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Criminal Sentencing

CRIMINAL SENTENCING

United States v. Alvarado, 909 F.2d 1443

Author: Judge Logan

Defendant, Alvarado, pleaded guilty of possession with intent to distribute more than 100 grams of heroin. Alvarado challenged the appropriateness of his sentence. Alvarado contended that the district court erred by: (1) failing to make express findings regarding the accuracy of disputed information in Alvarado's presentence report; (2) refusing to allow Alvarado to inspect and refute inculpatory information inspected by the court *in camera*; and (3) increasing Alvarado's offense level because of his alleged role as an organizer or leader in the criminal activity.

The Tenth Circuit remanded the case for resentencing. First, pursuant to Fed. R. Crim. P. 32(c)(3)(D), if a defendant challenges information in a presentence report, the court must either make a factual finding regarding the accuracy of the information, or expressly state that it is not relying on the disputed information. This procedure was not followed by the district court, however. Thus, the court remanded the case. Second, the district court erred in denying Alvarado access to the *in camera* material. The court explained that Alvarado's sentencing was based on material to which he was denied access. This, in essence, conflicts with the requirement that a defendant be permitted to rebut or explain such material. Finally, the district court's finding that Alvarado played a managerial role in the criminal activity was not inconsistent with the factual findings and, therefore, was not an erroneous decision. Thus, the court did not err in Alvarado's base offense level.

United States v. Alvarez, 914 F.2d 213

Author: Judge Brown, sitting by designation

Defendant, Alvarez, appealed a fifty-one month sentence for his attempted escape from a federal correctional facility. On appeal, Alvarez alleged that: (1) the district court erroneously categorized him as a career offender under the Sentencing Guidelines; and (2) the district court erred in refusing to find him a minor participant in the escape.

The Tenth Circuit affirmed the district court's decision. First, the court rejected Alvarez's interpretation of the Sentencing Guidelines. The court discredited his argument that Congress intended the statute to apply to career violent offenders and to career drug offenders, but not to offenders whose current offense is of a different character than prior offenses. Second, the district court's decision that Alvarez was not a minor participant in the escape was not clearly erroneous. The court reasoned that Alvarez failed to prove by a preponderance of the evidence that he was less culpable than others in the offense. Accordingly, no adjustment in the sentence was warranted.

United States v. Arredondo-Santos, 911 F.2d 424

Author: Judge Brorby

Defendant, Arredondo-Santos, appealed his sentence of thirty months for possession with intent to distribute less than fifty kilograms of marijuana. Arredondo-Santos argued that the district court erred when it refused to reduce his offense level by two levels. He contended that as a mere driver he was but a minor participant in the criminal activity and, therefore, less culpable than other participants.

The Tenth Circuit affirmed the district court's determination. The court reasoned that couriers are indispensable to any drug network. As the courier, Arredondo-Santos could not argue that he was any less culpable than the people who sold or purchased the drugs. Furthermore, there was no evidence of other participants. The court noted that when culpability is weighed, evidence must exist of other participants and their role in the criminal activity.

United States v. Baker, 914 F.2d 208

Author: Judge Tacha

Defendant, Baker, was convicted of bank robbery and receiving an explosive in interstate commerce with knowledge that it would be used to kill, injure, or intimidate other individuals. Pursuant to the Sentencing Guidelines, Baker's crimes and criminal history would normally dictate a sentence range of fifty-one to sixty-three months. The district court, however, found two aggravating factors and departed upward from the Sentencing Guidelines, thereby imposing a seventy month sentence.

In affirming the district court's decision, the Tenth Circuit applied a three step analysis. First, the court said that the circumstances justified a departure from the Sentencing Guidelines. The court noted that the dangers inherent with dynamite justified the departure. Second, the court found that the circumstances given by the district court for departure actually existed. Finally, the court held that the degree of the district court's departure was reasonable.

United States v. Barry, 895 F.2d 702

Author: Chief Judge Holloway

Defendant, Barry, appealed the district court's order sentencing him to a prison term subject to a supervised release. Barry argued that he should have been allowed to withdraw his guilty plea because the district court failed to comply with Fed. R. Civ. P. 11(c)(1) ("Rule 11"), by not informing him of the supervised release.

The Tenth Circuit affirmed the district court's decision. The court reasoned that, although the district court's failure to advise Barry of the period of supervised release conflicted with the requirements of Rule 11, Barry's substantive rights were not detrimentally affected. The court found that the district court's error could not have had a significant in-

fluence on Barry's guilty plea. The court concluded that the district court's failure to comply with Rule 11 did not warrant a reversal.

United States v. Beaulieu, 900 F.2d 1531

Author: Judge Seth

Defendant, Beaulieu, was convicted of conspiracy to manufacture amphetamines. During trial, Beaulieu's version of the facts was contradicted by several government witnesses. Consequently, the government contended that Beaulieu obstructed justice by testifying untruthfully. Accordingly, the government recommended, in a pre-sentence report, that Beaulieu's sentence be adjusted upward by two levels. Beaulieu appealed, arguing that the upward adjustment for untruthful testimony: (1) inhibited exercise of his right to testify; (2) deprived him of due process; and (3) was based on insufficient evidence.

The Tenth Circuit affirmed the sentence. The court noted that it is not unconstitutional for a sentencing judge to evaluate the truthfulness of a defendant's testimony. The court reasoned that there is no protected right to commit perjury. Thus, adjusting Beaulieu's sentence upward because he gave untruthful testimony did not violate his right to testify. Second, the court rejected Beaulieu's argument that he was deprived of due process. The court reasoned that it is not unconstitutional for a sentencing judge, who observed a defendant at trial, to consider the defendant's alleged perjury. Third, there was sufficient evidence to support the district court's finding that Beaulieu obstructed justice by testifying untruthfully. The court based its decision on Beaulieu's testimony and deferred to the district court's credibility assessments. Accordingly, the sentencing judge's conclusion that there was perjury was not clearly erroneous.

United States v. Bernhardt, 905 F.2d 343

Author: Judge McKay

Defendant, Bernhardt, pleaded guilty to bank fraud. He subsequently appealed the district court's imposition of a sentence greater than that proscribed by the Sentencing Guidelines.

The Tenth Circuit affirmed the sentence. The court outlined criteria used for reviewing an upward departure from the Sentencing Guidelines: (1) circumstances cited by the district court must justify the departure; (2) circumstances used to justify the departure must actually exist in the instant case; and (3) the departure must be reasonable. The court stated that Bernhardt's criminal history was not adequately reflected in the Sentencing Guidelines. Accordingly, such "under-reflection" justified an upward departure. Second, the district court made proper factual determinations regarding Bernhardt's lengthy criminal record. Third, the upward departure was reasonable. The court explained that the departure was guided by possible sentences in higher categories.

Birr v. Shillinger, 894 F.2d 1160

Per Curiam

Defendant, Birr, pleaded guilty to accessory to felony murder and accessory to the underlying felony of aggravated robbery. He was sentenced to life imprisonment for the murder and twenty to twenty-five years for the robbery, with the sentences to run consecutively. Birr subsequently filed a petition for writ of *habeas corpus*, which was denied by the district court. He, therefore, appealed the denial of his writ of *habeas corpus*, alleging that his sentences for felony murder and the underlying felony violated the fifth amendment guarantee against double jeopardy.

The Tenth Circuit affirmed the judgment of the district court. The court stated that, in cumulative sentencing situations, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Thus, federal courts must defer to a state court's determination of legislative intent. Here, a majority of the Wyoming Supreme Court, in affirming Birr's convictions and sentences, held that the Wyoming legislature intended cumulative punishment for accessory to felony murder and accessory to the underlying felony of aggravated robbery. Given the required legislative intent to impose multiple punishment, the court found no violation of the double jeopardy clause.

United States v. Bishop, 921 F.2d 1068

Author: Judge Barrett

Dissent: Judge Ebel

Defendant, Bishop, was convicted on two counts of bank robbery by force, violence and intimidation. Bishop's presentence report reflected a criminal history of larceny by fraud and knowingly concealing stolen property. These previous felony charges were consolidated for sentencing, and Bishop was subsequently sentenced to three years concurrent imprisonment on each count. His previous sentences were treated as one for the purpose of Bishop's criminal history, and only three criminal history points, rather than nine, were considered in assigning a criminal history category. Concluding that the criminal history points did not adequately reflect the seriousness of Bishop's past criminal conduct, the district court departed upward and sentenced him to seventy-one months. On appeal, Bishop argued that the district court erred in computing his sentence. Specifically, Bishop argued that his three prior felonies were, in fact, related because they were part of a common scheme or plan. Also, he argued that his criminal history category was not significantly under-represented by the three criminal history points.

The Tenth Circuit affirmed the sentence. The parties agreed that the review would be governed by a three-step test: (1) whether the circumstances cited by the district court justified a departure; (2) whether there was a sufficient factual basis for the justifications cited; and (3) whether the degree of departure was reasonable. Bishop only chal-

lenged the departure, not the degree of departure, so the court's review was limited to the first two steps. The circumstance cited by the district court was that Bishop had two prior felony convictions for which he received no criminal history points. The factual basis for considering these to be unrelated felonies was sufficient. Thus, the district court was justified in concluding that Bishop's criminal history category did not adequately reflect his criminal background.

United States v. Blackner, 901 F.2d 853

Author: Judge Henley, sitting by designation

Defendant, Blackner, appealed his mandatory ten year sentence following his guilty plea to possession with intent to distribute cocaine. Blackner argued that the mandatory minimum sentence provisions of 21 U.S.C. § 841(b)(1) violated due process and the eighth amendment as applied to a drug addict, since narcotic addiction is not a criminal offense. He argued further that his conviction violated equal protection because he would have received a different sentence under state law.

The Tenth Circuit affirmed the district court's ten year sentence. The court held that the sentence provisions of 21 U.S.C. § 841 (b)(1) applied to Blackner, since possession with intent to distribute cocaine is a culpable act separate from addiction. The court also held that different penalties under federal and state law for the same type of offense do not constitute an equal protection violation.

United States v. Boyd, 901 F.2d 842

Author: Judge Brimmer, sitting by designation

Defendant, Boyd, pleaded guilty to possession of cocaine. Boyd subsequently appealed the sentence imposed by the district court. She argued that the amount of narcotics used to determine her offense level was incorrect. Essentially, Boyd stated that in plea negotiations, she revealed the amount of cocaine that both her sister and mother carried for her. Boyd argued that these amounts were improperly used to increase her base offense level.

The Tenth Circuit affirmed the sentence imposed by the district court. The court explained that Boyd's sentence was not enhanced by information she volunteered in the plea negotiations. Rather, such information was supplied by her sister, and Boyd simply corroborated the "story." Accordingly, the district court did not abuse its discretion in aggregating the quantity of narcotics used to determine Boyd's sentence.

United States v. Bruning, 914 F.2d 212

Author: Judge Tacha

Defendant, Bruning, pleaded guilty to passing counterfeit notes in violation of 18 U.S.C. § 472. He subsequently appealed the district court's application of the Sentencing Guidelines which increased his

base offense level. Bruning argued that his sentence should not be increased because note 3 of § 2B5.1 of the Sentencing Guidelines recommends prohibiting application of subsection (b)(2) to persons who produce counterfeit notes by photocopying.

The Tenth Circuit rejected Bruning's argument and, therefore, affirmed the decision of the district court. The court ruled that note 3 excluded application of subsection (b)(2) to only those defendants who produce notes that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny. Thus, the method of production was not dispositive.

United States v. Calderon-Porras, 911 F.2d 421

Author: Judge Brorby

Defendant, Calderon-Porras, was convicted for smuggling marijuana. He subsequently appealed his sentence, claiming that he should have been classified as a minimal participant because his actions were those of an amateur. Moreover, he contended that he was entitled to a lesser sentence because he was a one-time courier.

The Tenth Circuit affirmed the district court's decision. The court ruled that Calderon-Porras should not be classified as a minimal participant because: (1) lack of knowledge, not skill, in the criminal undertaking is critical for a determination of minimal participant status; and (2) a courier may be classified as a minimal participant.

United States v. Callihan, 915 F.2d 1462

Author: Judge Anderson •

Defendant, Callihan, pleaded guilty to conspiring to manufacture, possessing with intent to distribute, and distributing amphetamines in violation of 21 U.S.C. § 486. Callihan was subsequently sentenced to 120 months in prison based on a seized volume of ninety-four kilograms of chemicals used to make phenyl-2-propanone ("P2P"), a controlled substance. Callihan appealed, contending that: (1) the sentence should have been fifty-seven months since only 2.95 kilograms of P2P was seized; and (2) the footnote used in the Sentencing Guidelines was rewritten to mean that the controlled substance found in the "entire amount," should be used as the scale weight, rather than the weight of a mixture or compound containing the controlled substance.

The Tenth Circuit affirmed the district court's sentencing. The court explained that the sentencing manual and significant case law substantiate that "mixture or compound" includes the agent carrying the controlled substance. Therefore, the district court used the appropriate offense level.

Carbray v. Champion, 905 F.2d 314

Author: Judge Ebel

Defendant, Carbray, was convicted of assault with a deadly weapon

in an Oklahoma state court. The jury recommended, and the trial judge imposed, a 199 year prison term. The term was based, in part, on the Oklahoma recidivism statute, Okla. Stat. tit. 21, § 51(A)(1)(1981). The Court of Criminal Appeals reduced the term to seventy-five years after finding the prosecutor's remarks concerning possible pardon or parole were prejudicial. In his *habeas corpus* petition, Carbray appealed, alleging that: (1) the district court improperly considered four felony convictions to enhance his sentence because they all resulted from an invalid 1957 juvenile conviction; and (2) the Criminal Court of Appeals arbitrarily resentenced him to seventy-five years, thereby depriving him of liberty without due process of law.

The Tenth Circuit affirmed the district court's decision to enhance Carbray's sentence. The court explained that any connection between Carbray's 1957 conviction and the four felony convictions was too attenuated to amount to constitutional error. Second, the court ruled that the reduction in Carbray's sentence did not violate the fourteenth amendment. The court explained that an appellate court may constitutionally exercise discretion and modify a jury sentence on appeal if it has been granted authority to do so by the state. The court found the Oklahoma Criminal Court of Appeals only had discretion to modify a sentence to the statutory minimum. Since the district court resentenced Carbray to the statutory minimum, the reduction was not arbitrary.

United States v. Colbert, 894 F.2d 373

Author: Judge McKay

Defendant, Colbert, pleaded guilty to conspiracy to distribute cocaine base. He was subsequently sentenced to 264 months of incarceration. Colbert appealed his sentence, contending the Sentencing Guidelines constitute cruel and unusual punishment in denigration of the eighth amendment.

The Tenth Circuit affirmed the sentence. The court ruled that Colbert's base offense level was not disproportionate to what Congress and other jurisdictions have indicated as appropriate for drug offenses. Moreover, the court noted Congress' intent to create severe penalties for drug offenders. Accordingly, the court held the Sentencing Guidelines do not violate the eighth amendment.

Murray v. Cowley, 913 F.2d 832

Author: Judge Tacha

Plaintiff, Murray, appealed a district court order denying his petition for writ of *habeas corpus*. Murray contended that the district court erred in finding no equal protection violation when the state court refused to reduce his sentence. Specifically, the state court would not reduce his sentence for second degree murder from an indeterminate term of life to a definite sentence of ten years, following a change in the second degree murder statute.

The Tenth Circuit dismissed Murray's appeal. The court found that Murray was not similarly situated to persons convicted under new second degree statutes. Accordingly, the state's refusal to reduce Murray's sentence, as if he had been convicted under the new statute, did not violate due process. The district court, therefore, did not err in denying Murray's petition for writ of *habeas corpus*.

United States v. Creech, 913 F.2d 780

Author: Judge Moore

Defendant, Creech, appealed an upward departure in his sentence. The district court adjusted upward because it found the victim of his crime to be "vulnerable" within the meaning of Sentencing Guideline § 3A1.1. The victim was chosen from a list of newlywed persons.

The Tenth Circuit reversed and held that unless the criminal act is directed against the young, aged, handicapped, or unless the victim is chosen because of some unusual personal vulnerability, § 3A1.1 cannot be employed. The court held that application of the guideline was clearly erroneous because it did not focus on the victim, but rather upon a class of persons to which the victim belonged.

Davis v. Maynard, 911 F.2d 415

Per Curiam

Defendant, Davis, was convicted of murder and sentenced to death. The Tenth Circuit upheld his murder conviction but vacated his death sentence. The court ruled that the district court's anti-sympathy and aggravating circumstance instructions were overbroad. The Supreme Court subsequently vacated the Tenth Circuit's judgment and remanded the case for reconsideration in light of *Saffle v. Parks*, 110 S.Ct. 1257 (1990). *Saffle* held that an anti-sympathy instruction constituted a "new rule" which could not be applied on collateral review of a criminal judgment.

On remand, the Tenth Circuit reinstated its original judgment, vacating Davis' death sentence. The court ruled that although the anti-sympathy instruction constituted the creation of a "new rule," the aggravating circumstance instruction did not. The court explained that its original ruling regarding the aggravating circumstance instruction was dictated by precedent existing before Davis' conviction became final.

United States v. Donaldson, 915 F.2d 612

Author: Judge Logan

Defendants, Gerald and Lowell Donaldson, appealed their sentences after pleading guilty to drug conspiracy charges. On appeal, the Donaldsons: (1) challenged the validity of the Sentencing Guidelines; and (2) asserted the district court erred in determining the weight of the marijuana seized by the government. Moreover, Gerald Donald-

son separately argued that the district court erred in failing to declare him a minor participant and reducing his base offense level accordingly.

The Tenth Circuit affirmed the district court's holdings. The court held that the Donaldsons' constitutional attack on the Sentencing Guidelines was without merit because the Supreme Court and the Tenth Circuit had previously rejected their arguments. Second, using a clearly erroneous standard of review, the court upheld the district court's determination of the drug's weight. The court explained the Donaldsons did not meet their burden in proving bad faith by the government in destroying the seized marijuana before the Donaldsons had an opportunity to examine it. Finally, the court upheld the district court's refusal to reduce Gerald Donaldson's base offense level. The court reasoned that drug couriers are not necessarily minor participants under the Sentencing Guidelines. Thus, the court ruled that Donaldson was no less culpable than the other participants and thus not deserving of an offense level reduction. Moreover, Gerald Donaldson's due process rights were not violated when the district court failed to state its reasons for not giving him a reduction in base offense level. There is no legal requirement that a judge state reasons for his finding of fact.

United States v. Doyan, 909 F.2d 412

Author: Chief Judge Holloway

Defendant, Doyan, pleaded guilty to conspiring to possess cocaine with the intent to distribute. The district court subsequently sentenced and fined Doyan. Doyan appealed his fine, contending: (1) the district judge abused his discretion and violated the Sentencing Guidelines; and (2) the imposition of the fine under the Sentencing Guidelines violated Doyan's equal protection rights under the federal constitution.

The Tenth Circuit affirmed the fine. First, the court ruled that the district court judge did not abuse his discretion by imposing a fine in excess of \$32,000. The Sentencing Guidelines state that a court has discretion over the fine to be imposed. The court explained that the Sentencing Guidelines mandate a punitive fine sufficient to cover the costs of incarceration. The Sentencing Guidelines, however, impose no obligation to tailor the fine according to a defendant's ability to pay. Second, Doyan's equal protection rights were not violated by the imposition of a fine. The court explained that it could not say the fine "bore" no rational relationship to the legitimate governmental interest in criminal justice.

United States v. Easterling, 921 F.2d 1073

Author: Judge Brorby

Defendant, Easterling, pleaded guilty to conspiracy to distribute methamphetamine and to use of a firearm during the commission of a drug trafficking crime. The district court voiced its dissatisfaction with the first presentence report because it did not adequately reflect the seriousness of Easterling's conduct. Consequently, a second report was

prepared indicating that Easterling was involved in the distribution of substantially larger amounts of methamphetamine. On appeal, Easterling argued that: (1) during sentencing, the district court erred in relying on the second presentence report because it was based on estimates lacking any articulable basis; (2) the government breached the plea agreement; and (3) the district court erred in failing to consider mitigating circumstances.

The Tenth Circuit affirmed the sentence. First, the court upheld the district court's determination regarding the quantity of drugs involved. The court explained that the determination was not clearly erroneous. The court also stated that factual determinations under the Sentencing Guidelines require only a preponderance of the evidence. Moreover, the use of estimates is acceptable as long as the information upon which the estimates are based have a minimum indicia of reliability. Further, the court found that the drug quantity information was not improperly obtained by the probation officer's overreaching. The court explained that the information came independently of Easterling and prior to his cooperation. Second, the court found that any breach of the plea agreement was immaterial because the district court reduced the sentence to reflect Easterling's cooperation. The court also found that information in the presentence report regarding the quantity of narcotics involved was not a breach of the plea agreement. The court explained that a probation officer is not prohibited from providing relevant information to the court. Third, the court ruled that the district court properly considered mitigating circumstances. Finally, the court ruled that the district court failed to append a written record of disputes concerning the factual accuracy of the presentence report. Consequently, the court remand for the district court to perform this ministerial task.

United States v. Emrick, 895 F.2d 1297
Per Curiam

Defendant, Emrick, appealed the district court's upward departure from the Sentencing Guidelines.

The Tenth Circuit reversed and remanded the district court's upward departure. The court stated that whether a case's circumstances justify an upward departure is a question of law. To determine if such circumstances exist, fact finding must be involved. The court ruled that due to the absence of adequate findings by the district court, it could not conduct an appropriate review. Consequently, the court remanded for appropriate findings.

United States v. Florentino, 922 F.2d 1443
Author: Chief Judge Holloway

Defendant, Florentino, appealed his sentence resulting from a conviction for transporting illegal aliens and aiding and abetting. Florentino claimed the district court erred in "double counting" his prior

convictions when calculating his offense level and criminal history category under the Sentencing Guidelines. Florentino also objected to the use of the same prior convictions in sentencing him at the top of the applicable Sentencing Guideline range.

The Tenth Circuit affirmed the district court's sentence. On *de novo* review, the court examined the enhancement provisions of the Sentencing Guidelines. The court found the Sentencing Guidelines to be unambiguous. The court stated that there was a clear intention to have prior convictions for transporting illegal aliens count towards increasing both Florentino's offense level and criminal history category. Moreover, the court rejected Florentino's contention that the district court improperly counted his earlier convictions when sentencing him at the top of the Sentencing Guideline range.

United States v. Fortenbury, 917 F.2d 477

Author: Judge Logan

Defendant, Fortenbury, pleaded guilty to possession of a firearm. The district court judge did not believe that Fortenbury's criminal history accurately reflected the seriousness of past criminal conduct and, therefore, made an upward departure from the Sentencing Guidelines. Fortenbury appealed the sentence imposed by the district court.

The Tenth Circuit reversed and remanded for resentencing. The court applied a three step test to determine if the upward departure in sentencing was justified. First, the court ruled that the district court properly identified the circumstances which warranted the upward departure in sentencing. The circumstances were that Fortenbury was treated leniently in the past for other offenses, and the leniency did not deter future criminal activity. Second, the court ruled that the basis for the upward departure in sentencing was not clearly erroneous. The court stated, however, that the upward departure from the Sentencing Guidelines was unreasonable. The court explained that upgrading the offense level to determine sentencing was an improper application of the Sentencing Guidelines.

United States v. Fredrick, 897 F.2d 490

Author: Judge McKay

Defendant, Fredrick, pleaded guilty to possession of heroin with intent to distribute. She subsequently appealed her sentence. Specifically, Fredrick contended that the district court violated her due process rights by considering non-charged criminal activity in computing her sentence. In addition, Fredrick challenged the Sentencing Commission's 1988 revision of the Sentencing Guidelines. The revision mandates consideration of non-charged criminal activity in reaching a sentence.

The Tenth Circuit, on *de novo* review, held that the district court did not violate Fredrick's due process rights by considering non-charged

criminal activity. The court explained that these criminal activities were proven by a preponderance of the evidence. In addition, the Sentencing Commission's 1988 revision did nothing more than identify several aspects of relevant conduct, just as the earlier guideline did. Thus, the revision was within the Sentencing Commission's statutory authority. The judgment of the district court was, therefore, affirmed.

United States v. Freitekh, 912 F.2d 421

Author: Judge McKay

Defendant, Freitekh, pleaded guilty to unlawful receipt of a firearm in violation of 18 U.S.C. § 922(g)(1). Prior to sentencing, he was arrested on two state charges of aggravated assault, which did not appear on his criminal record at sentencing. The district court subsequently agreed to suspend Freitekh's sentence provided that he participate in a halfway house program, pay a fine, and participate in a substance abuse program. Freitekh failed to return to the halfway house on the day he was convicted of the state charges. Consequently, he was arrested for failure to comply with federal probation. Thus, he was resentenced to thirty months after the court altered the presentence report to include the state conviction. Freitekh appealed, challenging the legality of the district court's upward departure from the Sentencing Guidelines. Freitekh argued that his sentence was unreasonable because it was three times the Sentencing Guidelines' maximum limit.

The Tenth Circuit vacated the sentence and remanded for resentencing. The court based its decision on a three step process used in reviewing upward departures from the Sentencing Guidelines: (1) the district court must set forth specific findings of aggravating circumstances existing in the present situation which were not adequately taken into consideration by the Sentencing Commission; (2) the district court's underlying findings of fact must not be clearly erroneous; and (3) the departure must be reasonable. The court found that the district court's order failed to state specific reasons for the departure which, therefore, precluded the court from conducting its review.

United States v. Gamble, 917 F.2d 1280

Author: Judge McWilliams

Defendant, Gamble, pleaded guilty to conspiracy to distribute fifty or more grams of cocaine. Gamble claimed that the guilty plea was in return for a four year prison sentence. Gamble, however, was sentenced to ninety-six months in prison. On appeal, Gamble requested that the sentence be vacated and the four year sentence be imposed. Alternatively, Gamble requested that he be allowed to withdraw his guilty plea, or have an evidentiary hearing on the issue of whether the government made a promise to him regarding the length of his sentence.

The Tenth Circuit affirmed the conviction and sentence. The court reviewed the letter which had been sent to Gamble and his attorney by the government. The letter clearly stated that any sentence imposed

would be within the discretion of the district judge. The court took note that at the sentencing hearing, Gamble failed to mention any promises made to him by the government concerning the length of his sentence. Finally, the court ruled that, because the letter from the government was clear and ambiguous, parole evidence would not be allowed to determine its meaning. Thus, Gamble's affidavit, filed after the sentencing hearing, would not effect the court's determination. Accordingly, there was no need to hold an evidentiary hearing on the matter.

United States v. Garcia, 919 F.2d 1478

Author: Judge Logan

Defendant, Garcia, pleaded guilty to transporting illegal aliens, thereby violating 8 U.S.C. § 1324(a)(1)(B). He subsequently appealed his seven month sentence. Even though Garcia admitted his criminal history category was properly calculated, he nonetheless contended that the district court improperly considered his prior criminal conviction and overemphasized his transportation of only three illegal aliens. In essence, Garcia appealed the district court's decision to impose sentence at a particular point within the proper guideline range.

The Tenth Circuit held that the district court's sentencing was proper and dismissed Garcia's appeal. The court stated that the sentence was not appealable because Garcia was placed within the correct criminal history category and correct sentencing range. The court explained that sentences are only reviewable if the defendant claims that it was incorrectly calculated or was based on clearly erroneous factual findings concerning offense levels, characteristics, or adjustments. Garcia, however, challenged the factors the district court relied on to impose sentence at a particular point within the Sentencing Guidelines. Consequently, his sentence was not reviewable. Moreover, the court noted that the Sentencing Guidelines were intended to give sentencing discretion to district courts.

United States v. Gardner, 905 F.2d 1432

Author: Judge Ebel

Defendant, Gardner, pleaded guilty to bank robbery by force and aiding and abetting the commission of a bank robbery. The district court judge did not believe that Gardner's criminal history accurately reflected the seriousness of past criminal conduct and, therefore, departed upward from the Sentencing Guidelines. Accordingly, Gardner was sentenced to 210 months in prison. Gardner appealed the sentence, arguing that the upward departure was unreasonable because the district court improperly considered convictions which fell outside the fifteen year limit.

The Tenth Circuit affirmed the upward departure from the Sentencing Guidelines. The court applied a three pronged test to determine the validity of the sentence. First, the court held that the district court properly identified circumstances which warranted the upward departure in

sentencing. For example, the district court properly considered previous convictions, even though they were outside the time limit. The court reasoned that the convictions were similar in nature to the crime for which Gardner was sentenced. The second prong of the test was also satisfied because the factual basis for the upward departure was not clearly erroneous. Finally, the court held that the upward departure from the Sentencing Guidelines was reasonable. The court explained that the district court upgraded Gardner into a class whose description most closely matched his history, that of a career offender.

United States v. Hand, 913 F.2d 854

Author: Judge Anderson

Defendant, Hand, appealed the district court's conviction and ninety-seven month sentence for his role in aiding and abetting the manufacture of methamphetamine. On appeal, Hand contended that: (1) the government breached the plea agreement by eliciting unfavorable testimony under cross-examination during sentencing, and stating that the court was free to come to its own conclusion regarding a sentence reduction; and (2) the district court failed to make findings of fact regarding information contained in the presentence report.

The Tenth Circuit affirmed the district court's ruling. The court declared that Hand could not reasonably understand the government's plea agreement to proscribe a proper cross-examination of Hand and other witnesses at sentencing. Similarly, a plea agreement cannot be used to block a court's access to a complete and accurate factual record. Moreover, the government's statement concerning the court's discretion to determine a sentence did not amount to a repudiation of its recommendation for a sentence reduction. The court explained that a criminal defendant has no right, as a matter of law, to an enthusiastic recommendation by a prosecuting attorney. Finally, according to Fed. R. Crim. P. 32(c)(3)(D), factual findings are only required when the defendant disputes a fact contained in the presentence report. Hand did not identify any inaccurate statement of fact contained in the presentence report. Instead, he contested the report's legal conclusion. Consequently, Hand's disagreement over conclusions drawn from the facts in the presentence report does not allege factual inquiries, thereby requiring specific findings by the court.

United States v. Harris, 907 F.2d 121

Author: Judge Logan

Defendant, Harris, was convicted for aiding and abetting wire fraud. The district court subsequently departed upward and sentenced Harris to four years imprisonment. The district court concluded that due to Harris's past criminal history, it was justified in departing upward from the Sentencing Guidelines.

The Tenth Circuit reversed and remanded for resentencing. The court explained that the district court's upward departure was unreason-

able. The departure was more than double the twenty-one month maximum sentence under the Sentencing Guidelines. The court stated that despite a long record of nonviolent, nondrug crimes, Harris did not meet the requirements for a career offender. He also did not meet the requirements for one who engages in a pattern of criminal conduct as a livelihood.

United States v. Hart, 922 F.2d 613

Author: Judge Cook

Defendant, Hart, appealed the denial of his Fed. R. Crim. P. 35 motion to reduce his sentence and his Fed. R. Crim. P. 32 motion to correct errors in his presentence investigation report ("PSI"). On appeal, Hart argued that the district court: (1) abused its discretion in denying his Rule 35 motion; and (2) violated Rule 32 by failing to hold a hearing regarding the accuracy of information in the PSI or disavowing any reliance on the disputed information.

The Tenth Circuit affirmed the denial of both motions. The court reasoned that since Hart did not contend that his sentence was illegal or imposed in an illegal manner, the district court did not abuse its discretion in denying his Rule 35 motion. Second, the court said that Rule 32 only applies to factual inaccuracies. The court found that Hart objected mostly to the tenor of the report and that the specific factual inaccuracies that he raised would have not influenced the sentence imposed.

United States v. Hughes, 901 F.2d 830

Author: Judge Tacha

Defendant, Hughes, pleaded guilty to armed robbery of a bank and to jeopardizing a life with a dangerous weapon. Because Hughes was previously convicted of two crimes of violence, the district court ruled that he was a career offender. The Sentencing Guidelines require a sentence of 262-300 months for a career offender who commits a crime of violence. Hughes was, therefore, sentenced to 262 months in prison. He appealed, contending that the sentence violated his eighth amendment rights because it constituted cruel and unusual punishment. Moreover, Hughes argued that the Sentencing Guidelines' career offender provisions violate the eighth amendment because they aggregate disparate offenses without regard to the seriousness of the offense or the defendant's personal characteristics.

The Tenth Circuit affirmed the district court's judgment. The court ruled that the determination of proper penalties is a matter for the legislature, and that sentences within the statutory limits are not considered cruel and unusual punishment. The eighth amendment requires that a sentence not be disproportionate to the severity of the crime. Hughes's sentence for armed robbery was not disproportionate to the gravity of his crime, particularly since he pointed a submachine gun at a bank teller. The court also held that because the Sentencing Guidelines allow

sentencing courts to depart downward in appropriate cases, the eighth amendment was not violated.

United States v. Irvin, 906 F.2d 1424

Author: Judge McCay, sitting by designation

Defendant, Irvin, was convicted of mail fraud. Irvin subsequently appealed his sentence, claiming: (1) a pattern of criminal conduct must continue for a longer period of time than that which occurred here; and (2) a substantial portion of his income requires a substantial total income.

On *de novo* review, the Tenth Circuit remanded the sentencing to district court. The court did, however, affirm the district court's interpretation of "substantial period of time" as a well-organized criminal venture lasting approximately five to seven months. But, the court reversed the district court's interpretation of a substantial portion of income. The court concluded that the sentencing guideline meant an amount above \$6,700. Irvin's income was only \$4,894.72.

United States v. Jackson, 921 F.2d 985

Author: Judge Bratton

Defendant, Jackson, was originally sentenced to five years imprisonment for possession of ammunition by a felon. Jackson appealed the sentence and secured a remand. On remand, the district court departed upward from the Sentencing Guidelines and resentenced Jackson to five years imprisonment. Jackson appealed the latter sentence, arguing that: (1) the second sentence increased his punishment in violation of the double jeopardy clause; and (2) an upward departure from the Sentencing Guidelines was unwarranted and unreasonable in magnitude.

The Tenth Circuit affirmed the sentence. The court found that the double jeopardy clause was not violated when Jackson was resentenced. The court reasoned that Jackson had knowledge that the original sentence was appealable and, therefore, he had no expectation that the sentence was final. The court also found that the district court's upward departure was proper. The district court properly took into account prior convictions outside the applicable time limit, a criminal history category which did not adequately reflect the seriousness of Jackson's past criminal conduct, leniency of past sentences, and similarity between Jackson's present and past criminal offenses. Finally, the court reasoned that the magnitude of departure was reasonable because "slavish" adherence to the Sentencing Guidelines would cause unwarranted sentencing disparities.

United States v. Kinney, 915 F.2d 1471

Author: Judge Logan

Defendant, Kinney, pleaded guilty to possession of contraband in prison. Kinney appealed the sentence imposed. Specifically, he argued

that during sentencing, the district court improperly held his prior convictions for bank robbery in two separate states as unrelated. Rather, Kinney contended that the two convictions were related because they were part of a common scheme and they could have been consolidated.

The Tenth Circuit found that the district court's decision was not clearly erroneous. The court stated that under the Sentencing Guidelines, cases are related if they: (1) occurred on a single occasion; (2) were part of a single scheme or plan; or (3) were consolidated for trial or sentencing. The court held that the fact the cases could have been consolidated does not satisfy the requirement that they be consolidated. Further, a concurrent sentence given by a separate jurisdiction at a different date was not a consolidated sentence under the Sentencing Guidelines. Also, the only evidence of a common scheme was Kinney's own testimony. This was not sufficient to hold the cases as related.

United States v. Kirby, 921 F.2d 254

Author: Judge McWilliams

Defendant, Kirby, appealed the twelve month sentence he received for failing to appear at trial on various drug charges. Kirby argued that a prior sentence should not have been included in computing his criminal history category because the incarceration was more than fifteen years before the "commencement of the instant offense."

The Tenth Circuit vacated the sentence and remanded for resentencing. The court agreed with Kirby. The court concluded that "commencement of the instant offense" meant the date Kirby failed to appear in court for his drug charges, not the date he committed the underlying drug offense. Accordingly, since Kirby's prior conviction was beyond the fifteen year period, the district court erred in considering it when determining his sentence.

United States v. Kirk, 894 F.2d 1162

Author: Judge Kane, sitting by designation

Defendant, Kirk, pleaded guilty to unlawful receipt of a sawed-off shotgun. During sentencing, Kirk argued that he was entitled to a six-point reduction in offense level because he possessed the shotgun as part of a collection and intended to mount it on the wall of his den. Kirk's presentence report recommended, however, that this point reduction be denied; the gun was found concealed in a drawer, and Kirk made no effort to mount it. The court accepted the recommendation. Kirk appealed the sentence, contending that the burden was improperly placed on him to establish that he was entitled to the point reduction. Instead, Kirk argued the government must bear the burden of proof on all sentencing issues.

The Tenth Circuit affirmed the sentence after reviewing the allocation of burden of proof as an issue of first impression. Sentencing Guidelines § 2K2.1 provides for a six-point reduction in the defendant's

base offense level for unlawful receipt or possession of firearms if the defendant possessed the firearm "solely for lawful sporting purposes or collection." This, however, does not address the issue of allocating the burden of proof. Ultimately, the court held that the government bears the burden of proof for sentence increases and the defendant for sentence decreases. Here, the sentencing judge properly found that Kirk failed to prove by a preponderance of evidence that he was entitled to a point reduction.

United States v. Kuntz, 908 F.2d 655

Author: Judge Logan

Defendant, Kuntz, pleaded guilty to possession with intent to distribute less than 100 kilograms of marijuana. The United States agreed that if Kuntz cooperated, it would consider a motion for departure downward pursuant to § 5K1.1 of the Sentencing Guidelines. Kuntz was subsequently sentenced to the maximum amount of time in prison for his offense. Kuntz appealed, contending: (1) that § 5K1.1 of the Sentencing Guidelines was violative of due process and separation of powers; (2) the district court erred in not providing a pre-sentencing hearing on the issue of diminished capacity; and (3) he was denied effective counsel at sentencing. The prosecutors counter-argued that the Tenth Circuit lacked jurisdiction to hear Kuntz's claims. The prosecutors explained that the district court's refusal to depart downward was a discretionary decision and, therefore, unreviewable.

The Tenth Circuit affirmed the decision of the district court. The court first ruled that it did have jurisdiction. The court reasoned that a decision of the district court was not challenged. Instead, the constitutionality of the federal sentencing procedures was challenged. Consequently, the appeal was from a sentence allegedly imposed in violation of law and was, therefore, properly before the court. The court then rejected Kuntz's constitutional challenge of the Sentencing Guidelines. The court stated that neither due process nor separation of powers requires a judicial review of a prosecutor's decision not to make a motion to downgrade a sentence. The court reasoned that sentencing is not an inherently discretionary judicial function, as evidenced by congressional control of the procedures, guidelines, and factors of the sentencing framework. The court did not reach Kuntz's question as to whether he was improperly denied a hearing on diminished capacity. The court stated that no request for such a hearing was formally made to the district court. Accordingly, Kuntz waived whatever procedural objection he may have had. Finally, the court rejected Kuntz's claim that he was denied effective counsel at sentencing. The court held that this claim was frivolous.

United States v. Labat, 915 F.2d 603

Author: Judge Moore

Defendant, Labat, pleaded guilty to conspiracy to possess cocaine

with intent to distribute. Labat was sentenced to sixty months in prison and was ordered to pay fines for the cost of his incarceration. Labat subsequently appealed, contending that the district court overlooked additional factors in determining an appropriate fine. In particular, the district court failed to consider Labat's inability to pay, and it failed to consider the burden on his dependents. Labat also argued that a fine for the costs of incarceration is an additional fine which cannot be assessed unless a punitive fine is first levied.

The Tenth Circuit affirmed the judgment but vacated the fine. The court first explained that Labat is indigent and without potential prospects for improving his situation. Moreover, he is without current assets. Further, there is no indication that he can gain employment upon release from custody that would produce sufficient income to pay the fine. In effect, the court ruled that it is an incorrect application of the Sentencing Guidelines to impose a fine that a defendant has little chance of paying. Second, the court ruled that an additional fine cannot be imposed unless the court first imposes a punitive fine.

United States v. Larsen, 904 F.2d 562

Author: Judge Logan

Defendants, Larsen and Brennan, pleaded guilty to single counts of distribution of lysergic acid diethylamide ("LSD"). Both were sentenced pursuant to 21 U.S.C. § 841(b)(1)(B)(v), which requires a five year minimum sentence when more than one gram of LSD is involved. In calculating the amount of narcotics distributed, the district court included the weight of the blotter paper which contained the LSD. Larsen and Brennan argued that this inclusion was improper when determining their sentences.

The Tenth Circuit affirmed the district court's ruling. The court held that the weight of the paper was properly included in determining the sentences. The court found that Congress intended such mediums to be calculated in sentencing determinations.

United States v. Lowden, 905 F.2d 1448

Author: Judge Anderson

Defendant, Lowden, challenged the district court's decision not to reduce his sentence below the Sentencing Guidelines. Lowden's conviction was previously affirmed, and the matter was remanded for further determinations as to the sentence. It was not clear from the record whether the district court declined to depart from the Sentencing Guidelines because it thought it was powerless to do so or because the facts did not warrant such a departure.

The Tenth Circuit affirmed the district court's decision on remand. The district court clarified on remand that it had the power to depart downward, but it declined to do so. The court explained that the district

court correctly refused to depart downward based upon the prevalence of alcohol abuse on Indian reservations.

United States v. Maldonado-Campos, 920 F.2d 714

Author: Judge Baldock

Defendant, Maldonado-Campos, was convicted of possession of marijuana with intent to distribute. Maldonado-Campos appealed his conviction and sentence, contending that: (1) there was insufficient circumstantial evidence for a conviction; (2) the district court failed to properly grant a reduction in the sentence for his status as a minor participant; and (3) the district court failed to depart downward from the criminal history category when sentencing.

The Tenth Circuit affirmed the conviction but vacated the sentence and remanded for resentencing. First, the court ruled that the circumstantial evidence was sufficient to support a conviction. The court explained that Maldonado-Campos need not have carried the suitcases of marijuana for the jury to conclude beyond a reasonable doubt that he knowingly participated in the importation venture. Second, the court found that the district court's statement regarding "minor" and "minimal" participants was ambiguous and needed further clarification. Consequently, the court remanded for application of the correct legal standard. Finally, the court stated that it had authority to review the district court's failure to depart downward. The court reasoned that the review was proper because the district court misapprehended its power to depart from the Sentencing Guidelines. The court ruled that it lacked a sufficient record to determine whether the district court would have granted a downward departure had it thought itself empowered.

United States v. Mays, 902 F.2d 1501

Author: Judge Bratton, sitting by designation

Defendant, Mays, pleaded guilty to distribution of cocaine. He was sentenced to a lengthened term of incarceration because the district court found Mays to be an organizer, leader, or supervisor of criminal activity. Mays appealed, asserting that: (1) the district court erred in its factual findings; and (2) the Sentencing Guidelines were unconstitutionally vague.

The Tenth Circuit affirmed the decision of the district court. The court ruled that Mays controlled the source of the narcotics, personally met with the purchasing undercover agent and received money in exchange for cocaine. Thus, the district court's factual findings were correct. The court further held that the terms "organizer," "leader," "manager," "supervisor," and "criminal activity" were not unconstitutionally vague. The court explained that the terms were clearly ascertainable by an ordinary person exercising ordinary common sense.

United States v. Mendes, 912 F.2d 434

Author: Judge Tacha

Defendant, Mendes, was convicted of possession with intent to distribute cocaine and heroin. Mendes was subsequently sentenced to a minimum of ten years in prison. Mendes appealed his sentence on various due process and equal protection grounds. Specifically, Mendes argued: (1) the Sentencing Guidelines are not rationally related to its purpose of punishing "drug kingpins;" (2) the Sentencing Guidelines are facially invalid because they set punishment for the amount of the mixture of drugs not the amount of pure drugs found; (3) § 841(b) of the Sentencing Guidelines is unconstitutional because it creates a factual presumption that a person possessing a large quantity of illegal drugs is a "drug kingpin;" and (4) § 841(b) of the Sentencing Guidelines should be declared facially invalid because the punishment is disproportionate to the crime.

The Tenth Circuit affirmed the decision of the district court. First, the court held that the Sentencing Guidelines more than passed the rational relationship test for presumed valid legislation containing a non-suspect classification. The court reasoned that there is a legitimate state interest in controlling both "kingpins" and "managers" at the retail level. Second, the court held that Mendes did not have standing to challenge the facial validity of § 841(b). The court reasoned that a defendant cannot claim a statute is unconstitutional in some of its reaches if the statute is constitutional as applied to him. Third, the court held that no such presumption of "kingpinness" was present in § 841(b), and that such status was not relevant to the Sentencing Guidelines. Last, the court ruled that Mendes lacked standing to challenge the facial validity of the Sentencing Guidelines. Moreover, his sentence was not disproportionate for a person possessing the quantities of drugs in his possession and who had a prior felony conviction.

Montoya v. United States Parole Comm'n, 908 F.2d 635

Author: Judge Seymour

Dissent: Judge Tacha

Plaintiff, Montoya, was convicted of conspiracy to import cocaine and transporting a firearm in interstate commerce after a former felony conviction. Defendant, United States Parole Commission ("Commission"), made a decision to set a release date outside the applicable guideline range. The Commission informed Montoya that its decision was based primarily upon a finding that he exhibited a history of assaultive/aggressive behavior. The Commission relied primarily upon Montoya's 1958 robbery and 1967 murder convictions. Montoya filed for *habeas corpus* relief, challenging the Commission's decision. The district court denied relief. Montoya appealed, contending that the record contained no support for the Commission's conclusion that, due to his history of assaultive/aggressive behavior, he was a more serious risk than indicated by the Sentencing Guidelines.

The Tenth Circuit reversed the decision of the district court. The court ruled that, in accordance with congressional intent, departure from the Sentencing Guidelines is proper only if the Commission has a rational basis. The court found that there was no rational basis to depart upward. The court explained that Montoya's robbery conviction was an insufficient display of assaultive/aggressive behavior to warrant departure. Also Montoya's murder conviction lacked proof of assaultive/aggressive behavior because the conviction was premised on the felony murder doctrine. In essence, Montoya was not present when the murders occurred, but was a participant in the underlying crime.

United States v. Moore, 919 F.2d 1471

Author: Judge Cook, sitting by designation

Defendant, Moore, appealed his conviction of cocaine possession, use of a firearm in relation to possession with intent to distribute, and use of a machine gun in relation to drug trafficking. Moore challenged the imposition of consecutive sentences on the two firearm counts as violating the double jeopardy clause of the Constitution. Moore also questioned the sufficiency of the evidence used to link the firearms to the drug trafficking. Further, he argued that facts alleged in the affidavit to retain a search warrant were insufficient to show probable cause. Finally, Moore challenged the district court's upward adjustment of his sentence based on his role as a leader or organizer.

The Tenth Circuit vacated the sentences imposed on the two firearm counts, remanded for resentencing, and affirmed the district court on all other issues. The court ruled that when more than one firearm is involved, conviction for a single drug trafficking offense only results in a single violation of the statute. Accordingly, multiple sentences may not be imposed. Second, the court found that there was sufficient evidence for a jury to conclude that there was a relation between the use of the firearm and the drug trafficking. Third, the court ruled the affidavit sufficient to show probable cause. The court explained that details in the affidavit were sufficient to show that cocaine would be found in Moore's apartment. Also, the court upheld the two-level upward adjustment of Moore's sentence. The court found a sufficient showing that Moore exercised direction or control over another person in the drug distribution scheme.

United States v. Oliva-Gambini, 909 F.2d 417

Author: Judge Seymour

Defendant, Oliva-Gambini, pleaded guilty to three counts of distributing cocaine. During sentencing, defendant requested a two-point reduction in his sentence because he claimed to be a minor participant in the commission of a crime. Specifically, he claimed that because he distributed and did not supply the cocaine, he was substantially less culpable than the average participant. The district court, however, determined that minor participant status does not apply to drug of-

fenses. Accordingly, his sentence was not reduced. Oliva-Gambini subsequently appealed his sentence.

On *de novo* review, the Tenth Circuit stated that the district court erred when it held that a defendant convicted of cocaine distribution could not be classified as a minor participant. The court next considered, under a clearly erroneous standard, whether Oliva-Gambini was entitled to minor participant status. Oliva-Gambini, however, presented no evidence that he was less culpable than other participants in the crime. He only presented a stipulated statement that he was not the source for the cocaine. Accordingly, the sentence was affirmed.

Gamble v. Parsons, 898 F.2d 117

Author: Judge Ebel

Plaintiff, Gamble, appeared *pro se* seeking federal *habeas corpus* relief pursuant to 28 U.S.C. § 2254. Gamble alleged that his present sentence was enhanced by improperly obtained convictions. The district court denied relief, reasoning that the conviction's collateral consequences, upon which his sentence was based, were not sufficient to render Gamble "in custody" for purposes of his petition.

The Tenth Circuit concluded that Gamble demonstrated he was denied a federal right. Accordingly, he satisfied an element necessary for the issuance of a certificate of probable cause pursuant to 28 U.S.C. § 2253. Also, the court found that Gamble was "in custody" for statutory purposes. The court explained that Gamble's sentence was enhanced by previous expired convictions. Gamble could, therefore, challenge his present sentence to the extent that it was enhanced by an alleged invalid prior conviction.

United States v. Richardson, 901 F.2d 867

Author: Judge Baldock

Defendant, Richardson, pleaded guilty to conspiracy to pass counterfeit obligations with intent to defraud the United States. Richardson appealed his sentence of thirteen months, asserting that the district court erred in: (1) failing to accept the adjusted offense level contained in the plea agreement; (2) adhering to the Sentencing Guideline range in view of the lighter sentences received by others involved in the conspiracy; and (3) calculating the credit for time spent in custody prior to sentencing.

The Tenth Circuit affirmed the district court's holding that the stipulations in a plea agreement were nonbinding. The court reasoned that the facts were not known to the district court at the time it accepted the plea agreement. Therefore, the court found that the district court was well within its authority, when new facts were discovered, in adding levels to the offense level. Second, the court held that because the lighter sentences of the co-conspirators arose out of either a different court or different laws, the district court's refusal to depart from the

Sentencing Guidelines was nonreviewable. Finally, the court remanded for reconsideration the calculation of credit due to Richardson for time he spent in custody after the commission of the offense.

United States v. Roberts, 898 F.2d 1465

Author: Judge Seymour

Defendant, Roberts, pleaded guilty to an information alleging one count of assault with intent to commit a felony within the special maritime and territorial jurisdiction of the United States. Roberts was subsequently sentenced to forty-one months in prison followed by two years of supervised release. Roberts appealed, challenging his sentence. Roberts alleged that a proviso of the Sentencing Guidelines was unconstitutionally vague. This proviso allows a court to use the offense level of stipulated conduct when it is more serious than the offense for which a defendant is convicted. Specifically, Roberts contended the proviso failed to define "more serious offense," nor does it set out criteria for determining the seriousness of an offense. Roberts also contested the district judge incorrectly applied the Sentencing Guidelines for robbery instead of for aggravated assault.

The Tenth Circuit affirmed the sentence. The court found no merit in Roberts's claim that the proviso of § 1B1.2(a) was impermissibly vague with respect to the term "more serious offense." The court explained that the Sentencing Guidelines provide a clear means by which the relative seriousness of offenses encompassed by stipulated conduct can be evaluated. Moreover, the court rejected Roberts's complaint that the district judge improperly applied the Sentencing Guidelines for robbery instead of for aggravated assault. The court reasoned that the stipulated facts established the offense of robbery.

United States v. Russell, 905 F.2d 1439

Author: Judge McWilliams

Defendant, Russell, pleaded guilty to robbing a federally insured bank, thereby violating 18 U.S.C. § 2113(a). Russell's sentence was subsequently upgraded by three levels after the district court found that he possessed a firearm during the robbery. His sentence was further upgraded after his entire criminal history was considered, instead of just the previous fifteen years as recommended by the Sentencing Guidelines. Russell was ultimately sentenced to 105 years in prison. He appealed his sentence, challenging: (1) the district court's finding that he was armed while committing the robbery; and (2) the enhancement of the sentence imposed by the district court after considering his entire criminal history.

The Tenth Circuit affirmed the judgment and sentence. The court found sufficient evidence to support the finding that Russell was armed during the robbery. This conclusion was reached after reviewing statements made by Russell during the robbery and after determining that he was in possession of a revolver shortly before and after the robbery.

Also, the court held that the enhanced sentence imposed after considering Russell's entire criminal history did not violate the Sentencing Guidelines. The court reasoned that to limit Russell's criminal history to the fifteen years preceding his sentencing, when he had been in prison for eleven of those years, would not represent the seriousness of his past criminal conduct, or the likelihood that he would commit other crimes.

United States v. Rutter, 897 F.2d 1558

Author: Judge Baldock

Defendant, Rutter, pleaded guilty to distribution of cocaine. Rutter subsequently appealed his sentence, contending the district court erred when it: (1) improperly considered certain amounts of cocaine when determining his base offense level; (2) characterized him as a supervisor; (3) failed to adhere to the plea agreement during sentencing; and (4) made insufficient findings of fact to determine the sentence.

The Tenth Circuit affirmed the district court's sentence, but remanded for preparation of the required written record. The court ruled that under the Sentencing Guidelines, a court may consider quantities of drugs not specified in the count of conviction but part of the same common plan. Second, the court held that Rutter's reliance on a third party to transport the drugs for sale was sufficient evidence to characterize Rutter as an organizer. Third, the district court was free to determine all relevant facts without being bound by the stipulation included in the plea agreement. Also, the court noted that the plea agreement stated that the stipulations were not binding on the district court. Finally, the district court made sufficient record findings of fact to justify the sentence.

United States v. Salazar, 909 F.2d 1447

Author: Judge Dumbauld, sitting by designation.

Pursuant to an agreement with the government, defendant, Salazar, pleaded guilty to fabricating false immigration documents. Under this agreement, the government consented to not bring further charges against Salazar for any act committed on or before December 31, 1988, which involved the creation of false documents. Salazar, however, contended that at the sentencing hearing, the government violated the agreement. Specifically, Salazar argued that the government erred when, at the sentencing hearing, it mentioned that Salazar committed the same crime almost 100 times during a seven to eight month period.

The Tenth Circuit affirmed the district court's sentencing. The court reasoned that the language of the agreement did not impose obligations on the government in regard to recommending a certain sentence. In fact, the agreement expressly reserved the government's right to argue for any appropriate sentence.

United States v. Sanchez, 907 F.2d 127

Author: Judge Logan

Defendant, Sanchez, was convicted in 1981 on two counts of unlawful possession of food stamps. Sentencing included probation to run until October 31, 1988. Sanchez was arrested and charged with a drug offense, however, on October 27, 1988. Following that arrest, a warrant for his arrest was ordered on October 31, 1988, but not issued until November 2, 1988. After Sanchez was convicted of the drug charge, his probation on the prior conviction was revoked. Sanchez appealed the revocation of probation, arguing that the arrest warrant for the probation revocation was not timely issued.

The Tenth Circuit affirmed the decision of the district court, reasoning that 18 U.S.C. § 3653 was controlling. Although the warrant was not issued during the probation period, it was issued within the statutory maximum probation period of five years and was, therefore, valid. The court determined that the Sentencing Reform Act ("Act"), which replaced § 3653, applies only to "offenses" committed after November 1, 1987. The Act triggering revocation of probation was not an "offense" within the meaning of the Act. Sanchez's offense was the unlawful possession of food stamps years earlier.

United States v. Sardin, 921 F.2d 1064

Author: Judge Seymour

Defendant, Sardin, and two other defendants pleaded guilty to maintaining a crackhouse in return for a dismissal of other counts. Moreover, each defendant also agreed to cooperate with the prosecution. In return, the prosecution agreed not to use, to any of the defendants' disadvantage, information disclosed. The district court subsequently sentenced each defendant. The district court, however, departed upward from the Sentencing Guidelines because of the large quantity of drugs involved. Sardin's sentence deviated from the Sentencing Guidelines by a minimum of eighty-three months, while his two codefendants' sentences deviated by a minimum of only fifteen months and thirty-five months. This occurred despite the fact that the upward departure for each was justified by the same quantity of drugs. On appeal, Sardin argued that information disclosed by his codefendants should not have been used against him and that drug quantity is an impermissible basis for an upward departure from the Sentencing Guidelines.

The Tenth Circuit first stated that the codefendants' statements could be used against him even though Sardin previously disclosed the identical information. Second, quantity of drugs is a valid factor to consider in determining whether an upward departure is appropriate. The court then raised the issue, *sua sponte*, of whether the disparity in sentences was justified. The court noted that a federal appellate court should not consider an issue not raised below. The court, however, may

exercise its discretion to resolve an issue not passed on below which, if not addressed, would otherwise result in manifest injustice. Consequently, the court determined that there was an unaccounted-for difference which existed between the degree of upward departure in Sardin's sentence and his co-defendants' sentence. The court noted that when codefendants have similar criminal histories and engage in the same misconduct, the Sentencing Guidelines mandate the court to avoid unwarranted sentence disparities. Since the record failed to explain the reason for Sardin's disproportionate sentence, the court reversed and remanded for resentencing.

United States v. Smith, 919 F.2d 123

Author: Judge Seymour

Defendant, Smith, pleaded guilty to passing counterfeit notes. As part of Smith's sentence, the district court imposed an alternative fine of \$225,000. On appeal, Smith argued that the district court misapplied the Sentencing Guidelines for fines. Specifically, she alleged that the fine fell outside the applicable range.

The Tenth Circuit ruled that the district court imposed a fine in excess of the maximum established by the Sentencing Guidelines. Accordingly, the court vacated the fine and remanded for further sentencing. The court reasoned that the maximum fine allowed is \$50,000, unless the defendant is convicted under a statute authorizing a maximum fine greater than \$250,000. Smith was convicted under a statute that imposed a fine of \$5,000. Therefore, the guideline for fines was misapplied. The court noted that even if the statute, under which the defendant is convicted, is construed to include the alternative fine statute, the maximum fine allowed is not greater than \$250,000.

United States v. Snell, 922 F.2d 588

Author: Judge McWilliams

Defendant, Snell, was convicted of aiding and abetting. Prior to sentencing, Snell filed a motion for a judgment of acquittal, or, for a new trial. The district court judge denied this motion, and Snell appealed. The district court declared the Sentencing Guidelines unconstitutional as a violation of the separation of powers doctrine. As a result of this, and because Snell made a good faith effort to provide substantial assistance to the prosecution, the district court sentenced Snell below the minimum level established by the Sentencing Guidelines. The government cross-appealed the downward departure in sentencing, claiming the district court acted without authority.

The Tenth Circuit held that it was improper for the district court to make a downward departure in sentencing without a motion filed by the government. The government's appeal was timely and since the Sentencing Guidelines do not violate the separation of powers doctrine, the sentence was vacated and the case remanded for resentencing. The

court affirmed the conviction of Snell after determining there was sufficient evidence of aiding and abetting.

United States v. Sorenson, 915 F.2d 599

Author: Judge McWilliams

Defendant, Sorenson, was sentenced to five years imprisonment after pleading guilty to carrying and using a firearm in relation to a drug trafficking charge, and six months imprisonment after pleading guilty to maintaining a place for the distribution and use of cocaine. Sorenson appealed the district court's denial of his motion to compel the government to file a written motion pursuant to 18 U.S.C. § 3553(e). This statute requires a court to depart below the statutory requirement for criminal sentencing because of a defendant's substantial assistance to the investigation or prosecution of another person. Sorenson maintained that his plea bargain agreement should have included this motion.

The Tenth Circuit affirmed the judgment of the district court. The court held that in a plea bargain, the government is not required to file this motion. Moreover, failure to require this motion was not a violation of Sorenson's substantive or procedural due process rights. The only instance in which the court can impose this requirement on the government is when the defendant's assistance was so substantial as to demand meaningful relief.

United States v. Soto, 918 F.2d 882

Author: Judge Tacha

Defendant, Soto, pleaded guilty to possession with intent to distribute a controlled substance. Soto requested a downward departure from the Sentencing Guidelines based on the possibility of deportation for the drug conviction. The district court decided not to depart downward and sentenced accordingly. Soto appealed, claiming the district court abused its discretion and incorrectly applied the guidelines by not taking into account his possible deportation.

The Tenth Circuit dismissed the case for lack of jurisdiction. The court explained pursuant to 18 U.S.C. § 3742, an appellate court is not granted jurisdiction over a district court's discretionary refusal to depart downward from the Sentencing Guidelines. The court also found no merit in Soto's argument that the refusal to depart downward would result in deportation. The court specifically ruled that a sentencing court shall not consider the possible deportation of an alien resident for a drug conviction in deciding whether to depart downward from the Sentencing Guidelines.

United States v. St. Julian, 922 F.2d 563

Author: Judge Brorby

Defendant, St. Julian, pleaded guilty to maintaining a premises for

the purpose of distributing cocaine base. The adjusted guideline recommended a sentence of thirty to thirty-seven months, but the court imposed a sentence of seventy-two months. St. Julian appealed, arguing that: (1) the district court made an improper upward departure from the Sentencing Guidelines because drug quantity is not an appropriate basis to make this determination when the base offense is maintaining a crackhouse; (2) the district court improperly used drug quantity information obtained under a plea agreement; (3) the district court improperly imposed a two level upward adjustment for St. Julian's failure to appear at a sentencing hearing; and (4) the district court improperly imposed a two level upward adjustment for possession of weapons.

The Tenth Circuit affirmed the district court's upward departure from the Sentencing Guidelines but vacated the sentence and remanded the matter for resentencing. The court reasoned that the district court failed to provide an adequate and specific statement of reasons supporting the particular sentence imposed. The three-step test for departures from the guidelines is: (1) whether the circumstances cited by the district court justify a departure; (2) whether there is a sufficient factual basis for the circumstance cited; and (3) whether the degree of departure is reasonable. Using this three part test, the court ruled that the quantity of drugs involved was an aggravating factor not adequately taken into consideration by the Sentencing Commission. Thus, the circumstance cited by the district court justified a departure. Consequently, there was a sufficient factual basis that St. Julian was involved with a certain amount of cocaine base. The district court, however, did not provide a specific statement of reasons for the particular sentence imposed. The court, therefore, could not perform its duty to determine whether the sentence was unreasonable and outside the Sentencing Guidelines' range. Second, the court found that the district court did not use drug-quantity information obtained from St. Julian pursuant to a plea agreement. The court explained that St. Julian failed to allege any facts that would support his argument that he was the ultimate source of the drug quantity information. Third, St. Julian's wrongful failure to appear at a sentencing hearing was a willful obstruction of justice, justifying a two level upward adjustment. Finally, a two level upward adjustment for possession of a firearm during the commission of the offense was justified. The court explained that it was proper despite the fact that St. Julian was not present when the guns were purchased and was not in possession of the guns when they were confiscated.

United States v. Trujillo, 906 F.2d 1456

Author: Judge Barrett

Defendant, Trujillo, was convicted and sentenced for possession with intent to distribute more than 500 grams of cocaine and aiding and abetting. Trujillo appealed his sentence, arguing that: (1) his acceptance of responsibility should result in a downward departure, and his decision not to make a statement should not be construed as lacking

acceptance of responsibility; (2) the district court abused its discretion when it did not find that there was timely acceptance of responsibility; (3) his sentence should have been the same as his co-defendants, and the inequality violated his due process and equal protection rights; and (4) the district court incorrectly applied the Sentencing Guidelines when it considered the total amount of cocaine found, not just the amount Trujillo pleaded guilty to possessing.

The Tenth Circuit affirmed the district court's sentencing decision. First, the court stated that the sentencing judge is entitled to consider contrition in his sentence reductions. Second, the sentencing court is in the best position to evaluate demeanor, the timeliness of admissions, and the quality of admissions in imposing the sentence. Third, the court stated that no right exists requiring co-defendants to receive the same sentences. Also, the court found there was no violation of due process and equal protection rights because Trujillo had time to contest the probation officer's recommendations before sentencing. Finally, the court ruled that the amount of drugs found can be aggregated for sentencing purposes.

United States v. Valle-Sanchez, 912 F.2d 424

Author: Judge Dumbauld, sitting by designation

During a FBI undercover investigation, an agent saw a stash of cocaine which defendant, Miguel Valle-Sanchez, admitted amounted to a pound. Subsequently, Miguel and Pepe Valle-Sanchez (the "Sanchezes"), pleaded guilty to conspiracy to distribute cocaine. The Sanchezes later argued, however, that the district court erroneously calculated the amount of cocaine on which their sentences were based. Specifically, they argued that: (1) their sentences should not be based on a larger quantity of drugs than the amount specified in the indictment; (2) only quantities seized or tested and analyzed should be used in determining their sentences; and (3) the addition of the pound in the calculation violated the plea agreement.

The Tenth Circuit affirmed the district court's decision. The Sentencing Guidelines provide that the court has the discretion to take into account conduct for which the defendant is not formally charged. Second, the court ruled that it is not necessary to include only the substances seized in the sentencing calculation. Finally, the court stated that Miguel's admission to possessing a pound of cocaine was prior to the plea agreement. Therefore, the agreement was not violated.

United States v. Vanderlaan, 921 F.2d 257

Author: Judge Brown, sitting by designation

Defendant, Vanderlaan, appealed his sentence of 210 months for bank robbery. Vanderlaan contended that the district court erred in counting a 1973 conviction for career offender liability. Vanderlaan argued that the conviction was barred from consideration because it was too remote in time. Specifically, he alleged that the conviction did not

result in a "sentence of imprisonment" within the fifteen year time period because he was sentenced to drug rehabilitation instead of incarceration.

The Tenth Circuit affirmed the sentence. Upon *de novo* review of the Sentencing Guidelines, the court ruled that a restricted drug treatment program, granted in lieu of a prison term, is in fact a "sentence of incarceration" and could be correctly counted as a previous offense. The court explained that the Sentencing Guidelines make no distinction between "sentences of imprisonment" and other types of sentences. Thus, the court stated that Vanderlaan's sentence was a "sentence of imprisonment" that resulted in his incarceration within the fifteen years of the commission of the instant offense. Accordingly, he was correctly labeled a career offender.

United States v. White, 893 F.2d 276

Author: Judge Tacha

Defendant, White, pleaded guilty to bank robbery. White appealed the district court's imposition of a forty-six month prison term arguing that the upward departure from the Sentencing Guidelines was unreasonable and clearly erroneous.

The Tenth Circuit held that the departure from the Sentencing Guidelines was reasonable. The court used a three-step process to determine if the district court's departure was warranted: (1) mitigating circumstances not adequately taken into account by the Sentencing Commission must justify a departure; (2) circumstances cited by the district court to justify a departure must actually exist in the instant case; and (3) the degree of departure from the Guidelines must be reasonable. On *de novo* review, the court first held that White's criminal history category score, as calculated under the Sentencing Guidelines, underrepresented the seriousness of his criminal history. Second, the court stated that White did not dispute the existence of previous forgery charges or the instant aggravated robbery charge. Also, the court was not erroneous in concluding that White was out on bail at the time of the instant offense. Third, the district court closely followed the Sentencing Guidelines' policy statement when it imposed the forty-six month sentence.

United States v. Williams, 922 F.2d 578

Author: Judge Brorby

Defendant, Williams, pleaded guilty to two bank robbery counts. Williams was previously convicted for four separate bank robberies. According to the Sentencing Guidelines, therefore, Williams's recommended sentence was thirty-seven to forty-six months. The probation officer, however, suggested an upward departure from the Sentencing Guidelines because he believed the recommendation did not reflect the seriousness of Williams's past conduct or the likelihood that Williams would commit another crime. The district court agreed and sentenced

Williams under the career criminal provisions of the Sentencing Guidelines. On appeal, Williams argued that the upward departure was not warranted.

The Tenth Circuit reviewed the upward departure under a three-part test. First, the district court must articulate circumstances which warrant departure and which are not adequately considered by the Sentencing Guidelines. Second, factual findings of the district court must not be clearly erroneous. Third, the degree of departure must be reasonable. The court found that the district court satisfied this test. Williams's record satisfied the first two requirements, and the district court acted reasonably in following the career criminal guidelines in determining the sentence.

United States v. Zamarripa, 905 F.2d 337

Author: Judge Seymour

Defendant, Zamarripa, pleaded guilty to abusive sexual contact in violation of 18 U.S.C. §§ 7(3), 2244(a)(1), and 2245(3). The district court subsequently sentenced Zamarripa, departing upward from the Sentencing Guidelines. Zamarripa appealed, challenging the upward departure.

The Tenth Circuit held that the district court's upward departure was proper if it: (1) ascertained the sentence under the Sentencing Guidelines; (2) addressed the applicable adjustments; and (3) explained the particular circumstances present to support a departure and why the circumstances were not adequately addressed by the adjustments built into the Sentencing Guidelines. The court was unclear as to precisely which guideline the district court was departing from, since several different guideline applications were possible. Consequently, the court vacated the sentence and remanded for resentencing.