Federal Sentencing GUIDE

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Federal Sentencing Guidelines Cases From All Circuits

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IN THIS ISSUE:

Guidelines Sentencing, Generally

8th Circuit says increase based on agent's cover identity was not sentencing manipulation. (135)(330) Defendant sold firearms to undercover agents. The district court added enhancements under §§2K2.1(b)(1), (5), and (6) for selling the firearms to someone defendant knew should not have them and for selling firearms that defendant knew would be taken out of the country. An agent had represented to defendant that he had previously served more than a year in prison, that he belonged to an outlaw motorcycle gang, and that the firearms would be transported to Mexico. The Eighth Circuit rejected defendant's claim that basing the enhancements on fictitious facts made up by the agents constituted sentencing manipulation. The agent gave specific and legitimate law enforcement reasons for providing this cover identity. A recent prison release would explain the agent's newness to the neighborhood and why nobody knew him. This would also mesh with telling defendant that he belonged to an outlaw biker gang. The agent also testified that telling defendant that the firearms would be transported to Mexico or to an outlaw biker gang gave him an avenue to buy as many firearms as defendant was willing to sell. *U.S. v. Sacus*, __ F.3d __ (8th Cir. Apr. 30, 2015) No. 14-1361.

Application Principles, Generally

7th Circuit reverses supervised release term where court failed to determine guideline range. (150)(800) Defendant, who had been sentenced in 2013 to five years of probation for a drug offense, violated the terms of his probation just over six months later by, among other things, causing an accident and a resulting injury to another person by driving while drunk. The court sentenced defendant to a year and a day in prison, followed by ten years of supervised release. However, the judge failed to determine the guidelines range for the supervised release. The Seventh Circuit reversed and remanded. The judge was not bound by the guideline range of three years of supervised release. However, the judge was required, before deciding on the length of the defendant's term of supervised release, to calculate the

guidelines range and assess its appropriateness in light of the sentencing factors in 18 U.S.C. §3553(a). He failed to do these things. The error was not harmless simply because the judge could have imposed the same ten-year term of supervised release had he known that the top of the applicable guidelines range was only 3 years. *U.S. v. Downs,* __ F.3d __ (7th Cir. May 5, 2015) No. 14-3157.

Offense Conduct, Generally (Chapter 2)

7th Circuit agrees that bank fraud involved sophisticated means. (218) Defendant, a bank manager, befriended Suarez, an elderly customer at the bank. After defendant discovered that Suarez owned a property worth upwards of $1.8 million, defendant caused Suarez to delist his property with Coldwell Banker so that defendant could sell it for him. Defendant then convinced Suarez to obtain a home equity line of credit on the property, and, submitted multiple loan applications in Suarez's name to multiple banks. Defendant also fraudulently opened a joint checking account in his and Suarez's name, which listed his home address, rather than Suarez's, as the address of record. Defendant took these steps to facilitate his access to the loan funds and to ensure that he, rather than Suarez, received any notifications regarding the line of credit in order to postpone detection. The Seventh Circuit upheld a §2B1.1(b)(10)(C) sophisticated means enhancement. *U.S. v. DeMarco,* __ F.3d __ (7th Cir. Apr. 24, 2015) No. 14-1526.

11th Circuit approves enhancement for number of victims in tax fraud case. (218) Defendant, a tax professional, operated a complex fraud scheme in which she acquired personal information under false pretenses from victims who were homeless or disabled, and then used that information to file false tax returns and pocket the refunds. She challenged a §2B1.1(b)(2)(C) enhancement based on the number of victims, contending that the IRS was the only victim. The Eleventh Circuit disagreed. Application Note 4(E)(ii) to §2B1.1 states that "any individual whose means of identification was used unlawfully or without authority" is a victim under §2B1.1(b)(2). Application Note 2 to §2B1.6, which bars a sentencing enhancement for the number of victims, did not apply here. For offenses governed by §2B1.1, like mail fraud and false claims, an enhancement is permitted under §2B1.1(b)(2) based on the number of victims, even where the indictment also charged aggravated identity theft. *U.S. v. Ford,* __ F.3d __ (11th Cir. Apr. 28, 2015) No. 14-10381.

6th Circuit approves loss based on difference between loan and amount recovered from selling collateral. (219) Defendant was involved in a scheme in which unqualified straw buyers fraudulently obtained loans to purchase property. After the mortgages went into foreclosure, the lenders acquired the properties through credit bids at public foreclosure sales, and subsequently resold them in Real Estate Owned (REO) sales. The court calculated the loss by crediting the amount the lenders received from the REO sales. Defendant argued that the court should have reduced the loss by the amount of the lenders' "credit bids" at the foreclosure sales, rather than the amounts they received from the subsequent REO sales. The Sixth Circuit disagreed. Note 3(E)(ii) of §2B1.1 directs the court to credit "the amount the victim has recovered at the time of sentencing from the disposition of the collateral." While a lender may receive something of value from purchasing collateral in a foreclosure sale using a credit bid, the lender does not "recover" any amount of money until the property is ultimately sold to a third party. The district court properly based its §2B1.1

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loss calculation on the difference between the amount loaned and the amount eventually recovered by selling the properties securing the loan. *U.S. v. Kerley,* __ F.3d __ (6th Cir. Apr. 23, 2015) No. 13-5821.

10th Circuit holds factual challenges to loss calculation did not rise to level of plain error. (219) Defendant participated in three mortgage-fraud schemes. The district court calculated a loss of $8,961,191.18, which defendant challenged for the first time on appeal. The Tenth Circuit held that defendant's factual challenges did not rise to the level of plain error. Included in the losses were the amounts of five second-mortgage loans totaling $422,588. The court calculated the losses from printouts from UTLS Default Services. Defendant asserted that the amounts could not be believed because each printout was wrong in naming the holder of the first-mortgage note on the property. This challenge raised solely a question of fact – whether there was there a second mortgage in the amount stated on the printout. More importantly, the issue raised by defendant was one of admissibility of evidence, not sufficiency. Because defendant failed to object to the evidence below, there was no need for the government to explain why the printout was likely to be accurate. Defendant gave no reason to believe that the government could not present reliable evidence on remand of the amount of the second-mortgage loans. *U.S. v. Howard,* __ F.3d __ (10th Cir. Apr. 28, 2015) No. 14-1075.

11th Circuit upholds loss calculation in tax fraud case. (219)(370) Defendant, a tax professional, operated a complex fraud scheme in which she acquired personal information under false pretenses from victims who were homeless or disabled, and then used that information to file false tax returns and pocket the refunds. The Eleventh Circuit upheld the district court's finding that the loss was greater than $400,000. An IRS agent testified at sentencing that he reviewed all of the tax returns. Because many of the victims could not be located and interviewed, the agent narrowed the list of returns to just those that included common addresses, i.e. those addresses that defendant listed repeatedly on different victims' tax returns. The agent interviewed as many victims as he could locate and visited each address and confirmed that it was highly unlikely that these addresses housed the individuals who were identified as residing there. The victims whom the agent located confirmed that their returns were indeed fraudulent. The "common address" returns, plus those returns confirmed to be fraudulent from victim interviews, totaled $500,501 in losses. *U.S. v. Ford,* __ F.3d __ (11th Cir. Apr. 28, 2015) No. 14-10381.

7th Circuit affirms increase for using firearm in connection with another felony. (284)(770) Defendant pled guilty to being a felon in possession of firearm. The district court applied an increase under §2K2.1(b)(6)(B) for using or possessing a firearm "in connection with another felony offense," finding that defendant had pointed a loaded firearm at Harris. Although Harris's accounts of the evening to two police officers differed in some respects, the Seventh Circuit upheld the enhancement. The district court thoroughly reviewed all the evidence, and found Harris's accounts to be sufficiently reliable. Numerous details were consistent with each other, including her identification of defendant as the perpetrator, her description of the interior of defendant's residence, her description of the gun, her contention that defendant pointed the weapon at her head in an effort to obtain sex, and her statements that they had been drinking together while at his residence. The court found defendant's account of the evening not credible, noting that he kept changing stories. *U.S. v. Sandidge,* __ F.3d __ (7th Cir. Apr. 20, 2015) No. 14-1492.

5th Circuit upholds child porn increase based on peer-to-peer file sharing software. (310) Defendant pled guilty to receiving child pornography. The Fifth Circuit upheld a §2G2.2(b)(3)(B) distribution increase based on defendant's knowing use of Frostwire, a type of peer-to-peer file sharing software, to download and distribute child pornography. Defendant admitted installing and uninstalling peer-to-peer software numerous times. He was familiar with search terms that return images of child pornography. Defendant knew that other users could download his files and that, by allowing users to do so, he would be distributing child pornography. Finally, defendant admitted that he "was always careful not to allow anybody to download much off of me," implying that he knowingly let some users download from him. The district court thus correctly concluded that defendant distributed child pornography in exchange for a non-pecuniary thing of value. *U.S. v. Groce,* __ F.3d __ (5th Cir. Apr. 28, 2015) No. 14-50272.

5th Circuit affirms pattern of activity enhancement in child porn case. (310) Defendant pled guilty to receiving child pornography. The district court increased the sentence under §2G2.2(b)(5) for "engag[ing] in a pattern of activity involving the sexual abuse or exploitation of a minor." Although defendant had exposed himself to min-

ors on several occasions, he argued that the enhancement did not apply because his conduct did not involve actual contact. The Fifth Circuit found that any error was harmless. The court found defendant's case "unique" because it had never seen someone convicted of receiving child pornography "act out" like defendant. The court stated that it was imposing the statutory maximum because of the facts of this case, and not because of the guideline range. Without the enhancement, defendant's recommended guideline range would be 235-240 months, and his 240-month sentence was within this guideline range. If the case were remanded, the panel had no doubt that the court would impose the same 240-month sentence. *U.S. v. Groce*, __ F.3d __ (5th Cir. Apr. 28, 2015) No. 14-50272.

1st Circuit upholds finding that domestic violence conviction was crime of violence. (330) Defendant pled guilty to firearms charges, and received a base offense level of 24 under §2K2.1(a)(2) for two prior offenses that were crimes of violence. On appeal, defendant argued for the first time that his base offense level should have only been 22 because he only had one prior conviction for a crime of violence. The First Circuit held that the district court did not plainly err in ruling that defendant's Puerto Rican domestic violence conviction under Article 3.1 was a crime of violence. Article 3.1 was a divisible statute, and the panel concluded that a conviction under the "physical force" element of Article 3.1 would likely qualify as a crime of violence. Ordinarily, the court would try to determine from the relevant documents whether defendant's prior conviction was for an offense under the "physical force" element. However, because defendant made no specific challenge to the PSR's conclusion that the list of his prior convictions included two crimes of violence, there were no documents to review. Accordingly, defendant did not show the necessary prejudice, even assuming that the district court erred in not independently seeking out the records of conviction. *U.S. v. Serrano-Mercado*, __ F.3d __ (1st Cir. May 1, 2015) No. 13-1730.

1st Circuit applies obliterated serial number increase despite a second visible number. (330) Guideline §2K2.1(b)(4)(B) provides for a four-level increase if the firearm involved in a felon-in-possession conviction "had an altered or obliterated serial number." Defendant's pistol had an obliterated serial number on the frame and an unaltered serial number on the slide. He argued that the district court erred in applying the enhancement because the serial number, although obliterated in one place, remained unaltered elsewhere on the gun. The First Circuit upheld the enhancement. The text of the guideline required only "an altered or obliterated serial number," U.S.S.G. §2K2.1(b)(4)(B). The guideline's text did not require that all of the gun's serial numbers be so affected. Here, the complete defacement of the serial number on the frame of the firearm resulted in the required obliteration. *U.S. v. Serrano-Mercado*, __ F.3d __ (1st Cir. May 1, 2015) No. 13-1730.

1st Circuit affirms despite error in finding that felon-in-possession offense was a crime of violence. (330) (742) Defendant was convicted of being a felon in possession of a firearm. The district court applied a base offense level of 24 under §2K2.1(a)(2) based on its finding that defendant had two prior felony convictions for a crime of violence. On appeal, the parties agreed the district court erred when it determined that defendant's prior felon-in-possession offense was a crime of violence. The First Circuit accepted the government's concession, but found that the procedural error was harmless. Incorrect application of the guidelines is harmless error where the district court specifies that a particular issue did not affect the sentence imposed. Here, the district court emphasized defendant's substantial criminal history, and the fact that every previous probation, parole, or supervised release he served had been revoked, showing a lack of respect for the law and the need for a longer sentence. The court "clearly identified the contested crime-of-violence issue ... and adequately explained its overall sentence applying 18 U.S.C. §3553(a)." *U.S. v. Thibeaux*, __ F.3d __ (1st Cir. May 4, 2015) No. 14-1961.

8th Circuit approves stolen firearm increase despite defendant's claim that he intended to return gun. (330) Defendant was convicted of being a felon in possession of a firearm. Hines, defendant's "occasional" girlfriend, had previously reported to police that the gun had been stolen. Police found the weapon at defendant's apartment. Defendant testified at trial that he took the firearm from Hines after an incident during which he and Hines argued, she threatened him with the gun, and the gun accidentally discharged. He further testified that he did not return the gun to Hines immediately for fear that she would use it against him again; that he gave the gun to his mother because he knew that, as a convicted felon, he was not permitted to possess the gun; and that he intended to return the gun to Hines eventually. The Eighth Circuit upheld a §2K2.1(b)(4) enhancement for a "stolen" firearm. Although "intent to permanently deprive" is an element of common-law larceny, §2K2.1(b)(4) does

not require a theft equivalent to common-law larceny. Even if defendant intended to return the gun, the undisputed facts were sufficient to show that he wrongfully took the firearm with the intent to deprive Hines of her ownership rights. *U.S. v. Mathews,* __ F.3d __ (8th Cir. May 5, 2015) No. 14-2574.

8th Circuit agrees that defendant possessed firearms that confederate sold to undercover agents. (330) Defendant pled guilty to firearms charges. The district court applied an enhancement under §2K2.1(b)(1)(B) for possessing 8 to 24 firearms. Defendant conceded that he possessed the six firearms that he sold to the undercover agents by himself, but he argued that he did not possess another 11 firearms that his associate Lee sold to the agents and for which defendant received a finder's fee. The Eighth Circuit found no error. The district court reasonably inferred from their conduct that the defendant and Lee had an implicit agreement to sell the firearms to the undercover agents. Defendant and Lee worked in concert. They brought value to the transaction and were compensated accordingly. Defendant provided access to the buyer while Lee provided access to the firearms. The number of transactions, the pattern of the transactions, and the fact that both were compensated for the transactions all supported the conclusion that they had an implicit agreement to illegally sell firearms. Therefore, defendant could be held accountable for the number of firearms that he jointly possessed with Lee in furtherance of a joint criminal enterprise. *U.S. v. Sacus,* __ F.3d __ (8th Cir. Apr. 30, 2015) No. 14-1361.

7th Circuit remands where court failed to comment on potentially meritorious argument. (340)(750) Defendant pled guilty to illegal reentry after deportation. He argued for a below-guideline sentence for three reasons: first, the government's delay in charging made him ineligible for a sentence concurrent with his state sentence and failed to give him credit for time spent in immigration detention; second, the 16-level enhancement under U.S.S.G. §2L1.2(b)(1)(A) was unfairly severe; and third, that he would face unusual hardships as a deportable alien. The district court imposed a guideline sentence with only the tersest explanation. The Seventh Circuit reversed and remanded, because defendant's first argument had recognized legal merit, and the record did not show that the district court considered it. The second two arguments did not require explicit comment by the district court. Both arguments were simply blanket challenges to the applicable guidelines. While a district court has discretion to consider such challenges, a court can reject them without expressly addressing them. Defendant's first argument was much stronger, and the court should have addressed it. *U.S. v. Estrada-Mederos,* __ F.3d __ (7th Cir. Apr. 29, 2015) No. 14-2417.

Adjustments, Generally (Chapter 3)

7th Circuit holds that bank manager abused trust of elderly client. (410) Defendant, a bank branch manager, befriended an elderly client, and convinced him to let defendant help him sell a three-acre property he owned. Defendant then convinced the man that in order to sell the property he needed to take out a $250,000 home equity line of credit on the property, with the proceeds ultimately transferred into defendant's personal account. Defendant spent the vast majority of the loan proceeds for his own personal use. The Seventh Circuit held that the district court properly applied a two-level abuse of trust enhancement under §3B1.3. Defendant used his position at the bank in order to convince the elderly client that he had a buyer for the property, persuade him that a line of credit was necessary to consummate the sale, and control the events that took place at the line of credit closing. Defendant himself admitted that the client trusted him to "do the right thing" in this financial transaction and that he abused this trust. *U.S. v. DeMarco,* __ F.3d __ (7th Cir. Apr. 24, 2015) No. 14-1526.

7th Circuit denies acceptance reduction where defendant denied relevant conduct. (482) Defendant pled guilty to being a felon in possession of a firearms. Over defendant's objection, the court applied an enhancement based on its finding that defendant had pointed the loaded gun at the head of Harris. Based on his denial of this conduct, the court also denied him a reduction for acceptance of responsibility, finding that the gun-pointing was relevant conduct. The Seventh Circuit upheld the denial of the acceptance reduction. Defendant seemed to concede that, had he actually pointed the firearm at Harris, his actions would constitute relevant conduct. Therefore, since the panel previously ruled that the court did not err in finding that defendant pointed the loaded firearm at Harris, it followed that the district court did not err in denying the acceptance of responsibility reduction. *U.S. v. Sandidge,* __ F.3d __ (7th Cir. Apr. 20, 2015) No. 14-1492.

Criminal History, Generally (Chapter 4)

2nd Circuit says New York drug conviction replaced by youthful offender adjudication did not qualify as ACCA conviction. (540) Defendant was sentenced under the Armed Career Criminal Act (ACCA). He argued that his 2001 New York drug conviction did not qualify as a predicate conviction because he was adjudicated as a youthful offender (YO) for that offense under New York law. The Second Circuit agreed, holding that a drug conviction under New York law that has been replaced by a YO adjudication is not a qualifying predicate conviction under the ACCA because it has been "set aside" within the meaning of 18 U.S.C. §921(a)(20) and New York law. In concluding that defendant's YO conviction had been "set aside," the panel found that (a) §921(a)(20) specifically required the district court to apply state law in making that determination, and (b) New York law deems such YO adjudications to be "set aside," and does not consider YO adjudications predicate convictions for sentencing enhancements in New York State courts. *U.S. v. Sellers,* __ F.3d __ (2d Cir. Apr. 27, 2015) No. 13-4431-cr.

Determining the Sentence (Chapter 5)

7th Circuit rejects several "standard" conditions of supervised release as vague and overbroad. (580) The district court imposed 15 supervised release conditions in one phrase by stating that defendant "shall comply with the 15 standard conditions that have been adopted by this Court." The court offered no explanation as to the propriety of those conditions, and it conducted no review of the applicable §3553(a) factors. The Seventh Circuit held that several of the conditions were fatally vague under its recent decision in *U.S. v. Thompson,* 777 F.3d 368 (7th Cir. 2015), including the requirements that defendant support his dependents and meet other family responsibilities, notify the probation officer at least ten days prior to any change of employment, not associate with any persons engaged in criminal activity, and not frequent places where controlled substances were illegally sold, used, distributed, or administered. Several other conditions were too broad to meet statutory requirements. These included the requirement that defendant answer truthfully all inquiries by the probation officer, and permit the probation officer to visit him at any time at home. *U.S. v. Sandidge,* __ F.3d __ (7th Cir. Apr. 20, 2015) No. 14-1492.

7th Circuit rejects as vague and overbroad condition of release barring use of "mood-altering substance." (580) The district court imposed several "special" conditions of supervised release, but provided no explanation as to why those conditions were appropriate. Following *U.S. v. Thompson,* 777 F.3d 368 (7th Cir. 2015), the Seventh Circuit vacated the conditions and remanded. In addition to the absence of explanation, at least one of the conditions also suffered from a fatal degree of vagueness, and potential overbreadth: that defendant "shall not consume ... any mood-altering substances." As held in *U.S. v. Siegel,* 753 F.3d 705 (7th Cir.2014), a prohibition of mood-altering substances could, by its terms, proscribe everything from chocolate to blueberries, substances "that are not causal factors of recidivist behavior." The case was remanded to reconsider the scope of the conditions. *U.S. v. Sandidge,* __ F.3d __ (7th Cir. Apr. 20, 2015) No. 14-1492.

8th Circuit upholds lifetime term of supervised release. (580)(800) In 2001, defendant was convicted of statutory rape, and in 2012, he failed to register as a sex offender. In 2014, two months after his release on the failure to register charges, defendant violated his release conditions, including having unsupervised contact with minors. The court revoked his supervised release and sentenced him to 24 months' imprisonment and supervision for life. The Eighth Circuit held that the lifetime term of supervised release was substantively reasonable. The guidelines range for supervised release was five years to life. "If the district court imposes a within-Guidelines sentence, this court presumes the sentence is reasonable, and [the defendant] bears the burden to rebut the presumption." On appeal, defendant made no legal argument rebutting the presumptive reasonableness of lifetime supervision. *U.S. v. Phillips,* __ F.3d __ (8th Cir. May 5, 2015) No. 14-2118.

8th Circuit rejects ban on all internet access where defendant only possessed adult porn. (580)(800) Two months after defendant's release from prison after being convicted of failing to register as a sex offender, he violated his release conditions. The court sentenced him to 24 months' imprisonment and supervision for life. The court ordered, as a condition of supervised release, that defendant not "possess or use ... a computer, ... or subscribe to or use any Internet service, ... without the written approval of the probation office." The Eighth Circuit

reversed and remanded. The record did not indicate that defendant ever possessed child pornography. The court apparently premised the ban on defendant's possession of adult pornography, and his statutory rape conviction. Because possessing child pornography may not necessarily justify a broad ban on internet access, a court exceeds its discretion under §3583(d) by banning internet access for possessing adult pornography. The prior-approval provision did not save this ban. On remand, lesser restrictions on defendant's internet access might be consistent with §3583(d). *U.S. v. Phillips,* __ F.3d __ (8th Cir. May 5, 2015) No. 14-2118.

9th Circuit rejects restitution to Canada in fraud prosecution. (610) Defendant pleaded guilty to fraud offenses. Before sentencing, Canada's Department of Justice asserted in the district court that Canada was a victim of defendant's offenses and sought restitution under the Mandatory Victims Restitution Act, 18 U.S.C. §3663A. The district court denied restitution, and Canada filed a petition for mandamus under the Crime Victims' Rights Act, 18 U.S.C. §3771. Judges Goodwin, Farris, and Friedland (per curiam) held that Canada's claim for restitution was based on events insufficiently related to the scheme in the indictment and the facts supporting defendant's guilty plea. The court found that defendant pleaded guilty to a scheme revolving around false generation and use of U.S. biodiesel credits, and Canada sought restitution for a scheme involving false subsidies to a company that was supposed to produce biodiesel in Canada. The court found that the two fraudulent schemes "proceeded on parallel tracks" but "were not causally linked." *In re Her Majesty the Queen in Right of Canada*, __ F.3d __ (9th Cir. May 12, 2015) No. 15-71346.

10th Circuit reverses improperly calculated restitution in mortgage fraud case. (610) Defendant participated in three mortgage-fraud schemes. The district court calculated loss for restitution purposes using the same method it used in calculating loss under §2B1.1, by adding the unpaid principal balances on each loan and subtracting the amounts recovered from sales of the properties securing the loans. Defendant argued that this methodology was incorrect for downstream lenders, *i.e.*, lenders who purchased the mortgage loan from the original lender or an earlier downstream lender. He noted that downstream noteholders could have paid less than the unpaid balance to acquire the notes. The Tenth Circuit agreed with defendant. Although the total-loss calculation under §2B1.1 does not depend on which lender in the chain of title of a mortgage note suffered what loss, that information was necessary to avoid wind-falls in awarding restitution. The panel remanded with instructions to redetermine the amount of actual loss to downstream-noteholder victims. *U.S. v. Howard,* __ F.3d __ (10th Cir. Apr. 28, 2015) No. 14-1075.

7th Circuit affirms consecutive sentences for federal robbery and state attempted murder. (650) Defendant robbed a UPS truck at gunpoint, and later shot an associate he suspected of "snitching." He was convicted in state court of attempted murder, aggravated battery and drug charges, and sentenced to 38 years. For hijacking the UPS truck, defendant was convicted in federal court of robbery, and sentenced to 235 months. The district court ordered his 235-month federal sentence to run consecutively to the state sentences. The Seventh Circuit held that the district court did not abuse its discretion in imposing consecutive sentences. Regardless of whether §5G1.3(b) or §5G1.3(c) was applicable, the court had authority to impose consecutive sentences. The court extensively justified a sentence at the high end of the guidelines range and the consecutive treatment of that sentence. The district court heard the harrowing testimony of the UPS driver and reviewed the driver's victim impact statement. The court also heard the testimony of the shooting victim, and reviewed her state court testimony regarding defendant's attempt on her life. The court clearly determined that the two crimes were each so serious in their own right that only consecutive sentences would be appropriate. *U.S. v. Moore,* __ F.3d __ (7th Cir. Apr. 24, 2015) No. 14-3269.

7th Circuit upholds making felon-in-possession sentence consecutive to unrelated state sentence. (650) Defendant pled guilty to being a felon in possession of a firearm. His guideline range was 92-115 months, and the district court sentenced him to 92 months, to be served consecutively to an unrelated state sentence. Defendant argued on appeal that the district court did not address his arguments for a concurrent sentence, and thus committed procedural error. The Seventh Circuit affirmed, finding that the district court adequately considered the §3553(a) factors in choosing a consecutive sentence. Defendant's only argument for a concurrent sentence was based on his contention that a within-guidelines sentence would be excessive as applied to him. The district court explicitly found that the guidelines range was reasonable in defendant's case. In fact, the court repeatedly stated that it contemplated imposing a sentence above the guidelines, due to defendant's recidivist behavior. Having found that the guidelines range was appropriate,

and not excessive, the district court necessarily rejected defendant's argument that "at the very least" his federal sentence should run concurrently to his state term. *U.S. v. Sandidge*, __ F.3d __ (7th Cir. Apr. 20, 2015) No. 14-1492.

Departures (§5K) and *Booker* Variances

1st Circuit affirms below-guidelines drug sentence as not too high. (742) Defendant was convicted of drug conspiracy charges, and sentenced to 128 months, which was eight months above the ten-year mandatory minimum, but 23 months below the bottom of the 151-188-month recommended guideline range. She contended that the judge did not consider every sentencing factor listed in 18 U.S.C. §3553(a). The first Circuit disagreed, noting that the judge said he considered "all the factors." Moreover, the judge touched on the seriousness of her crimes, talked about her difficult family circumstances, highlighted her lack of criminal record, alluded to societal-protective concerns, and stressed the need to avoid unwarranted disparities between her sentence and a co-conspirator. Although defendant argued that the judge put too much weight on one factor, and too little weight on others, judges are not required to give each factor equal billing. *U.S. v. Correa-Osorio*, __ F.3d __ (1st Cir. Apr. 22, 2015) No. 12-1300.

Violations of Probation and Supervised Release (Chapter 7)

5th Circuit affirms despite error in basing sentence on seriousness of offense and need for punishment. (800) Defendant violated the conditions of her supervised release by committing two new crimes, illegal reentry and murder. The district court rejected the 24-30 month guideline recommendation, and imposed a 60-month revocation sentence, based on the seriousness of the murder and the need to provide a just punishment. This was error under *U.S. v. Miller*, 634 F.3d 841, (5th Cir. 2011), which held that these factors cannot be the dominant factors in a sentencing decision. Nevertheless, the error was not "plain, because defendant could not satisfy the fourth prong of the plain-error standard. Defendant never was charged with or convicted of illegal reentry, even though she committed the crime. This conviction would have resulted in a guideline range of 57-71 months. Thus, the 60-month revocation sentence did not impugn the fairness, integrity, or public reputation of the court system. *U.S. v. Rivera*, __ F.3d __ (5th Cir. Apr. 29, 2015) No. 14-40389.

Topic Numbers In This Issue

Table of Cases

2015) No. 13-1730. Pg. 4

U.S. v. Thibeaux, __ F.3d __ (1st Cir. May 4, 2015) No. 14-1961. Pg. 4