FILED
United States Court of Appeals
Tenth Circuit

August 26, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY WAYNE NOLES,

Defendant - Appellant.

No. 25-6082
(D.C. No. 5:23-CR-00522-JD-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

After being charged in a 14-count indictment, Defendant Jerry Wayne Noles entered into a plea agreement under which he pleaded guilty to one count of conspiracy to commit bank fraud. The district court sentenced him to 40 months' imprisonment. On appeal Defendant raises two challenges to his sentence. He asserts that the government breached its promise to "not further prosecute" him for certain conduct specified in his plea agreement when it relied on that conduct during sentencing. Aplt. App., Vol. I at 64. And he argues that his sentence was

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

substantively unreasonable. Exercising jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Defendant and his daughter were indicted in the United States District Court for the Western District of Oklahoma on 14 counts alleging fraudulent conduct and money laundering. We supplement the abbreviated allegations in the indictment with the account in the probation office's presentence investigative report (PSR). Although Defendant has contended that the district court should not have considered alleged criminal conduct to which he did not plead guilty, he has not disputed on appeal the factual accuracy of the PSR account. The common thread of the misconduct is that Defendant repeatedly falsified information (such as his income and number of employees) and used loan proceeds contrary to the designated purpose of the loans.

To begin with, Defendant misused a revolving line of credit for his business (Coil Chem) from First National Bank & Trust Co. (FNB) by transferring $250,000 from the line of credit to his personal account to fund construction of the home of him and his wife. He then sought a $1.2 million loan from FNB for home construction without disclosing that he had used funds from Coil Chem's line of credit. Defendant's loan application inflated his income by at least 50%. A year later Defendant sought a second home-construction loan from FNB and again falsely inflated his income.

Later, Defendant defrauded the federal Paycheck Protection Program (PPP), a COVID-19 program that provided forgivable loans to small businesses to help cover payroll costs and other business expenses. He submitted two applications for PPP loans in which he inflated Coil Chem's payroll costs and number of employees, and he used most of the loan proceeds to repay his personal debts, while employees were missing paychecks. Defendant also used company credit cards to pay for personal expenses, and the company took out loans in the names of two fired executives who denied signing for the loans.

Once Defendant and his company were in such financial straits that they could not obtain credit, his daughter formed a new company that paid Defendant a $300,000 salary (and his daughter, $250,000) despite operating at a loss. Defendant enticed an investor by telling him that Defendant was working on securing a large contract with the United Nations, which Defendant was never awarded. And Defendant's daughter sent inflated reports of the company's expenses to the investor to receive more money.

Finally, Defendant filed for bankruptcy. His filings grossly understated his income (omitting his salary from the new company) and falsely omitted information about prior lawsuits.

Following lengthy plea negotiations, Defendant entered into a plea agreement with the government. The government would dismiss the indictment, and he would plead guilty to an information charging him on one count of conspiring with an unindicted co-conspirator (his wife) to commit acts of bank fraud relating to the FNB loans, thereby fixing his maximum sentence at five years' imprisonment.

II. DISCUSSION

A. Breach of Plea Agreement

Defendant contends that the government breached the plea agreement by making certain statements at the sentencing hearing. He relies on ¶ 24 of the agreement, which provides:

> [T]he United States will move to dismiss at sentencing the Indictment returned by a federal grand jury on December 19, 2023, in this case, and *the United States Attorney's Office* for the Western District of Oklahoma *will not further prosecute* Defendant for any crimes related to: (l) Defendant's submission of false statements to FNB on or about November 16, 2015, and on or about December 5, 2016; [2] Defendant's submission of false statements in connection with two Payment Protection Program ("PPP") applications on or about April 7, 2020, and on or about March 2, 2021; [3] Defendant's transfer of PPP proceeds on or about April 8, 2020, and on or about March 4, 2021; or [4] Defendant's false attestations in connection with his Chapter 7 bankruptcy case, *In re Jerry W. Noles*, case No. 22-11808-SAH. This Plea Agreement does not provide any protection against prosecution for any crime not specifically described above.

Aplt. App., Vol. I at 64 (emphasis added).

We ordinarily evaluate a plea agreement "using general principles of contract law to focus on the express language and construing any ambiguities against the government as the drafter of the agreement." *United States v. Wilson*, 137 F.4th 1127, 1136–37 (10th Cir. 2025) (brackets and internal quotation marks omitted). "Our review is through the lens of the defendant's reasonable understanding of the plea agreement." *Id.* at 1137 (internal quotation marks omitted). The government cannot escape compliance by relying on a "rigidly literal construction," but we will not impose obligations on the government "that are not an express or implied part of its agreement with the defendant." *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997) (internal quotation marks omitted).

Because, as Defendant acknowledges, he did not raise in district court his contention that the government breached the plea agreement, we review only for plain error. *See United States v. Ruiz*, 125 F.4th 1342, 1348 (10th Cir. 2025). "Under this standard of review, we reverse only when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1348 (internal quotation marks omitted). A "plain" error is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). "Not all breaches [of plea agreements] will be clear or obvious," as when "the scope of the Government's commitments [are] open to doubt." *Id.* at 143.

During sentencing, the government referenced conduct underlying counts in the dismissed indictment to argue that Defendant should receive a steeper sentence. To Defendant, this advocacy fell within the ordinary meaning of *prosecute*, which he defines as "'to accuse [a person] of some crime or breach of law or to pursue for redress or punishment of a crime or violation of law.'" Aplt. Br. at 37 (brackets in brief) (emphasis omitted) (quoting *Prosecute*, *Webster's Third New International Dictionary* 1820 (2002)).[1] But he points to no case where a court determined that the

[1] The quoted language is taken from definition 3.a in the dictionary, which states in full: "to institute legal proceedings against; *esp*: to accuse of some crime or

government broke a promise not to prosecute conduct by discussing that conduct during sentencing. He cites only cases discussing the government's general obligation to abide by terms of a plea agreement.

The government counters that a promise not to prosecute precludes only bringing additional charges, not sentencing advocacy. The government relies on the definitions of *prosecute* in the leading legal dictionary: "(1) To *commence* and carry out (*a legal action*)"; "(2) To *institute* and pursue a *criminal action* against (a person)"; and "(3) To engage in; carry on." *Prosecute, Black's Law Dictionary* 1478 (12th ed. 2024) (emphasis added). There is also support for the government's position in two circuit opinions that have rejected arguments like Defendant's. *See United States v. Streich*, 560 F.3d 926, 930 (9th Cir. 2009) (no breach of promise not to prosecute conduct when government "highlighted" conduct to advocate for longer sentence); *United States v. Allen*, 75 F.3d 439, 442 (8th Cir. 1996) (no breach of promise not to prosecute offenses when government "allow[ed] the allegations of the [offenses] to be considered as relevant conduct in calculating the amount of loss to the victims" because agreement was "subject to" sentencing guidelines (internal quotation marks omitted)); *cf. United States v. Salazar*, 909 F.2d 1447, 1448, 1449 (10th Cir. 1990) (government promise "not to bring further charges against defendant" did not restrict government from expressing its views on what sentence would be appropriate (emphasis and internal quotation marks omitted)). "When no authority from the Supreme Court or this circuit would compel a

---

breach of law or to pursue for redress or punishment of a crime or violation of law in due legal form before a legal tribunal <*prosecuted* them for fraud>."

determination that there was error and there is contrary authority in other circuits, the error can rarely be plain." *United States v. De Vaughn*, 694 F.3d 1141, 1159 (10th Cir. 2012) (internal quotation marks omitted).

Moreover, other provisions of the plea agreement eliminate any potential ambiguity. One paragraph of the plea agreement announces that the government was preparing to present to the court additional evidence of misconduct, stating that the government would stop investigating Defendant, "except insofar as required to prepare for further hearings in this case, including but not limited to sentencing." Aplt. App., Vol. I at 60.

And, most significantly, in the paragraph immediately following the promise not to prosecute, the government "reserves the right to inform . . . the Court of the nature and extent of Defendant's activities with respect to this case and all other activities of Defendant that the United States deems relevant to sentencing." *Id.* at 64–65. The phrase "Defendant's activities with respect to this case" contains no qualification with respect to the activities that the government agreed not to prosecute, and the language "all other activities" that the government "deems relevant to sentencing" emphasizes the absence of any restriction on the conduct to which the government can refer in sentencing.

In allowing the prosecution to comment at sentencing on other criminal activity by Defendant, the district court committed no error, much less plain error.

B. Substantive Reasonableness

Defendant asserts that his sentence is substantively unreasonable. We disagree.

"We review the substantive reasonableness of a sentence for abuse of discretion." *United States v. Sample*, 901 F.3d 1196, 1199 (10th Cir. 2018). "This is a deferential standard: a district court's sentence is substantively unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable," although we will not be simply "a rubber stamp." *Id.* at 1199 (internal quotation marks omitted).

"Review for substantive reasonableness focuses on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *Id.* at 1199 (internal quotation marks omitted). Those factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) just punishment (retribution), (b) deterrence, (c) incapacitation, and (d) rehabilitation; (3) the kinds of sentences available; (4) the Sentencing Commission Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need for restitution.

United States v. Cookson, 922 F.3d 1079, 1092 (10th Cir. 2019) (citation and internal quotation marks omitted); *see* 18 U.S.C. § 3553(a). These "statutory factors do not necessarily bear equal weight." *United States v. Zamora-Guerra*, 169 F.4th 1026, 1032 (10th Cir. 2026). "[W]e examine the totality of the circumstances, which includes the extent of a variance the district court makes from the Guideline sentencing range. Although we may presume a sentence within the Guideline range is reasonable, we do not presume a sentence is unreasonable when a district court varies from the Guideline range." *Id.* at 1029.

The PSR recommended a base offense level of 6 under USSG § 2B1.1(a)(2) for bank fraud, an 8-level increase under USSG § 2B1.1(b)(1)(E) because the intended loss (after credits for sales of collateral) was between $95,000 and $150,000, a 2-level increase under USSG § 3B1.1(c) for Defendant's leadership of the conspiracy, a 3-level decrease under USSG § 3E1.1(a)–(b) for accepting responsibility, and a 10-level gross-receipts enhancement that applies when a defendant "derived more than $1,000,000 in gross receipts" from bank fraud, USSG § 2B1.1(b)(17)(A),[2] for a total offense level of 23. Because Defendant had no criminal history, his criminal-history category was I. This led to a recommended guidelines advisory range of 46 to 57 months' imprisonment.

The PSR recommended the gross-receipts enhancement because the proceeds from the FNB bank loans exceeded $1 million. But Defendant objected that the loan went for a home half-owned by his wife, so he benefited by less than $1 million. At the sentencing hearing the district court sustained Defendant's objection.[3] Without the enhancement, the guidelines advisory range became 12–18 months' imprisonment. The court said, however, that it could still consider the size of the benefit in determining whether to impose a variance. And the government argued that the court *should* impose a sentence in the range that would result if the enhancement

[2] USSG § 2B1.1(b)(17)(A) provides for a 2-level increase unless the resulting offense level is less than 24. If it is less than 24, the offense level is increased to 24, USSG § 2B1.1(b)(17)(D), which resulted in a 10-level increase here.

[3] The government does not challenge this ruling on appeal.

applied. In that argument, it again referenced the charges and facts underlying the indictment.

The district court acknowledged its "statutory duty to impose a sentence sufficient for [Defendant] but not greater than necessary to fulfill the objectives of sentencing," Aplt. App., Vol. II at 68–69, and it said that it was considering the sentencing factors set forth in 18 U.S.C. § 3553 and the arguments of the parties. It discussed the nature and circumstances of the offense, mentioned the original indictment, and discussed "the specifics of [Defendant's] conspiracy to commit bank fraud offense," including how he took his company's loan to pay for home construction and how he obtained a separate construction loan without disclosing that he had already used his company's loan to pay for a portion of the construction. *Id.* at 71. It stated that Defendant's conduct "was motivated by greed and deception" and that he "personally benefited from the fraud." *Id.* It characterized Defendant's arguments as seeming to blame FNB, the lender, in an attempt to "diminish the crime." *Id.* at 72. In sum, the court emphasized that it "view[ed] the nature and circumstances of the offense as aggravating and serious, and that really [could not] be lost in everything else that [it was] going to say." *Id.* It was "the serious nature of [Defendant's] crime of conspiracy to commit bank fraud" and the need to "promote respect for the law and provide a just punishment for that offense" that "deserve[d] significant weight" in the sentencing calculus. *Id.*

The district court then considered, "to a lesser extent," the need for general deterrence (that is, the need for the sentence to deter others from committing like offenses). *Id.* at 73. In favor of Defendant, it noted his age (almost 62), his lack of criminal history, and his community service. On the other hand, "there [was] this span of criminal conduct that was indicted by the grand jury but to which [Defendant] did not plead guilty to." *Id.* at 76. While the judge was "careful not to overweigh criminal conduct for which there has been no finding of guilt," the conduct gave the court "pause." *Id.* at 77. In the end, it said, "there [we]re facts that cut both ways," so specific deterrence (that is, deterrence of Defendant himself) and public protection were "not the most important sentencing factors in [its] decision." *Id.*

The district court also "considered the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* But, it said, "by focusing on sentencing you as an individual, I am not concerned that I will create any unwarranted disparities. If there are disparities, they are warranted based on individual case differences." *Id.* at 77–78.

The district court sentenced Defendant to 40 months' imprisonment. It later filed a "Statement of Reasons" for the upward variance, listing "Dismissed/Uncharged Conduct," the "extent of fraudulent behavior," and "[t]o reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Aplt. App., Vol. III at 205.

Considering "the totality of the circumstances," this sentence was substantively reasonable. *Zamora-Guerra*, 169 F.4th at 1032. One could have concerns about the sentence if Defendant's fraud was limited to the two loans mentioned in the conspiracy count to which he pleaded guilty. But that offense was not a one-off. The uncharged misconduct described in the PSR indicates that Defendant for a significant period of time was a liar and a cheat of grand proportions. And even though the gross-receipts enhancement (which would have led to an advisory guideline range greater than his sentence) may not have been technically applicable, the purpose of the enhancement (to assure proper punishment of one responsible for fraudulent benefits exceeding $1 million) would encompass Defendant's conduct, where his "co-conspirator" spouse appeared to have little involvement except following Defendant's instructions and sharing a home with him.

Nonetheless, Defendant advances three arguments against the substantive reasonableness of his sentence. First, he argues that the district court did not consider gross receipts in sentencing him, pointing out that it did not reference gross receipts when stating its justifications for the sentence. But the court explicitly stated at the hearing that it could consider the gross receipts and that it considered the government's arguments, which encouraged it to sentence Defendant as if the enhancement applied. We see no reason to decline to consider the gross-receipts factor in assessing the substantive reasonableness of the sentence here.

Second, Defendant contends that the district court "failed to sufficiently address the unwarranted sentencing disparities that may result from its chosen sentence." Aplt. Br. at 27. He relies on Judiciary Sentencing Information (JSIN) data, pointing out that out of 994 defendants sentenced under his guideline, with the same criminal history and offense level, only 62% were sentenced to imprisonment and the average imprisonment term was eight months. Defendant's 40-month sentence was therefore five times higher than the average sentence. We are not persuaded.

To begin with, Defendant never mentioned JSIN statistics below. He correctly notes that we can take judicial notice of the statistics. *See United States v. Guevara-Lopez*, 147 F.4th 1174, 1186 n.7 (10th Cir. 2025). But even if we "have discretion to take judicial notice of the data because it's publicly filed," when reviewing for substantive reasonableness we "focus on what the parties had presented in district court; after all, the court couldn't abuse its discretion by failing to consider facts not presented." *United States v. Doty*, 150 F.4th 1351, 1357 (10th Cir. 2025) (brackets and internal quotation marks omitted).

True, sentencing courts are instructed to avoid "'unwarranted sentencing disparities among defendants with *similar* records who have been found guilty of similar conduct.'" *United States v. Cortez*, 139 F.4th 1146, 1156 (10th Cir. 2025) (quoting 18 U.S.C. § 3553(a)(6)). But the bare statistics referenced by Defendant cannot establish such disparities. (How many of the defendants in the JSIN statistics had obtained highly favorable plea agreements?) "Tenth Circuit precedent forecloses Defendant's disparity argument" when he "fails to show how he is similarly situated with those of the national average." *Id.*; *see also Zamora-Guerra*, 169 F.4th at 1036 ("Where, as here, the district court makes an individualized assessment of the defendant and justifies the upward variance, bare national statistics that tell us nothing personalized about the defendant do not aid us").

Third, Defendant argues that the district court "gave undue weight to evidence that [Defendant] had allegedly committed other unadjudicated and non-relevant offenses." Aplt. Br. at 27. This could occur if "the district court essentially abandoned consideration of the advisory guidelines range and substituted a calculation based explicitly on unrelated conduct with which [the defendant] had not been charged or convicted." *United States v. Allen*, 488 F.3d 1244, 1259 (10th Cir. 2007). But that was hardly the case here. At most, the district court considered the unadjudicated conduct to place Defendant's adjudicated guilt in context.

III. CONCLUSION

We **AFFIRM** the district court's judgment.

Entered for the Court

Harris L Hartz
Circuit Judge