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## District Judge Increases Sentence After Appeal

By David Zapp

It used to be that a judge increasing a defendant's sentence after a successful appeal was presumed to be acting out of vindictiveness. A petitioner cannot be punished by a sentencing judge for exercising his post-conviction right to appeal – that was the ruling in the Supreme Court case, *North Carolina v. Pearce*. However, the Supreme Court has since narrowed that presumption so that it now applies only to cases where “there is a ‘reasonable likelihood’ that an unexplained increase in sentence is the product of **actual vindictiveness** on the part of the sentencing authority.” *Alabama v. Smith*, 490 U.S. 794, 799 (1989).

In *U.S. v. Singletary*, the defendant pled guilty to crack cocaine possession with the intent to distribute. His plea agreement stated that the Guideline range would be between 27 and 33 months' incarceration, but at the sentencing hearing the judge expressed the view that additional “aggravating” factors called for a greater sentence. During the course of the crime, Singletary and three friends had forced a terrified seventeen-year-old boy with whom they were not acquainted to drive them around in the boy's parents' car. Accordingly, the judge sentenced Singletary to 42 months.

Singletary appealed the sentence, and the Second Circuit Court of Appeals returned the case to the District Court for resentencing, not necessarily because it considered the sentence too harsh, but because the District judge had handed the sentence down pre-*Booker*. (Before the ruling in *Booker*, the sentencing Guidelines were mandatory – judges had to follow them. They are now considered merely advisory, meaning that judges must take them into account, but ultimately have the discretion to impose whatever sentences they consider appropriate.)

At resentencing, the District Court reviewed the facts of the case and decided to increase Singletary's sentence to 54 months.

The defendant again appealed the ruling, arguing that the increase in sentence was vindictive. But the Court of Appeals disagreed, stating that, “because *Booker* fundamentally altered the law pursuant to which defendants are sentenced, that alteration of the law, standing alone, render[s] a challenge based on vindictiveness highly implausible.” *U.S. v. Singletary*, 458 F 3d. 72 (2nd Cir. 2006). Further, the Court of Appeals found the facts of the

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case to justify the District Court's implementation of a non-Guidelines sentence, and upheld the increased sentence.

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# Courts Enforce Criticized Ratio

By David Zapp

In the recent case of *U.S. v. Castillo*, Judge Robert Sweet of the Southern District of New York handed down a sentence on a crack dealer that was more lenient than indicated by the Guidelines. He did so because he believed that the 100:1 ratio specified by the Guidelines -- one kilogram of crack cocaine should attract the same sentence as a hundred kilos of powder cocaine -- was unjust.

Castillo was named in a complaint filed with the Southern District alleging that he was part of a conspiracy to distribute crack in Manhattan. In a search of his apartment, the FBI discovered crack cocaine, powder cocaine and other drug paraphernalia. Following his arrest, Castillo admitted to participation in a drug ring that distributed crack cocaine. He pled guilty to all charges in his indictment.

The Pre-Sentence report stated that the Guidelines called for a term of imprisonment in the range of 135 to 168 months. The government fought for a sentence in that range, but Castillo argued for the lesser term of 70 to 87 months. At the sentencing hearing, Judge Sweet agreed with the government that the Guideline range was in fact 135 to 168 months, but opted to sentence Castillo instead to 87 months and three years of supervised release. He based this calculation on a 20:1 ratio, which had been employed in *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005). In his ruling, the judge explained: "Since *Booker*, a number of courts, concerned by the disparity between crack and cocaine powder sentences imposed under the Guidelines, have imposed non-Guidelines sentences in cases involving crack."

Not surprisingly, the government appealed the sentence. Though the Court of Appeals shared Judge Sweet's concern, it declared the sentence to be inappropriate. "We would be blind to the thoughtful policy discussions of the last dozen years," the court stated, "if we did not acknowledge what [recent surveys] reveal: that the district court is surely not alone in its concerns that the current ratio is too great." *U.S. v. Castillo* (2nd Cir. 2006). Yet the court went on to conclude: "[W]hat that ratio should be . . . can result only from legislative direction," and until the Guidelines are modified, courts must abide by the 100:1 ratio.

When the Guidelines were implemented, Congress justified the huge ratio imbalance by referring to presumptions of addictiveness and violence that were generally accepted at the time. It is now known that powder and crack cocaine contain the exact same chemical substance; the greater addictiveness of crack is the result of differences in the way the two substances are used. And today statistics show that violence linked to crack-related crime is only marginally greater than the violence associated with powder cocaine. Thanks

to these false assumptions, relatively minor-league crack dealers receive extremely harsh sentences compared to high-volume traffickers in powder cocaine.

Another serious concern about the 100:1 ratio is that it aggravates the racial bias that is so much a part of the sentencing process in this country. While the majority of crack users are white, the greater part of those convicted of crack cocaine offenses are African American. According to the USSC (United States Sentencing Commission), in 2000 statistics showed that while approximately 2/3 of crack users were white, nearly 85% of crack cases were brought against African Americans. And while whites also made up the majority of powder cocaine users, they were the smallest percentage of those convicted of powder cocaine offenses with 30% of powder cases brought against African Americans and 18% against whites.

Although the United States Sentencing Commission has repeatedly recommended a change in the law to reduce the ratio, Congress has yet to act upon its recommendations.

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