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A Tribute to the Honorable Vincent L. Broderik

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> Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.
>
> SOCRATES[1]

It is rare for any Federal Judge to permit a criminal defense attorney the opportunity to engage in a pre-sentence conference where the facts in mitigation of a client's sentence can be presented in Chambers preceeding the final imposition of the sentence. The late Judge Vincent L. Broderick afforded us this unique opportunity. While the sentences he imposed were neither more stringent nor more lenient than those of his brethren on the bench, the sentencing conferences he held gave the Government and the defendant a meaningful forum in which to engage in adversarial combat. The discourse was often heated as Judge Broderick challenged both prosecutor and defense counsel to support their sentencing requests with the heavy artillery of law and logic. It always seemed as if there was this last "window of opportunity" to persuade the Judge that leniency was appropriate, and that whatever sentence he had previously considered was, at that point, not yet memorialized in a Judgment and Order.

The Federal Sentencing Guidelines promulgated in 1987 by the Sentencing Commission, and imposed upon federal judges by Congress, took a great deal of sentencing discretion away from the bench. Prior to the Guidelines, a sentencing court looked at the maximum and minimum sentences prescribed by statute and would consider, for instance, the myriad of individual characteristics, the nature and magnitude of the crime, and any prior criminal history or evidence of recidivism. All these

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1. Socrates (470-399 B.C.), *in* THE QUOTABLE LAWYER at 142 (D. Shrager & E. Frost eds., 1986) citing F.P.A. BOOK OF QUOTATIONS (F. P. Adams ed., 1952).

factors were then placed into a judicial "blender." The result was a sentence which the court believed was appropriate in light of all the circumstances. The reality was, however, that the sentence was, to some extent, determined by various geographical prejudices towards certain types of crimes and certain types of defendants. The concept of the Guidelines was to eliminate these unwarranted sentencing disparities within the Federal system. With the advent and implementation of the Guidelines, it became the Sentencing Commission that determined the appropriate "time for the crime." What had previously been within the "sole discretion" of the court was now placed in the hands of the Commission and in the hands of the United States Attorney's Offices through their charging decisions. Under the Guidelines, each criminal statute has a corollary Guideline section which, along with specific offender characteristics, determines the number of months within a Guideline range that the court is mandated to sentence. There are, however, exceptions to this mandatory sentence if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ."[2] Judge Broderick would fully consider the extent to which a circumstance, whether it was a defendant's personal history or an unusual aspect of the crime, was of a kind or degree that was not adequately considered, and his sentencing departures reflected his commitment to impose a sentence that was appropriate. While his upward departures were never welcomed by defense counsel and defendants, they were, for the most part, deserved.

Judge Broderick sat on the Sentencing Commission but he never hid behind the constraints of the Guidelines and often used his discretion to depart from them when he deemed it appropriate. He knew well that "it was not Congress' aim to straitjacket a sentencing court, compelling it to impose sentences like a robot inside a Guideline's glass bubble, and preventing it from exercising discretion, flexibility or independent judgment."[3] This independent judgment was exercised both to the joy and sorrow of all who stood before him for sentencing. Although the Guidelines carve out a sentencing range for cases that fall

2. 18 U.S.C. § 3553(b) and U.S.S.G. § 5K 2.0.
3. United States v. Lara, 905 F.2d 599, 604 (2d Cir. 1990).

within the "heart land," Congress did not aim or intend to avoid sentencing disparities, but rather to avoid *unwarranted* sentencing disparities.[4]

The Government has the exclusive power to charge and plea bargain. The decision on what the Guideline range will be is determined by these charges and is therefore placed in the hands of the United States Attorney's Offices. It has become, in many respects, a reality of "[n]o, no! sentence first — verdict afterwards."[5] Judge Broderick voiced concern over the Government's extraordinary power in charging decisions and plea negotiations. Their power to charge a drug crime with a mandatory five or ten year sentence, or to include an additional count under Title 18 U.S.C. 924(c), which carries a mandatory five year consecutive sentence, was not lost on Judge Broderick. He was fully cognizant of the inequity of placing this power in such young hands. He stated: "[W]e're dealing here with 30-year-old, 28-year-old prosecutors without a life experience, considerable experience, in the criminal justice area."[6]

While sitting on the Sentencing Commission, Judge Broderick fought valiantly for fairness within the Guidelines. In addition to arguing against the wisdom of placing such power within the hands of young, inexperienced government attorneys, he also recognized the gross injustice of severe mandatory sentences for drug crimes where the charges, and therefore the sentence, are based solely on the weight of the drugs, and not on a particular defendant's characteristics or role in the distribution chain. He stated, "One danger, and it's a constant danger, is that we forget the fact that there is a human element in every sentencing, and that is something that just can't be dealt with on a statistical basis . . . ."[7] Therefore, each defendant that stood before him for sentencing was assured that the court would look at the applicable Guideline range and question its appropriateness under all of the circumstances.

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4. 18 U.S.C. § 3553(a)(6).

5. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 105 (Purnell Books 1975) (1865).

6. Testimony of Vincent L. Broderick (S.D.N.Y.) and Mark Wolf (D.Mass.) for the Criminal Law Committee of the Judicial Conference of the United States, Before the Sentencing Commission March 22, 1993 (excerpts), 6 FED. SENTENCING REPT. 76, 78 (Sept./Oct. 1993).

7. 6 FED. SENTENCING REPT. 76 (Sept./Oct. 1993).

Counsel approached each sentencing hearing with nervousness, fear, and hopeful anticipation, as there was always the possibility that the request for a downward departure would be granted and that the sentence would be, if not more lenient, at least appropriate. During those sentencing conferences, Judge Broderick's colloquy rarely gave any indication of what the final sentence would be. However, the discourse would generally begin with the Judge's unequivocal renunciation of any sentencing request he felt was either too harsh or too lenient.

The aim of the Sentencing Reform Act of 1984 was "to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. . . ."[8] It was a rare defendant who stood before Judge Broderick and was not sentenced in accordance with this mandate, although an exception occurred when the crime involved guns. Judge Broderick, a former prosecutor with the United States Attorney's Office and a former Police Commissioner for the City of New York, was predisposed to utilize his full discretion and upwardly depart when a defendant was convicted of any crime which involved a gun.

One of the most interesting departures Judge Broderick made was in *United States v. Bryser*.[9] That trial involved a group of highwaymen who owned an armored car pick-up service and vault. The defendants would pick up money from banks and retail chains, and store the money in their vault. The vault of Hercules Securities Unlimited was robbed, and $3,744,567.58 disappeared. Hercules filed an insurance claim, and the government filed charges against the owners of Hercules, charging them with an inside heist. The jury found the defendants guilty. Judge Broderick upwardly departed from the Guidelines, finding that the "Sentencing Commission in preparing the guidelines did not give adequate consideration to the

8. S. REP. No. 25, 98th Cong., 2d Sess. 52, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

9. 954 F.2d 79 (2d Cir. 1992), *cert. denied*, 112 S. Ct. 2939 (1992). This case is currently being appealed for the third time based upon the Honorable Barrington D. Parker Jr.'s refusal to fund an investigator to testify at the sentencing hearing regarding Mr. DeGerolamo's dissipation of the money at various casinos in Atlantic City. United States v. Bryser, et.al., 954 F.2d 79 (2d Cir. 1992), *appeal docketed*, No. 95-1571 (2d Cir.).

situation where defendants having taken money still have the money and obviously plan to have recourse to that money upon their release from prison."[10] This was a novel ground for an upward departure. The departure was upheld, but the case was remanded "so that appellants [could] contest the trial court's assumption that defendants still possess[ed] the money stolen from the vault."[11] Gerald DeGerolamo, one of the defendants, was originally sentenced to seventy-eight months of incarceration; on remand, the sentence was not changed. The bureau of prisons designated Mr. Degerolamo to Allenwood, a Federal Camp, with minimum security.

It was my pleasure to make the acquaintance of Mr. DeGerolamo a couple of years after he was initially sentenced, but had not, as of that time, completed his sentence. Mr. DeGerolamo was subsequently arrested on a complaint charging him and his son with attempting to break into and steal money from a security vault. It seems that the yellow line which runs around Allenwood was not strong enough to persuade Mr. DeGerolamo to remain within the confines of the Federal facility, so he left. While at large, he attempted to commit the same type of crime, was promptly arrested, and faced new Federal criminal charges as well as an escape charge.[12]

I was assigned to represent Mr. DeGerolamo for his initial arraignment on these new charges. As luck would have it, no magistrate-judge was available and Mr. DeGerolamo was arraigned before a Federal District Court Judge. It was not Mr. DeGerolamo's day, as his case was again assigned to the Honorable Vincent L. Broderick.

If there is one moment for which I have an indelible photograph in my mind, it is that moment when the Judge came out of his chambers and saw Mr. DeGerolamo standing before him

10. 954 F.2d at 89 (quoting from the trial court's sentencing determination).

11. *Id.* at 90.

12. He and others devised a scheme whereby an individual, aptly named "Shorty," would be placed in a small box. The box would be picked up by the security company and placed in one of their vaults and Shorty would exit the box, fill it with money, and reenter the box, which would then be shipped back to Mr. DeGerolamo. Shorty, who actually went into the box with his pillow with teddy bears on it, was, unfortunately (for DeGerolamo), working with the government. *United States v. Gerald DeGerolamo, et al.*, No. 2.1-93-Crim. 353-01 & 94-Crim. 02-65-01 (Charles L. Brieant (C.L.B.)) (S.D.N.Y.).

on the new charges. Judge Broderick's eyes twinkled as he looked from the complaint to my client and back at the complaint. Shaking his head slowly, with a look of astonishment and slow deliberation, he commented that he could not believe Mr. DeGerolamo was standing in front of him on these new charges. After a pregnant pause, I could not help but remark that Mr. DeGerolamo was also amazed that this new matter was being arraigned before the court that had so recently sentenced him. Although all indigent clients must fill out a financial affidavit listing their income and assets so that the court can determine whether they are entitled to assigned counsel, the court refused to accept Mr. DeGerolamo's financial affidavit. Judge Broderick also refused to assign him counsel, remarking that he had $3,700,000 stashed away from his last theft and could go hire a lawyer.

Judge Broderick would always consider any facts which were unique to the commission of the crime or to the defendant. In exercising his sentencing discretion, he would occasionally downwardly depart from the constraints of the Guideline sentencing range. In *United States v. Arun Gaind*,[13] the Judge considered the total destruction of Mr. Gaind's business in departing downward, even after the jury had found Mr. Gaind guilty, stating that:

> [E]limination of defendant's ability to engage in similar or related activities — or indeed any major business activity — for some time, and the substantial loss of assets and income resulting from this have decreased for the foreseeable future, his ability to commit further crime of the type he was tempted to undertake, and constitute[d] a source of both individual and general deterrence.[14]

His sentencing procedure was also most unusual. The Judge would invite the defendant, counsel, the Government, probation, and defendant's immediate family into chambers for a conference on the record. The discussion began with the issues raised in defendant's sentencing papers. More often than

13. 829 F. Supp. 669 (S.D.N.Y. 1993).

14. *Id.* at 671. Arun Gaind had owned laboratories that tested land and water samples for the government and private companies. The government contract required that all samples be tested within 10 days. Mr. Gaind engaged in what was termed "time travel" whereby he would adjust his computers to back date the samples to comply with the government contract.

not, there would be an admonishment for the length and breadth of the papers. There was never any doubt that a great deal of time had been spent reviewing all of the submissions carefully, and that each case cited had been checked. The Judge would discuss why the defendant's reasoning was faulty, and why the cases cited were not on point, alluding to both statutory authority and the relevant legislative history. Defense counsel would then be given the opportunity to argue why their cases, if not on point, were applicable and should be followed, and also why the defendant's unique position should be considered. The unprepared were cut off quickly and curtly. Judge Broderick did not suffer fools lightly. Conversely, prepared litigants who could articulate their position and intelligently support their theory had a forum for debate and a Judge who would always listen.

The Government and probation were also brought into the discussion. The young government attorney, who may have been given the file to merely cover the sentencing, was scolded harshly for not knowing the case and the law. A former prosecutor, the Judge expected every assistant to be fully prepared and accepted nothing less. The discussion would continue until the court was satisfied that it understood everyone's position clearly. I always had the feeling that the sentence had not yet been written in stone and that as long as we were back in chambers, there was a chance I could persuade the court to impose a more lenient sentence than the Guidelines mandated. I'll never know if my papers and my arguments actually changed the court's initial sentencing position; however, Judge Broderick's sense of fairness in the process was always appreciated.

Judge Broderick was dedicated and he was tireless. This was so imminently clear during those last few months when, courageously fighting the illness that would ultimately claim him, he continued to work. He will be remembered by all who had the privilege to appear before him. His knowledge of the law challenged us, his inherent sense of justice and fair play guided us, and his love of our legal system, with all of its faults, elevated us. His work on the Sentencing Commission and the compassion with which he presided will remain a tribute to his years on the bench.