

FEDERAL CRIMINAL SENTENCING
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I. SENTENCING LAW IN THE TENTH CIRCUIT, POST-GALL

A. General principles

1. The sentencing court must consider the advisory sentencing guideline range in deciding upon an appropriate sentence , and that range must be calculated correctly. United States v. Munoz-Nava, 524 F.3d 1137, 1146 (10th Cir. 2008).
2. The sentencing court must consider the factors set out in 18 U.S.C. § 3553(a) in deciding upon an appropriate sentence. Munoz-Nava, 524 F.3d at 1146.
3. A sentencing court's decision to impose a sentence outside the advisory sentencing guideline range may be based on factors disfavored by the guidelines and on factors already taken into account by the guidelines. Munoz-Nava, 524 F.3d at 1148 (disfavored factors); United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008) (factors already taken into account).
4. The sentencing court may impose a sentence outside the advisory sentencing guideline range even if there is nothing extraordinary or unusual about the defendant or the case. Smart, 518 F.3d at 808.
5. The sentencing court may impose a sentence outside the advisory sentencing guideline range to account for unwarranted disparity between the defendant's sentence and that of a co-defendant. Smart, 518 F.3d at 804.

6. The sentencing court may impose a sentence outside the advisory sentencing guideline range if it concludes that the disparity between the crack guidelines and the powder-cocaine guidelines yields a sentence greater than necessary to achieve the purposes of sentencing set out in 18 U.S.C. § 3553(a). United States v. Trotter, 518 F.3d 773 (10th Cir. 2008).

B. Review of the sentence

1. Standard of review

- a. The Tenth Circuit reviews a sentence first for procedural reasonableness and then for substantive reasonableness. Munoz-Nava, 524 F.3d at 1146.
- b. The Tenth Circuit reviews a district court's legal conclusions regarding the advisory sentencing guidelines *de novo* and its factual findings for clear error. United States v. Todd, 515 F.3d 1128, 1139 (10th Cir. 2008).

2. Procedural reasonableness

- a. A sentence is procedurally unreasonable if the sentencing court commits significant procedural error. Significant procedural error includes: (1) improperly calculating the advisory sentencing guideline range; (2) treating the guidelines as mandatory; (3) failing to consider the sentencing factors set out in 18 U.S.C. § 3553(a); (4) selecting a sentence based on clearly erroneous facts; and (5) failing to adequately explain the reasons for the chosen sentence, including the reasons for any variance from the advisory sentencing guideline range. Munoz-Nava, 524 F.3d at 1147.
- b. Significant procedural error occurs if the sentencing court refuses to consider the specific nature and circumstances of the offense conduct, including whether the offense committed was more or less heinous than offenses

committed by other defendants convicted under the same statute. United States v. Cerno, 529 F.3d 926, 938-39 (10th Cir. 2008).

- c. The announcement of an alternative sentence based on the exercise of Booker discretion does not render a guideline-calculation error harmless if the sentencing court provides no more than a perfunctory explanation for the alternative sentence. United States v. Pena-Hermosillo, 522 F.3d 1108, 1117-18 (10th Cir. 2008).

3. Substantive reasonableness

- a. A sentence is substantively unreasonable if its imposition constitutes an abuse of discretion. Munoz-Nava, 524 F.3d at 1146.
- b. A sentencing court abuses its discretion if the sentence imposed is arbitrary, capricious, whimsical, or manifestly unreasonable, Munoz-Nava, 524 F.3d at 1146, or if the sentence manifests a clear error of judgment or is outside the range of possible outcomes the facts and law at issue can fairly support. Todd, 515 F.3d at 1135 n.3.
- c. After Gall, both within-guidelines sentences and outside-the-guidelines sentences are reviewed for abuse of discretion. Given that both types of sentences are reviewed under the same standard, the effect of the Tenth Circuit's presumption of reasonableness for within-guidelines sentences is a "puzzle." Todd, 515 F.3d at 1134 n.4.
- d. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." Munoz-Nava, 524 F.3d at 1146.

II. RESULTS OF SUBSTANTIVE REASONABLENESS APPEALS IN THE TENTH CIRCUIT, POST-GALL (through August 18, 2008)

A. Totals

	<u>Sentences held substantively reasonable</u>	<u>Sentences held substantively unreasonable</u>
Upward variances	5	0
Downward variances	9	0
Within-guidelines sentences	<u>58</u>	<u>0</u>
	= 72	= 0

B. Upward variances held substantively reasonable

1. United States v. Doe, 262 Fed.Appx. 86, 2008 WL 116291 (10th Cir. 2008) (upward variance from 108-month high end of guideline range to 236 months)
2. United States v. White, 265 Fed Appx. 719, 2008 WL 410682 (10th Cir. 2008) (upward variance from 60-month high end of guideline range to 147 months)
3. United States v. Taghizadeh, 2008 WL 1790191 (10th Cir. 2008) (upward variance from 121-month high end of guideline range to 216 months)
4. United States v. Wittig, 528 F.3d 1280 (10th Cir. 2008) (upward variance from 6-month high end of guideline range to 24 months)
5. United States v. Scott, 529 F.3d 1290 (10th Cir. 2008) (upward variance from 87-month high end of guideline range to 120 months)

C. Downward variances held substantively reasonable

1. United States v. Martinez, 2008 WL 55990 (10th Cir. 2008) (downward variance from guideline sentence of life to 20 years)
2. United States v. Smart, 518 F.3d 800 (10th Cir. 2008) (downward variance from 168-month low end of guideline range to 120 months)
3. United States v. Valdez, 269 Fed.Appx. 805, 2008 WL 695540 (10th Cir. 2008) (downward variance from 360-month low end of guideline range to 215 months)
4. United States v. Silva-Torres, 271 Fed.Appx. 736, 2008 WL 794858 (10th Cir. 2008) (downward variance from 41-month low end of guideline range to 33 months)
5. United States v. Rodriguez-Ramirez, 271 Fed.Appx. 813, 2008 WL 904663 (10th Cir. 2008) (downward variance from 15-month low end of guideline range to 10 months)
6. United States v. Bejar, 2008 WL 1735154 (10th Cir. 2008) (downward variance from 70-month low end of guideline range to 60 months)
7. United States v. Armendariz-Castillo, 2008 WL 1766791 (10th Cir. 2008) (downward variance from 46-month low end of guideline range to 41 months)
8. United States v. Munoz-Nava, 524 F.3d 1137, 2008 WL 1947011 (10th Cir. 2008) (downward variance from 46-month low end of guideline range to 12 months)
9. United States v. Huckins, 529 F.3d 1312 (10th Cir. 2008) (downward variance from 78-month low end of guideline range to 18 months)