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. 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.” 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). 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. 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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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:

[It] 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.¹

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.’” 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 ‘un warranted’ 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.”

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 “un warranted” 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). 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.” 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.” 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,” Statham explained that “[s]uch a categorical rule is now foreclosed by Gall.”

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 and Woods v. United States, and implicitly abrogated those cases upon which Omole and Woods relied. 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.

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. 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. One of the opinions cites other cases in the Omole lineage that were in essence overruled by Statham and Bartlett. 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.

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” and failed to acknowledge that the old rule was no longer good law. 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.

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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.” 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. 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. 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.

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. 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.

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.

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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.
Twocases involved

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10 Id. at 908.

11 Id.

12 Id. at 908–9.

13 Statham, 581 F.3d at 556.

14 Id. (citing 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; Boscariello, 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. Vázquez-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. Willis, 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. Caver, 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-defendants); United States v. Bennett, 664
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24 See 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; Pismans, 443 F.3d at 916; Boscarrino, 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.

27 For 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 Boscarrino, 437 F.3d at 628)). 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))).

28 Seventh 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.

29 See United States v. McMutaney, 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.’”).

31 See, 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).

32 See, 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”).