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TRANSCRIPTS: United States v. Benny Vasconcelos

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**United States District Court,
District of Rhode Island.**

**UNITED STATES of America v.
Benny VASCONCELOS¹**

**No. 04-081ML
Argued and Decided January 28, 2005
Sentencing**

28 JANUARY 2005 – 9:30 A.M.

THE COURT: This is the matter of the United States versus Benny Vasconcelos. The matter is before the Court this morning for imposition of sentence.

I have the pre-sentence report which was prepared by the probation office, and the probation officer prepared the report before the United States Supreme Court handed up its decision in *Booker* and *Fanfan*. And so the probation officer made the guidelines calculations in accordance with the law pre-*Booker* and *Fanfan*.

The determination was made that this Defendant is a criminal history category of IV with a total offense level of 25.

I see that, on behalf of the Defendant, Mr. Cicilline has filed certain objections to the pre-sentence report which were addressed by the probation officer. Mr. Cicilline, have you had an opportunity to review the pre-sentence report with your client?

MR. CICILLINE: Yes, I have, your Honor.

THE COURT: And are you pressing any of your objections this morning?

1. Sentencing Hearing Transcript, United States v. Vasconcelos, No. 04-081ML (D.R.I. 2005) (Judge Mary Lisi presiding).

MR. CICILLINE: I would like to address them. I guess I am sort of pressing them.

THE COURT: Okay. Why don't you come up to the podium so you can make a record.

MR. CICILLINE: And, Judge, I would like to ask that at least my arguments be incorporated into my sentencing argument later on.

The Defendant objected to Section 18 of the pre-sentence report where the author has given him a four-level increase under 2K2.1(b) (5) talking about possessing of any firearm in connection with another – with another felony offense or possessing or transferring of a firearm with knowledge or reason to believe that is in connection with another felony offense.

And, Judge, I will probably concede that it's probably an accurate enhancement; but when you look at the facts of this case, when the crime for which he has pled guilty to is trading a firearm for drugs, I'm not so sure that's what the guidelines contemplated as another felony offense.

And it seems to me that that's sort of murky now; and in light of *Fanfan* and *Booker*, I think we can deal with that a lot easier.

THE COURT: Certainly technically, though the exchange of drugs for guns fits the definition of the guideline, that the possession of the guns was in connection with another felony offense, that felony offense here being distribution of crack.

MR. CICILLINE: Yes, technically correct, but I think in light of the new Supreme Court decision we can deal with that a little easier than we would have a few weeks back.

The other objection, Judge, I had was an enhancement – excuse me, manipulation. In this case, there is some conversation between the agent who's conducting the transaction and the Defendant; and at some point the agent, Troiano, says to him, How do you want to be paid, in heroin or crack? Had the agent said heroin, these numbers would have come way down.

Now, I realize the case law is, again, probably against me on this issue and the manipulation. However, when you look at what could have been purchased or brought for the exchange, those numbers, again, would have dropped significantly.

I mean, this Defendant faces a five-year mandatory minimum because it's crack. We're stuck with that. I mean, I realize that. But it seems to me that one could argue that the Government

manipulated the sentence in this case by just saying, Yes, we want crack as opposed to heroin, and then the numbers would have been lower. Those are my objections. Thank you.

MR. MATOS: Good morning, your Honor. I addressed the objections in the Government's sentencing memorandum. They contradict the plea agreement in this case, your Honor. Not only that, they're properly applied.

In regard to the argument of sentence manipulation, it's just not an appropriate argument in this case. The Defendant introduced the concept of crack or heroin.

* * *

THE COURT: Okay. It does appear from the agent's affidavit that it was the Defendant who introduced the idea that it would be either crack or heroin, he apparently had access to both, and that the agent took him up on the offer of taking the crack as opposed to the heroin. Of course, that clinched for Mr. Vasconcelos a mandatory minimum sentence in this case.

The next question the Court needs to address and the Government has already anticipated, I think, the argument that Mr. Cicilline will make on behalf of this client, is whether or not the Court should follow the guidelines calculations done in this case, which would require the Court to impose a sentence essentially on the drug offense because the guidelines calculations for that offense are so much greater that the guidelines calculations for the gun charge.

And the Government's position, as I understand it, is that the Court should give great weight to the guidelines as Judge Cassell, the District of Utah, has set out in his opinion, which I'm familiar with, although I will say I do not totally agree with.²

Mr. Cicilline, you have a problem in that in the plea agreement your client has already agreed to certain things. I guess I probably should have the Government tell me what they want me to do in terms of sentence, and then you can respond to it.

MR. MATOS: Your Honor, as the Court has highlighted, the Government is requesting that the Court give great weight in this case to the guideline calculation. I understand it's an argument

2. See *United States v. Wilson*, 350 F.Supp.2d 910, 911-25 (D. Utah 2005).

that the Court is already familiar with coming from the Government in these matters. It's –

THE COURT: It's the second time I've heard it, Mr. Matos, and I guess I'm going to keep hearing it until the First Circuit rules.

MR. MATOS: As the Court indicated to me a couple of weeks ago, we're in uncharted waters these days; but that is our position, your Honor. I would state that there isn't anything within Title 18 United States Code, Section 3553(a), that lands towards a departure from the guideline calculation.

The Government is recommending – this was a serious drug offense. It's a case where the Defendant –

THE COURT: Let me ask you this, Mr. Matos. If the choice had been heroin, what would Mr. Vasconcelos be looking at?

MR. MATOS: I haven't done that calculation, your Honor, and –

THE COURT: I think it's already done. It would have been 30 to 37 months.

MR. MATOS: Okay. But, your Honor, what I would say to that is, your Honor, the fact is the Defendant introduced the concept of either. He had access to both.

THE COURT: Let me address a more fundamental problem that I have with – and I think this is a perfect case; and, frankly, I hope you take me up. It's the perfect case that demonstrates the artificial inflation of sentences with the crack ratio, and that's something that even the Sentencing Commission was troubled by.

The initial offense in this case was a gun charge, and then the drugs came into it. So now we've basically got the tail wagging the dog in this case. If we were dealing with the gun charge with the four-level increase, Mr. Vasconcelos, he's no stranger to the system, would be looking at 30 to 37 months. Introduce crack into the mix, and we're now looking at 84 to 105 months, more than twice. How do you reconcile that under 3553(a)?

MR. MATOS: Your Honor, the fact is, I understand the political argument in that regard, your Honor, and I don't mean to discount the political argument in any manner.

THE COURT: I wouldn't label it a political argument. I would label it an argument on proportionality in sentencing. I mean, that's the basis of the argument, that these figures, these penalties assigned for these grossly inflated figures just don't

make sense.

Everybody, it seems almost universally everybody agrees. It's just that nobody in a position of power will take the step of fixing it, even though – even the Sentencing Commission suggested it should be fixed.

MR. MATOS: Your Honor, it may be that the system – that Congress at some point decides that there is disproportionality that needs to be addressed. What Congress has clearly signaled, however, and we are enforcing laws enacted by Congress, what Congress has clearly signaled, however, is that crack cocaine is an offense that it intends to be addressed more severely. That's why there's a five-year mandatory minimum here.

THE COURT: Oh, I know.

MR. MATOS: And given the fact that there is that clear Congressional intent on applying a different sentencing level, I don't see how there is a – how that can then be transformed into basically contradicting the intent of Congress into coming up with an explanation that a sentence outside the guideline range would be reasonable pursuant to 3553(a).

THE COURT: Isn't that what *Booker* says that the sentencing judge should now look at those guidelines as advisory, and in doing so, the Court, the sentencing Court is directed to the factors set forth by statute in 3553(a), and tailor a sentence that fits not only the offense but the offender because, you see, in the past we were more concerned with the numerical machinations we had to go through under the guidelines and really left out perhaps the most important element of the equation, and that was the offender. Thirty-five fifty-three directs me to look at the offender as well as those other factors.

MR. MATOS: I think, your Honor, there's another part of that that I think needs to be addressed both by the Government as we go forward in these matters and by the Court as well, which is the whole genesis of the guidelines in the first place which were this perception that there needed to be a certain amount of certainty regarding sentences and parity amongst Defendants.

THE COURT: I agree with you. I think that that's what everybody thought at the outset. I think that when Congress started tinkering with them and including these mandatory minimums and the directive with respect to crack, as I said, even the Sentencing Commission knows that those guidelines don't

make much sense. That's why I'm saying I hope you take me up on this one.

MR. MATOS: Your Honor, if –

THE COURT: I take it you're going to advocate, as you are obligated to do, for the low end of the guideline range.

MR. MATOS: That's correct, your Honor. If I can make one additional point in regards to the Court's comment regarding the sentencing guidelines, and the Sentencing Commission is obviously a body that focuses on this. Basically that's their full-time job.

Despite the fact that there's a minimum mandatory five-year sentence in this case and despite the fact whether the Sentencing Commission had concerns about the disparity in sentences between crack cocaine and other drug offenses, this Defendant, according to the sentencing guidelines that were enacted by a commission that has expressed this view, still comes out under their guidelines at 84 months, which is more than five years.

So they've got him above the mandatory minimum even after they have considered this issue regarding the disparity.

THE COURT: Well, they weren't permitted to fix the problem. I think that the Commission itself took the position that it should be fixed, but they weren't permitted to do so.

MR. MATOS: I understand, your Honor, but my singular point on that is even despite their concern about it, the guideline range for this Defendant is not five years, which presumably the Sentencing Commission couldn't go below that, but we're still at a sentence over five years even under the guidelines that were enacted by a commission that has expressed this concern.

THE COURT: I know. I know. Okay.

MR. MATOS: Thank you, your Honor.

THE COURT: Mr. Cicilline, you heard me tell the Government that I hope they take me up. So you're starting out already ahead of the game.

* * *

MR. CICILLINE: Judge, the Court has fixed right on the problems. I mean, this is a perfect example of a young man, that because of the way the Government has chosen to proceed, they've sort of manipulated the numbers.

THE COURT: Well, I'm not going to buy your manipulation argument because your client was the one apparently who

introduced the idea that he was a full-service drug dealer and had an assortment of narcotics available to him with which he could make this purchase.

MR. CICILINNE: Judge, respectfully, what I think happened here is that this Defendant had access to the drug dealers who could provide whatever they wanted.

THE COURT: Oh, yeah.

MR. CICILINNE: In other words, I don't think he had a shop set up to sell drugs. He knew where he could get them.

THE COURT: But he essentially is a walking drug supermarket because he can get whatever you want. So your manipulation argument's not going to carry you too far. You're much better off, frankly, with the proportionality argument.

MR. CICILLINNE: And, your Honor, the proportionality argument is clearly one that we would like to – this Court to look at closely.

We have a Defendant who, because of the numbers, had the drugs been heroin, the numbers would have been farther down on the scale, allowing him to receive a sentence less than half of what, because of the crack cocaine, almost doubles his sentence.

Frankly, Judge, I guess I'm stuck with, as I said in the pre-sentencing memo, I'm stuck with the statutory problem of the five years, and that gets me. We can't do anything about that.

It seems to me that that would be the appropriate and reasonable sentence that ought to be imposed in this case in light of the proportionality argument, in light of the fact that he is a 21-year-old man.

When you look at his criminal history, Judge, it clearly is – it's a lot of little minor petty stuff in there, you know, driving offenses, trespassing. There is one robbery, but that was ultimately dismissed.

It seems to me that when you look at that, when you look at his age of 21 years old, when you look at the fact that he's going to lose five years of his life if the Court comes down to the 60-month sentence, he will lose five years of the prime of his life.

And I would also point out that the Supreme Court has talked about using the guidelines as – for guidance. I would argue to the Court that the statutory penalties in this case are also guidance given to us by Congress.

THE COURT: Well, they are more than guidance. The

mandatory minimum is more than guidance. It's just that.

MR. CICILLINE: It's that. But again, it's similar. We look at it, that's what we're going to end up with, that's an appropriate punishment for a young man who's never really spent any time in jail, Judge. He did 90 days. It seems to me that the 60-month sentence would be appropriate, and I think the Court said something that I found very significant.

You now have an opportunity to introduce the offender into the punishment mix as opposed to dealing with just the offense, and that's really profound because that's exactly what you should be doing. You should be introducing the offender into the mix with the offense and coming up with the appropriate sentence, and I'm asking this Court to give him a reasonable sentence of 60 months.

* * *

THE COURT: . . . As I said, the probation officer in this case did the guidelines calculations; and this case, because of the nature of the charges and the nature of the narcotics involved, sets up a perfect example of how the guidelines, if they were mandatory and controlling, would set up a situation where the Court would be required to impose a sentence far in excess of what might be considered an appropriate or just sentence. And that's because of the introduction of the crack cocaine into the mix.

This Defendant had approximately 12-and-a-half grams of crack cocaine that he used to purchase the two firearms that he's charged with possessing in Count I of the Information.

The guidelines require the Court to take into account that those firearms were possessed in connection with another felony, here the drug transaction, and the increase in the offense level there is four levels because it's without regard to the nature of the narcotic involved.

That guideline range provides for 30 to 37 months, I think, of incarceration.

* * *

THE COURT: And that takes into account the Defendant's criminal history. When we proceed to the guidelines calculations on Count II, the distribution of cocaine base, now the Defendant, because, again, of his criminal history and the amount of the drug involved, is looking at a minimum sentence of 84 months or as much as 105 months, almost three times the amount of time for

the true underlying offense in this case, which was a felon in possession of firearms.

And but for the fact that the exchange rate here is predicated on crack versus money versus heroin versus powder cocaine, the Court would be sentencing the Defendant somewhere around two-and-a-half to three years.

Fortunately for you, Mr. Vasconcelos, the United States Supreme Court rendered its decision in the *Booker* and *Fanfan* cases; and in a very thoughtful opinion, Justice Breyer has ruled that, and for the majority he has, that the guidelines are unconstitutional if they're mandatory.

And in that opinion, he tells the district judges who sentence the human beings who come into the courtroom to take the guideline into account as on factor in tailoring an individualized sentence that takes into account not only all of the facts and circumstances of the offense but also requires the Court to go back to the statute, 3553(a), and the statutory factors that he Court must take into account in fashioning that individualized sentence.

I start with the first sentence of 3553(a), and that is that the Court shall impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2).

And as I look at this case, I see a young man who is 21 years old, I guess you've turned 22 now, just barely, this month, who has spent little time in prison, who does not have an extraordinarily bad record, who has had a tough time of it growing up, DCYF [Department of Children Youth and Families] doesn't get involved in your life if things are going well at home, and apparently DCYF was involved for quite some time, whose record of convictions is not, as I say terribly bad and who tells me he got his high school diploma while he was in the training school. That's good. I'm glad you finally did that.

And so as I look at the factors set forth in paragraph (2) of 3553(a), I have to take into account the need for the sentence imposed to reflect the seriousness of his offense. This is bad. This is bad, Mr. Vasconcelos. You're a felon. You can never have a gun. I don't know what you were planning to do with those two guns, but it was only going to lead to more trouble.

I also have to take into account a sentence that will promote respect for the law. Here, there's a mandatory minimum term

that's required of five years; and in my judgment, five years to a young man who just turned 22 is an extraordinarily long period of time and would certainly impress upon him a need to respect the law.

It certainly provides just punishment. It will also, hopefully, deter this Defendant and others from engaging in the same kind of criminal conduct. It will be sufficient time to protect the public from this Defendant because, as I say, Mr. Vasconcelos, you're never going to be able to have a gun, so make up your mind never to be anywhere near one.

I need to take into account the need to provide the Defendant with educational or vocational training. This Defendant, so far as I can see, has never had a job, and that may well be because he's never even bothered to look and because he doesn't have the training necessary to find one.

I have to take into account the kinds of sentences available to me. Here, there's mandatory minimum term of incarceration of five years, and so incarceration is the only sentence available to me.

And finally, I have to take into account the kinds of sentences and the sentencing range established under the sentencing guidelines. And in this case, as I said, the guidelines, because of the introduction of this rather small amount of crack cocaine, take this case way into the stratosphere of sentences.

And as I said earlier, even the Commissioners, the Sentencing Commission itself, almost all judges, the crack guidelines I think almost universally are believed to be way too high.

So the guideline in this case simply doesn't make sense. As I said, Count II here is the tail wagging the dog. The real offense is Count I, the possession of the firearms.

And so I make the determination here that the guideline range is too high for this particular offense and this particular Defendant. I have no choice but to impose at least the mandatory minimum term, and I think here that that is certainly a sufficient term of incarceration to achieve the objectives as set forth in 3553(a). Frankly, it's a little more than I think is required, but I have no choice.

Therefore, Mr. Vasconcelos, I sentence you to a term of five years of incarceration on both counts to be served concurrent with each other.