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REVIEW OF CO-DEFENDANT SENTENCING DISPARITIES BY THE SEVENTH CIRCUIT:
Two Divergent Lines of Cases

*By Alison Siegler**

In the past few years, the Supreme Court and every federal Circuit Court of Appeals have recognized that 18 U.S.C. § 3553(a) grants judges the discretion to consider co-defendant disparities at sentencing.¹ In *United States v. Statham*, 581 F.3d 548, 556 (7th Cir. 2009), the Seventh Circuit reached the same conclusion, stating unequivocally that it is “open in all cases to an argument that a defendant’s sentence is unreasonable because of a disparity with the sentence of a co-defendant.”² Nonetheless, the Seventh Circuit has issued several recent decisions in which it has, without explanation, ignored *Statham* and held that a district court cannot consider co-defendant disparities under § 3553(a).³ In the interest of *stare decisis*, the Seventh Circuit should clarify that district courts are permitted to consider co-defendant disparities under § 3553(a).

The issue of co-defendant disparities typically arises when two or more co-defendants in a case are facing the identical sentencing range under the United States Sentencing Guidelines but have differing culpability or played very different roles in the offense. For example, imagine a bank robbery case in which Defendant Driver drove to the bank with Defendant Robber as his passenger, and then Defendant Robber entered the bank, held the teller at gunpoint, and ran away on foot with \$12,000. Assuming neither defendant had any criminal history, they would both be facing a guidelines range of 78–97 months.⁴ The sentencing judge might grant Driver a minor role reduction under U.S.S.G. § 3B1.2 to differentiate between his role and that of Robber. Under Supreme Court precedent and *Statham*, the judge also has the authority to vary from the guidelines range under § 3553(a), either by granting Driver a below-range sentence or Robber an above-range sentence, in order to ensure that their respective sentences track their respective culpabilities and roles.

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**Alison Siegler is an Associate Clinical Professor of Law, at the University of Chicago Law School. She is a 1998 graduate of the Yale Law School and was a Senior Editor of the Yale Law Journal. She clerked for Judge Robert Gettleman, United States District Judge, Northern District of Illinois, from 1998 – 2000. The author would like to thank University of Chicago Law School Class of 2012 students Conor Shaw and James Kraehenbuehl for their research assistance and Andrew Grindrod and Linda Shi for their editorial assistance.*

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The Supreme Court made it clear in *Gall v. United States*, 552 U.S. 38 (2007), that two separate aspects of the sentencing statute — § 3553(a)(6) and § 3553(a)(2) — afford district judges this discretion. Section 3553(a)(6) directs the district court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The Eighth Circuit had held in *Gall* that the sentencing judge had failed to consider the statute’s directive to avoid unwarranted disparities in sentencing him to probation, a lower sentence than his co-defendants had received. See *Gall*, 552 U.S. at 54. The Supreme Court disagreed and explained:

[I]t is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. The District Judge regarded Gall’s voluntary withdrawal as a reasonable basis for giving him a less severe sentence than the three codefendants discussed with the AUSA, who neither withdrew from the conspiracy nor rehabilitated themselves as Gall had done.⁵

The Supreme Court thus endorsed sentencing court discretion to consider co-defendant disparities under § 3553(a)(6) and to grant a differently situated defendant a lower sentence than his co-defendants.

Gall also demonstrated that it is entirely appropriate for sentencing courts to compare co-defendants’ relative culpability under another subsection of the sentencing statute, § 3553(a)(2), and to reduce one defendant’s sentence accordingly. In addressing § 3553(a)(2)(A)’s requirement that the sentence imposed “promote respect for the law,” the Supreme Court approved the sentencing

judge’s decision to compare Gall’s culpability with that of his co-defendants and to sentence Gall to probation rather than prison based on his lesser culpability. The Court held:

[T]he unique facts of Gall’s situation provide support for the District Judge’s conclusion that . . . “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.”⁶

It is thus clear from *Gall* that both § 3553(a)(6) and § 3553(a)(2) entitle sentencing judges to consider co-defendant disparities.⁷

Before *Gall*, the Seventh Circuit took the position that § 3553(a)(6) was only concerned with “an unjustified difference across judges (or districts) rather than among defendants to a single case.”⁸ In two 2009 decisions, however, the Seventh Circuit recognized that this view was no longer tenable. In the first case, *United States v. Bartlett*, 567 F.3d 901, 908–09 (7th Cir. 2009), the court relied on § 3553(a) generally, explaining that the sentencing statute as a whole permits consideration of co-defendant disparities. For that reason, *Bartlett* deduced, “if the district judge thought himself forbidden to take account of [the co-defendants’] (relatively) low sentences when deciding what punishment

to impose on [the other defendants], he was mistaken.”⁹

While *Bartlett* clearly authorized sentencing judges to consider co-defendant disparities under § 3553(a) generally, its interpretation of whether § 3553(a)(6) also authorized consideration of co-defendant disparities was less clear. The Seventh Circuit explained that the defendants’ arguments in *Bartlett* raised two questions: “first, does § 3553(a)(6) require a judge to reduce anyone’s sentence below the Guideline range because other persons who committed the same crime but pleaded guilty and cooperated received lower terms?; second, does § 3553 as a whole *permit* a judge to go below the Guideline range for this reason?”¹⁰





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The court answered the first question in the negative, explaining that “[a] difference justified by the fact that some wrongdoers have accepted responsibility and assisted the prosecution, while others have not, is not ‘unwarranted.’”¹¹ The court then qualified this statement as follows:

[Section] 3553 permits a judge to reduce one defendant’s sentence because of another’s lenient sentence—not because of § 3553(a)(6), but despite it. Avoiding ‘unwarranted’ disparities (as the Sentencing Commission or a court of appeals defines them) is not the summum bonum in sentencing. Other objectives may have greater weight, and the court is free to have its own policy about which differences are “unwarranted.”¹²

The court’s point was that even though § 3553(a)(6) does not require a sentencing judge to take account of co-defendant disparities, a judge is permitted to account for such disparities in one of two ways: the judge may determine that those disparities are “unwarranted” under the court’s own definition of that word, or the judge may place greater weight on a different § 3553(a) objective. The court thus answered the second question in the affirmative, holding that § 3553(a) as a whole allows a judge to give one co-defendant a below-range sentence to equalize his punishment with that of another co-defendant.

A few months after *Bartlett*, the court clarified in *Statham* that § 3553(a)(6) also permits a judge to reduce one defendant’s sentence based on a low sentence given to a co-defendant (even if it does not require the judge to do so).¹³ The court found that this conclusion was inescapable after *Gall*, which had “endorsed a district court’s consideration of the need to ‘avoid unwarranted disparities, but also unwarranted similarities among other co-conspirators’ when calculating a reasonable sentence.”¹⁴ The court in *Statham* went on to conclude that the Seventh Circuit was “therefore open in all cases to an argument that a defendant’s sentence is unreasonable because of a disparity with the sentence of a co-defendant.”¹⁵ Although *Statham* recognized that the Seventh Circuit had previously operated on the “presumption that a sentencing disparity is problematic only if it is between the defendant’s sentence and the sentences imposed on other similarly situated defendants nationwide,”¹⁶ *Statham* explained that “[s]uch a categorical rule is now foreclosed by *Gall*.”¹⁷

Statham and *Bartlett* therefore unambiguously granted sentencing judges within the Seventh Circuit the authority to consider co-defendant disparities under two different § 3553(a) factors. In doing so, the Seventh Circuit explicitly abrogated an entire line of cases that forbade sentencing judges from considering disparities among co-defendants, including *Omole v. United States*¹⁸ and *Woods v. United States*,¹⁹ and implicitly abrogated those cases upon which *Omole* and *Woods* relied.²⁰ Every other court of appeals to consider the issue since the advent of advisory guidelines has likewise determined that either § 3553(a)(6), or § 3553(a) generally, grants district judges the discretion to consider co-defendant disparities.²¹

Since *Statham*, the Seventh Circuit’s co-defendant disparity jurisprudence has diverged into two opposing lines of cases. One line of cases expressly follows *Statham* and authorizes district courts to take co-defendant disparities into account.²² The other line of cases forbids consideration of co-defendant disparities and denies relief to defendants raising that issue. Most of the opinions in the latter line cite *Omole* — one of the cases explicitly abrogated by *Statham* — and do not cite *Statham*.²³ One of the opinions cites other cases in the *Omole* lineage that were in essence overruled by *Statham* and *Bartlett*.²⁴ And none of the post-*Statham* opinions that forbid consideration of co-defendant disparities recognizes the impact of *Statham* and *Bartlett* or acknowledges that they are deviating from settled Seventh Circuit and Supreme Court precedent.²⁵

Perhaps the two lines of post-*Statham* precedent can be explained by the fact that, in certain cases, the government continued to rely on the very proposition that *Statham* held was “foreclosed by *Gall*”²⁶ and failed to acknowledge that the old rule was no longer good law.²⁷ The quality and accuracy of parties’ briefs serve an important role in ensuring that courts have the most recent case law before them when making decisions. See, e.g., *United States v. Hicks*, 122 F.3d 12, 13 (7th Cir. 1997) (observing that the government had “misled the [district] judge about the state of the law” by relying on obsolete precedent). It is possible that the divergence in the Seventh Circuit’s co-defendant disparity case law is the result of the government’s reliance on the rule that *Statham* deemed obsolete. It is also possible that the divergence stems from the fact that *Statham* does not appear to have been circulated under Seventh Circuit Rule 40(e), which requires that any “proposed opinion . . . adopting a position which would overrule a prior opinion of this court” be circulated to all of the active judges before publication.²⁸

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Regardless of the reason for the diverging lines of precedent, it is essential that the Seventh Circuit bring its co-defendant disparity case law back in line with *Gall* and *Statham*. Forbidding consideration of co-defendant disparities not only deviates from circuit precedent but also rests on a rationale that is no longer constitutionally viable. The Seventh Circuit’s original justification for prohibiting courts from considering co-defendant disparities was that “the Sentencing Commission implicitly considered the potential for disparity of sentences, whether justified or unjustified, between co-defendants in its creation of an applicable sentencing range,” and “district courts must only consider factors that have not been considered by the Sentencing Commission.”²⁹ But in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court deemed the section of the sentencing statute from which that rule was derived to be “a necessary condition of the constitutional violation” and excised that provision to bring the guidelines into compliance with the Sixth Amendment.³⁰ The prohibition is thus inconsistent with *Booker* itself. It is also incompatible with the entire thrust of the Supreme Court’s post-*Booker* jurisprudence, which has consistently reified district court discretion — including discretion to vary from the guidelines to account for disparities.³¹ Like the Supreme Court, the Seventh Circuit has acknowledged in other contexts the breadth of sentencing court discretion to take disparities into consideration and to grant sentences that vary from the guidelines.³²

Furthermore, as the Supreme Court has recognized, the sentencing statutes grant judges the authority to ensure that the punishment imposed on co-defendants tracks their relative roles and culpability.³³ Judges likewise have the discretion to punish participants who are equally culpable, and to similarly punish participants with divergent culpability differently from one another. And judges have the power to grant a lighter punishment to a co-defendant like Driver, who played a lesser role or is less culpable, and to impose a higher punishment on a co-defendant like Robber, who played a greater role and is more culpable. As noted earlier, § 3553(a) may not require judges to consider co-defendant disparities, but it certainly authorizes judges to account for those disparities at sentencing.³⁴

The Seventh Circuit would advance the principle of *stare decisis* if it were to examine the apparent dissonance in its co-defendant disparity jurisprudence and acknowledge that its own precedent and Supreme Court law authorize district courts to take co-defendant disparities into account at sentencing. *Stare decisis* is one of the bedrocks of our common law system. As Justice

Cardozo once observed, the “labor of judges would be increased almost to the breaking point if . . . one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” *The Nature of the Judicial Process* 149 (1921). *Statham* represents this secure foundation, as it is the only case in which the Seventh Circuit has conducted a full analysis of the Supreme Court’s reasoning in *Gall*. A court’s failure to adhere to its prior law causes “the instability and unfairness that accompany disruption of settled legal expectations.” *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (citations omitted). *Stare decisis*, to the contrary, “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Id.* at 243. To promote these laudable objectives in the sentencing context, the Seventh Circuit should return to the secure foundation of *Gall*, *Statham*, and *Bartlett*.

¹ See *Gall v. United States*, 552 U.S. 38, 56 (2007). For a listing of the other circuits’ relevant precedents, see *infra* note 21.

² In doing so, *Statham* specifically abrogated *United States v. Woods*, 556 F.3d 616, 623 (7th Cir. 2009) and *United States v. Omole*, 523 F.3d 691, 700–01 (7th Cir. 2008), which had precluded district judges from considering disparities among co-defendants in imposing sentences.

³ See *infra* notes 23–24.

⁴ The defendants’ offense levels would be 28, because each would have a base offense level of 20, would receive an additional 2 levels because a financial institution was involved, would receive an additional 5 levels because a firearm was brandished, and would receive an additional 1 level based on the amount of loss. See U.S.S.G. § 2B3.1. The relevant conduct rules would ensure that Defendant 1 received the identical specific offense characteristic enhancements as Defendant 2. See U.S.S.G. § 1B1.3.

⁵ *Gall*, 552 U.S. at 55–56; see also *id.* at 54 (“[A]s we understand the colloquy between the District Judge and the AUSA, it seems that the judge gave specific attention to the issue of disparity when he inquired about the sentences already imposed by a different judge on two of Gall’s co-defendants.”).

⁶ *Id.* at 54 (quoting the district court’s sentencing decision in *United States v. Gall*, 374 F. Supp. 2d 758, 763–64 (S.D. Iowa 2005), and referring to § 3553(a)(2)(A)’s dictate that judges must consider “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”).

⁷ *Gall*’s holding is consistent with the plain language of the sentencing statute. The relative conduct, roles, and culpabilities of co-defendants are clearly relevant under § 3553(a)(1)’s requirement that sentencing courts consider “the nature and circumstances of the offense.” Information about the relative conduct of co-defendants is also relevant to determining what punishment is sufficient but not greater than necessary to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” for each co-defendant under § 3553(a)(2)(A). And nothing in the plain language of § 3553(a)(6) limits consideration of “unwarranted disparities” to nationwide disparities, or prohibits the sentencing judge from considering disparities among co-defendants.

⁸ *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006).

⁹ *Bartlett*, 567 F.3d at 909.



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¹⁰ *Id.* at 908.

¹¹ *Id.*

¹² *Id.* at 908–09.

¹³ *Statham*, 581 F.3d at 556.

¹⁴ *Id.* (quoting *Gall*, 552 U.S. at 55).

¹⁵ *Id.*

¹⁶ *Id.* (citing *Woods*, 556 F.3d at 623; *Omole*, 523 F.3d at 700–01).

¹⁷ *Statham*, 581 F.3d at 556.

¹⁸ 523 F.3d at 700–01 (“This court refuses to view the discrepancy between sentences of co-defendants as a basis for challenging a sentence. ‘We will not disturb the appealing defendant’s sentence even when a co-conspirator’s sentence is lenient.’ We will only ‘disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant’s sentence and all other similar sentences imposed nationwide.’”) (quoting *United States v. White*, 406 F.3d 827, 837 (7th Cir. 2005); *United States v. Simpson*, 337 F.3d 905, 909 (7th Cir. 2003)).

¹⁹ 556 F.3d 616, 623 (7th Cir. 2009) (“[W]e do not view a discrepancy between sentences of co-defendants as a basis for challenging a sentence. We look at a disparity only if it is between the defendant’s sentence and all other similar sentences imposed nationwide.” (citing *Omole*, 523 F.3d 691; *Simpson*, 337 F.3d 905)).

²⁰ Those cases included *Simpson*, 337 F.3d at 909 (“As we have said on numerous occasions, ‘a disparity among co-defendants’ sentences is not a valid basis to challenge a guideline sentence otherwise correctly calculated.” (quoting *United States v. Simmons*, 218 F.3d 692, 696 (7th Cir. 2000))), the precedent on which the *Omole* and *Woods* decisions relied. See *Omole*, 523 F.3d at 700–01; *Woods*, 556 F.3d at 623. They also included (in chronological order): *United States v. Edwards*, 945 F.2d 1387, 1398 (7th Cir. 1991) (“A sentence which is mistaken, too draconian or too lenient as to co-defendant A does not grant co-conspirator B the license to benefit from a lighter sentence nor does it impose the added burden of a tougher sentence.”); *White*, 406 F.3d at 837, relied on by *Omole*, 523 F.3d at 700–01; *Boscarino*, 437 F.3d at 638 (“[T]he kind of ‘disparity’ with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case.”); *United States v. Pisman*, 443 F.3d 912, 916 (7th Cir. 2006) (“[T]he § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts.”); *United States v. Mendoza*, 457 F.3d 726, 730–31 (7th Cir. 2006) (“Disparity in sentences among defendants for the violation of the same statute is only warranted when the facts of a surrounding a crime demonstrate to the sentencing judge that one defendant should receive a greater or lesser sentence based on the circumstances of that particular case.”); *United States v. Davila-Rodriguez*, 468 F.3d 1012, 1014 (7th Cir. 2006) *relied on by Omole*, 523 F.3d at 701.

²¹ See e.g., *United States v. Vazquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006) (recognizing that “a district court may consider disparities among co-defendants in determining a sentence”); *United States v. Wills*, 476 F.3d 103, 110 (2d Cir. 2007) (“We do not, as a general matter, object to district courts’ consideration of similarities and differences among co-defendants when imposing a sentence.”), *abrogated on other grounds by United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008)); *United States v. Parker*, 462 F.3d 273, 277 (3d Cir. 2006) (“Although § 3553(a) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so.”); *United States v. Gomez*, 215 F. App’x 200, 202 (4th Cir. 2007) (implying that consideration of co-defendant disparities is allowed, but concluding that Gomez was not similarly situated to the co-defendant); *United States v. Bennett*, 664

F.3d 997, 1015 (5th Cir. 2011) (“[A]voiding unwarranted sentencing disparities among co-defendants is a valid sentencing consideration.”), *cert. denied*, 11-9109, 2012 WL 733887 (Apr. 2, 2012); *United States v. Simmons*, 501 F.3d 620, 624 (6th Cir. 2007) (“A district judge, however, may exercise his or her discretion and determine a defendant’s sentence in light of a co-defendant’s sentence.”); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006) (invalidating a sentence that resulted in unwarranted disparities between the sentences of the defendant and less culpable members of related conspiracies); *United States v. Saeteurn*, 504 F.3d 1175, 1181–83 (9th Cir. 2007) (upholding as a legitimate generalized § 3553(a) consideration the district court’s decision to compare defendant with his co-defendants and sentence him in accordance with his role); *United States v. Smart*, 518 F.3d 800, 804 (10th Cir. 2008) (“[A] district court may also properly account for unwarranted disparities between co-defendants who are similarly situated, and...the district court may compare defendants when deciding a sentence.”); *United States v. Zavala*, 300 F. App’x 792, 795 (11th Cir. 2008) (“It is not erroneous for the district court to have considered the ‘unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct’ when the statute specifically mandates such consideration.”); *United States v. Mejia*, 597 F.3d 1329, 1344 (D.C. Cir. 2010) (considering and rejecting an argument that a disparity between co-defendants’ sentences was unwarranted), *cert. denied*, 131 S. Ct. 586 (2010).

²² See, e.g., *United States v. Shamah*, 624 F.3d 449, 460 (7th Cir. 2010) (citing *Statham* for the proposition that factual differences among co-defendants may justify a sentencing disparity), *cert. denied*, 131 S. Ct. 1529 (2011); *United States v. Favara*, 615 F.3d 824, 830–31 (7th Cir. 2010) (holding that the judge “adequately considered any disparity between Favara’s sentence and those of her co-defendants”), *cert. denied*, 131 S. Ct. 1812 (2011); *United States v. Turner*, 604 F.3d 381, 390 (7th Cir. 2010) (recognizing that *Statham* “foreclosed . . . a rule” that “a sentencing disparity is problematic only if it is between the defendant’s sentence and the sentences imposed on other similarly situated defendants nationwide” and holding that “Section 3553(a)(6) does not allow unwarranted sentencing disparities between co-defendants” (quoting *Statham*, 581 F.3d at 556)); *United States v. Pulley*, 601 F.3d 660, 668 (7th Cir. 2010) (“Pulley properly contends that § 3553(a)(6) does not allow unwarranted sentencing disparities between co-defendants.” (citing *Statham*, 581 F.3d at 556; *Bartlett*, 567 F.3d at 908–09)); see also *United States v. Cerna*, No. 10-2533, 2012 WL 1178878 at *3 (7th Cir. Apr. 10, 2012) (rejecting a claim that defendant’s sentence created an unwarranted disparity with his co-defendants on the grounds that they “received cooperation reductions, had lower criminal history categories, or played a smaller role in the overall scheme”).

²³ See *United States v. Durham*, 645 F.3d 883, 897 (7th Cir. 2011) (holding that “a discrepancy between sentences of co-defendants is not a basis for challenging a sentence,” and denying the defendant’s co-defendant disparity challenge because, “the purpose of § 3553(a)(6) is to eliminate unjustified sentencing disparities ‘across judges (or districts) rather than among defendants to a single case’” (citing *Omole*, 523 F.3d at 700 and quoting *Davila-Rodriguez*, 468 F.3d at 1014)); *United States v. Courtland*, 642 F.3d 545, 553 (7th Cir. 2011) (quoting *United States v. Gooden*, 564 F.3d 887, 891 (7th Cir. 2009) for the proposition that “[w]e do not view the ‘discrepancy between sentences of co-defendants as a basis for challenging a sentence’ and will disturb a sentence only if it creates an unwarranted sentence disparity between similar defendants nationwide” (quoting *Omole*, 523 F.3d at 700)); *United States v. Sandoval*, 668 F.3d 865, 873 (7th Cir. 2011) (“[The defendant’s] argument does not get off the ground given our refusal to entertain sentencing challenges based on disparities between co-defendants’ sentences.” (citing and quoting *Omole*, 523 F.3d at 700)).

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²⁴See *United States v. Scott*, 631 F.3d 401, 405 (7th Cir. 2011) (“[W]e remain true to our precedent, holding that in order for [§ 3553(a)(6)] to be applicable, the court must be presented with disparate sentences not among codefendants or coconspirators but among judges or districts.” (citing *Bartlett*, 567 F.3d 907–08; *Pisman*, 443 F.3d at 916; *Boscarino*, 437 F.3d at 637–38)).

²⁵*Statham* is mentioned by only one of the post-*Statham* opinions that prohibit consideration of co-defendant disparities. In *United States v. Vaughn*, 431 F. App’x 507 (7th Cir. 2011) (unpublished), *cert. denied*, 132 S. Ct. 1068 (2012), the court cited *Statham* and *Bartlett* for the narrow proposition that a disparity between one defendant and a co-defendant who cooperated is not unwarranted. However, *Vaughn* also implied that co-defendant disparities are never unwarranted based on the obsolete rationale of the pre-*Statham* cases. *See id.* at 509 (“[§ 3553(a)(6)] is addressed to unjustified differences in sentences imposed by different judges or across judicial districts, not sentences imposed upon defendants in the same case.”).

²⁶*Statham*, 581 F.3d at 556.

²⁷For example, in *Durham*, the government stated: “This Court has held consistently that ‘the court must be presented with disparate sentences not among co-defendants or coconspirators but among judges or districts.’” Brief of the United States at 41, *Durham*, 645 F.3d 883 (No. 10-1308) (quoting *Scott*, 631 F.3d at 405). In 2011, it was inaccurate for the government to contend that the Seventh Circuit had “consistently” prevented judges from considering co-defendant disparities given *Statham*’s clear statement to the contrary in 2009. Likewise, in *Vaughn*, the government stated that “the kind of ‘disparity’ with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case.” Brief of Plaintiff-Appellee at 15, *Vaughn*, 431 F. App’x 507 (No. 10-3972) (quoting *Bartlett*, 567 F.3d at 907 (quoting *Boscarino*, 437 F.3d at 638)). Less egregiously, but still in error, the government in *Courtland* failed to note that *Omole* had been abrogated on other grounds when it cited *Omole* for an unrelated proposition. Brief of Plaintiff-Appellee at 25, *Courtland*, 642 F.3d 545 (No. 10-2436). Had the abrogation been brought to the court’s attention, the *Courtland* opinion might not have relied on the portion of *Omole* that was abrogated by *Statham*. *See Courtland*, 642 F.3d at 554 (“[w]e do not view the ‘discrepancy between sentences of codefendants as a basis for challenging a sentence’ and will disturb a sentence only if it creates an unwarranted sentence disparity between similar defendants nationwide” (quoting *Gooden*, 564 F.3d at 891 (quoting *Omole*, 523 F.3d at 700))).

²⁸Seventh Circuit Rule 40(e) (“A proposed opinion . . . adopting a position which would overrule a prior opinion of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”). The Seventh Circuit typically indicates Rule 40(e) circulation with a footnote, and there is no such footnote in *Statham*.

²⁹See *United States v. McMutuary*, 217 F.3d 477, 489–490 (7th Cir. 2000) (citing 18 U.S.C. § 3553(b)).

³⁰*Booker*, 543 U.S. at 259 (excising § 3553(b)). As *Bartlett* held, courts are now free to vary from the guidelines regardless of whether the Commission has implicitly deemed a given disparity warranted or justified. *See Bartlett*, 567 F.3d at 909 (“[T]he court is free to have its own policy about which differences are ‘unwarranted.’”).

³¹See, e.g., *Booker*, 543 U.S. at 233 (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (granting district courts discretion to determine that the disparity created by the guidelines’ treatment of crack and powder cocaine is unwarranted, and to grant below-range sentences accordingly); *Spears v. United States*, 555 U.S. 261, 264 (2009) (*per curiam*) (clarifying that a district court may grant a below-guidelines sentence

on the basis of a categorical, not merely case-by-case, disagreement with the disparities produced by a proper application of the guidelines).

³²See, e.g., *United States v. Reyes-Hernandez*, 624 F.3d 405, 416, 422 (7th Cir. 2010) (reversing prior Seventh Circuit precedent that prevented sentencing judges from granting below-guidelines sentences based on a different disparity—the fast-track disparity—and authorizing district courts to disagree with directives issued by Congress to the Sentencing Commission); *United States v. Corner*, 598 F.3d 411, 415–16 (7th Cir. 2010) (concluding that “district judges are entitled to disagree with the Commission’s policy choices . . .,” that “every judge is at liberty to . . . sentence at variance with a Guideline,” and that “*Booker*, *Kimbrough*, and *Spears* hold that the floors (and ceilings) in Guidelines are not legally binding”).

³³See *supra* note 7. In connection with another sentencing statute, 18 U.S.C. § 3661, the Supreme Court recently emphasized the importance of “[p]ermitt[ing] sentencing courts to consider the widest possible breadth of information about a defendant,” and emphasized that “Congress could not have been clearer in directing that ‘[n]o limitation . . . be placed on the information concerning the background, character, and conduct’ of a defendant that a district court may ‘receive and consider for the purpose of imposing an appropriate sentence.’” *United States v. Pepper*, 131 S. Ct. 1229, 1240, 1241 (2011) (quoting § 3661). Information about a defendant’s “conduct” surely includes information about how his culpability and role in the offense compare with those of his co-defendant.

³⁴Of course, recognizing this discretion leads to the question of whether a sentencing judge should adjust a given defendant’s sentence in a particular case, understanding that neither *Bartlett* nor *Statham* requires it. That next decision will depend on the facts of the case and should be left to the discretion of the sentencing judge. As the Supreme Court has acknowledged, “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.” *Gall*, 552 U.S. at 51 (citations omitted); see also *Rita v. United States*, 551 U.S. 338, 363 (2007) (Stevens, J., concurring) (“[D]istrict courts have an institutional advantage over appellate courts’ because they ‘must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.’” (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996))). In the context of sentencing disparities, the Court has emphasized that “Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities” and to weigh any disparities “against the other § 3553(a) factors.” *Kimbrough*, 552 U.S. at 108. That is exactly what the district judge did in *Statham*. As the Seventh Circuit recognized, the district judge properly took into account the fact that “*Statham*’s co-defendants entered plea agreements with the government, cooperated in the investigation, and had less-extensive criminal histories.” *Statham*, 581 F.3d at 556. It was appropriate for the sentencing judge to conclude, in light of those facts, that “the different members of the conspiracy were not similarly situated.” *Id.* Given that conclusion, “there is . . . nothing unreasonable about the fact that the sentences [*Statham* and his co-defendants] received were also different.” *Id.* Just as the authority to deny a co-defendant disparity reduction request on the ground that two defendants’ divergent conduct justifies different sentences rests with the sentencing judge, so, too, does the authority to grant a co-defendant disparity reduction request on the ground that two defendants’ conduct justifies similar sentences. This inquiry necessarily will be fact-specific and case-specific.