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AVOIDING DISPARITIES BETWEEN SENTENCES OF CO-DEFENDANTS IS A LEGITIMATE SENTENCING GOAL

by
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Individuals who play similar roles in the same criminal scheme should receive similar sentences. Yet defendants convicted after exercising their right to trial often receive sentences exponentially greater than their co-defendants who plead guilty to the same crimes. Until recently, sentencing courts had no ability to depart from the mandatory Sentencing Guidelines to address the potential unfairness of this situation because the Guidelines were aimed at creating nationwide sentence uniformity rather than individualized justice. Following the U.S. Supreme Court's decision in *United States v. Booker* to render the Guidelines advisory, however, several courts have concluded that they are now free to consider as a relevant sentencing factor the need to avoid unwarranted disparities between sentences of co-defendants.¹ Such a rule promotes respect for the law, keeps the power to determine sentences in the hands of judges rather than prosecutors, and ensures that individuals are not unfairly punished for exercising their constitutional right to stand trial.

Following *Booker*, sentencing courts must follow the factors enumerated in 18 U.S.C. § 3553(a), one of which is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). In the pending appeals of *United States v. Thurston* (1st Cir.) and *United States v. Ebberts* (2d Cir.), cases addressing the issue of extreme disparities between the sentences of co-defendants convicted of playing similar roles in the same criminal scheme, the First and Second Circuits must decide whether this statute permits courts to consider such disparities at sentencing.

In *Thurston*, the defendant, William Thurston, was a corporate vice president who was convicted at trial of conspiracy to defraud Medicare. At sentencing, the district court departed downward from a Guidelines range that exceeded the five-year statutory maximum and sentenced Thurston to three months' imprisonment. The court based the departure primarily on the fact that the

¹See, e.g., *United States v. Lazenby*, Nos. 05-2214, 05-2216, 2006 U. S. App. LEXIS 5960, at *16 (10th Cir. Mar. 10, 2006); *United States v. Hensley*, 363 F. Supp. 2d 843, 845 (W.D. Va. 2005); *Ferrara v. United States*, 372 F. Supp. 2d 108, 121 (D. Mass. 2005); *United States v. Gray*, 362 F. Supp. 2d 714, 719 (S.D. W. Va. 2005); *United States v. Revock*, 353 F. Supp. 2d 127, 129 (D. Me. 2005). In contrast, the Fifth and Seventh Circuits, relying on pre-*Booker* authority, have recently concluded that the only disparities a district court may consider at sentencing continue to be nationwide sentence disparities. See *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006); *United States v. Duhon*, ___ F.3d ___, 2006 WL 367017, at **7-8 (5th Cir. Feb. 17, 2006).

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company's president, who was the "architect" of the same fraud, had pled *nolo contendere* to a narrower conspiracy and received a sentence of probation. On appeal, the First Circuit held that the district court had no authority under the Guidelines to depart downward based on co-defendant sentence disparity. *United States v. Thurston*, 358 F.3d 51, 78 (1st Cir. 2004). The Supreme Court subsequently vacated the First Circuit's decision for reconsideration in light of *Booker*.

At resentencing, the district court again imposed a non-Guidelines sentence of three months' imprisonment to avoid a gross disparity with the sentence of probation received by Thurston's co-defendant. At sentencing, the court stated that while Section 3553(a)(6) is primarily aimed at eliminating nationwide disparity, "there can be cases in which the disparity in sentencing between similarly situated codefendants would be so pronounced that to impose those disparate sentences would injure respect for the law and confidence in the administration of justice." The court also believed that a failure to address that disparity would send the message "that it's just too risky to exercise [the] right to stand trial." The government's appeal is currently pending before the First Circuit.

In *Ebbers*, former WorldCom CEO Bernard Ebbers was convicted at trial of securities fraud. At sentencing, Ebbers argued that the district court should consider the need to avoid unwarranted disparity between his sentence and the sentence that the court would be imposing on WorldCom's former-CFO, who had pled guilty to the same crime and cooperated against Ebbers. Unlike the court in *Thurston*, however, the district court ruled that Section 3553(a)(6) was intended solely to avoid nationwide sentencing disparities and sentenced Ebbers to 25 years' imprisonment. A few weeks later, the district court sentenced the CFO to five years' imprisonment, even though the court concluded that he was the "architect" of the fraud at WorldCom. Ebbers' appeal is currently pending before the Second Circuit.

Thurston and *Ebbers* demonstrate that permitting district courts to consider co-defendant sentence disparities is necessary to promote respect for the law and achieve just punishment for similar conduct. Moreover, such a rule ensures that judges, not prosecutors, maintain the power to determine appropriate sentences for criminal defendants. Without the power to consider co-defendant sentence disparities, district courts would be unable to curb abuses associated with excessive charge or fact bargaining by prosecutors. Charge bargaining is the practice of permitting a defendant to plead guilty to a limited number of charges in order to limit sentence exposure. Fact bargaining involves the government permitting the defendant to plead guilty to a limited factual predicate while agreeing not to bring aggravating sentencing factors to the attention of the sentencing court. Excessive fact or charge bargaining (or both) may result in one co-defendant receiving a far more lenient sentence than another co-defendant who engaged in the same conduct but failed to obtain the same government deal. Permitting judges to consider the sentences of similarly situated co-defendants limits prosecutors' ability to manipulate sentences through their charging decisions.

Of course, defendants are entitled to leniency at sentencing in return for their decision to accept responsibility and cooperate with the government. Plea bargaining is undeniably an important part of the criminal justice system that assists the government in prosecuting crime. Yet when the sentence received by a government cooperator is grossly disproportionate to the sentence of a defendant convicted at trial who played a similar role in the same criminal scheme, the goals of just punishment and sentence uniformity are not served. For example, the wide disparity between the five-year sentence of WorldCom's CFO and the 25-year sentence imposed on Bernard Ebbers undermines respect for the rule of law and the administration of justice. If district courts cannot consider disparate sentences obtained by co-defendants when sentencing defendants convicted at trial, defendants will be unfairly punished for exercising their constitutional right to stand trial.