

Federal Sentencing

by Roger W. Haines, Jr. and J. Douglas Wilson

GUIDE

**Federal Sentencing Guidelines
Cases From All Circuits**

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Offense Conduct, Generally (Chapter 2)

7th Circuit allows upward variance based on unique nature of defendant's mortgage fraud. (218)(741) Defendant pleaded guilty to fraud targeted at homeowners who owed on their mortgages. His guidelines range was 70 to 87 months, but the court varied upward to 144 months. Defendant argued that the district court gave undue weight to the nature of his crimes and their effect on the victims. The Seventh Circuit rejected the argument, ruling that the sentence rested on the "unique characteristics and qualities of" defendant's crime. *U.S. v. Wood*, ___ F.4th ___ (7th Cir. Apr. 18, 2022) No. 20-1454.

11th Circuit bases loss on amount billed despite Medicare's lower reimbursement rate. (219) Defendant was convicted of fraud for billing Medicare for false visits to nursing homes. The district court calculated the loss based on the claims that defendant submitted to Medicare, reduced by 10%--the court's estimate of the value of defendant's legitimate services. The Eleventh Circuit rejected defendant's argument that he never intended to receive the amount he billed, because he knew Medicare would not reimburse him for the full amount. *U.S. v. Moss*, ___ F.4th ___ (11th Cir. Apr. 12, 2022) No. 19-14548.

3d Circuit affirms life sentence for drug trafficking despite First Step Act claim. (245) Defendant was convicted of drug trafficking and received a mandatory life sentence under 21 U.S.C. § 841(b)(1)(C). On appeal, the Third Circuit rejected his argument that the First Step Act had altered § 841(b)(1)(C). The FSA did not affect the mandatory life sentence for a defendant who has a prior conviction for a "felony drug offense." *U.S. v. Zayas*, ___ F.4th ___ (3d Cir. Apr. 21, 2022) No. 20-1265.

6th Circuit says downward variance was not too high despite claim that pilot was coerced to fly drugs. (240)(741) Defendant pleaded guilty to drug trafficking. His guidelines range was 87 to 108 months, but the court varied downward to 60 months. Defendant argued that the court failed to consider that his participation in the drug enterprise was coerced, that the district court started from

a premise that life in prison was appropriate, and that it gave too much weight to his status as a pilot. The Sixth Circuit affirmed, finding that the district court considered defendant's mitigation arguments, it did not matter where the court started, and the court had not placed excessive weight on defendant's being a pilot. *U.S. v. Matthews*, ___ F.4th ___ (6th Cir. Apr. 11, 2022) No. 20-6156.

11th Circuit reverses denial of First Step Act crack motion for failure to afford opportunity to be heard. (250)

While serving a 135-month sentence for crack cocaine, defendant wrote a letter to the judge asking about the First Step Act. The judge said he was not eligible for relief, so defendant filed an FSA motion, addressing only his eligibility. The district court found him ineligible, adding that even if he were eligible, his motion would be denied because he perjured himself at trial, brandished a firearm, stipulated that the crack was 94% pure, and had already benefitted from two sentence reductions based on guidelines amendments. The Eleventh Circuit reversed, finding that defendant was eligible because no mandatory minimum applied, and that the district court's ruling on the merits "cannot stand" because defendant was not afforded an opportunity to be heard on the merits. *U.S. v. Smith*, ___ F.4th ___ (11th Cir. Apr. 19, 2022) No. 19-13056.

2d Circuit upholds upward RICO variance, despite claim that codefendant was more violent. (290)(741)

Defendant was convicted of RICO and other offenses. His guidelines range was 110 to 137 months, but the district court varied upward to 198 months. Defendant argued that this was substantively unreasonable because it matched his codefendant's sentence, who was more violent. The Second Circuit affirmed, noting that the district court considered all of the 18 U.S.C. § 3553(a) factors, including defendant's history and characteristics and "violent tendencies." *U.S. v. Gershman*, ___ F.4th ___ (2d Cir. Apr. 12, 2022) No. 20-30.

1st Circuit applies increase for use of computer regardless of whether defendant or minor travels. (310)

Defendant pleaded guilty to enticement of a minor. At sentencing, the district court added two offense levels under § 2G1.3(b)(3)(A) for using a computer to commit the offense. The First Circuit affirmed, rejecting defendant's argument that the enhancement applies only when defendant or the minor travels in connection with the offense. *U.S. v. Procell*, ___ F.4th ___ (1st Cir. Apr. 12, 2022) No. 19-1929.

1st Circuit upholds assessment for offense against minor, finding defendant was not indigent. (310)

A \$5,000 assessment is required by 18 U.S.C. § 3014 for any non-indigent defendant convicted of a crime against a minor. Defendant was convicted of enticing a minor to engage in sex, and the district court imposed a \$5,000 assessment. Defendant claimed he was indigent, but the First Circuit upheld the assessment, noting that defendant had a bachelor's degree in engineering, was relatively young, and had a supportive family. *U.S. v. Procell*, ___ F.4th ___ (1st Cir. Apr. 12, 2022) No. 19-1929.

11th Circuit upholds child porn sentence against claim that offenses were not "serious." (310)(742)

Defendant was convicted of various child pornography offenses and was sentenced to 700 months—the middle of the guidelines range. Defendant argued that his sentence was substantively unreasonable because of his autism, lack of criminal history, "chaotic" home life, and because his offenses were "not serious." The Eleventh Circuit affirmed, finding that the district court properly considered all of the factors that defendant advanced. The panel found defendant's arguments about the seriousness of his offense "shocking," because defendant had "degraded, humiliated, and threatened" many young girls. *U.S. v. Woodson*, ___ F.4th ___ (11th Cir. Apr. 13, 2022) No. 20-

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Editors:

- Roger W. Haines, Jr.
- J. Douglas Wilson
Publication Manager
- Nancy Russell

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10443.

1st Circuit reverses firearms sentence and bars reliance on a different prior conviction on remand. (330)

Defendant pleaded guilty to possession of a firearm by a felon. The guideline, § 2K2.1(a)(4), requires an increase if the defendant has a prior conviction for a “crime of violence.” Defendant had a prior conviction under Puerto Rico Laws Ann. tit. 33, § 5162 for attempted aggravated battery. The government conceded on appeal that this was not a “crime of violence,” but argued that defendant had a prior conviction for a “crime of violence” under another statute. The First Circuit rejected the government’s effort to uphold defendant’s sentence and barred the government from raising that ground on remand. *U.S. v. Vélez-Vargas*, __ F.4th __ (1st Cir. Apr. 21, 2022) No. 21-1298.

8th Circuit affirms where court said it would impose same sentence regardless of prior “crime of violence.” (330)(850)

Defendant was convicted of possession of a firearm by a person who could not lawfully possess one. The district court ruled that his prior conviction under Iowa Code §§ 708.2A(1) and 708.2A(2) for domestic abuse assault, was a “crime of violence” that increased his guidelines range under § 2K2.1(a)(4)(A). On appeal, the Eighth Circuit ruled that this was at most harmless error because the district court stated that it would have imposed the same sentence without the enhancement. *U.S. v. Roldan-Marin*, __ F.4th __ (8th Cir. Apr. 20, 2022) No. 21-1016.

9th Circuit rules Montana distribution of cocaine is a “controlled substance offense.” (330)

The guideline for possession of a firearm by a felon, § 2K2.1(a)(2), requires an increase if the defendant has two prior convictions for a “controlled substance offense.” Here, defendant had a prior conviction under Montana Code Ann. §§ 45-2-302 and 45-9-101 for distribution of cocaine. Reviewing for plain error, the Ninth Circuit held that the district court’s finding that the prior cocaine conviction qualified as a “controlled substance offense” was not erroneous. *U.S. v. House*, __ F.4th __ (9th Cir. Apr. 15, 2022) No. 20-30169.

Adjustments (Chapter 3)**1st Circuit says dropping gun while struggling with police created risk of bodily injury. (460)**

Defendant pleaded guilty to possession of a firearm by a felon. At sentencing, the district court added two levels under § 3C1.2 for recklessly creating a risk of bodily injury

while fleeing from a police officer. The court relied on defendant’s physical struggle with a police officer while he was being arrested for possessing a gun. The First Circuit held that dropping a loaded firearm while engaging in a struggle with police is sufficient to trigger the enhancement. *U.S. v. Brown*, __ F.4th __ (1st Cir. Apr. 14, 2022) No. 20-1612.

2d Circuit bases obstruction increase on entire RICO offense, not just predicate acts. (461)

Defendant was convicted of RICO, among other offenses. At sentencing, the district court added two levels under § 3C1.1 for obstruction of justice. The district court found that defendant’s sister had threatened a debtor to defendant’s gang, falsely told the debtor that conversations with defendant were friendly, and tried to get the debtor to write a letter on defendant’s behalf containing false statements. The Second Circuit found that the obstruction enhancement applied to defendant’s offense level for RICO, not to the underlying acts that made up RICO. *U.S. v. Gershman*, __ F.4th __ (2d Cir. Apr. 12, 2022) No. 20-30.

Criminal History, Generally (§4A1.1)**10th Circuit says Texas aggravated robbery was a “violent felony,” using the categorical approach. (540)**

Defendant was convicted of possession of a firearm by a felon. Under the Armed Career Criminal Act, a defendant convicted of that offense who has three prior felonies for, among other offenses, a “violent felony” must receive a 15-year minimum mandatory sentence. Defendant had a prior conviction under Texas Penal Code § 29.03 for aggravated robbery. The Tenth Circuit applied the modified categorical approach and held defendant’s Texas aggravated robbery was a “violent felony.” *U.S. v. Wilkins*, __ F.4th __ (10th Cir. Apr. 15, 2022) No. 19-5114.

Determining the Sentence (Chapter 5)**7th Circuit finds defendant waived any challenge to supervised release conditions. (580)(855)**

Prior to defendant’s sentencing for violating his supervised release conditions, the district court set forth a list of special conditions of supervised release and justifications for them. Defendant initialed the conditions, thereby indicating that he agreed with them, and waived any reading of the conditions at sentencing. On appeal, defendant sought to challenge one of the conditions he had initialed. The Seventh Circuit found he had waived any challenge to that condition and that his failure to object was not

“inadvertent.” *U.S. v. Patlan*, __ F.4th __ (7th Cir. Apr. 12, 2022) No. 21-1500.

11th Circuit upholds restitution where doctor visits were not medically necessary. (610) At defendant’s sentencing for fraud in visiting patients in nursing homes, the district court calculated restitution as the amount that defendant received from Medicare, less the amount for services defendant actually provided. The Eleventh Circuit rejected defendant’s argument that the amount of legitimate services that he provided was actually greater, affirming the district court’s finding that many of defendant’s visits were not medically necessary. *U.S. v. Moss*, __ F.4th __ (11th Cir. Apr. 12, 2022) No. 19-14548.

Sentencing Hearing (§6A)

1st Circuit says oral sentence controls over written judgment. (750) At defendant’s sentencing for transfer of obscene material to a minor and other offenses, the district court stated at sentencing that it was imposing the statutory maximum or 120 months for that count, to be served concurrently to a 135-month sentence on another count. The district court’s written judgment stated that it was imposing a 135-month sentence. The First Circuit found that the district court’s oral judgment controlled, and that sentence was legal. *U.S. v. Procell*, __ F.4th __ (1st Cir. Apr. 12, 2022) No. 19-1929.

5th Circuit finds no difference between oral and written judgments. (750) At defendant’s sentencing for drug trafficking, the district court said that if defendant returned to the U.S. after serving his custodial sentence, he must report to Probation within 72 hours. However, the written judgment said that if defendant returned to the U.S., he must report to Probation immediately. The Fifth Circuit affirmed, finding no material difference between the oral and written statements. The court disapproved earlier unpublished decisions ordering the district court to conform the written judgment to its oral pronouncement of sentence. *U.S. v. Perez-Espinosa*, __ F.4th __ (5th Cir. Apr. 21, 2022) No. 20-40769.

7th Circuit affirms fraud sentence despite reference to unrelated defendant. (770) At defendant’s sentencing for fraud, the district court referred to an unrelated defendant who had also defrauded victims. The Seventh Circuit found no error, noting that the information about the other defendant’s case was not inaccurate, and the district court did not rely on information about others in sentencing defendant. *U.S. v. Wood*, __ F.4th __ (7th Cir. Apr. 18, 2022) No. 20-1454.

10th Circuit reverses pre-ordained revocation sentence for failure to consider guidelines. (770)(800) The district court offered defendant a choice between probation and the 51 months recommended by the government, adding that if defendant violated the conditions of probation, he would face a sentence of 84 months. Defendant chose probation, but then violated the conditions, and was sentenced to 84 months. The Tenth Circuit reversed, because the court imposed its preordained sentence without doing a guidelines analysis. *U.S. v. Moore*, __ F.4th __ (10th Cir. Apr. 12, 2022) No. 20-3171.

11th Circuit reverses where court’s statement of reasons relied on new ground for sentence. (770) In its statement of reasons accompanying defendant’s sentence, the district court relied on a ground for sentencing that it had not mentioned at defendant’s sentencing hearing. The Eleventh Circuit reversed because defendant did not have an opportunity to object to the new ground and there was substantial doubt as to its accuracy. *U.S. v. Mosely*, __ F.4th __ (11th Cir. Apr. 21, 2022) No. 20-11146.

11th Circuit says court gave adequate reasons for sentence within range by considering § 3553(a) factors. (775) Defendant’s child pornography guidelines range was 360 to 1,404 months, and the court sentenced him to 700 months. Defendant argued that the district court violated subsection (c)(1) of 18 U.S.C. § 3553 by failing to give reasons for sentencing within a range greater than 24 months. The Eleventh Circuit held that the district court considered many of the 18 U.S.C. § 3553(a) factors, which was sufficient to satisfy subsection (c)(1). *U.S. v. Woodson*, __ F.4th __ (11th Cir. Apr. 13, 2022) No. 20-10443.

Plea Agreements, Generally (§6B)

1st Circuit affirms despite claim that government gave only “lip service” to plea agreement. (790) Defendant pleaded guilty to being a felon in possession of a firearm. His plea agreement provided for an offense level in a specific range, and the government recommended a sentence within that range in its sentencing memorandum and its oral statements at the sentencing hearing. The district court found the offense level was greater than stipulated in the plea agreement but varied downward below the government’s recommendation. Defendant argued that the government only paid “lip service” to the plea agreement by failing to object to the higher offense level and by arguing that defendant behaved “recklessly.” The First Circuit affirmed, ruling that the government had no

obligation to go beyond the plea agreement and was required to provide relevant information supporting its sentencing recommendation. *U.S. v. Brown*, __ F.4th __ (1st Cir. Apr. 14, 2022) No. 20-1612.

Violations of Probation and Supervised Release (Chapter 7)

7th Circuit says defendant's admission made it unnecessary to rely on positive drug test. (800) Defendant violated his supervised release conditions by testing positive for methamphetamine. At the revocation hearing, the district court relied on defendant's admission to using methamphetamine in revoking his supervised release. The Seventh Circuit found that defendant's admission made it unnecessary for the court to rely on defendant's positive drug test, and the court properly calculated the applicable guidelines. *U.S. v. Patlan*, __ F.4th __ (7th Cir. Apr. 12, 2022) No. 21-1500.

Appeal of Sentence (18 U.S.C. §3742)

10th Circuit says defendant did not invite error by choosing probation sentence. (855) At defendant's initial sentencing, the district court offered defendant the choice of the 51-month sentence proposed by the government or a sentence of probation, adding that if he violated probation, he would face an 84-month sentence. Defendant chose the latter, but violated his probation conditions, and the court sentenced him to 84 months. The Tenth Circuit reversed because the district court failed to consider the guidelines, and also held that defendant had not invited the court's error by choosing the original sentence. *U.S. v. Moore*, __ F.4th __ (10th Cir. Apr. 12, 2022) No. 20-3171.

7th Circuit distinguishes errors that must be objected to from errors that do not require objection. (870) Defendant failed to object at sentencing when the district court referred to an unrelated fraud defendant. The Seventh Circuit held that if the alleged error is apparent, the failure to object means that the "plain error" standard governs. By contrast, if the district court creates an issue without giving the defendant an opportunity to object then no objection is necessary to preserve the issue for review on appeal. Here, the Seventh Circuit held that no objection was necessary for defendant to challenge the district court's mentioning of an unrelated defendant at sentencing. *U.S. v. Wood*, __ F.4th __ (7th Cir. Apr. 18, 2022) No. 20-1454.

Habeas Corpus/28 U.S.C. 2255 Motions

5th Circuit says release from prison may not moot §2241 motion, if there are collateral effects. (880) Defendant filed a 28 U.S.C. § 2241 motion objecting to a condition of supervised release that required him to participate in group therapy. While his motion was pending, he was released from prison. Without requiring a response from the government, the district court dismissed the motion as moot because defendant was no longer incarcerated. The Fifth Circuit reversed, noting that defendant was deprived of veterans benefits because of his conviction, and it could not determine whether the case was moot because the government had not responded to the motion. *Foster v. NFN Warden, Fed. Detention Center, Seagoville*, __ F.4th __ (5th Cir. Apr. 13, 2022) No. 20-10841.

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