WLF Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

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COURT OF APPEALS MANDATES SUBSTANTIAL PRISON TERM FOR BUSINESS EXECUTIVE

(*United States v. Thurston*)

In a major decision regarding the application of the U.S. Sentencing Guidelines, the U.S. Court of Appeals for the First Circuit last week reversed a three-month prison sentence that was imposed twice by two different district court judges on a business executive, and ordered that he be resentenced for yet a third time for at least three years in prison. The court, however, rejected the Justice Department's argument that the sentence should be increased to the statutory maximum of five years for this first offense. The decision was a setback for the Washington Legal Foundation (WLF) which filed a brief arguing that the original three-month sentence was appropriate under the voluntary Sentencing Guidelines. The ruling may likely be appealed to the U.S. Supreme Court.

In *Thurston v. United States,* two executives employed by a medical laboratory testing company were indicted in 1998 on one conspiracy count for allegedly billing Medicare for certain blood tests for patients which were performed, but were determined to be medically unnecessary in most, but not all, cases. The prosecutors allowed the president of the company, who developed the testing program, to plead *nolo contendere* and to receive probation. They offered the same deal to William Thurston, vice-president of the company, who rejected it and elected to exercise his constitutional right to trial because he believed he did nothing wrong. Expert testimony at trial indicated that the billing procedures were legal. Nevertheless, Mr. Thurston was found guilty by a jury of the single conspiracy count.

At Thurston's first sentencing hearing in 2002, the government demanded a prison sentence of five years, the statutory maximum, because of the then-mandatory guidelines. The trial judge rejected that extreme sentence and departed from the guidelines, imposing instead a reasonable sentence of three months in prison, three months home detention, and two years probation. The judge rejected the five-year sentence in order to avoid a gross sentencing disparity with the more culpable co-defendant who received probation, and because of Thurston's extensive community and charitable work.

The Justice Department appealed the sentence. On appeal, the U.S. Court of Appeals for the First Circuit noted that the sentence "outraged the prosecutors" but reluctantly concluded that the then-mandatory guidelines were binding on trial and appellate court judges, and ordered Thurston to be resentenced to the maximum term of five years. On remand, the trial judge, wanting no part in this apparent miscarriage of justice, took himself off the case.

In the meantime, Thurston's attorneys appealed his sentence to the U.S. Supreme Court in 2004 where similar cases were pending regarding the constitutionality of the Sentencing

Guidelines under the Sixth Amendment. WLF had filed a brief supporting Thurston at that certiorari stage and also filed a brief in *United States v. Booker*, which became the test case for the guidelines. In January 2005, the Supreme Court reversed the appeals court ruling in Thurston shortly after its landmark ruling in *Booker* that the Guidelines violated the constitutional right to have a jury determine beyond a reasonable doubt all of the factors that were used by a judge in imposing a sentence. The Supreme Court further ordered that Thurston be resentenced under guidelines that should only be considered, but are not mandatory.

In June 2005, a different federal judge held two days of hearings and concluded that the original sentence was just and served the ends of justice. He stated that imposing a five-year sentence on Thurston would cause extreme sentencing disparity for similarly situated defendants, the very situation the guidelines were supposed to prevent, and would engender disrespect for the law by the public. The Justice Department made the absurd argument that the sentencing guidelines were meant to eliminate only national sentencing disparities, and that extreme disparities in sentences between co-defendants who are similarly situated in the same case are somehow fair and just.

In its brief filed on behalf of itself and the Allied Educational Foundation, WLF sharply criticized the Justice Department for their relentless prosecution of Thurston who is a pillar of integrity in his community, and who did not personally profit from the challenged billing practice. In particular, WLF argued that by accepting a plea and probation from a more culpable co-defendant, the government was representing that such a sentence served the valid principles of punishment and deterrence, and that the five-year sentence dictated by the flawed guidelines was excessive punishment, violated other statutory directives, and would not serve the ends of justice.

WLF further presented statistics compiled earlier this year by the U.S. Sentencing Commission showing that in cases where courts departed from the guidelines under the voluntary post-*Booker* system, the median sentence for fraud was only *one month*. WLF also cited an article by then Commissioner Stephen Breyer, now Justice Breyer, that the Commission believed that a short sentence of one to six months was sufficient for deterrence purposes in serious white-collar cases.

The Court of Appeals stated in its recent decision that while some departure from the Guidelines was permissible, the departure in this case was too great to be considered reasonable, and that any new sentence below 36 months would not be upheld on appeal. WLF plans to participate in the case in any future proceedings.

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For information, contact WLF Senior Executive Counsel Paul Kamenar at 202-588-0302. WLF's briefs in *Thurston* are posted on its website at *www.wlf.org*.