

Federal Sentencing

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GUIDE

**Federal Sentencing Guidelines
Cases From All Circuits**

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IN THIS ISSUE:

- 2nd Circuit says extradited defendant lacked standing to argue that sentence violated diplomatic note. Pg. 1
- 10th Circuit says loss need not be charged in indictment or submitted to jury. Pg. 1
- D.C. Circuit rejects challenge to loss calculation that would result in sentence within same guideline range. Pg. 3
- 11th Circuit says future value of collateral need not be foreseeable. Pg. 3
- 11th Circuit approves same sentence on remand despite elimination of 16-level increase. Pg. 4
- 5th Circuit says sales of ammunition barred lower offense level. Pg. 4
- 4th Circuit says North Carolina drug offense was not “serious drug offense” under ACCA. Pg. 5
- 9th Circuit finds condition barring use of uncontrolled substances impermissibly vague. Pg. 5
- 8th Circuit reverses for failure to reduce restitution by value of recovered firearms. Pg. 5
- 7th Circuit reverses where court failed to adequately explain its upward variance. Pg. 6
- 1st Circuit rules government’s statements at sentencing did not violate plea agreement. Pg. 7
- 9th Circuit reverses for failure to prove defendant lied about “spice” in violation of supervised release. Pg. 7

Guidelines Sentencing, Generally

2nd Circuit says extradited defendant lacked standing to argue that sentence violated diplomatic note. (110) (750) Defendant was extradited by the Republic of Colombia to face drug charges in the United States on the condition that “a sentence of life imprisonment will not be sought or imposed.” The United States agreed to the condition in a Diplomatic Note to the Colombian government. Defendant contended on appeal that his 648-month sentence violated this condition because it was effectively a life sentence. The Second Circuit held that defendant lacked prudential standing to challenge his sentence on this ground. Any individual right that defendant might have under the terms of his extradition was “only derivative through the state[].” Thus, he would only have standing to raise the claim that his sentence violated the terms of his extradition if the Government of Colombia first made an official protest. *U.S. v. Suarez*, ___ F.3d ___ (2d Cir. June 30, 2015) No. 14-2378-cr.

10th Circuit says loss need not be charged in indictment or submitted to jury (120)(219) Defendants were convicted of wire fraud and money laundering. They argued that the loss necessary to support an increase under §2B1.1(b)(1) was an “element” of the offense that must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt to satisfy the Fifth and Sixth Amendments as interpreted in *Alleyne v. U.S.*, ___ U.S. ___, 133 S. Ct. 2151 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Tenth Circuit rejected the argument, because none of the defendants were subject to a mandatory minimum sentence or sentenced beyond the statutory maximum for their convictions. The judicial fact-finding only affected the sentencing ranges under the advisory sentencing guidelines, so the *Apprendi-Alleyne* rule did not apply. *U.S. v. Zar*, ___ F.3d ___ (10th Cir. June 23, 2015) No. 13-1111.

Application Principles, Generally (Chapter 1)

11th Circuit says using acquitted conduct to calculate loss did not require clear and convincing evidence. (175)(219)(755)

Defendant was involved in a long-running mortgage fraud scheme. He was convicted of conspiracy and one substantive count, and was acquitted of all other substantive counts. There were 29 properties involved in the fraudulent conduct, and the court held defendant accountable for losses attributable to ten of these properties, despite his acquittal on the substantive counts for these properties. On appeal, the Eleventh Circuit found no error. Under long-standing precedent, relevant conduct of which a defendant was acquitted may be considered in sentencing for the offense of conviction, as long as the government proves the acquitted conduct by a preponderance of the evidence. The panel rejected defendant's argument, raised for the first time on appeal, that the court should have used a clear and convincing evidence standard. *U.S. v. Cavallo*, ___ F.3d ___ (11th Cir. June 22, 2015) No. 12-15660.

11th Circuit considers loss from uncharged conduct. (175)(219)

Defendant was convicted of mortgage fraud conspiracy and one substantive count, and was acquitted of all other substantive counts. There were 29 properties involved in the fraudulent conduct, and the court held defendant accountable for losses from ten properties. The Eleventh Circuit upheld the inclusion of losses from two properties for which defendant was not charged. Defendant's brother, Bobka, participated in fraudulent transactions for both these properties, and defendant partnered with his brother in their real estate investments. Defendant actively managed these two properties through his partnership with his brother, and they shared a bank account with defendant's wife through which they jointly funneled money for the transactions. Moreover, defendant and his wife reported ownership of both properties and the expenses incurred in renting out each property on their 2006 and 2007 joint tax returns. The court did not err in finding that the losses from these properties were within the scope of the criminal activity that defendant agreed to undertake. *U.S. v. Cavallo*, ___ F.3d ___ (11th Cir. June 22, 2015) No. 12-15660.

1st Circuit remands to permit court to modify sentence under retroactive guideline amendment. (192)(850)

Defendant pled guilty to drug charges and was sentenced to 72 months. While defendant's appeal was

pending, the district court issued an order sua sponte modifying the sentence on the basis of the amendment to the guidelines under 18 U.S.C §3582(c)(2). That order purported to reduce defendant's sentence to 58 months. Under the recently decided *U.S. v. Maldonado-Rios*, ___ F.3d ___ (1st Cir. June 15, 2015), a district court has no jurisdiction to modify a sentence while an appeal of that sentence is pending. However, as explained in *Maldonado-Rios*, Federal Rule of Appellate Procedure 12.1 permits a district court to issue "an indicative ruling" on a motion to modify a sentence while an appeal is pending. The First Circuit therefore treated the district court's order as if it were an indicative ruling under Rule 12.1, and remanded the case to the district court so that it could enter an order modifying defendant's sentence. *U.S. v. Cardoza*, ___ F.3d ___ (1st Cir. June 23, 2015) No. 13-2145.

7th Circuit finds defendant waived argument for further sentence reduction. (192)(855)

When a defendant requests a sentence reduction under §3582(c) based on a guideline amendment, and the defendant previously received a below-guidelines sentence because of substantial assistance, the court is authorized to give a com-

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parable, below-guidelines reduction. Defendant's original sentence was reduced by 30 percent, from 127 months to 88 months based on his assistance. Thus, when defendant requested a sentence reduction under §3582(c), the public defender and government jointly requested a reduction to 83 months. The court granted the requested reduction. Defendant argued on appeal that he should have received a greater reduction, claiming that he did not "consent" to the joint motion. The Seventh Circuit held that defendant waived this argument. Defendant never complained about his lawyer's representation during the §3582 proceedings, and it was too late for him to do so now. He was bound by the acts of his lawyer over "what arguments to pursue." Because defendant (through his lawyer) argued for and received an 83-month sentence, defendant waived any argument for a different sentence. *U.S. v. Nichols*, __ F.3d __ (7th Cir. June 17, 2015) No. 15-1108.

Offense Conduct, Generally (Chapter 2)

D.C. Circuit rejects challenge to loss calculation that would result in sentence within same guideline range. (219)(765) Defendant, a salaried employee at a non-profit, used his position to pay himself over \$110,000 in additional compensation. He challenged the district court's loss calculation on appeal, contending that the court should have reduced the loss by the fair market value of the services rendered by his companies. The D.C. Circuit found it unnecessary to address this argument, because the district court said it would impose the same sentence even if it accepted defendant's own loss calculation. Under either calculation, the 24-month sentence was within the guidelines range. It was therefore entitled to a presumption of reasonableness on appeal. Defendant did not rebut this presumption, nor could he. In imposing the sentence, the district court carefully considered the §3553(a) sentencing factors. In particular, it found the offense to be "very serious" in nature because defendant had engaged in a "lengthy and complex" scheme that involved hundreds of discrete acts of embezzlement, abusing the trust of his employer, and concealing his fraudulent conduct even after he was confronted. *U.S. v. Kaufman*, __ F.3d __ (D.C. Cir. June 23, 2015) No. 14-3041.

10th Circuit counts losses from additional properties as relevant conduct. (219) Defendant was convicted of wire fraud and money laundering in connection with a

mortgage fraud scheme. She argued that the district court erred by including losses from three specific properties in its sentencing calculation. These three properties were among the 18 properties involved in the mortgage fraud scheme, but defendant argued that the government failed to prove that the losses attributable to the three properties constituted relevant conduct under §1B1.3. The Tenth Circuit found no clear error. The indictment listed the three properties among the 18 properties involved in the mortgage fraud scheme, and the evidence at trial showed that losses from these three properties were reasonably foreseeable to defendant, regardless of whether she participated directly in the real estate transactions related to these three specific properties. *U.S. v. Zar*, __ F.3d __ (10th Cir. June 23, 2015) No. 13-1111.

11th Circuit says future value of collateral need not be foreseeable. (219) Defendant was involved in a long-running mortgage fraud scheme. He challenged the district court's loss calculation, contending that it was not "reasonably foreseeable" to him that lenders, stuck with the properties on whose loans defendant and his cohorts had defaulted, would suffer such large losses, because he could not have anticipated that the real estate market would take a sharp downturn. The Eleventh Circuit termed this argument "audacious," given that defendant's participation in fraudulent activities involving over 30 properties in the Sarasota area contributed to the very economic downturn he claimed was unforeseeable. Moreover, "[u]nlike the application note regarding the determination of loss, the application note regarding credits against loss does not speak in terms of foreseeability. The sentencing guidelines, therefore, require foreseeability of the loss of the unpaid principal, but do not require foreseeability with respect to the future value of the collateral." *U.S. v. Cavallo*, __ F.3d __ (11th Cir. June 22, 2015) No. 12-15660.

1st Circuit upholds firearm enhancement where defendant did not challenge PSR's allegations. (284) Defendant pled guilty to drug charges, and received a §2D1.1(b)(1) firearm enhancement. In support of the enhancement, the district court referred to defense counsel's acknowledgment that co-conspirators possessed firearms as described in the PSR. The stipulated version of the facts in the plea agreement also reflected that defendant and his co-conspirators engaged in transactions for a thousand or more kilograms of cocaine at a time. Finally, defendant did not object to allegations in the PSR that enforcers in the organization used guns to protect the organization's members and its proceeds. The

First Circuit upheld the firearm enhancement. *U.S. v. Miranda-Martinez*, ___ F.3d ___ (1st Cir. June 24, 2015) No. 14-1149.

1st Circuit says prior felony need not be alleged in indictment or proved beyond a reasonable doubt.

(340) Defendant pled guilty to illegal reentry pursuant to 18 U.S.C. §1326. At sentencing, the district court found that the statutory maximum was 20 years under 8 U.S.C. §1326(b)(2) because defendant had illegally reentered the United States after a conviction for an aggravated felony. Defendant argued on appeal that the fact that his prior conviction was an aggravated felony had to be alleged in the indictment and proved beyond a reasonable doubt in order for him to be sentenced to more than the two-year statutory maximum under 8 U.S.C. §1326(a). The First Circuit held that defendant’s argument was foreclosed by *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998), which held that §1326(b)(2) did not define a crime separate from §1326(a). Accordingly, defendant’s aggravated felony conviction was not an element of the crime defined in subsection (b)(2), and did not need to be charged in the indictment. *U.S. v. Jimenez-Banegas*, ___ F.3d ___ (1st Cir. June 24, 2015) No. 13-1980.

11th Circuit approves same sentence on remand despite elimination of 16-level increase. (340)(741)

Defendant was convicted of illegal reentry following deportation. In his first appeal, the Eleventh Circuit vacated his 87-month sentence, reversing the district court’s finding that his prior Florida conviction for false imprisonment was as a “crime of violence” under §2L1.2(b)(1)(A)(ii). The removal of the 16-level crime of violence enhancement reduced his guideline range from 70-87 months to 21-27 months. On remand, the court varied upward, and again imposed an 87-month prison term. The Eleventh Circuit held that the 87-month sentence was substantively reasonable. The court followed the spirit and letter of precedent and obeyed the applicable statutory provisions when it considered the §3553(a) factors at sentencing. The district court supported the 60-month variance with significant justifications, including the facts of defendant’s earlier violent crimes. The panel rejected the dissent’s argument that it has been “sending a message to district courts” that an upward variance is less likely to get vacated than a downward variance. *U.S. v. Rosales-Bruno*, ___ F.3d ___ (11th Cir. June 19, 2015) No. 12-15089.

5th Circuit says sales of ammunition barred lower offense level. (345)

Defendant was convicted of unlaw-

fully exporting firearms components. The district court used a base offense level of 26, the default level for unlawfully exporting firearms under §2M5.2(a)(1). Defendant argued that the offense level should have been 14 under §2M5.2(a)(2) because “the offense involved only (A) non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed two, (B) ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or (C) both.” The district court found that the lower offense level did not apply both because (1) the empty magazines were not “small arms” and (2) the offense involved more than 500 rounds of ammunition. The alternative ammunition ruling was based on a relevant conduct finding that defendant’s export scheme also involved selling thousands of rounds to the same cartel affiliates that purchased the magazines. Defendant did not challenge the ammunition finding on appeal. Because the ammunition finding alone prevented application of the lower offense level, the Fifth Circuit rejected defendant’s argument. *U.S. v. Gonzalez*, ___ F.3d ___ (5th Cir. June 23, 2015) No. 14-40344.

Adjustments, Generally (Chapter 3)

10th Circuit rules court made adequate findings to support managerial enhancement. (431)

Defendant was convicted of charges arising from a mortgage fraud scheme. The district court found, over defendant’s objection, that he held a managerial or supervisory role in the conspiracy. The Tenth Circuit held that the district court made adequate findings to support the enhancement. While the court’s specific factual findings are admittedly sparse, the findings were not so deficient as to hinder appellate review. Significantly, the court ruled on the matter immediately after the prosecutor directed the court’s attention to specific portions of the trial record and the court concluded the “record clearly reflect[ed]” defendant’s role as a manager or supervisor. The record established that defendant recruited others to participate in the mortgage fraud scheme, advised them as to which homes to buy and sell, directed their utilization of the grant programs, and introduced them to co-conspirator Jacoby so he could act as the real estate agent and, in some cases, provide hard-money loans for down payments. These activities sufficiently demonstrated defendant’s role as a manager or supervisor in the mortgage fraud scheme. *U.S. v. Zar*, ___ F.3d ___ (10th Cir. June 23, 2015) No. 13-1111.

Criminal History, Generally (Chapter 4)

4th Circuit says North Carolina drug offense was not “serious drug offense” under ACCA. (540) Defendant was sentenced as an armed career criminal based in part on a 1984 North Carolina drug conviction. Defendant argued that the offense did not qualify as a “serious drug offense” because it was not punishable by a 10-year sentence. At the time of the 1984 conviction, North Carolina grouped felonies into different classes and assigned each class a baseline, “presumptive” term of imprisonment. It also set a maximum, aggravated term of imprisonment for each offense class. Defendant’s alleged ACCA predicate was one of eight different offenses consolidated into two different judgments. The judgments did not specify how many years were awarded for each individual offense. The alleged predicate was a drug offense that carried a presumptive term of three years, and a maximum aggravated penalty of ten years. The judgments did not list any aggravating or mitigating factors. The Fourth Circuit agreed with defendant that his offense did not qualify as a serious drug offense under the ACCA. Under *U.S. v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), where there are no aggravating factors, the court considers the presumptive term to be the maximum applicable punishment. Nothing in the record supported the government’s contention that the 1984 drug offense was punishable by ten years. *U.S. v. Newbold*, ___ F.3d ___ (4th Cir. June 30, 2015) No. 10-6929.

Determining the Sentence (Chapter 5)

9th Circuit finds condition barring use of uncontrolled substances impermissibly vague. (580) In imposing sentence, the district ordered as a condition of supervised release that defendant “may not knowingly use or possess any substance, controlled or uncontrolled, that [defendant] believe[s] is intended to mimic the effects of any controlled substance.” The district court intended to prevent defendant from using a version of “spice,” which mimics the effect of marijuana. The Ninth Circuit held that this condition was impermissibly vague because it prohibited defendant from using substances such as coffee, chocolate, or sodas with caffeine. *U.S. v. Aquino*, ___ F.3d ___ (9th Cir. July 20, 2015) No. 14-10360.

8th Circuit reverses for failure to reduce restitution by value of recovered firearms. (610) Defendant pleaded guilty to stealing 36 firearms from a federally licensed firearms dealer. The district court ordered restitution of \$18,666.62 to be paid to two victims: \$2500 to 417 Guns, the licensed dealer from which the firearms were stolen, and \$16,166.62 to Gibson and Associates, the amount it paid to 417 Guns for its insured loss from the theft. At sentencing, the government advised that 18 firearms had been recovered, but the district court did not reduce the amount of restitution by the value of the recovered firearms. Eight of the recovered firearms were turned over to insurer Gibson and Associates, which then sold the firearms to 417 Guns for \$2,025. An additional 10 firearms were recovered and were currently in police custody. The Eighth Circuit found plain error and remanded. The statute unambiguously provides that a restitution award must be reduced by “the value (as of the date the property is returned) of any part of the property that is returned.” 18 U.S.C. §3663A(b)(1)(B)(ii). Here, the MVRA victim was 417 Guns, not its insurer, Gibson and Associates. The reduction must be based on the fair market value of the recovered property to the victim, 417 Guns, not the value to its insurer, Gibson and Associates. The ten firearms recovered but still in police custody required further inquiry by the district court before a final order of restitution could be entered. *U.S. v. Fonseca*, ___ F.3d ___ (8th Cir. June 24, 2015) No. 14-2893.

10th Circuit says restitution for foreclosed property is reduced by amount of money victim received in selling it. (610) Defendants were convicted of wire fraud and money laundering. They argued that the court erred in calculating the loss for restitution purposes by failing to offset the fair market value of the collateral real estate at the date of foreclosure when the victim-lender took title and could have sold it for cash. The Tenth Circuit noted that the Supreme Court has rejected this methodology in *Roberts v. U.S.*, ___ U.S. ___, 134 S. Ct. 1854 (2014) (holding that restitution under the MVRA must be reduced by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it”). *U.S. v. Zar*, ___ F.3d ___ (10th Cir. June 23, 2015) No. 13-1111.

11th Circuit reverses restitution order that did not take into account value of collateral to victims. (610) Defendants were involved in a long-running mortgage fraud scheme. At sentencing, the district court ordered restitution of \$13,229,100, which reflected the face

amount of all loans for the ten properties attributed to them. Unlike the court's loss calculation, the court's restitution computation did not reflect any credits against loss for the proceeds of properties that had been sold or for the current fair market value of properties not yet sold. Because the loss calculation for guidelines' purposes did properly factor in those credits, that loss figure was only \$7,454,210.74, which was about \$6 million less than the amount of restitution imposed. The Eleventh Circuit found this was a "striking difference" that could "not to be justified by either the law or the facts of this case." Because the restitution ordered by the court did not take into account the value of the collateral properties to the victims, it did not represent the actual loss to the victims, but instead improperly conferred a windfall on them. The panel vacated the restitution order and remanded. *U.S. v. Cavallo*, __ F.3d __ (11th Cir. June 22, 2015) No. 12-15660.

Departures (\$5K) and Booker Variances

11th Circuit finds no unwarranted sentencing disparity where defendant invited leniency for his wife. (716) Defendant was involved in a long-running mortgage fraud scheme. He contended that his 120-month sentence was substantively unreasonable because it was harsher than the sentences imposed on many of his co-conspirators. See 18 U.S.C. §3553(a)(6). The Eleventh Circuit found no error. First, under §3553(a)(6), a defendant who cooperates with the government and pleads guilty is not "similarly situated" to a co-defendant who proceeds to trial. Thus, only three of defendant's co-defendants could be considered "similarly situated" to defendant. Bobka received a 180-month sentence, which was higher than defendant's 120-month sentence. Streinz received a 60-month sentence, which was the statutory maximum for his sole count of conviction. Although defendant's wife only received a one-year sentence, the lenient sentence was at the behest of defendant, who took full responsibility for his wife's involvement and requested mercy for her so that she could care for their minor son. *U.S. v. Cavallo*, __ F.3d __ (11th Cir. June 22, 2015) No. 12-15660.

8th Circuit says alternate ground for career offender sentence supported sentence. (741) The district court found that defendant was a career offender, resulting in a guideline range of 188-235 months. The court then explained that even if defendant were not a career offender

(with a guideline range of 92-115 months), the court would have varied upward due to the seriousness of defendant's criminal conduct and his incorrigibility. Under either approach, the court declared that it would impose the same sentence of 188 months. The court then reduced the sentence to 132 months on unrelated grounds. The Eighth Circuit found it unnecessary to address whether the court properly classified defendant as a career offender, because the district court's alternative decision to vary upward was sufficient to justify the sentence imposed. In concluding that defendant was "at high risk to recidivate" and was "incorrigible," the court cited defendant's extensive criminal history, which resulted in 22 criminal history points, making him "atypical" even for offenders in the highest criminal history category with 13 or more points. Moreover, lenient sentences in prior cases had not changed defendant's behavior. There was no error. *U.S. v. Hentges*, __ F.3d __ (8th Cir. June 22, 2015) No. 14-1455.

7th Circuit reverses where court failed to adequately explain its upward variance. (742) Defendant was convicted of being a felon in possession of a destructive device, a pipe bomb. The district court calculated a guideline range of 33-41 months, but sentenced him to 120 months, the statutory maximum. The Seventh Circuit held that the district court failed to adequately explain the reasons for such a significant variance. The court's explanation only totaled one full page of the sentencing transcript, made no explicit reference to 18 U.S.C. §3553, failed to explain how it balanced those factors, and made no reference to the advisory guideline range at all. The court observed that defendant had "an extensive criminal record" and mentioned "an occasion where [he] discharged firearms at people." However, the facts of his criminal history were already taken into account by his criminal history level. The court also referenced its need to "incapacitate" defendant to "protect society." These brief remarks did not explain why defendant was different from the vast majority of defendants. Finally, the court made no mention of mitigation at sentencing until defendant's attorney asked after the fact whether the court had considered his arguments in mitigation. *U.S. v. Lockwood*, __ F.3d __ (7th Cir. June 16, 2015) No. 14-1809.

8th Circuit upholds sentence at bottom of guideline range for felon in possession. (742) Defendant pled guilty to being a felon in possession of a firearm. The district court denied defendant's request for a downward variance, observing that defendant fled from police and

that the gun he possessed was fully loaded. The court then sentenced him to 37 months, at the bottom of his advisory guideline range. Defendant argued that his sentence was substantively unreasonable, and that the court placed undue weight on the circumstances of his offense and ignored mitigating factors. The Eighth Circuit affirmed the sentence. It was within the advisory guideline range, so the panel presumed that it was substantively reasonable. Moreover, defendant advanced his mitigating factors at the sentencing hearing and in a sentencing memorandum, and therefore the panel presumed that the district court considered them. *U.S. v. Williams*, ___ F.3d ___ (8th Cir. June 25, 2015) No. 14-2600.

10th Circuit affirms sentence despite claims of coercion and aberrant conduct. (742) Defendant was convicted of wire fraud and money laundering. The district court denied his motion for a variance, concluding that most of the factors he asserted had already been accounted for in the guidelines, that his conduct was planned rather than aberrational, and that while others had recruited him into the fraudulent scheme, they had not done so through coercion or duress. On appeal, defendant contended that the district court abused its discretion by essentially presuming the reasonableness of the advisory guidelines sentence and failing to adequately consider his reasons for seeking a lower sentence. The Tenth Circuit disagreed, finding that the district court did all it was required to do before imposing a within-Guidelines sentence. Here, the district court noted the advisory sentencing range of 63-78 months, discussed several §3553(a) factors, considered defendant's arguments for a variance, and stated its reasons for rejecting those arguments before imposing the low-end prison sentence of 63 months. There was no abuse of discretion under these circumstances. *U.S. v. Zar*, ___ F.3d ___ (10th Cir. June 23, 2015) No. 13-1111.

Plea Agreements, Generally (§6B)

8th Circuit finds defendant's arguments were barred by appeal waiver. (760)(850) Defendant pled guilty to stealing firearms from a federally licensed firearms dealer. On appeal, defendant argued that the district court abused its discretion in varying upward and in not granting an additional sentence credit for 5.4 months of good time credit the Bureau of Prisons gave him while serving a Kansas sentence. Defendant also argued that the district court's sentence was vindictive or a violation of the Double Jeopardy Clause. The Eighth Circuit concluded that these contentions were without merit,

given the waiver of appeal in his written plea agreement. Although the agreement permitted him to appeal an "illegal sentence," including a sentence that exceeded the statutory maximum, the exception did "not include less serious sentencing errors, such as a misapplication of the Sentencing Guidelines, an abuse of discretion, or the imposition of an unreasonable sentence." The sentencing issues raised by defendant fell within the scope of the appeal waiver. The constitutional issues had no merit. *U.S. v. Fonseca*, ___ F.3d ___ (8th Cir. June 24, 2015) No. 14-2893.

1st Circuit rules government's statements at sentencing did not violate plea agreement. (790) Defendant pled guilty to drug trafficking crimes. His written plea agreement did not recommend a firearm enhancement, and stipulated that the parties agreed that "no further adjustments or departures" would be sought. His PSR, however, indicated that one of defendant's co-conspirators carried a gun during the conspiracy. At sentencing, after the government acknowledged that they had evidence that firearms were involved in the offense, the district court imposed a two-level firearm enhancement. The First Circuit held that the government's comments did not violate the plea agreement. The agreement did not limit the information the prosecutor could convey. It merely limited the "purpose of her remarks." The district court, not the prosecutor, raised the subject of the challenged enhancement based on its reading of the PSR. In response to an apparent invitation by the court, the prosecutor explained in non-argumentative terms her knowledge of the basis for the PSR's recommendation. Then the prosecutor twice voiced full support for including no enhancement. *U.S. v. Miranda-Martinez*, ___ F.3d ___ (1st Cir. June 24, 2015) No. 14-1149.

Violations of Probation and Supervised Release (Chapter 7)

9th Circuit reverses for failure to prove defendant lied about "spice" in violation of supervised release. (800) A condition of supervised release required defendant to "answer truthfully all inquiries by the probation officer." In a telephone conversation with her probation officer, defendant's speech was slurred. She denied using any "illicit drugs," but two days later, she tested positive for "spice," a synthetic form of marijuana. The probation officer charged her with violating the supervised release condition requiring her to tell the truth in response to inquiries from her probation officer. At the hearing,

defendant admitted that she smoked “spice,” but denied it was an “illicit drug.” The district court found that she had lied to the probation officer, in violation of her supervised release. The Ninth Circuit reversed, holding that the government had not shown by a preponderance of the evidence that defendant lied when she denied consuming an illicit drug, because the government never proved that defendant knew that she smoked a variety of “spice” that contained a controlled substance. *U.S. v. Aquino*, __ F.3d __ (9th Cir. July 20, 2015) No. 14-10360.

2015) No. 12-15089. Pg. 4
U.S. v. Suarez, __ F.3d __ (2d Cir. June 30, 2015) No. 14-2378-cr. Pg. 1
U.S. v. Williams, __ F.3d __ (8th Cir. June 25, 2015) No. 14-2600. Pg. 7
U.S. v. Zar, __ F.3d __ (10th Cir. June 23, 2015) No. 13-1111. Pg. 1, 3, 4, 5, 7

Topic Numbers In This Issue

110, 175, 192
219, 284
340, 345
431
540, 580
610
716, 741, 742, 750, 755, 760, 765, 790
800, 850, 855

Table of Cases

U.S. v. Aquino, __ F.3d __ (9th Cir. July 20, 2015) No. 14-10360. Pg. 5, 8
U.S. v. Cardoza, __ F.3d __ (1st Cir. June 23, 2015) No. 13-2145. Pg. 2
U.S. v. Cavallo, __ F.3d __ (11th Cir. June 22, 2015) No. 12-15660. Pg. 2, 3, 6
U.S. v. Fonseca, __ F.3d __ (8th Cir. June 24, 2015) No. 14-2893. Pg. 5, 7
U.S. v. Gonzalez, __ F.3d __ (5th Cir. June 23, 2015) No. 14-40344. Pg. 4
U.S. v. Hentges, __ F.3d __ (8th Cir. June 22, 2015) No. 14-1455. Pg. 6
U.S. v. Jimenez-Banegas, __ F.3d __ (1st Cir. June 24, 2015) No. 13-1980. Pg. 4
U.S. v. Kaufman, __ F.3d __ (D.C. Cir. June 23, 2015) No. 14-3041. Pg. 3
U.S. v. Lockwood, __ F.3d __ (7th Cir. June 16, 2015) No. 14-1809. Pg. 6
U.S. v. Miranda-Martinez, __ F.3d __ (1st Cir. June 24, 2015) No. 14-1149. Pg. 4, 7
U.S. v. Newbold, __ F.3d __ (4th Cir. June 30, 2015) No. 10-6929. Pg. 5
U.S. v. Nichols, __ F.3d __ (7th Cir. June 17, 2015) No. 15-1108. Pg. 3
U.S. v. Rosales-Bruno, __ F.3d __ (11th Cir. June 19,