

Federal Sentencing

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GUIDE

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Application Principles (Ch. 1)

9th Circuit finds hate crime guideline ambiguous, and holds it requires crime to be motivated by hate. (180) (410) Defendant was convicted of Hobbs Act robbery for taking the phone of the victim he met through a dating app, and using the phone to withdraw money from the victim's bank accounts. At sentencing, the district court added three levels for "hate crime motivation" under § 3A1.1, finding that defendant targeted the victim because of his sexual orientation. The Ninth Circuit held that the guideline was ambiguous and therefore relied on the history, purpose and ordinary understanding of the words "hate crime" to hold that § 3A1.1 requires the court to find beyond a reasonable doubt that the defendant was motivated by hate or animus, rather than simply the victim's vulnerability. The sentence was reversed and remanded for resentencing. *U.S. v. Patterson*, __ F.4th __ (9th Cir. Oct. 1, 2024) No. 22-50287.

Offense Conduct (Ch. 2)

2d Circuit affirms upward variance for health care fraud despite lower sentences for codefendants. (218) (741) Defendant was convicted of health care fraud. His guidelines range was 33 to 41 months, but the court varied upward to 96 months. Defendant argued that the district court penalized him for going to trial because it gave lower sentences to codefendants who pled guilty. The Second Circuit found no error, ruling that defendant was not similarly situated to his codefendants, and they all had accepted responsibility for their actions. *U.S. v. DiMassa*, __ F.4th __ (2d Cir. Sept. 26, 2024) No. 23-6844.

5th Circuit reverses for failure to base loss on the value of the goods at the time they were sold. (219) Defendant was convicted of defrauding the Veteran's Administration during the Covid pandemic. The district court calculated the loss under § 2B1.1 as the fair market value of the goods before the pandemic. The Fifth Circuit reversed, holding that the district court should have used the fair market value at the time goods were sold. *U.S. v. Ritchey*, __ F.4th __ (5th Cir. Sept. 26, 2024) No. 23-60468.

11th Circuit upholds guideline drug sentence despite claim that court minimized defendant's mental health.

(240)(742) Defendant pleaded guilty to drug trafficking and was sentenced to 170 months—within the guidelines range. Defendant argued that the district court failed to give sufficient weight to his mental health issues gave too much weight to the fact that he was on supervised release when he committed offense. The Eleventh Circuit affirmed, finding that the district court properly relied on many factors in sentencing defendant. *U.S. v. Hayden*, ___ F.4th ___ (11th Cir. Oct. 3, 2024) No. 19-14780.

1st Circuit finds statements by minor in presentence report were reliable. (310) Defendant was convicted of enticement of a minor. He argued that the district court based his sentence on inaccurate statements by the minor in the presentence report. The First Circuit found no error, finding that the statements in the presentence report appeared to be reliable and defendant failed to offer any countervailing evidence. *U.S. v. Acevedo-Osorio*, ___ F.4th ___ (1st Cir. Sept. 24, 2024) No. 21-1708.

11th Circuit reverses recidivist increase because prior Florida conviction was not a sex offense. (310)(500) At defendant's sentencing for attempted of a minor, the district court found that defendant was a Repeat and Dangerous Sex Offender under § 4B1.5 because he had a prior conviction under Florida Stat. § 847.0135(4)(b) for traveling to meet a minor after soliciting a parent or guardian. The Eleventh Circuit followed the Third Circuit in applying the categorical approach to the elements of the crime, finding the Florida statute could be violated by traveling to meet a minor for the purpose of contributing to the delinquency of a child, and therefore the Florida statute was too broad to qualify as a sex offense. The § 4B1.5 enhancement was reversed. *U.S. v. Lusk*, ___ F.4th ___ (11th Cir. Oct. 3, 2024) No. 22-12078.

11th Circuit affirms cross-reference to attempted murder for felon in possession of firearm. (330) Defendant was convicted of being a felon in possession of a firearm. At sentencing, the court applied the cross-reference to the attempted murder guideline, § 2A2.1, because police officers responding to a drive-by shooting found defendant in the back of his mother's car with loaded firearms around him, and shell casings that matched the shells in the firearms. The Eleventh Circuit found this evidence supported the cross-reference to the attempted murder guideline. *U.S. v. Cenephat*, ___ F.4th ___ (11th Cir. Sept. 23, 2024) No. 22-13741.

Adjustments (Ch. 3)

11th Circuit finds any error in reckless endangerment enhancement was harmless. (460)(850) Defendant was convicted of possession of a firearm by a felon. His guideline range was 324-405 months, but the court sentenced him to the statutory maximum 120 months. On appeal, defendant argued that the court erred in adding two levels under § 3C1.2 for reckless endangerment during flight. The Eleventh Circuit found any error harmless because the guideline range would still have been well above the statutory maximum and the court indicated it would have imposed the same sentence regardless. *U.S. v. Cenephat*, ___ F.4th ___ (11th Cir. Sept. 23, 2024) No. 22-13741.

2d Circuit reverses for lack of finding that false statement was willful obstruction. (462) At defendant's sentencing for Hobbs Act robbery, the district court added two levels under § 3C1.1 for obstruction of justice based on defendant's conflicting statements about whether he had tried oxycodone. The Second Circuit reversed, noting that although the statements were untruthful and material, the district court failed to find that they were willful. *U.S. v. Orelie*, ___ F.4th ___ (2d Cir. Oct. 3, 2024) No. 23-6175.

7th Circuit says Amendment 775 allows denial of third level for failure to accept responsibility at sentencing.

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(480) At sentencing for mail theft, the district court granted a two-level reduction for acceptance of responsibility under § 3E1.1, but refused to order the government to move for the third level, because at sentencing, defendant had frivolously challenged the loss amount. Defendant argued that under Amendment 775, sentencing was irrelevant once he pled guilty before the prosecution had to prepare for trial. The Seventh Circuit ruled that Amendment 775 did not abrogate prior precedent holding that the government could properly refuse to move for the third level based on failure to accept responsibility at sentencing. *U.S. v. Orona*, __ F.4th __ (7th Cir. Oct. 1, 2024) No. 21-1734.

Determining the Sentence (Ch. 5)

1st Circuit affirms condition restricting contact with children, including defendant's own. (580) Defendant was convicted of coercion and enticement of a minor to engage in sexual conduct and sentenced to 292 months—the bottom of the guidelines range. At sentencing, the court imposed a supervised release condition restricting defendant's unsupervised contact with children, including his own. The First Circuit held that, although the district court did not explain that condition, it was reasonably supported by defendant's criminal conduct during the offense. *U.S. v. Acevedo-Osorio*, __ F.4th __ (1st Cir. Sept. 24, 2024) No. 21-1708.

11th Circuit says standard supervised release conditions need not be orally pronounced. (580) At defendant's sentencing for drug trafficking, the district court referred to the standard supervised release conditions in its oral judgment, but only spelled out the standard conditions in its written judgment. The Eleventh Circuit found that no conflict between the oral and written sentences because they both stated that defendant would have to follow the standard conditions of supervised release. *U.S. v. Hayden*, __ F.4th __ (11th Cir. Oct. 3, 2024) No. 19-14780.

1st Circuit reverses restitution to mother of sex offense victim for failure to find mother was victim. (610) Defendant was convicted of coercion and enticement of a minor to engage in sexual conduct. At sentencing, the court ordered restitution for the damage defendant caused to the victim's mother's car. The First Circuit reversed because the district court failed to make a finding that the victim's mother was a "victim" within the meaning of the Mandatory Victims Restitution Act. *U.S. v. Acevedo-Osorio*, __ F.4th __ (1st Cir. Sept. 24, 2024) No. 21-1708.

9th Circuit reverses offset from restitution for amounts medical insurers would otherwise have paid. (610) De-

fendant was convicted of health care fraud and was ordered to pay restitution. At sentencing, the district court offset the amount of restitution by the amount that the victim insurers would otherwise have paid for defendant's services. The Ninth Circuit reversed, ruling that the court should have offset the cost of medically necessary services that defendant provided if he had been acting honestly. *U.S. v. Solakyan*, __ F.4th __ (9th Cir. Sept. 30, 2024) No. 22-50023.

1st Circuit reverses Human Trafficking assessment for failure to find that defendant was not indigent. (630) Defendant was convicted of coercion and enticing a minor to engage in sexual conduct. At sentencing, the district court imposed a \$5,000 assessment under the Justice for Victims of Trafficking Act. The First Circuit reversed because the district court did not make the required finding of non-indigency. *U.S. v. Acevedo-Osorio*, __ F.4th __ (1st Cir. Sept. 24, 2024) No. 21-1708.

Sentencing Hearing (§6A)

11th Circuit dismisses appeal despite claim that failing to orally state standard conditions violates due process. (750) Defendant pleaded guilty pursuant to a plea agreement that waived his right to appeal unless his sentence was unconstitutional. He appealed, claiming that it violated due process for the district court to include 13 standard supervised release conditions in the judgment that were not orally pronounced. The Eleventh Circuit ruled that it is proper to include standard conditions of release by reference without orally stating them at sentencing. Accordingly there was no due process violation and defendant's waiver required dismissal of the appeal. *U.S. v. Read*, __ F.4th __ (11th Cir. Oct. 3, 2024) No. 23-10271.

Plea Agreements (6B)

1st Circuit finds government breached plea agreement by not arguing forcefully enough. (790) The government and defendant entered into a plea agreement that required the parties to recommend a 120-month sentence. The district court instead imposed a 292-month sentence—the low end of the guidelines range. The First Circuit held that the government breached the plea agreement by adopting a "tightlipped" approach at sentencing and failing to advocate for the 120-month sentence. *U.S. v. Acevedo-Osorio*, __ F.4th __ (1st Cir. Sept. 24, 2024) No. 21-1708.

Appeal of Sentence

9th Circuit overrules requirement of "clear and convincing evidence" for "disproportionate" increases. (850)(870)

The Ninth Circuit, has long required trial courts to make factual findings by "clear and convincing evidence" "when a sentencing factor has an "extremely disproportionate" effect on the sentence." See *U.S. v. Lonich*, 23 F.4th 881 (9th Cir. 2022); *U.S. v. Staten*, 466 F.3d 708 (9th Cir. 2006); *U.S. v. Lynch*, 437 F.3d 90 (9th Cir. 2006); *U.S. v. Jordan*, 256 F.3d 922 (9th Cir. 2001); *U.S. v. Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000); *U.S. v. Hopper*, 177 F.3d 824 (9th Cir. 2019); *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991). The en banc Ninth Circuit overruled these cases and held that due process only requires proof by a preponderance of the evidence regardless of the impact of a guidelines enhancement on the overall sentence. The Court relied on the fact that *Booker* made the guidelines advisory, and noted that nearly every other circuit has rejected the clear and convincing standard for guidelines enhancements. *U.S. v. Lucas*, 101 F.4th 1158 (9th Cir. 2024) (en banc).j

Violations of Probation and Supervised Release (Ch. 7)

7th Circuit rules supervised release term was tolled while defendant was in state prison. (800)

The district court revoked defendant's supervised release and sentenced him to two years in custody. On appeal, the Seventh Circuit rejected defendant's argument that his supervised release term had expired before it was revoked, noting that under 18 U.S.C. § 3624(e), a term of release is tolled during any period in which the defendant is imprisoned in connection with a conviction for a Federal, State, or local crime. Here, defendant had been imprisoned in State custody for five months, which tolled his federal supervised release term. *U.S. v. Harris*, ___ F.4th ___ (7th Cir. Oct. 2, 2024) No. 23-2421.

7th Circuit affirms revocation of release where defendant did not contest evidence. (800)

The district court found that defendant violated supervised release by using drugs at a Salvation Army treatment center. Defendant argued that he had not admitted the Salvation Army allegations. The Seventh Circuit found that defendant did not contest the Salvation Army allegations and therefore waived any objection to them. *U.S. v. Harris*, ___ F.4th ___ (7th Cir. Oct. 2, 2024) No. 23-2421.

7th Circuit finds court did not rely on inaccurate information in revoking release. (800)

On appeal from revocation of supervised release, defendant argued that the district court improperly found that he possessed a firearm because the state court had not found that the gun was his. The Seventh Circuit found there was sufficient evidence for the district court to find that defendant possessed the firearm. *U.S. v. Harris*, ___ F.4th ___ (7th Cir. Oct. 2, 2024) No. 23-2421.

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