recognize that the pre-sentence report recommended that "the fine in this case be waived in lieu of the recommended order of restitution." The Probation Office based this recommendation on a restitution order in excess of \$396,000; the district court ordered that the defendant pay \$155,000 in restitution. On remand, the district court should consider the amount of restitution actually imposed in determining the propriety of a fine. See 18 U.S.C. § 3572(a)(4), (b).