INTERACTIVE

Case Law Update

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Case Law Update provides brief summaries of select Supreme Court and appellate court decisions that involve the guidelines and other aspects of federal sentencing. Each quarterly release is replaced with a cumulative update. Cases appear in descending chronological order within a circuit. The Commission publishes this document to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission and it should not be considered definitive or comprehensive.

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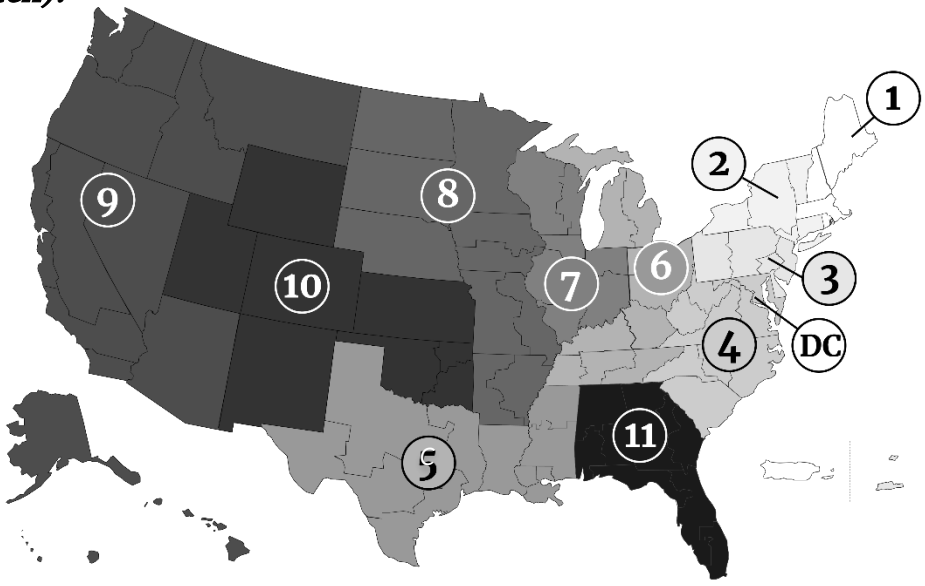

Cases appear in descending chronological order within a circuit.

U.S. Supreme Court

Lora v. United States, 143 S. Ct. 1713 (2023)	The concurrent-sentence bar in 18 U.S.C. § 924(c)(1)(D)(ii) does not extend to convictions under 18 U.S.C. § 924(j). "Congress plainly chose a different approach to punishment in subsection (j) than in subsection (c)." Therefore, a court may run a section 924(j) sentence concurrently or consecutively.

Appellate Court

Career Offender

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Menéndez-Montalvo, 88 F.4th 326 (1st Cir. 2023)	A violation of Article 3.1 of Puerto Rico Domestic Violence Law 54 is not a "crime of violence" under §4B1.2—and thus not a Grade A violation under §7B1.1(a)(1)—"because the degree of force sufficient to support a conviction [for that offense] is less than the amount of 'physical force' necessary to satisfy the Guidelines' definition of a 'crime of violence.'"
United States v. Williams, 80 F.4th 85 (1st Cir. 2023)	Massachusetts assault with a dangerous weapon remains a "crime of violence" under the elements clause of §4B1.2 after *Borden v. United States*, 141 S. Ct. 1817 (2021), and *United States v. Taylor*, 142 S. Ct. 2015 (2022). Maine robbery with the use of a dangerous weapon also is a "crime of violence" under §4B1.2's elements clause.

Second Circuit

United States v. Chaires, 88 F.4th 172 (2d Cir. 2023)	The defendant's prior state court narcotics convictions could not serve as career offender predicate offenses under §4B1.1, as the convictions were "brought under a state provision [N.Y. Penal Law § 220.39(1)] that is categorically broader" than the definition of "controlled substance offense" in §4B1.2(b) because it includes cocaine isomers not covered by the federal Controlled Substances Act.
United States v. Gibson, 60 F.4th 720 (2d Cir. 2023)	On panel rehearing, the Second Circuit declined the government's request to classify as dicta its prior ruling that in deciding whether a prior state offense is a "controlled substance offense" under §4B1.2(b), courts should not use the time of the prior offense as the comparison point between the state and federal controlled substance schedules.

Third Circuit

United States v. Amos, 88 F.4th 446 (3d Cir. 2023)	Second-degree aggravated assault in violation of 18 Pa. Cons. Stat. § 2702(a)(3) is not a "crime of violence," as defined in §4B1.2(a), for purposes of §2K2.1(a)(4)(A).
United States v. Henderson, 80 F.4th 207 (3d Cir. 2023)	Pennsylvania robbery under 18 Pa. Const. Stat. § 3701(a)(1) is divisible and subsection (ii) qualifies as a "crime of violence" under §4B1.2(a)'s elements clause because it "contemplates a level of force that is capable of causing physical pain or injury" and "embodies an intentional mens rea."
United States v. Henderson, 64 F.4th 111 (3d Cir. 2023)	As previously held in *United States v. Abreu*, 32 F.4th 271 (3d Cir. 2022), §4B1.2(a)'s definition of "crime of violence" excludes conspiracies. Contrary to the government's suggestion, *United States v. Preston*, 910 F.2d 81 (3d Cir. 1990)—which held that conspiracy to commit robbery qualified as a predicate under the Armed Career Criminal Act—no longer controls because it conflicts with the Supreme Court's later decisions in *United States v. Mathis*, 579 U.S. 500 (2016), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
United States v. Brasby, 61 F.4th 127 (3d Cir. 2023)	A state crime that can be committed with extreme indifference recklessness qualifies as a "crime of violence" for purposes of §4B1.2(a). Applying the categorical approach, the Third Circuit examined the Model Penal Code, learned treatises, and its own multijurisdictional survey and found that the elements of the defendant's prior New Jersey aggravated assault offense were a categorical match with the elements of the generic federal offense of aggravated assault. Accordingly, the prior offense qualified under §4B1.2(a).
United States v. Lewis, 58 F.4th 764 (3d Cir. 2023)	A "controlled substance" for purposes of the definition of "controlled substance offense" in §4B1.2 includes substances regulated by either state or federal law at the time of the prior conviction, not at the time of the instant sentencing.

Fourth Circuit

United States v. Miller, 75 F.4th 215 (4th Cir. 2023)	The district court correctly applied §2K2.1(a)(4)(A) based on the defendant's prior "controlled substance offense" under a North Carolina statute that prohibits selling or delivering—defined as "the actual[,] constructive, or attempted transfer" of—a controlled substance. The statute does not include attempt offenses, which would render it a categorical mismatch with §4B1.2(b), because North Carolina separately criminalizes attempt offenses.
United States v. Davis, 72 F.4th 605 (4th Cir. 2023)	Under the South Carolina drug distribution statute, a conviction for "attempted transfer" of cocaine base is a completed distribution offense—not an attempted distribution—and thus qualifies as a career offender predicate "controlled substance offense" under §4B1.2(b).
United States v. Groves, 65 F.4th 166 (4th Cir. 2023)	"[A]n offense prosecuted on an aiding and abetting theory can qualify as a 'controlled substance offense' under [§]4B1.2(b)" because "the inclusion of aiding and abetting in

	Application Note 1 was not an effort to improperly expand [§]4B1.2(b)'s definition of a 'controlled substance offense.'" The Fourth Circuit distinguished its prior opinion in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), which held that attempt offenses listed in Application Note 1 cannot qualify as a "controlled substance offense." Unlike an attempt offense, aiding and abetting is not a standalone offense, but rather a "theory of criminal liability for an underlying substantive offense."
Fifth Circuit	
United States v. Vargas, 74 F.4th 673 (5th Cir. 2023) (en banc)	Application Note 1 to §4B1.2, which further defines "controlled substance offense" to include inchoate offenses, is entitled to deference under *Stinson v. United States*, 508 U.S. 36 (1993). In so holding, the Fifth Circuit joins the First, Second, Seventh, and Tenth Circuits and splits with the Third, Sixth, Ninth, Eleventh, and D.C. Circuits, with Fourth Circuit opinions on both sides of the split.
Sixth Circuit	
United States v. Jones, 81 F.4th 591 (6th Cir. 2023)	The term "controlled substance offense" in §4B1.2(b) can include a "state-law controlled substance offense" "even if it defines a controlled substance differently from the Controlled Substances Act." In so holding, the Sixth Circuit agreed with the Third, Fourth, Seventh, Eighth, and Tenth Circuits and split with the Second, Fifth, and Ninth Circuits, which define the term "controlled substance" in the guidelines only by reference to federal law.
United States v. Carter, 69 F.4th 361 (6th Cir. 2023)	Ohio robbery is a categorical match for the definition of "extortion" in §4B1.2, and therefore is a "crime of violence." Though sharing the same name, Ohio robbery need not be a match for guidelines robbery; it suffices that it is a match for extortion.
Seventh Circuit	
United States v. Brown, 74 F.4th 527 (7th Cir. 2023)	A conviction for Illinois vehicular hijacking remains a "crime of violence" under §4B1.2(a)(1) after *Borden v. United States*, 141 S. Ct. 1817 (2021).
Eighth Circuit	
United States v. Goforth, 87 F.4th 380 (8th Cir. 2023)	Kidnapping in violation of Arizona Revised Statutes § 13-1304 is a "crime of violence" as defined in §4B1.2(a)(2) for purposes of the alternative base offense level of 20 at §2K2.1(a)(4)(A).
United States v. Campos, 79 F.4th 903 (8th Cir. 2023)	A violation of Texas Health and Safety Code § 481.112(a) for "offering to sell a controlled substance" is not an attempt to commit a "controlled substance offense" for purposes of §4B1.2(b) because a section 481.112(a) offense can be committed "without having the intent to distribute or dispense drugs."

United States v. Cungtion, 72 F.4th 865 (8th Cir. 2023)	*Borden v. United States*, 141 S. Ct. 1817 (2021), did not overrule *United States v. Clark*, 1 F.4th 632 (8th Cir. 2021), which held that a conviction under Iowa Code § 708.4(2) for "inten[tionally]" causing "bodily injury" necessarily involves the use of physical force. Accordingly, such a conviction qualifies as a "crime of violence" under §4B1.2(a).
United States v. Green, 70 F.4th 478 (8th Cir. 2023)	Assault while displaying a dangerous weapon in violation of Iowa Code § 708.2(3) is a "crime of violence" for purposes of §4B1.2(a) because using or displaying a dangerous weapon to another "in an angry or threatening manner qualifies as a threatened use of physical force," as held in *United States v. McGee*, 890 F.3d 730, 736–37 (8th Cir. 2018).

Ninth Circuit

United States v. Castro, 71 F.4th 735 (9th Cir. 2023)	Montana partner or family member assault is not categorically a "crime of violence" under §4B1.2(a)(1) because it can be committed by "nothing more than causing mental anguish through nonviolent conduct."
United States v. Castillo, 69 F.4th 648 (9th Cir. 2023)	"[T]he text of §4B1.2 unambiguously does not include inchoate offenses," and courts are "no longer permitted to rely on the commentary of an unambiguous guideline after *Kisor [v. Wilke*, 139 S. Ct. 2400 (2019)]," therefore a conviction for conspiracy to distribute is not a "controlled substance offense." In holding that Application Note 1 to §4B1.2 is not entitled to deference, the Ninth Circuit joined the Third, Fourth, Sixth, Eleventh, and D.C. Circuits and split with the First, Second, Seventh, Eighth and Tenth Circuits.

Tenth Circuit

United States v. Maloid, 71 F.4th 795 (10th Cir. 2023)	The district court properly deferred to Application Note 1 to §4B1.2, which defines the term "crime of violence" to include inchoate offenses, because *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), "did not abrogate" *Stinson v. United States*, 508 U.S. 36 (1993). As a result, the *Guidelines Manual*'s commentary "governs unless it runs afoul of the Constitution or a federal statute or is plainly erroneous or inconsistent with the guideline provision it addresses."
United States v. Brooks, 67 F.4th 1244 (10th Cir. 2023)	Oklahoma aggravated assault and battery is not a "crime of violence" [within the meaning of §4B1.2(a)] for the purposes of §2K2.1(a)(4)(A).

Eleventh Circuit

United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc)	"[T]he plain language definition of 'controlled substance offense' in §4B1.2 unambiguously excludes inchoate offenses," and there is "no need to consider, much less defer to, the commentary in Application Note 1." The court overruled its prior precedent, which had held that "the commentary in Application Note 1 constitutes a binding interpretation of §4B1.2(b)," concluding that its prior holdings were "incongruous with *Kisor* [*v. Wilkie*, 588 U.S. __ (2019)]." This case deepens a circuit split between the Third (en banc), Fourth,

	Sixth (en banc), and D.C. Circuits—with which the Eleventh Circuit agrees—and the First, Second, Seventh, Eighth (en banc), and Ninth Circuits.
United States v. Harrison, 56 F.4th 1325 (11th Cir. 2023)	Georgia's robbery statute is divisible under *Mathis v. United States*, 579 U.S. 500 (2016), and robbery by intimidation qualifies as a "crime of violence" under the enumerated clause in §4B1.2(a)(2).

Categorical Approach

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

United States v. Gomez, 87 F.4th 100 (2d Cir. 2023)	A conviction for intentional murder under New York law based on a *Pinkerton* [*v. United States*, 328 U.S. 640 (1946),] theory of liability categorically qualifies as a "crime of violence" under 18 U.S.C. § 924(c) and does not conflict with *United States v. Davis*, 149 S. Ct. 2319 (2019).
United States v. Pastore, 83 F.4th 113 (2d Cir. 2023)	Under the modified categorical approach, a conviction for violating 18 U.S.C. § 1959(a)(5) (Violent crimes in aid of racketeering) premised upon an attempted murder under New York law is a "crime of violence" for purposes of 18 U.S.C. § 924(c). Attempted murder under New York law remains a "crime of violence" after *United States v. Taylor*, 142 S. Ct. 2015 (2022), because it requires a substantial step towards the *use* (not mere threat) of force.
United States v. Minter, 80 F.4th 406 (2d Cir. 2023)	A prior conviction for sale of cocaine under New York law is not a "serious drug offense" under the Armed Career Criminal Act because New York law includes all isomers of cocaine while the Controlled Substances Act only regulates optical and geometric isomers of cocaine.
United States v. Davis, 74 F.4th 50 (2d Cir. 2023)	The murder in aid of racketeering (VICAR murder) statute, 18 U.S.C. § 1959(a)(1), is divisible, and the defendant's underlying New York intentional second-degree murder conviction is a "crime of violence" for purposes of 18 U.S.C. § 924(c).
Colotti v. United States, 71 F.4th 102 (2d Cir. 2023)	New York larceny by extortion is divisible, and the form committed by threat of physical injury to a person is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).
United States v. Eldridge, 63 F.4th 962 (2d Cir. 2023)	Kidnapping in the second degree under New York law is not categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because it can be committed through deception. Accordingly, the defendant's kidnapping in aid of racketeering charge, which was based on this offense, could not serve as a predicate under 18 U.S.C. § 924(c)(1)(A)(ii).

United States v. Collymore, 61 F.4th 295 (2d Cir. 2023)	The holding of *United States v. Taylor*, 142 S. Ct. 2015 (2022), that attempted Hobbs Act robbery is not a "crime of violence," required that the court vacate the defendant's convictions for violating 18 U.S.C. §§ 924(c) (possession of a firearm during a crime of violence) and 924(j)(1) (causing a death during a section 924(c) violation) premised upon an attempted Hobbs Act robbery.
United States v. Morris, 61 F.4th 311 (2d Cir. 2023)	A VICAR assault offense is divisible into assault with a deadly weapon and assault resulting in serious bodily injury; assault with a deadly weapon is further divisible based on the underlying statute. Accordingly, a defendant's conviction of 18 U.S.C. § 924(c) was supported where the predicate VICAR assault with a deadly weapon was in turn predicated on a state crime that met the definition of a "crime of violence."
United States v. McCoy, 58 F.4th 72 (2d Cir. 2023)	Following *United States v. Taylor*, 142 S. Ct. 2015 (2022), 18 U.S.C. § 924(c) convictions premised on completed Hobbs Act robberies remain valid. Recent circuit precedent holding that Hobbs Act robbery is not a "crime of violence" under §4B1.1, which limits the term to force against a person, is not inconsistent because section 924(c)'s definition of "crime of violence" includes force against a person or property.
Hall v. United States, 58 F.4th 55 (2d Cir. 2023)	The holding of *United States v. Davis*, 139 S. Ct. 2319 (2019)—that the residual clause in 18 U.S.C. § 924(c) is unconstitutionally vague—applies retroactively to cases on collateral review. Applying *Davis* and *United States v. Taylor*, 142 S. Ct. 2015 (2022), the defendant's prior offenses of conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery do not qualify as "crimes of violence" under section 924(c).

Third Circuit

United States v. Jordan, 88 F.4th 435 (3d Cir. 2023)	An armed bank robbery in violation of 18 U.S.C. § 2113(d), a divisible statute, that is predicated on section 2113(a)'s first paragraph "always involves purposely or knowingly using, attempting to use, or threatening to use force" and is therefore a "crime of violence" under 18 U.S.C. § 924(c).
United States v. Stevens, 70 F.4th 653 (3d Cir. 2023)	Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c) even when it is predicated on an aiding and abetting or *Pinkerton* [*v. United States*, 328 U.S. 640 (1946)] conspiracy theory of guilt.
United States v. Jenkins, 68 F.4th 148 (3d Cir. 2023)	Second-degree aggravated assault in violation of 18 Pa. Cons. Stat. § 2702(a)(3) is not a "violent felony" under the Armed Career Criminal Act (ACCA) because it can be violated by a failure to act.
United States v. Stoney, 62 F.4th 108 (3d Cir. 2023)	A completed Hobbs Act robbery is categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because it requires proof of "the use, attempted use, or threatened use of physical force."

Fourth Circuit

United States v. Thomas, 87 F.4th 267 (4th Cir. 2023)	Assault with a dangerous weapon under the Violent Crimes in Aid of Racketeering Activity (VICAR) statute, 18 U.S.C. § 1959(a)(3), remains a "crime of violence" pursuant to the force clause of 18 U.S.C. § 924(c)(3) after *United States v. Davis*, 139 S. Ct. 2319 (2019). Because it so qualifies, the district court was not required to look to the elements of the predicate state offense underlying the VICAR conviction.
United States v. McDaniel, 85 F.4th 176 (4th Cir. 2023)	Assault on a federal officer under 18 U.S.C. § 111 is categorically a "crime of violence" pursuant to 18 U.S.C. § 924(c)(1)(A) because section 111 is a divisible statute in which a section 111(b) enhanced felony assault requires intentional violent force.
United States v. Redd, 85 F.4th 153 (4th Cir. 2023)	Maryland first-degree assault is not categorically a "violent felony" under the Armed Career Criminal Act (ACCA) because the state statute "is indivisible and can be violated in a manner that does not satisfy the force clause": the least culpable conduct, assault with a firearm, can be committed with a mens rea of recklessness.
United States v. Ogle, 82 F.4th 272 (4th Cir. 2023)	Tennessee aggravated assault qualifies as a predicate "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) (the ACCA) because the statute includes an element of threatened use of force capable of causing physical pain or injury to another person.
United States v. Green, 67 F.4th 657 (4th Cir. 2023)	While Hobbs Act robbery satisfies the elements clause in 18 U.S.C. § 924(c)(3)(A), neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery are valid predicate offenses, thus requiring vacatur of the defendant's 18 U.S.C. § 924(j) conviction pursuant to a timely 28 U.S.C. § 2255 motion.
United States v. Ivey, 60 F.4th 99 (4th Cir. 2023)	Because Hobbs Act robbery requires intentional conduct and cannot be committed recklessly, *United States v. Borden*, 141 S. Ct. 1817 (2021), does not undermine circuit precedent holding that Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

Fifth Circuit

United States v. Villarreal, 87 F.4th 689 (5th Cir. 2023)	After *Borden v. United States*, 141 S. Ct. 1817 (2021), convictions for aggravated assault under Texas Penal Code §§ 22.02(a)(1) and 22.02(a)(2) cannot constitute predicate offenses under 18 U.S.C. § 924(e), the Armed Career Criminal Act, "because the offenses do not require the 'physical use of force against the person of another.'"
United States v. Alkheqani, 78 F.4th 707 (5th Cir. 2023)	*Wooden v. United States*, 142 S. Ct. 1063 (2022), did not abrogate *Shepard v. United States*, 544 U.S. 13, 16 (2005), which permits a court considering Armed Career Criminal Act predicate offenses "to examine only 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to

	which the defendant assented.'" Therefore, a district court errs in relying on the presentence report alone to determine if predicate offenses occurred on separate occasions.
United States v. Powell, 78 F.4th 203 (5th Cir. 2023)	Texas robbery-by-threat remains a "violent felony" under the Armed Career Criminal Act's elements clause after *United States v. Taylor*, 142 S. Ct. 2015 (2022).
United States v. Hill, 63 F.4th 335 (5th Cir. 2023)	"[T]he substantive equivalence of aiding and abetting liability with principal liability means that aiding and abetting Hobbs Act robbery is, like Hobbs Act robbery itself, a crime of violence" under the elements clause of 18 U.S.C. § 924(c). However, in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), "*attempted* Hobbs Act robbery does not qualify as a crime of violence under the elements clause."

Sixth Circuit

United States v. Jamison, 85 F.4th 796 (6th Cir. 2023)	A juvenile conviction for carrying or possessing a firearm in the commission or attempted commission of a felony under Michigan law qualifies as a "violent felony" under the ACCA where the underlying felony so qualifies. Michigan second-degree murder qualifies as a "violent felony" because it "(1) requires a level of culpability almost indistinguishable from purposeful or knowing, and (2) necessarily involves the use of force."
Nicholson v. United States, 78 F.4th 870 (6th Cir. 2023)	Conspiracy to commit a violent crime in aid of racketeering, 18 U.S.C. § 1959(a)(6) (VICAR), is not a "crime of violence" for purposes of 18 U.S.C. § 924(c) because mere agreement to use force does not necessitate the "use, attempted use, or threatened use of physical force." However, aiding and abetting a VICAR assault with a dangerous weapon is a "crime of violence" for purposes of section 924(c) because the government must prove that the underlying assault—which itself is a "crime of violence"—occurred, and there is no distinction between aiding and abetting such a crime and committing it.
United States v. Wilkes, 78 F.4th 272 (6th Cir. 2023)	The term "geometric isomers" in the Controlled Substances Act covers "diastereomers," a type of stereoisomer, of cocaine. Therefore, a Michigan statute prohibiting cocaine and its "stereoisomers" is not broader than the definition of "serious drug offense" under the Armed Career Criminal Act (ACCA).
United States v. Smith, 70 F.4th 348 (6th Cir. 2023)	North Carolina assault with a deadly weapon with intent to kill and inflicting serious injury is a categorical match for the definition of "violent felony" in 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or "ACCA").
Banuelos-Jimenez v. Garland, 67 F.4th 806 (6th Cir. 2023)	Arkansas third degree assault, which has as an element "purposely create[ing] apprehension of imminent physical injury," necessarily involves "threatened use of physical force," and therefore is a "crime of violence" under 18 U.S.C. § 16.

United States v. White, 58 F.4th 889 (6th Cir. 2023)	An Ohio aggravated robbery conviction does not qualify as a "violent felony" for purposes of 18 U.S.C. § 924(e) because Ohio aggravated robbery does not require that force is used knowingly or intentionally, rather than recklessly.

Seventh Circuit

United States v. Hatley, 61 F.4th 536 (7th Cir. 2023)	Hobbs Act robbery is a "violent felony" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or "ACCA"). Where committed by force against property, Hobbs Act robbery fits within ACCA's enumerated offense of "extortion" because the generic definition of extortion—taking through wrongfully induced consent—encompasses a taking against someone's will. This holding is "broadly consistent" with the Ninth, Tenth, and Fifth Circuits and a criminal law treatise, while the Fourth and Sixth Circuits have found a "categorical mismatch based partly on the same discrepancy between a nonconsensual taking and a taking with a victim's wrongfully induced consent."

Eighth Circuit

Janis v. United States, 73 F.4th 628 (8th Cir. 2023)	Second-degree murder under 18 U.S.C. § 1111(a) is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Because section 1111(a) "requires malice aforethought, the crime always involves 'consciously directed' force [as outlined in *Borden v. United States*, 141 S. Ct. 1817 (2021),] and thus constitutes a 'crime of violence' under § 924(c)'s force clause."
United States v. Lung'aho, 72 F.4th 845 (8th Cir. 2023)	Arson under 18 U.S.C. § 844(f)(1) is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because the required mental state—"maliciously"—does not necessarily involve the "use, attempted use, or threatened use of physical force against the person or property of another." While malice "involves a higher level of risk than recklessness," under *Borden v. United States*, 141 S. Ct. 1817 (2021), "neither requires actors to 'consciously direct[]' their acts towards a specific person or property" or "an intentional act designed to cause harm."

Ninth Circuit

United States v. Eckford, 77 F.4th 1228 (9th Cir. 2023)	Aiding and abetting Hobbs Act robbery, like Hobbs Act robbery, is a "crime of violence" under the elements clause of 18 U.S.C. § 924(c). "[E]ven though accomplice liability presents an alternative means of committing an offense, that alternative means of commission does not affect whether the predicate offense 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another,'" and is not irreconcilable with *United States v. Taylor*, 142 S. Ct. 2015 (2022), which dealt instead with the inchoate crime of attempted Hobbs Act robbery.

Tenth Circuit

United States v. Kepler, 74 F.4th 1292 (10th Cir. 2023)	Second-degree murder is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) and is, therefore, a predicate offense for the defendant's 18 U.S.C. § 924(j)(1) conviction for causing death by discharging a firearm during a "crime of violence."
United States v. Gallimore, 71 F.4th 1265 (10th Cir. 2023)	Under *Wooden v. United States*, 142 S. Ct. 1063 (2022), which requires a multifactored analysis to identify whether prior violent felonies were committed on "separate occasions" pursuant to 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or "ACCA"), either time or place may be dispositive. Here, both time—distinct calendar days—and place—different locations—"decisively differentiate[d]" the defendant's three burglaries.
United States v. Williams, 61 F.4th 799 (10th Cir. 2023)	When assessing whether a prior state drug conviction categorically qualifies as a "serious drug offense" under the ACCA—which defines a "controlled substance" by reference to the federal Controlled Substance Act—courts must compare "the state drug schedules in effect at the time of [the] prior convictions and the federal drug schedules in effect at the time [of] the instant federal offense." In so holding, the Tenth Circuit joined the Third and Eighth Circuits, and split from the Eleventh Circuit (time of prior state conviction) and the Fourth Circuit (time of federal sentencing).

Eleventh Circuit

United States v. Wiley, 78 F.4th 1355 (11th Cir. 2023)	Aiding and abetting a completed Hobbs Act robbery continues to constitute a "crime of violence" under 18 U.S.C. § 924(c) after *United States v. Taylor*, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery is not a "crime of violence."
United States v. Gary, 74 F.4th 1332 (11th Cir. 2023)	Florida aggravated assault qualifies as a "violent felony" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA") because the "statute requires an intentional threat to use violence against another person."
Somers v. United States, 66 F.4th 890 (11th Cir. 2023)	Florida aggravated assault "requires a *mens rea* of at least knowing conduct and, accordingly, . . . it qualifies as an ACCA predicate offense under *Borden v. United States*, 141 S. Ct. 1817 (2021)."
United States v. Penn, 63 F.4th 1305 (11th Cir. 2023)	A Florida sale-of-cocaine offense qualifies as a "serious drug offense" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or "ACCA") because "attempted transfers of a controlled substance[,] [which the Florida statute prohibits,] are 'distributing' as ACCA uses the term."

Chapter Three Adjustments

D.C. Circuit

United States v. Mohammed, 89 F.4th 158 (D.C. Cir. 2023)	The district court properly applied §3A1.4(a)—for "a felony that involved, or was intended to promote, a federal crime of terrorism"—to a defendant who intended to promote, but was not convicted of, such a crime. While Congress directed the Commission to amend the terrorism adjustment, which previously referred to "international terrorism," so that it "only applies to Federal crimes of terrorism," it did not "unambiguously direct that [§3A1.4] requires conviction of a federal crime of terrorism." There was "no plain error in the Commission's 1996 amendment" setting forth the current language in §3A1.4.

First Circuit

United States v. Vaquerano, 81 F.4th 86 (1st Cir. 2023)	"[T]he minor-use enhancement [at §3B1.4] is valid as applied to defendants ages 18 to 21." This provision permissibly implements "in broader form" a congressional directive that the Commission provide a sentencing enhancement for "a defendant 21 years of age or older . . . if the defendant involved a minor in the commission of the offense."

Second Circuit

United States v. Strange, 65 F.4th 86 (2d Cir. 2023)	"[T]he submission of false information to a sentencing court, if it would have been capable of influencing the sentence, is a valid basis for applying" the obstruction of justice enhancement, §3C1.1. Where the defendant received this enhancement based on forged letters, and that conduct was similar to the offense of conviction, the district court properly concluded that the defendant's case was not the "extraordinary" one in which an adjustment for acceptance of responsibility under §3E1.1 applied despite the §3C1.1 adjustment.

Third Circuit

United States v. Mercado, 81 F.4th 352 (3d Cir. 2023)	The district court did not clearly err in relying on post-plea misconduct—a consideration listed in Application Note 1 to §3E1.1—to deny a §3E1.1(a) reduction. Section 3E1.1(a) is "genuinely ambiguous," and the non-exhaustive list of considerations in Application Note 1 is "reasonable" and "invokes the [] Commission's 'substantive expertise.'" Thus, Application Note 1 to §3E1.1 is entitled to "controlling weight."

Fourth Circuit

United States v. Henderson, 88 F.4th 534 (4th Cir. 2023)	Where a defendant fled from law enforcement—without evidence that the defendant acted recklessly or created a substantial risk of death or bodily injury—and a firearm was subsequently found, application of the enhancement for reckless endangerment pursuant to §3C1.2, which requires "flight-plus-something-more," was erroneous.

Fifth Circuit

United States v. Mendoza-Gomez, 69 F.4th 273 (5th Cir. 2023)	The defendant's flight from U.S. Border Patrol was not obstructive conduct under §3C1.1 but rather "a 'spur of the moment' decision that 'reflect[ed] panic.'"
	When the defendant "physically prevented" a U.S. Border Patrol agent from arresting another member of his group, the defendant "obstructed justice in an offense that was closely related to" his conviction under 18 U.S.C. § 111 for assaulting the same agent. Therefore, the conduct was "properly categorized as an obstruction of justice under §3C1.1."
United States v. Melendez, 57 F.4th 505 (5th Cir. 2023)	A defendant who discarded several ounces of methamphetamine from a vehicle during a police chase and did not "ensure that the discarded drugs could not be consumed and pose a danger to others" plausibly had "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Therefore, the district court correctly applied a two-level adjustment under §3C1.2.

Sixth Circuit

United States v. Sykes, 65 F.4th 867 (6th Cir. 2023)	The obstruction of justice adjustment under §3C1.1 applied where the defendant sought to have the victim discuss her testimony with his attorney, claimed he "had a dream that she did not come to court," and told her she could invoke her right to silence or "say whatever she desired."

Seventh Circuit

No cases selected by Commission staff.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

United States v. Klensch, 87 F.4th 1159 (9th Cir. 2023)	The district court improperly relied on the defendant's conduct as a courier of illegal aliens as dispositive in denying a minor role adjustment at §3B1.2 despite clarification in the commentary that "perform[ing] an essential or indispensable role . . . is not determinative."
United States v. Vinge, 85 F.4th 1285 (9th Cir. 2023)	The level of control required for a defendant to qualify as an organizer (as opposed to a leader) under subsection §3B1.1(c) is only "the ability and influence necessary to coordinate the activities of others to achieve the desired result."

Tenth Circuit

United States v. Brown, 85 F.4th 1291 (4th Cir. 2023)	The §3C1.2 adjustment for reckless endangerment during flight "may be applied to conduct found relevant under §1B1.3(a)(2)," which here included defendant's prior high-speed flights from law enforcement.
United States v. Walker, 74 F.4th 1163 (10th Cir. 2023)	The district court correctly applied §3A1.3 (Restraint of Victim) where the "defendant had held the victim's wrist and chin, prevented him from moving, and force fed him to the point of choking."
United States v. Hunsaker, 65 F.4th 1223 (10th Cir. 2023)	Enhancement of the defendant's offense level pursuant to §3B1.1(b) was erroneous because the defendant was not a "manager or supervisor" of "one or more other participants" in a drug trafficking organization as required by Application Note 2 to §3B1.1. Conclusory statements regarding the defendant's title within the organization, and his intimate connection to co-conspirators, were insufficient to establish the enhancement's applicability.

Eleventh Circuit

	No cases selected by Commission staff.

Compassionate Release

D.C. Circuit

United States v. Wilson, 77 F.4th 837 (D.C. Cir. 2023)	"[W]e conclude that Section 3582(c)(1)(A) is a nonjurisdictional claim-processing rule," as have all other circuits to have decided the question, so "we need not reach whether it requires defendants to exhaust each issue." Further, because circuit precedent prohibits consideration of changes in law, "this Court does not decide whether [appellant's] contentions would constitute extraordinary and compelling reasons under the not-yet-effective guidelines" that allow such consideration.

First Circuit

United States v. Rivera-Rodríguez, 75 F.4th 1 (1st Cir. 2023)	"[C]ompassionate release appealability, 'like appealability with respect to the disposition of virtually all other post-judgment motions, is governed by 28 U.S.C. § 1291.'" Further, no statute bars a district court from exercising jurisdiction over motions to reconsider compassionate release motions, and "reconsideration denial falls within the purview of 28 U.S.C. § 1291 finality considerations."
United States v. Gonzalez, 68 F.4th 699 (1st Cir. 2023)	"[W]hile courts should still follow the 'any complex of circumstances' approach under [*United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022)] for as long as no applicable policy statement applies to prisoner-initiated motions for compassionate release, this approach should be shaped by the arguments advanced by defendants." Where the defendant "made it clear . . .

	that he meant to advance two alternative arguments, one for immediate release predicated on COVID-19 concerns and another for a reduced sentence based on the sentencing disparity," the district court acted reasonably in analyzing these two arguments separately.

Second Circuit

	No cases selected by Commission staff.

Third Circuit

United States v. Stewart, 86 F.4th 532 (3d Cir. 2023)	The Supreme Court's decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), did not disturb the holding in *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), that "neither the length of a lawfully imposed sentence nor any nonretroactive change to mandatory minimum sentences" qualifies as an "extraordinary and compelling reason" warranting relief. In reaching this result, the Third Circuit expressly did not consider the effect on *Andrews* of the Commission's recent amendment expanding the list of reasons to include "unusually long sentences."

Fourth Circuit

United States v. Brown, 78 F.4th 122 (4th Cir. 2023)	The Fourth Circuit reversed and remanded with instructions to grant the defendant's compassionate release motion and reduce his sentence by twenty years because the "sheer and unusual length" of his mandatory minimum 30-year sentence for two counts of possessing a firearm in furtherance of a drug trafficking crime—a "clear 'gross disparity'" with similarly situated defendants sentenced under current law who would be subject to ten years total—warranted relief.
United States v. Mangarella, 57 F.4th 197 (4th Cir. 2023)	Because it was unclear whether the district court considered the defendant's particular heightened susceptibility to COVID-19 under the 18 U.S.C. § 3553(a) factors, the district court did not set forth enough analysis to allow for meaningful appellate review of its denial of compassionate release.
United States v. Malone, 57 F.4th 167 (4th Cir. 2023)	The district court abused its discretion by failing to sufficiently consider relevant 18 U.S.C. § 3553(a) factors that "clearly favor release"—including the defendant's degenerated health, advanced age, and placement on home confinement by the Bureau of Prisons pursuant to the CARES Act—while deciding the defendant's successive request for compassionate release.
United States v. Bond, 56 F.4th 381 (4th Cir. 2023)	The district court did not abuse its discretion when it denied the defendant's request for compassionate release after properly considering, among other sentencing factors, the benefit negotiated pursuant to his original plea agreement.

Fifth Circuit

United States v. McMaryion, 64 F.4th 257 (5th Cir. 2023)	"[A] prisoner may not leverage non-retroactive changes in criminal law to support a compassionate release motion, because such changes are neither extraordinary nor compelling." Therefore, the defendant was not entitled to a sentence reduction on the ground that "the First Step Act reduced the statutory minimums applicable to his offenses."
United States v. Escajeda, 58 F.4th 184 (5th Cir. 2023)	"[A] prisoner cannot use [18 U.S.C.] § 3582(c) to challenge the legality or duration of his sentence; such arguments can, and hence *must*, be raised" on direct appeal or under chapter 153 of title 28. Because the defendant's claims that his sentence exceeded the statutory maximum and that he received ineffective assistance of counsel would have been cognizable under 28 U.S.C. § 2255, they are not cognizable under section 3582(c).

Sixth Circuit

United States v. West, 70 F.4th 341 (6th Cir. 2023)	Sentencing error—in this case, a presumed violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—is not an "extraordinary and compelling reason" warranting compassionate release.

Seventh Circuit

United States v. Vaughn, 62 F.4th 1071 (7th Cir. 2023)	In assessing whether a movant has demonstrated extraordinary and compelling reasons warranting compassionate release, "a combination of factors may move any given prisoner past [the threshold], even if one factor alone does not." The district court, properly under existing circuit precedent, refused to consider the effect of a nonretroactive change in law, but "[a]ll of the other considerations [raised by the defendant] . . . were taken into account." The district court did not commit clear error or abuse its discretion in holding "they f[e]ll short."
United States v. Williams, 62 F.4th 391 (7th Cir. 2023)	"[A] defense of failure to exhaust under § 3582(c)(1)(A) is timely if raised by the United States at its first opportunity, even if that opportunity does not come until briefing on appeal."
United States v. Von Vader, 58 F.4th 369 (7th Cir. 2023)	Arguments about whether a defendant continues to be a career offender under *Johnson v. United States*, 576 U.S. 591 (2015), or *Mathis v. United States*, 579 U.S. 500 (2016), should be pursued on collateral review under 28 U.S.C. § 2255, not in a compassionate release motion under 18 U.S.C. § 3582(c)(1). And "§ 3582(c) assuredly is not a means to obtain indirect review of a district court's ruling, in an action filed under § 2255, that the prisoner is not entitled to equitable tolling of the statutory time limit."

Eighth Circuit

United States v. Rodriguez-Mendez, 65 F.4th 1000 (8th Cir. 2023)	*Concepcion v. United States*, 142 S. Ct. 2389 (2022), is not relevant to the threshold question of whether a defendant has established an "extraordinary and compelling reason" for a sentencing reduction under 18 U.S.C. § 3582(c)(1)(A). As a result, *Concepcion* did not

	overrule *United States v. Crandall*, 25 F.4th 582 (8th Cir. 2022), which held that a non-retroactive change in a sentencing law, whether alone or in combination with other factors, does not contribute to a finding of "extraordinary and compelling reasons" for a sentencing reduction.

Ninth Circuit

United States v. Roper, 72 F.4th 1097 (9th Cir. 2023)	District courts may consider non-retroactive changes in post-sentencing decisional law affecting the guidelines in determining whether "extraordinary and compelling reasons" exist for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). In reaching this conclusion, the Ninth Circuit noted that some circuits have "kept the door open" to these motions, while others have held that such decisional law cannot be considered.

Tenth Circuit

United States v. Wesley, 60 F.4th 1277 (10th Cir. 2023)	"[A]n 18 U.S.C. § 3582(c)(1)(A)(i) motion may not be based on claims specifically governed by 28 U.S.C. § 2255." In so holding, the Tenth Circuit agreed with "holdings or considered dicta from the Second, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits," but split with the First Circuit.

Eleventh Circuit

	No cases selected by Commission staff.

Criminal History

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

	No cases selected by Commission staff.

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit	
United States v. Fowler, 58 F.4th 142 (4th Cir. 2023)	The district court did not plainly err when it assigned one criminal history point pursuant to §4A1.1(c) for a prior criminal domestic violence offense involving a diversionary disposition in reliance on limited information contained in the PSR where the defendant made no showing that the information was unreliable.
Fifth Circuit	
	No cases selected by Commission staff.
Sixth Circuit	
United States v. Rogers, 86 F.4th 259 (6th Cir. 2023)	As a matter of first impression, the Sixth Circuit held that for the purposes of §4A1.2(a)(2), an intervening "arrest" means "placing someone in police custody as part of a criminal investigation."
United States v. Hinojosa, 67 F.4th 334 (6th Cir. 2023)	Whether a defendant's prior conviction resulted in his being incarcerated within 15 years of his current offenses—and therefore scored for criminal history purposes—depends upon §4A1.2(e)'s standards rather than state standards for assessing criminal history. The district court erred by relying on state law.
Seventh Circuit	
United States v. Claybron, 88 F.4th 1226 (7th Cir. 2023)	Remand for resentencing under 28 U.S.C. § 2106 was appropriate where Amendment 821 would lower the defendant's guideline range and the defendant filed his appeal before the amendment was proposed. While the defendant could file a motion under 18 U.S.C. § 3582(c) to seek relief under the amendment, there is "no difference between that statute and § 2106," as "the same relief would be available under either statutory path," and "no reason why remand under § 2106 is unjust or imprudent, particularly where it promotes judicial economy."
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
United States v. Sadler, 77 F.4th 1237 (9th Cir. 2023)	Application Note 6 to §4A1.2, which excludes sentences from convictions that have "been ruled constitutionally invalid in a prior case," does not create a right to collaterally challenge the validity of a prior conviction used for purposes of calculating criminal history. Even if a prior felon-in-possession conviction was imposed in contravention to *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that conviction must have been ruled invalid in a prior case to be

	excluded; it is not sufficient "that there is precedent that, through a process of inference, undermines the foundations on which that conviction rests."

Tenth Circuit

	No cases selected by Commission staff.

Eleventh Circuit

United States v. Jews, 74 F.4th 1325 (11th Cir. 2023)	An Alabama youthful offender adjudication is not an "adult" conviction for purposes of §2K2.1 or §4A1.2 under the multi-factor test set forth in *United States v. Pinion*, 4 F.3d 941 (11th Cir. 1993).

Drug Offenses

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Fitzpatrick, 67 F.4th 497 (1st Cir. 2023)	Under §5C1.2(a)(2), "a firearm can be possessed 'in connection with the offense' . . . so as to foreclose the availability of the safety valve even if the weapon was not possessed during the commission of the specific transaction that underlies the count that carried the mandatory minimum sentence." "This result inures because the guidelines define 'offense' to include both 'the offense of conviction and all relevant conduct.'"
United States v. Melendez-Rosado, 57 F.4th 32 (1st Cir. 2023)	"[A] premises that serves both as a family's place of residence and as the hub of a drug-distribution enterprise has two principal uses." And "[t]he fact that one principal use is for drug distribution permits a sentencing court to impose the stash-house enhancement" under §2D1.1(b)(12).

Second Circuit

United States v. Vinales, 78 F.4th 550 (2d Cir. 2023) (per curiam)	The applicability of the increase for maintaining a premises for manufacturing or distributing a controlled substance, §2D1.1(b)(12), is determined under a "totality of the circumstances" test and the factors in Application Note 17 to §2D1.1.
United States v. Helm, 58 F.4th 75 (2d Cir. 2023)	Section 1B1.3(a)(1)(A) does not include a scienter requirement as to the drug type involved in a nonpossessory context, such as where a defendant "who—without ever coming into actual or constructive possession—agrees to purchase a quantity of drugs." A court at sentencing must consider the quantity of drugs with which a defendant is directly and personally involved even if he lacks knowledge of the specific drug type and did not personally possess all the drugs involved.

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit

United States v. Wysinger, 64 F.4th 207 (4th Cir. 2023)	Determination of whether a prior conviction for a "felony drug offense" qualifies for enhanced punishment pursuant to 21 U.S.C. § 841(b)(1)(C) requires comparison of the elements of the defendant's prior offense with the criteria specified in 21 U.S.C. § 802(44), using definitions in section 802, rather than definitions under state law.

Fifth Circuit

	No cases selected by Commission staff.

Sixth Circuit

United States v. Taylor, 85 F.4th 386 (6th Cir. 2023)	The "drug-house enhancement," §2D1.1(b)(12), applied even though the defendant did not reside in or have a possessory interest in the house, where he exerted sufficient control over the house by threatening the resident into allowing drug storage. The enhancement for using "fear, impulse, friendship, affection, or some combination thereof" to involve another in the offense, §2D1.1(b)(16)(A), also applied based on this conduct, where the resident had minimal knowledge of the enterprise and distanced herself from the drug activities in her house.
United States v. Terry, 83 F.4th 1039 (6th Cir. 2023)	The "drug house" enhancement, §2D1.1(b)(12), may apply based on a small number of drug sales at the residence, including those made only by the defendant's co-conspirator.
United States v. Reed, 72 F.4th 174 (6th Cir. 2023)	The district court erred in finding that the offense involved 4.5 kilograms of actual methamphetamine, where the parties stipulated only to the purity of 2.665 kilograms of methamphetamine and "there was no evidence in the record about the purity" of additional amounts.
United States v. McReynolds, 69 F.4th 326 (6th Cir. 2023)	Defendant was not responsible for all drug quantities involved in a conspiracy where the evidence as to the scope of the conspirator's agreement with the defendant established only that the defendant knew of the conspiracy, not that he was a participant.
United States v. Kennedy, 65 F.4th 314 (6th Cir. 2023)	For the firearms enhancement at §2D1.1(b)(1) to apply in the context of a long-running drug trafficking conspiracy, the government must prove some nexus between the firearm possession and "the defendant's activities in pursuit of the conspiracy." The government met that standard, "albeit barely," where it showed constructive possession of firearms and text messages on the same day discussing drug trafficking.

United States v. Reinberg, 62 F.4th 266 (6th Cir. 2023)	A defendant was not eligible for safety-valve relief where the district court could plausibly conclude she withheld information about a potential firearm transaction, and she failed to present evidence to the contrary.

Seventh Circuit

United States v. Bingham, 88 F.4th 1220 (7th Cir. 2023)	A defendant is not necessarily ineligible for safety valve relief under 18 U.S.C. § 3553(f) based solely on the applicability of the firearms enhancement at §2D1.1(b)(1). Joining all other circuits to have addressed this issue, the Seventh Circuit held "that the no-firearms condition in [§ 3553(f)(2)] is narrower than the firearms enhancement and does not impute reasonably foreseeable acts of co-conspirators to a defendant" as §2D1.1(b)(1) does.
United States v. Granger, 70 F.4th 408 (7th Cir. 2023)	The district court erred by holding a defendant accountable, under relevant conduct principles, for the drug quantity of the whole conspiracy during his participation without addressing what conduct was "reasonably foreseeable" to this defendant.

Eighth Circuit

United States v. Shelton, 82 F.4th 1294 (8th Cir. 2023)	A BB gun is a "dangerous weapon" for purposes of §2D1.1(b)(1). The guidelines explicitly state that a BB gun is "a dangerous weapon but not a firearm." USSG §1B1.1, comment. (n.1(H)). Additionally, a BB gun is a "dangerous weapon" because it is "capable of inflicting . . . serious bodily injury." USSG §1B1.1. comment. (n.1(E)).

Ninth Circuit

United States v. Alaniz, 69 F.4th 1124 (9th Cir. 2023)	The enhancement at §2D1.1(b)(1) for possession of a dangerous weapon at the time of a felony drug offense is constitutional "because it clearly comports with a history and tradition of regulating the possession of firearms during the commission of felonies involving a risk of violence," under *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).
United States v. Salazar, 61 F.4th 723 (9th Cir. 2023)	The district court erred when it failed to make a finding under 18 U.S.C. § 3553(f) that the defendant had made a truthful proffer before applying the safety valve, having found such a proffer would be futile. "[T]here is no futility exception to the proffer requirement" under section 3553(f)(5), and defendants need to provide all information relevant to the offense, whether or not relevant or useful to the government.

Tenth Circuit

United States v. Martinez, 82 F.4th 994 (10th Cir. 2023)	The district court erroneously determined that the defendant was ineligible for relief under §5C1.2(a)(2), which provides that the defendant must not "possess a firearm or other dangerous weapon . . . in connection with the offense" to qualify for the guideline safety valve, because "mere constructive possession" and no more, without knowledge of the

	firearm or exclusive possession of the property on which the firearms were found, was insufficient to disqualify the defendant.

Eleventh Circuit

	No cases selected by Commission staff.

Economic Crimes

D.C. Circuit

United States v. Otunyo, 63 F.4th 948 (D.C. Cir. 2023)	Under §2B1.1(a)(1), "an offense referenced to this guideline" refers to "any one" of the defendant's convictions, not the "most serious" offense within a group under the guidelines. Application of the sophisticated means enhancement (§2B1.1(b)(10)(C)) together with the enhancement for sophisticated money laundering (§2S1.1(b)(3)) was not double counting where the money laundering was sophisticated for separate reasons than the sophisticated means for the underlying bank fraud.

First Circuit

United States v. Gadson, 77 F.4th 16 (1st Cir. 2023)	The district court did not plainly err in using "intended loss" rather than "actual loss" to determine the base offense level under §2B1.1. Circuit precedent provides "reasonable arguments as to why 'loss' as used in [§2B1.1] does not unambiguously mean only actual loss, and why 'intended loss' falls within that term's 'zone of ambiguity.'"
United States v. Iwuanyanwu, 69 F.4th 17 (1st Cir. 2023)	The district court did not clearly err in applying a two-level enhancement under §2B1.1(b)(11)(C)(i) for a co-conspirator's unauthorized use of a third party's means of identification to fraudulently open a bank account, where the defendant's own use of fraudulent documents to open bank accounts established "that it was reasonably foreseeable to him that [his co-conspirators] could use false identities when opening additional bank accounts." The district court did not clearly err in applying a two-level enhancement under §2B1.1(b)(2)(A)(iii) for causing substantial financial hardship where the victim, who was disabled, unable to work, and lived on a fixed income, wired almost six months of income to the defendant and had to take out personal loans to pay her medical expenses as a result.

Second Circuit

	No cases selected by Commission staff.

Third Circuit

United States v. Kousisis, 82 F.4th 230 (3d Cir. 2023)	In an amended opinion, the Third Circuit continued to hold that the government benefits rule under Application Note 3(F)(ii) to §2B1.1 does not apply to disadvantaged business enterprise ("DBE") procurement fraud cases. Instead, "loss is calculated by taking the full face value of the contract and deducting the fair market value of the services rendered."
United States v. Upshur, 67 F.4th 178 (3d Cir. 2023)	The term "tax loss" as used in §§2T1.1 and 2T1.4 is unambiguous and means "the total amount of loss that was the object of the [tax fraud] offense." Thus, the "tax loss" covers both the actual loss and the intended loss "that would have resulted had the offense been successfully completed."
United States v. Nucera, 67 F.4th 146 (3d Cir. 2023)	A cross reference under §2B1.1(c)(3) is appropriate for an 18 U.S.C. § 1001 offense only when the defendant's false statement "set forth in the count of conviction" constitutes, equates to, or "establishes an offense specifically covered by another guideline." Where the defendant lied about committing a civil rights violation, but the lying did not itself constitute or establish the violation, the cross reference did not apply.

Fourth Circuit

	No cases selected by Commission staff.

Fifth Circuit

United States v. Hagen, 60 F.4th 932 (5th Cir. 2023)	The district court correctly applied a two-level increase for "sophisticated [money] laundering" under §2S1.1(b)(3) because the defendants "bifurcated, mislabeled, and prepaid" invoices related to illegal kickbacks. Because this conduct was not the basis for a different enhancement, the limitation in Application Note 5(B) did not foreclose the increase.

Sixth Circuit

United States v. Smith, 79 F.4th 790 (6th Cir. 2023)	Expanding on *United States v. Xiaorong You*, 74 F.4th 378 (6th Cir. 2023), the Sixth Circuit explained its reasoning that the "context of the [g]uidelines . . . renders the term 'loss' in the fraud guideline (§2B1.1(b)) ambiguous." Courts must use relevant conduct to determine the offense level and the term "harm" in §1B1.3 "clearly contemplates harm that actually occurred and harm that the person intended to cause." "If the fraud guideline does not include intended loss, then the court cannot meaningfully apply the relevant-conduct guideline, which is applicable to all sentencings and contemplates intended harm as conduct for which a defendant should be held accountable."
United States v. Xiaorong You, 74 F.4th 378 (6th Cir. 2023)	Application Note 3(A) to §2B1.1, which defines "loss" as the "greater of actual loss or intended loss," is entitled to deference because the term "loss" is genuinely ambiguous, the commentary falls "within the zone of ambiguity," and the "character and context" of the

	commentary entitles it to deference. In so holding, the Sixth Circuit split with the Third Circuit.

Seventh Circuit

United States v. Klund, 59 F.4th 322 (7th Cir. 2023)	Where the defendant delivered some, but not all, promised goods under fraudulent contracts, "[t]he district court did not clearly err in calculating the intended loss [under §2B1.1] by including the bid price of [the] outstanding contracts" and in declining to offset that amount by the cost of unshipped goods the defendant argued he would have delivered.

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Diaz-Menera, 60 F.4th 1289 (10th Cir. 2023)	The defendant's base offense level for the instant money laundering offense was correctly calculated pursuant to §2S1.1(a)(1)(A) based on the underlying drug conspiracy from which the laundered funds were derived, even though he did not possess or distribute the drugs.

Eleventh Circuit

United States v. Verdeza, 69 F.4th 780 (11th Cir. 2023)	Because *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc), which held that courts should not defer to the commentary in §4B1.2, did not directly resolve whether the definition of "loss" in §2B1.1 is ambiguous, circuit precedent holding that intended loss must be considered applied on plain error review.

Firearms

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Daniells, 79 F.4th 57 (1st Cir. 2023)	The four-level increase in §2K2.1(b)(5) for "trafficking of firearms" applies where the defendant made a "'bulk' gun transfer[]" "to at least one buyer or other transferee," and not where the defendant "engaged in multiple individual gun transfers." "Plainly read, the enhancement [under §2K2.1(b)(5)] applies if [the defendant] transferred two or more guns while having reason to believe that at least one of them would be used or

United States v. Bishoff, 58 F.4th 18 (1st Cir. 2023)	possessed unlawfully." The district court correctly applied the enhancement where the defendant sold several unserialized firearms to an undercover officer, the sales were conducted in clandestine locations, and the defendant and the undercover officer discussed drugs during one of the sales, "create[ing] a reasonable inference that the desire to purchase the custom, untraceable weapons . . . stemmed from a desire to use them to unlawful ends." The district court did not abuse its discretion in applying an enhancement under §2K2.1(b)(6) for the defendant's possession of firearms "in connection with another felony." Statements by the defendant's supplier established that the defendant "gave him drugs in exchange for guns, for either the firearms themselves or just their assembly."

Second Circuit

	No cases selected by Commission staff.

Third Circuit

Range v. Att'y Gen., 69 F.4th 96 (3d Cir. 2023) (en banc)	18 U.S.C. § 922(g)(1) is unconstitutional as applied to the defendant. It violates the defendant's Second Amendment right to keep and bear arms because despite his prior false statement conviction, "he remains among 'the people' protected by the Second Amendment" and the government did not carry its burden to show that "our Nation's history and tradition of firearm regulation" support disarming the defendant.

Fourth Circuit

United States v. Henderson, 88 F.4th 534 (4th Cir. 2023)	Where a defendant was charged with a single violation of 18 U.S.C. § 922(g)(1), the district court's application of §2K2.1(b)(6)(B)—for possession of a firearm in connection with another felony offense—based solely on the fact that the defendant falls into another class of prohibited persons under section 922(g) was erroneous.
United States v. Dix, 64 F.4th 230 (4th Cir.), *reh'g en banc denied*, 64 F.4th 149 (2023)	In an opinion revised after rehearing, the Fourth Circuit reaffirmed its prior holding that the district court correctly applied the §2K2.1(b)(6)(B) enhancement for use or possession of a firearm "in connection with another felony offense"—namely failure to stop when signaled by law enforcement—because the firearm "emboldened" the defendant's flight from law enforcement and rendered it more dangerous.
United States v. Waters, 64 F.4th 199 (4th Cir. 2023)	Because *Rehaif v. United States*, 139 S. Ct. 2191 (2019), announced a new substantive rule narrowing the scope of a criminal statute by interpreting its terms, it applies retroactively to cases on collateral review through an initial 28 U.S.C. § 2255 motion.

Fifth Circuit

United States v. Daniels, 77 F.4th 227 (5th Cir. 2023)	The provision in 18 U.S.C. § 922(g)(3), which bars an individual "who is an unlawful user of or addicted to any controlled substance" from possessing a firearm, violates the Second Amendment as applied to the defendant—an admitted regular marijuana user who was not shown to be intoxicated at the time of his arrest.
United States v. Choulat, 75 F.4th 489 (5th Cir. 2023)	Application Note 14(B) to §2K2.1, which provides that a gun is presumed to be related to a drug trafficking offense if it is found "in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia," is entitled to deference under *Stinson v. United States*, 508 U.S. 36 (1993).
United States v. Lopez, 70 F.4th 325 (5th Cir. 2023)	Under relevant conduct principles, the district court properly applied the four-level enhancement under §2K2.1(b)(6)(B) for using a firearm "in connection with another felony offense" based on a separate firearm possession that occurred a year and a half after the instant firearms offense. Though the offenses were temporally remote, "a felon's mere possession of a firearm satisfies the similarity [relevant conduct] factor," and the defendant's repeated use of one gun within a two-month span highlighted the regularity of his conduct.
United States v. Sharp, 62 F.4th 951 (5th Cir. 2023)	The four-level enhancement at §2K2.1(b)(4)(B) "does not apply when there is no evidence that [a] firearm ever had a serial number." "The text of §2K2.1(b)(4)(B) is clear that it only applies when the firearm 'had an altered or obliterated serial number,'" and "something cannot be 'altered or obliterated' if it never existed in the first place."
United States v. Rahimi, 59 F.4th 163 (5th Cir. 2023)	The provision in 18 U.S.C. § 922(g)(8), which prohibits persons subject to domestic violence restraining orders from possessing firearms, is unconstitutional under the Second Amendment, in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

Sixth Circuit

United States v. Brown, 86 F.4th 1164 (6th Cir. 2023)	"[F]raudulently purchased firearms are 'stolen' for purposes of the stolen-firearm enhancement" at §2K2.1(b)(4)(A). Because "stolen" is not defined in the *Guidelines Manual*, the Sixth Circuit gives the word its "ordinary meaning," which "covers [the defendant's] fraudulently purchased firearms."
United States v. Wilson, 75 F.4th 633 (6th Cir. 2023)	The district court erred in applying the enhancement for use of a firearm in connection with another felony, §2K2.1(b)(6)(B), without making factual findings regarding the defendant's self-defense claim. Self-defense may be invoked with respect to the other felony offense even where the defendant did not lawfully possess the firearm.
United States v. Crump, 65 F.4th 287 (6th Cir. 2023)	The "fortress theory"—that a firearm found in close proximity to drugs provides a sufficient nexus to show that the firearm was possessed "in connection with" a controlled substance

	offense—applies in the armed career criminal guideline, §4B1.4(b)(3)(A), as it does in §2K2.1(b)(6)(B), at least in the absence of an argument to the contrary.
United States v. Hitch, 58 F.4th 262 (6th Cir. 2023)	There was no impermissible double counting in applying the enhancement for stolen firearms, §2K2.1(b)(4)(A), and the enhancement for possessing a firearm in connection with another felony offense, §2K2.1(b)(6)(B), where the defendant stole firearms from a federally licensed firearms dealer because the enhancements punished "distinct aspects" of the conduct. Nor was there double counting in calculating the base offense level and enhancements for the defendant's conviction of 18 U.S.C. § 922(u) because the offense level was calculated based upon his conviction for 18 U.S.C. § 922(g) (felon in possession), and the offenses grouped.
Seventh Circuit	
United States v. Holden, 70 F.4th 1015 (7th Cir. 2023)	Potential challenges to the constitutionality of 18 USC § 922(n), criminalizing purchasing or receiving a firearm while under indictment for a felony, did not invalidate the defendant's prosecution under 18 U.S.C. § 922(a)(6) for making a false statement about whether he was under indictment or information. "[A] truthful answer to the question 'are you under indictment?' can be material to the propriety of a firearms sale, whether or not all possible applications of § 922(n) comport with the Second Amendment."
Eighth Circuit	
United States v. Jackson, 69 F.4th 495 (8th Cir. 2023)	18 U.S.C. § 922(g)(1) is constitutional "as applied to [the defendant] and other convicted felons, because the law 'is consistent with the Nation's historical tradition of firearm regulation.'" (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022)). The Third Circuit subsequently split with the Eighth Circuit, holding that section 922(g)(1) is unconstitutional as applied to the defendant in *Range v. Att'y Gen.*, 69 F.4th 96 (3d Cir. 2023) (en banc).
Ninth Circuit	
United States v. Munoz, 57 F.4th 683 (9th Cir. 2023)	A firearm is "unlawfully possessed" as described in the commentary providing which firearms are to be counted for an enhancement under §2K2.1(b)(1) ("offense involved three or more firearms") if the defendant's possession of that firearm was unlawful under a specific provision of either federal law or state law.
Tenth Circuit	
United States v. Brown, 85 F.4th 1291 (4th Cir. 2023)	The defendant's possession of multiple firearms on separate occasions constituted relevant conduct to his instant 18 U.S.C. § 922(g) offense of possessing ammunition.

Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023)	18 U.S.C. § 922(g)(1), which prohibits anyone previously convicted of a crime punishable by a term of imprisonment exceeding one year from possessing a firearm, is constitutional as applied to individuals convicted of non-violent felonies. Since *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), two other circuits have addressed this issue; the Tenth Circuit joined the Eighth Circuit and split with the Third Circuit.
United States v. Alqahtani, 73 F.4th 835 (10th Cir. 2023)	The district court did not err in applying the four-level sentencing enhancement under §2K2.2(b)(6)(B), which applies if a defendant "used or possessed any firearm or ammunition in connection with another felony offense." The district court properly relied on sufficiently reliable summaries of FBI interviews corroborated by sworn testimony that proved by a preponderance of the evidence that the same gun was used in connection with the aggravated assault at issue and that the victim subjectively felt fear.
United States v. Brooks, 67 F.4th 1244 (10th Cir. 2023)	Because attempted murder requires an intent to kill, the district court's cross-reference from §2K2.1 to §2A2.1 based on a finding of only malice aforethought was reversible error.
United States v. Eddington, 65 F.4th 1231 (10th Cir. 2023)	The district court abused its discretion in applying a four-level enhancement pursuant to §2K2.1(b)(6)(B) for possessing ammunition in connection with "another felony offense" based on the defendant's possession of a firearm by a prohibited person in violation of Colorado law. The defendant's instant ammunition possession offense did not "facilitate" the commission of the state firearm possession violation as required by Application Note 14(A) to §2K2.1.
United States v. Leib, 57 F.4th 1122 (10th Cir. 2023)	The district court did not err when it enhanced the defendant's offense level under §2K2.1(b)(6)(B) for use of a firearm "in connection with another felony offense" after finding by a preponderance of the evidence that the totality of the circumstances indicated that his conduct supported a felony conviction under New Mexico law.

Eleventh Circuit

	No cases selected by Commission staff.

First Step Act of 2018

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

United States v. Junius, 86 F.4th 1027 (3d Cir. 2023)	Murder in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e)(1)(A) is not a "covered offense" under section 404 of the First Step Act.
United States v. Brow, 62 F.4th 114 (3d Cir. 2023)	The First Step Act does not permit district courts to reduce the sentence for a separate, noncovered offense that was administratively aggregated with the sentence for a covered offense, nor to reduce a sentence on a covered offense that has been fully served.

Fourth Circuit

United States v. Troy, 64 F.4th 177 (4th Cir. 2023)	Under *Concepcion v. United States*, 142 S. Ct. 2389 (2022), "while a district court may consider other changes in the law when determining what reduction, if any, is appropriate" under section 404 of the First Step Act, the proper "benchmark" for the court's analysis is "the impact of the Fair Sentencing Act on the defendant's [g]uidelines range." *Concepcion* thus abrogates *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020), which instructed district courts to recalculate a movant's guidelines range based on "intervening case law" unrelated to the Fair Sentencing Act.
United States v. Jones, 60 F.4th 230 (4th Cir. 2023)	The statutory safety valve's criminal history provision at 18 U.S.C. § 3553(f)(1) is unambiguously conjunctive and, therefore, a defendant must have *all three* of the enumerated criminal history criteria to be ineligible for safety valve relief. In so holding, the Fourth Circuit joined the Ninth and en banc Eleventh Circuits and split with the Fifth, Sixth, Seventh, and Eighth Circuits.
United States v. Reed, 58 F.4th 816 (4th Cir. 2023)	The Supreme Court's decision in *Concepcion v. United States*, 142 S.Ct. 2389 (2022), abrogated *United States v. Collington*, 995 F.3d 347 (4th Cir. 2021), which "effectively required a sentence to be reduced based on changes in law." Thus, the district court did not abuse its discretion in denying a First Step Act section 404(b) motion even where doing so maintained a sentence that exceeds the statutory maximum sentence the defendant would have been subject to under the Fair Sentencing Act. But, under *Concepcion*, the district court's failure to consider all non-frivolous arguments raised by the parties was reversible error.

Fifth Circuit

No cases selected by Commission staff.

Sixth Circuit

United States v. Carpenter, 80 F.4th 790 (6th Cir. 2023)	The Sixth Circuit denied en banc review of a panel opinion holding that Section 403 of the First Step Act—relating to 18 U.S.C. § 924(c)—did not apply to the defendant's resentencing where his original sentence was imposed prior to the First Step Act.
United States v. Domenech, 63 F.4th 1078 (6th Cir. 2023)	After determining a defendant is eligible for First Step Act relief and calculating the guidelines range reflecting only the retroactive changes of the Fair Sentencing Act, a district court must reason through the parties' arguments regarding nonretroactive changes in the law. Failure to do so resulted in an inadequately explained sentence; additionally, because the district court had failed to adequately consider these arguments twice, reassignment of the case on remand was appropriate to preserve the appearance of fairness.
United States v. Akridge, 62 F.4th 258 (6th Cir. 2023)	In recalculating the defendant's guideline range as part of a First Step Act resentencing, the district court properly did not apply Sixth Circuit precedent issued subsequent to the defendant's initial sentencing holding that inchoate offenses are not career-offender predicates, as those cases do not reflect the retroactive application of the Fair Sentencing Act.
United States v. Woods, 61 F.4th 471 (6th Cir. 2023)	The First Step Act does not allow a district court to consider changes in law relating to the guidelines—including *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc)—that are unrelated to changes the Fair Sentencing Act made to crack-cocaine sentencing ranges when recalculating a defendant's guideline range.

Seventh Circuit

United States v. Curtis, 66 F.4th 690 (7th Cir. 2023)	If an original sentence imposed is a "single, integrated sentence that blends punishment for a non-covered offense such that the term 'sentence' applies to both offenses, the court has the discretion to consider resentencing for an offense that is not covered by the [First Step Act]." A court must look to the original sentencing to determine if "the two sentences were interdependent" for sentencing purposes; whether they group under the guidelines is indicative but not "wholly determinative."

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

United States v. Lopez, 58 F.4th 1108 (9th Cir. 2023)	The court denied rehearing en banc of an earlier panel decision holding in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), that the word "and" in the statutory safety valve's criminal history provision at 18 U.S.C. § 3553(f)(1) is "unambiguously conjunctive" and

	therefore, a defendant must meet all three criteria at section 3553(f)(1) to be ineligible for safety valve relief.

Tenth Circuit

	No cases selected by Commission staff.

Eleventh Circuit

United States v. McCoy, 88 F.4th 908 (11th Cir. 2023)	Circuit precedent holding that a motion for a sentence reduction under section 404(b) of the First Step Act cannot challenge a judge-found drug quantity does not violate the Due Process Clause and continues to bar from eligibility a movant whose judge-found drug quantity was higher than the First Step Act's amended drug quantity thresholds.
United States v. Files, 63 F. 4th 920 (11th Cir. 2023)	The court's prior statement in *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020), that a district court is permitted to reduce a defendant's sentence under the First Step Act "only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses,'" was a holding and *Concepcion v. United States*, 142 S. Ct. 2389 (2022), did not abrogate that holding.
United States v. Jackson, 58 F.4th 1331 (11th Cir. 2023)	Reconsidering on remand from the Supreme Court, the Eleventh Circuit concluded that *Concepcion v. United States*, 142 S. Ct. 2389 (2022), does not abrogate *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), which held that "district courts are bound by judge-made drug quantity findings in First Step Act [section 404] proceedings." The particular facts of the instant case—that the defendant's case was pending on direct appeal when *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was decided—does not alter the analysis, because the defendant's remedy was to challenge the sentence as erroneous after *Apprendi* was decided; "a First Step Act motion cannot masquerade as a direct appeal."

Restitution

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Cardozo, 68 F.4th 725 (1st Cir. 2023)	"[A]ny loss awarded in a restitution order under [18 U.S.C. §] 2264 must have been proximately caused by the offense conduct."

Second Circuit	
United States v. Avenatti, 81 F.4th 171 (2d Cir. 2023)	Attorneys' fees are "pecuniary loss[es]" under the Mandatory Victims Restitution Act where incurred during the course of the offense before the government investigation of the offense.
Third Circuit	
	No cases selected by Commission staff.
Fourth Circuit	
United States v. Taylor, 62 F.4th 146 (4th Cir. 2023)	A defendant convicted of Hobbs Act robbery could not avoid mandatory restitution where some of the victims' losses included cash and personal property that they had obtained through illegal activity.
Fifth Circuit	
United States v. Bopp, 79 F.4th 567 (5th Cir. 2023)	Because 18 U.S.C. § 2252A(a)(5)(B) criminalizes possession of "material" containing child pornography—here, a phone—"all of the victims" whose images appeared in the material are "entitled to restitution [under 18 U.S.C. § 2259]—whether or not the indictment included [descriptions of the] images depicting them."
United States v. Hagen, 60 F.4th 932 (5th Cir. 2023)	"[T]he categorical approach does not control the analysis of whether a Title 18 offense is 'against property'" for purposes of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. Rather, "[t]he text, structure, and purpose of the MVRA permit a sentencing court to consider the factual circumstances in which an offense was committed in deciding whether the offense was against property."
Sixth Circuit	
	No cases selected by Commission staff.
Seventh Circuit	
	No cases selected by Commission staff.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
United States v. Dadyan, 76 F.4th 955 (9th Cir. 2023)	The district court did not err by ordering restitution under the Mandatory Victims Restitution Act (MVRA) in an amount that exceeded the amount of loss it calculated under

	§2B1.1(b)(1) because "[t]here is no categorical rule that restitution must be equal to or less than the amount of loss" under the guidelines.

Tenth Circuit

United States v. Geddes, 71 F.4th 1206 (10th Cir. 2023)	Because restitution must be authorized by statute, the district court improperly imposed restitution as a freestanding obligation for tax offenses. "Title 26 tax offenses are not listed in the Victim and Witness Protection Act (VWPA) or the Mandatory Victims Restitution Act (MVRA)," thus restitution can only be imposed as a condition of supervised release.
United States v. Salti, 59 F.4th 1050 (10th Cir. 2023)	In ordering restitution, a district court may combine joint and several liability with apportionment in order to fully compensate the victim. After satisfying the restitution judgment against him, defendant was not entitled to a pro rata refund of codefendant's payment.

Eleventh Circuit

	No cases selected by Commission staff.

Sentencing Procedure

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Flores-González, 86 F.4th 399 (1st Cir. 2023) (en banc)	"[W]hether an upward variance based on a higher than average rate of gun violence in a community can be justified as a *Kimbrough* [*v. United States*, 552 U.S. 85 (2007)] policy disagreement remains unresolved."
United States v. Carvajal, 85 F.4th 602 (1st Cir. 2023)	"[U]nless and until the Supreme Court [reexamines its earlier precedent], or the Sentencing Commission revises the Guidelines," the use of acquitted conduct at sentencing does not violate the constitutional guarantees of due process.
United States v. Navarro-Santisteban, 83 F.4th 44 (1st Cir. 2023)	Where it is "impossible to extricate the influence of [uncorroborated] verbal hearsay" from the district court's "broader sentencing rationale," the court's error in considering that testimony at sentencing cannot be found harmless.
United States v. Rivera-Nazario, 68 F.4th 653 (1st Cir. 2023)	The district court did not abuse its discretion in finding the defendant voluntarily absent and sentencing him in absentia where he "remained at-large not only for the ten months that transpired from the date of the [post-plea] arrest warrant to his sentencing hearing, but well after the sentencing hearing, until he was finally apprehended." During his post-plea release, the defendant committed "numerous violations of release conditions," had been "informed of

	the importance of compliance with these conditions," and "knew that sentencing proceedings remained pending."
United States v. Muñoz-Fontanez, 61 F.4th 212 (1st Cir. 2023)	"When imposing a significant variance, a sentencing court must make clear *which* specific facts of the case motivated its decision and *why* those facts led to its decision." Here, the district court's "mere listing of the facts of the [defendant's] arrest, without emphasis on any particular circumstance, ma[de] it impossible to tell whether it was the [defendant's possession of an] automatic weapon [in connection with a drug crime] or something else that motivated its decision" to impose a sentence that was "nearly two and a half times" higher than the guideline range.
Second Circuit	
	No cases selected by Commission staff.
Third Circuit	
	No cases selected by Commission staff.
Fourth Circuit	
United States v. Carter, 87 F.4th 217 (4th Cir. 2023)	Where the defendant did not invoke his Fifth Amendment right against self-incrimination at sentencing, he could not establish on appeal that the district court's imposition of a harsher sentence based in part on its interpretation of his refusal to cooperate as lack of respect for society or court system was a "limited ground" for which he retained appellate rights despite a valid appellate waiver.
United States v. Singletary, 75 F.4th 416 (4th Cir. 2023)	As a matter of first impression, a defendant may raise a claim of judicial vindictiveness on direct appeal despite entering into a general appeal waiver because "an allegation of judicial vindictiveness fits squarely within [the] narrow class of claims" excepted from enforcement of an appeal waiver. Although "a presumption of vindictiveness applies to any unexplained increase" in sentence upon successful appeal before "the same judge, in the same posture," in this case, the presumption was rebutted by the district court's extensive explanation of aggravating post-sentencing conduct.
United States v. Covington, 65 F.4th 726 (4th Cir. 2023)	The district court did not err by discussing the appropriate term of imprisonment to be imposed before hearing from defense counsel, because the court's discussion did not constitute a formal oral pronouncement and premature imposition of sentence.
Fifth Circuit	
United States v. Gonzalez, 62 F.4th 954 (5th Cir. 2023)	"[W]hen a district court accepts a Rule 11(c)(1)(C) agreement and binds itself to impose a sentence specified in the agreement, the sentence imposed may be unreasonable," and thus

	reviewable on appeal under 18 U.S.C. § 3742(a)(1). "[A] Rule 11(c)(1)(C) agreement 'does not discharge the district court's independent obligation to exercise its discretion' under '[f]ederal sentencing law . . . to impose "a sentence sufficient, but not greater than necessary to comply with" the purposes of federal sentencing.'" In holding that a Rule 11(c)(1)(C) sentence may be reviewed for substantive reasonableness, the Fifth Circuit joins the Third, Sixth, Eighth, and Ninth Circuits, and splits with the Fourth, Seventh, and Tenth Circuits.

Sixth Circuit

United States v. Whitson, 77 F.4th 452 (6th Cir. 2023)	The district court plainly erred by "requiring [the defendant] to admit his guilt in order to fully consider the evidence of his rehabilitation."
United States v. Morris, 71 F.4th 475 (6th Cir. 2023)	Abuse-of-discretion review, rather than plain error review, applied on appeal where the district court asked if there was "anything further" after pronouncing the sentence but did not ask if there were objections to the sentence imposed. Under that standard, the district court erred in considering the defendant's violation conduct, rather than the original offense conduct, in analyzing the "nature and circumstances of the offense" in a supervised release violation sentencing and in not considering several 18 U.S.C. § 3553(a) factors.
United States v. Simmonds, 62 F.4th 961 (6th Cir. 2023)	The government did not breach a plea agreement by providing factual information to the court that resulted in a higher base offense level, where it answered the court's questions but did not request a base offense level higher than that agreed in the plea agreement. The district court did not err, plainly or otherwise, in imposing the higher base offense level recommended in the PSR rather than the base offense level specified in the plea agreement.

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

United States v. Jones, 71 F.4th 1083 (8th Cir. 2023)	The district court's imposition of a mandatory consecutive sentence for a violation of 18 U.S.C. § 924(j) did not require remand for resentencing. Although *Lora v. United States*, 143 S. Ct. 1713 (2023), which held that the prohibition on concurrent sentences at 18 U.S.C. § 924(c)(1)(D)(ii) does not govern sentences for section 924(j) convictions, was a "supervening controlling authority establishing a procedural error," the error was harmless because the district court would have exercised its discretion to impose a consecutive sentence.
United States v. Dickson, 70 F.4th 1099 (8th Cir. 2023)	A district court procedurally errs when it adopts a PSR and without adequate notice upwardly varies for reasons that contradict the PSR's fact findings.

United States v. McDaniel, 59 F.4th 975 (8th Cir. 2023)	The district court did not procedurally err by failing to disclose its reliance on the Commission's Judiciary Sentencing Information ("JSIN") data prior to sentencing because circuit precedent did not plainly require disclosure of "public information that is not specific to the defendant" to comply with Fed. R. Crim. P. 32. Moreover, any error the district court made in interpreting the JSIN data was harmless.
United States v. Soto, 58 F.4th 977 (8th Cir. 2023)	The district court violated the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by sentencing the defendant beyond the otherwise applicable statutory maximum penalty for possession of child pornography based on a fact that was not submitted to a jury and proven beyond a reasonable doubt.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Lee, 71 F.4th 1217 (10th Cir. 2023)	The district court procedurally erred in disregarding §5G1.3(b)(1), which provides for a downward adjustment for any period of imprisonment already served for "another offense that is relevant conduct to the instant offense of conviction" that "will not be credited to the federal sentence by the Bureau of Prisons." Although the guidelines are advisory, the district court still must properly calculate the guidelines before exercising discretion to vary.
United States v. Jimenez, 61 F.4th 1281 (10th Cir. 2023)	The district court did not err when it announced that it would impose a sentence within the guideline range before allowing the defendant to allocute because the pronouncement was not a "clear and unambiguous enunciation of a specific sentence."
United States v. Slinkard, 61 F.4th 1290 (10th Cir. 2023)	The district court erred by "definitively announcing" the sentence it would impose—a specific sentence in accordance with the applicable guideline term of life imprisonment—before allowing the defendant to allocute.

Eleventh Circuit

	No cases selected by Commission staff.

Sex Offenses

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Winczuk, 67 F.4th 11 (1st Cir. 2023)	The phrase "relating to the sexual exploitation of children" in 18 U.S.C. § 2251(e) "unambiguously refers to any criminal sexual conduct involving children," not just production of child pornography.

Second Circuit

United States v. Gates, 84 F.4th 496 (2d Cir. 2023)	The adjustment for engaging in a pattern of activity involving prohibited sexual conduct, §4B1.5(b), applies even where all predicate instances of prohibited sexual conduct stem from the crime of conviction.
United States v. Osuba, 67 F.4th 56 (2d Cir. 2023)	The district court did not clearly err in applying §4B1.5(b)(1) where inculpatory and exculpatory evidence both existed. Contrary to the defendant's arguments, the district court was not required to "vigorously examine the testimony and other evidence" to assess credibility, nor to hold an evidentiary hearing on factual disputes in the PSR.

Third Circuit

United States v. Perez-Colon, 62 F.4th 805 (3d Cir. 2023)	The determination that a minor was in the defendant's "custody, care, or supervisory control" for the purposes of §2G2.1(b)(5) does not require that the defendant had parent-like authority over the minor at the time the offense was committed. Further, the circuit court will review a district court's determination to apply §2G2.1(b)(5) for clear error. The categorical approach does not apply to §4B1.5(b) because §4B1.5(b) asks whether "the defendant engaged in a pattern of activity involving prohibited sexual conduct," regardless of whether the conduct led to a conviction. However, to determine if the defendant's "prohibited sexual conduct" constituted "an offense described in 18 U.S.C. § 2426(b)(1)(A) or (B)," the court must assess whether it violated either a relevant federal criminal law or a categorical state-law equivalent, which necessitates the application of the categorical approach.

Fourth Circuit

United States v. Ross, 72 F.4th 40 (4th Cir. 2023)	The defendant's 660-month (55-year) "functional life sentence"—a variance below the guideline sentence of 2,040 months' imprisonment—for production and possession of child pornography offenses, was not "grossly disproportionate" to his offenses and therefore did not violate the Eighth Amendment.

United States v. Skinner, 70 F.4th 219 (4th Cir. 2023)	The district court correctly applied the two-level enhancement in §2G2.1(b)(2)(A) for an offense that involves "the commission of . . . sexual contact" because the defendant's masturbation during a video call meets Application Note 2's definition of "sexual contact" as involving "the intentional touching . . . of *any* person."
United States v. Ebert, 61 F.4th 394 (4th Cir. 2023)	The district court did not err in applying the 5-level enhancement under §4B1.5(b)(1), correctly finding a pattern of activity involving criminal sexual conduct based on victim testimony, which the defendant sought—but failed—to discredit.

Fifth Circuit

United States v. Sadeek, 77 F.4th 320 (5th Cir. 2023)	"[T]he commission of distinct sexual assaults constitute[s] 'separate occasions,' whether on the same or different days, for purposes of §4B1.5(b)(1)" and its accompanying commentary at Application Note 4(B)(i).
United States v. Moore, 71 F.4th 392 (5th Cir. 2023)	The phrase "relating to the sexual exploitation of children" in 18 U.S.C. § 2251(e) "stretches beyond child pornography" and refers to "any criminal sexual conduct involving children."
United States v. Butler, 65 F.4th 199 (5th Cir. 2023)	"The plain meaning of 'sexual contact' [in §2G2.1(b)(2)(A)] includes masturbation because that act necessarily entails the 'intentional touching . . . of the genitalia . . . of *any* person with an intent to . . . arouse or gratify the sexual desire of *any* person.' 18 U.S.C. § 2246(3) (emphasis added). And that is so whether the act is performed by the defendant or the victim." The district court did not plainly err in applying §2G2.1(b)(6)(B)(i) for "the use of a computer or an interactive computer service to . . . solicit participation by a minor in [sexually explicit] conduct." Although the guidelines do not define "solicit," the defendant "plainly solicited" a victim's participation in sexually explicit conduct where he acknowledged that he "groomed" her and "used 'emotional ploys, such as threatening suicide, to gain control of her actions,' and 'threatened to send some of the videos to her parents if she did not continue to engage in online sexual chats' with him."

Sixth Circuit

United States v. Pennington, 78 F.4th 955 (6th Cir. 2023)	The district court plainly erred in applying §2G1.1(a)(1), which applies if the "offense of conviction is 18 U.S.C. § 1591(a)(1)," where the defendant was convicted of witness tampering under 18 U.S.C. § 1512(b)(1) in connection with conspiracy to violate section 1591 but was not convicted under section 1591 itself. The Sixth Circuit expressly left open the question of whether §2G2.1(a)(1) would have applied had the defendant been convicted of conspiracy to violate section 1591 under 18 U.S.C. § 1594.

United States v. Sykes, 65 F.4th 867 (6th Cir. 2023)	The phrase "relating to the sexual exploitation of children" in 18 U.S.C. § 2251(e) (a mandatory minimum enhancement) extends to "child-sexual-abuse offenses," including statutory rape offenses, in addition to "child-pornography-related offenses." In so holding, the Sixth Circuit agreed with the Fourth and Eighth Circuits and split with the Ninth Circuit. The enhancement for unduly influencing a minor to engage in prohibited sexual conduct, §2G1.3(b)(2), applied based upon the rebuttable presumption that it applies to a person ten years older than the minor. Even if the victim's behavior indicated she voluntarily engaged in sexual conduct with him, the presumption was not overcome where the defendant's communications indicated manipulation through "claiming he was falling in love with her, showering her with compliments, and promising that he would be with her forever."
United States v. Preece, No. 22-5297, 2023 WL 395028 (6th Cir. Jan. 25, 2023)	"[T]he text of §4B1.5(b) does not limit a sentencing court to considering only the offense of conviction." Unlike Chapters Two and Three of the *Guidelines Manual*, which are subject to the limitations in §1B1.3(a), under §1B1.3(b), courts apply Chapters Four and Five "on the basis of the conduct and information specified in the respective guidelines"—in the case of §4B1.5(b), a "pattern of activity involving prohibited sexual conduct." So conduct beyond the offense of conviction, including uncharged conduct, is properly considered in applying §4B1.5.

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

United States v. Coulson, 86 F.4th 1189 (8th Cir. 2023)	The Eighth Circuit held "for the first time, in line with a consensus of authority from other circuits, that the categorical approach applies to the [Sex Offender Registration and Notification Act] SORNA's tier analysis."
United States v. Perez, 61 F.4th 623 (8th Cir. 2023)	The district court erred in applying the enhancement under §4B1.5(b)(1), which may apply if the defendant's instant offense of conviction is a "covered sex crime," because the defendant was convicted of receipt and distribution of child pornography and of transportation of child pornography—offenses that are expressly excluded from the definition of "covered sex crime."

Ninth Circuit

United States v. Scott, 83 F.4th 796 (9th Cir. 2023)	The district court's application of the 2-level serious bodily injury enhancement at §2A3.1(b)(4)(B) did not result in impermissible double counting even though the definition of "serious bodily injury" in Application Note 1 to §2A3.1 provides that the "criminal sexual

	abuse" conduct "already is taken into account in the base offense level." Application Note 1 also references the definition of "serious bodily injury" in the commentary to §1B1.1, which includes the harm involved as well.
United States v. Scheu, 83 F.4th 1124 (9th Cir. 2023)	Forcibly moving a victim from the shoulder of the road into an adjoining cornfield and shoving her onto the ground approximately 35 to 40 feet from her initial location constitutes an "abduction" under the plain meaning of the term in §2A3.1(b)(5).

Tenth Circuit

United States v. Jackson, 82 F.4th 943 (10th Cir. 2023)	The district court correctly applied the cross reference under §2A3.4(c)(1) to §2A3.1 and the enhancements under §§3D1.4 and 4B1.5, provisions that address distinct sentencing goals and may be applied cumulatively for incremental penalty increases.
United States v. Coates, 82 F.4th 953 (10th Cir. 2023)	Applying its holding in *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), that "*Kisor* [*v. Wilkie*, 139 S.Ct. 2400 (2019),] does not apply to the Sentencing Commission, and therefore, its commentary should be relied upon unless 'plainly erroneous or inconsistent' with the guidelines," the Tenth Circuit held that the commentary defining "pattern of activity" under §2G2.2(b)(5) to include prior conduct unrelated to the underlying offense was not plainly inconsistent with that guideline or with §1B1.3(a)(1)(A).

Eleventh Circuit

United States v. Dawson, 64 F.4th 1227 (11th Cir. 2023)	The act of filming an adult masturbating "in the presence of a [clothed] child where the child is the object of sexual desire in the film 'uses' that child to engage in sexually explicit conduct for purposes of 18 U.S.C. § 2251(a)" and therefore falls within the scope of conduct prohibited by the statute.

Supervised Release

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Ruiz-Valle, 68 F.4th 741 (1st Cir. 2023)	When a court imposes a new term of supervised release following revocation of a previous term of supervised release, 18 U.S.C. § 3583(h) "requires that the term be reduced by all post-revocation terms of imprisonment imposed with respect to the same underlying offense."

Second Circuit

United States v. Francis, 77 F.4th 66 (2d Cir. 2023)	"[A] defendant violates a condition of his supervised release pursuant to 18 U.S.C. § 3583(d) if his conduct constitutes any one or more of a 'federal crime,' a 'state crime,' or a 'local crime,' whether or not the crime is prosecuted." Therefore, defendant's supervised release was properly revoked based on a conviction for simple possession of marijuana regardless of whether his conduct was a crime under state law, because it was a crime under federal law.
United States v. Kunz, 68 F.4th 748 (2d Cir. 2023)	A condition of supervised release limiting a supervisee to a single internet-connected device "would pose a significant burden on his liberty" and thus must be imposed by the court (as opposed to Probation) and justified by particularized on-the-record findings.
United States v. Farooq, 58 F.4th 687 (2d Cir. 2023)	A special condition of supervised release requiring a defendant to seek court approval before disseminating any information about his extortion victims did not violate the First Amendment where it was closely related to the charged conduct and to the defendant's history of disclosures (including in violation of court orders), limited to two individuals and to several months, and the court could grant the defendant permission if he requested it.

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit

United States v. Brantley, 87 F.4th 262 (4th Cir. 2023)	Fed. R. App. P. 4(b)'s timely appeal deadline is a mandatory claim-processing rule that cannot be disregarded even where a district court erroneously imposed additional conditions of supervised release not pronounced orally at sentencing and failed to inform the defendant of his right to appeal pursuant to Fed. R. Crim. P. 32(j).
United States v. Castellano, 60 F.4th 217 (4th Cir. 2023)	The district court abused its discretion by imposing a lifetime condition of supervision prohibiting access to all pornography, pictures displaying nudity, and magazines portraying juvenile models because it was overbroad and not reasonably related to the underlying transportation of child pornography offense.
United States v. Sueiro, 59 F.4th 132 (4th Cir. 2023)	The district court procedurally erred when it imposed burdensome lifetime special conditions of supervised release not sufficiently connected to the defendant's underlying child pornography convictions without particularized explanation.

Fifth Circuit

United States v. Caillier, 80 F.4th 564 (5th Cir. 2023)	"[A] district court cannot modify an unlawful condition under [18 U.S.C.] § 3583(e)(2) if the illegality of that condition is the basis for modification, regardless of whether it was the defendant or government who brought the motion challenging the conditions."

United States v. Greer, 59 F.4th 158 (5th Cir. 2023)	"The district court committed a reversible procedural error by sentencing [the defendant] to two consecutive nine-month terms of imprisonment for violating two conditions of his supervised release." Under 18 U.S.C. § 3583(e)(3), a court is limited "to imposing one term of imprisonment upon revoking one term of supervised release," so it "cannot impose *multiple* terms of imprisonment, concurrent or consecutive, upon revoking a single term of supervised release."
Sixth Circuit	
United States v. Campbell, 77 F.4th 424 (6th Cir. 2023)	The risk notification condition at §5D1.3(c)(12), as revised in 2016, is not impermissibly vague. In so holding, the Sixth Circuit agreed with the First, Eighth, Ninth, and Tenth Circuits, and split with the Second Circuit.
United States v. Robinson, 63 F.4th 530 (6th Cir. 2023)	The exclusionary rule, which bars the government from using evidence obtained in violation of the Fourth Amendment, does not apply in supervised release proceedings. Nor does the right to a jury trial apply to the mandatory revocation of supervised release for possession of a controlled substance or firearm or for refusal to comply with drug testing, under 18 U.S.C. § 3583(g).
Seventh Circuit	
	No cases selected by Commission staff.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
United States v. Montoya, 82 F.4th 640 (9th Cir. 2023) (en banc)	A district court "must orally pronounce all discretionary conditions of supervised release, including those referred to as 'standard' in §5D1.3(c) . . . in order to protect a defendant's due process right to be present at sentencing."
United States v. Taylor, 78 F.4th 1132 (9th Cir. 2023)	The district court's order that the defendant participate in an inpatient treatment program for "up to 365 days" did not constitute an upward variance because although it was a form of community confinement, the commentary to §5F1.1 allows for imposition of community confinement for more than six months "to accomplish the objectives of a specific rehabilitative program."
Tenth Circuit	
United States v. Geddes, 71 F.4th 1206 (10th Cir. 2023)	"[D]istrict courts must orally pronounce all discretionary conditions [of supervision] classified as standard by the sentencing guidelines at sentencing." However, while it remains

	best practice to impose all conditions of supervised release at sentencing, mandatory conditions need not be pronounced because the defendant has notice of conditions required by statute and any objection thereto "would be futile."
United States v. Faunce, 66 F.4th 1244 (10th Cir. 2023)	The district court's classification of violation conduct as criminal mischief was not plain error because it did not materially affect the decision to revoke supervised release, the guideline range, or the sentence. In addition, the district court neither abused its discretion by allowing victim testimony via remote video nor plainly erred by declining to find that the remote testimony violated the defendant's due process rights.
United States v. Booker, 63 F.4th 1254 (10th Cir. 2023)	District courts "may not modify or revoke a term of supervised release based on the need for retribution." Because 18 U.S.C. § 3583(e) uses "mandatory language to direct a court to consider some, but not all, [18 U.S.C.] § 3553(a) sentencing factors, it is procedural error to consider an unenumerated factor."
United States v. Prestel, 60 F.4th 616 (10th Cir. 2023)	The defendant's plea agreement allowing "appeal from a sentence which exceeds the statutory maximum" did not permit challenge to the lifetime conditions of his supervised release; unlike a term of release, a condition cannot exceed a statutory maximum.

Eleventh Circuit

United States v. Talley, 83 F.4th 1296 (11th Cir. 2023)	"[T]here can be no tolling of the period of supervised release on the basis of fugitive status" because "the justifications for fugitive tolling in other contexts—such as prison escapes—do not apply" and "the doctrine is inconsistent" with the statutory text and circuit case law. This case deepens a circuit split between the First Circuit—with which the Eleventh Circuit agrees—and the Second, Third, Fourth, and Ninth Circuits.
United States v. Hall, 64 F.4th 1200 (11th Cir. 2023)	If a court sentences a defendant to the statutory maximum period of imprisonment for violating the terms of supervised release, the court may not also impose a period of home confinement because 18 U.S.C. §§ 3563(b)(19) and 3583(e)(4) each provide that home confinement may be ordered "only as an alternative to incarceration."

General Application Issues

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Coby, 65 F.4th 707 (4th Cir. 2023)	The district court plainly erred by not "us[ing] the Guidelines Manual in effect on the date that the offense of conviction was committed" pursuant to §1B1.11(b)(1), when it increased the defendant's offense level pursuant to a guideline provision not in effect at the time of his sentencing in violation of the *ex post facto* clause of the Constitution.
United States v. Brown, 67 F.4th 200 (4th Cir. 2023)	Circuit precedent holding that the applicability of the 18 U.S.C. § 924(e)(1) (ACCA) enhancement is a matter for sentencing remains binding, notwithstanding intervening Supreme Court precedent, including *Wooden v. United States*, 142 S. Ct. 1063 (2022). Whether a defendant committed prior violent felony or serious drug offenses "on different occasions" need not be alleged in the indictment and found by a jury or admitted by the defendant.

Fifth Circuit

United States v. Valencia, 66 F.4th 1032 (5th Cir. 2023)	In *Wooden v. United States*, 142 S. Ct. 1063 (2022), the Supreme Court explicitly declined to address whether the Armed Career Criminal Act's "different-occasions requirement" must be "charged in the indictment and either admitted by [the defendant] or proven to a jury beyond a reasonable doubt." Therefore, *Wooden* does not overrule binding circuit precedent holding that the different-occasions requirement is a proper consideration for the district court at sentencing.

Sixth Circuit

United States v. Loos, 66 F.4th 620 (6th Cir. 2023)	The limitation on departing under §5K2.13 (Diminished Capacity (Policy Statement)) when "the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence" considers whether the facts of the offense bar the departure; the inquiry is not whether, at the time of sentencing, the defendant remains a threat to the public.

Seventh Circuit

No cases selected by Commission staff.

Eighth Circuit

United States v. Lebeau, 76 F.4th 1102 (8th Cir. 2023)	The district court did not plainly err by failing to order the defendant's federal sentence to run concurrently with a potential future state sentence when the state charges were pending at the time of federal sentencing, because "[g]iven the absence of a definition in the guidelines, and the limited authority on the issue, . . . it is at least subject to reasonable dispute whether the filing of a state charge, by itself, makes a future sentence 'anticipated' within the meaning of §5G1.3(c)."

Ninth Circuit

No cases selected by Commission staff.

Tenth Circuit

United States v. Warrington, 78 F.4th 1158 (10th Cir. 2023)	The district court did not plainly err by imposing a special assessment for each count of conviction, rather than assessing the penalty on a per-offender basis, because the Justice for Victims of Trafficking Act of 2015 imposes penalties on individuals "convicted of an offense" and is intended to both reflect the seriousness of the offense and provide financial resources to crime victims. The circuits are split on this point, with the Second Circuit adopting a per-offender rule and the Third and Ninth Circuits adopting a per-count interpretation.

Eleventh Circuit

No cases selected by Commission staff.

Other Offense Types

D.C. Circuit

United States v. Robertson, 84 F.4th 1045 (D.C. Cir. 2023)	The district court did not plainly err in applying an enhancement for causing or threating physical injury to a person in order to obstruct the administration of justice (§2J1.2(b)(1)(B)) or an enhancement for substantial interference with the administration of justice (§2J1.2(b)(2)). The defendant argued that "administration of justice" means only judicial or quasi-judicial proceedings, but "[t]he ordinary meaning of 'administration of justice' does not necessarily exclude Congress's certification of the Electoral College vote."

First Circuit

	The commentary to §2X1.1 "requires district courts to consider the value of the property that the conspirators specifically intended to steal when sentencing for a robbery conspiracy." Unlike the intended loss language in the commentary to §2B1.1, "the textual hook for intended conduct in [§2X1.1] is contained in the Guideline itself, quelling any

United States v. Walker, 89 F.4th 173 (1st Cir. 2023)	concern that the commentary could have impermissibly expanded the meaning of the relevant Guideline." When applying a three-point enhancement for brandishing or possessing a dangerous weapon under §2B3.1(b)(2)(E) via §2X1.1(a), the plain meaning of the guidelines requires only that a defendant specific intended to possess the dangerous weapon in connection with a robbery, not that he "possess[ed] a dangerous weapon with intent to use it as such."
Second Circuit	
	No cases selected by Commission staff.
Third Circuit	
United States v. Caraballo, 88 F.4th 239 (3d Cir. 2023)	The phrase "serious bodily injury" in §2A2.2(b)(3)(B) is ambiguous and the "reasonableness, character, and context" of the Commission's commentary interpreting the phrase in Application Note 1(M) to §1B1.1 "entitles it to controlling weight."
United States v. Garcia-Vasquez, 70 F.4th 177 (3d Cir. 2023)	A prior conviction for conspiracy to distribute cocaine, in violation of 18 U.S.C. § 846, qualifies as a "drug trafficking offense" under §2L1.2(b)(1)(A)(i) (2015). Unlike §4B1.2(b) (defining "controlled substance offense"), the text of §2L1.2(b)(1)(A)(i) does not define "drug trafficking offense," so its plain meaning applies, which includes drug trafficking conspiracy offenses.
Fourth Circuit	
United States v. Reed, 75 F.4th 396 (4th Cir. 2023)	District court did not err in applying an enhancement under §2J1.2(b)(1)(B) for "causing or threatening to cause . . . property damage" based on defendant's threat to file a lien because "the lien purported to create [an adverse] property right."
United States v. Covington, 65 F.4th 726 (4th Cir. 2023)	The defendant was not entitled to the four-level reduction pursuant to §2P1.1(b)(3) (escape from a "non-secure" facility and no offense committed while away) where there was sufficient evidence to reasonably conclude that he committed a disqualifying offense.
Fifth Circuit	
United States v. Scott, 70 F.4th 846 (5th Cir. 2023)	The district court properly applied the cross reference at §2J1.3(c)(1) for perjury "in respect to a criminal offense" based on the defendant's false testimony that resulted in another individual's conviction for drug trafficking. The defendant's perjury "was plainly 'in respect to' [the other individual's] drug offense under §2J1.3(c)(1)" even though it "sought to aid, not hinder," the prosecution for drug trafficking.

United States v. Sansbury, 66 F.4th 612 (5th Cir. 2023)	The district court properly applied a four-level abduction enhancement under §2B3.1(b)(4)(A) where, during a robbery, the defendant "pointed a gun at [a] cashier and forced him to walk . . . from the cashier area to the restroom, where [the defendant] zip-tied the cashier's hands." Under these facts, the victim was "forced to accompany an offender to a different location," and the "incapacitation of the cashier prevented the cashier from interfering in or disrupting the robbery, thereby facilitating the commission of the offense."
United States v. Huerta-Rodriguez, 64 F.4th 270 (5th Cir. 2023)	"When a defendant has a prior illegal-reentry conviction under [8 U.S.C. §] 1326(b)(2) that came *before* any intervening change in law calling into question the aggravated-felony status of the predicate offense, a district court does not err in sentencing the defendant under § 1326(b)(2) [for a new illegal-reentry conviction]. Under these circumstances, the prior illegal-reentry conviction is *itself* an aggravated felony that supports a subsequent § 1326(b)(2) sentence."

Sixth Circuit

United States v. Velasquez, 81 F.4th 583 (6th Cir. 2023)	A conviction for conspiracy to use interstate commerce to commit murder does not receive a 3-level reduction under §2X1.1(b)(2) because §2X1.1 applies only to conspiracies not covered by another guideline. Because §2E1.4 references to "the offense level applicable to the underlying conduct" and the offense level for the underlying conduct is §2A1.5, §2X1.1 is inapplicable because §2A1.5 expressly covers conspiracy.
United States v. Messer, 71 F.4th 452 (6th Cir. 2023)	The increase for use of a dangerous weapon in a kidnapping, §2A4.1(b)(3), applied where the defendant knew his confederates were armed and could reasonably foresee that they would use the firearm in committing a sexual assault during the kidnapping. The sexual exploitation increase, §2A4.1(b)(5), applied despite the defendant's argument that he believed there was consent.
United States v. Medlin, 65 F.4th 326 (6th Cir. 2023)	The enhancement for "permanent or life-threatening bodily injury" in §2A4.1(b)(2)(A) is not ambiguous. "This phrase is disjunctive and includes two possible types of injuries": permanent injury ("forever changed without the ability to return to what it once was") *or* life-threatening injury ("so serious as to actually threaten the victim's life"). Even if the enhancement were ambiguous, the definitions provided at Application Note 1(K) to §1B1.1 would likely fall within the zone of ambiguity and control. The victim's pulled teeth and scarring are permanent injuries under both the plain meaning of the guideline and the commentary.
Gilbert v. United States, 64 F.4th 763 (6th Cir. 2023)	Sentences for aggravated identity theft in violation of 18 U.S.C. § 1028A must run consecutively to all other sentences, including undischarged state sentences.

Seventh Circuit

United States v. White, 80 F.4th 811 (7th Cir. 2023)	Declining to employ the Third Circuit's multi-factor approach that considers whether physical contact was lengthy or confining, the court found application of the physical restraint enhancement at §2B3.1(b)(4)(B) to be proper where "[b]y pulling the bank manager by his shirt into the lobby at gunpoint, [a coconspirator] engaged in a physical act that 'depriv[ed the manager] of his freedom of physical movement.'" However, application of the enhancement was improper for a second robbery where the defendant "flashed a handgun and ordered a T-Mobile employee to lead the way to a back inventory room."

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Mason, 84 F.4th 1152 (10th Cir. 2023)	The assimilated offense of Oklahoma first-degree burglary, under the Indian Major Crimes Act, requires imprisonment for "not less than seven (7) years," a mandatory minimum sentence that deprived the sentencing court of authority to suspend or defer any portion of the penalty. Therefore, 84 months—not the advisory guideline range of 51 to 63 months imprisonment—was the guideline sentence for the offense pursuant to §5G1.1(b).
United States v. Linares, 67 F.4th 1085 (10th Cir. 2023)	Defendant was not entitled to a reduction of his offense level under §2X1.1(b)(1) for an attempt because he was about to complete the substantive offense (carjacking) but for interruption by the victim's 911 call. In addition, the district court correctly applied the §2B3.1(b)(5) enhancement for an "offense [that] involved carjacking" because the commentary definition of "carjacking" includes carjackings committed "by force and violence or by intimidation" and does not require the same intent to cause death or serious bodily harm as the federal carjacking statute, 18 U.S.C. § 2119.

Eleventh Circuit

United States v. Perez, 86 F.4th 1311 (11th Cir. 2023)	A sentence imposed pursuant to 18 U.S.C. § 3147—which provides that a person who commits a felony offense while on pretrial release "shall be sentenced, in addition to the sentence prescribed for the offense, to . . . a term of imprisonment of not more than ten years," with the additional term to be "consecutive to any other sentence of imprisonment"—"can exceed the maximum term prescribed for the underlying offense(s) of conviction" if the

	fact of committing the felony offense while on pretrial release is submitted to a jury and proven beyond a reasonable doubt.
United States v. Ware, 69 F.4th 830 (11th Cir. 2023)	The district court properly applied the "restraint" enhancement in §2B3.1(b)(4)(B) where the defendant "pointed a gun in a customer's face while she was on the floor and threatened to kill her," "forced a victim to the ground at gunpoint," and "forced an employee down the hall of the establishment at gunpoint."

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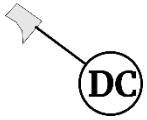

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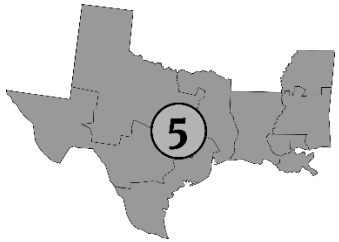

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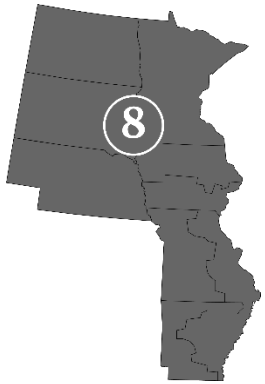

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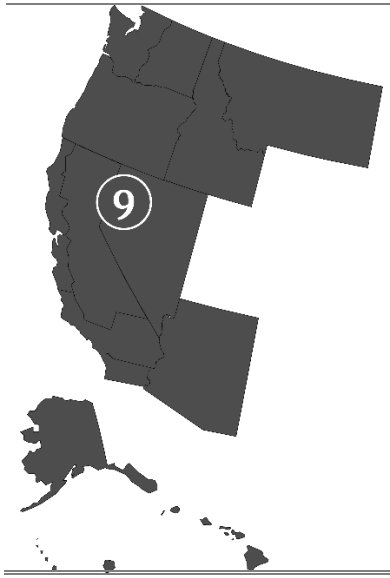

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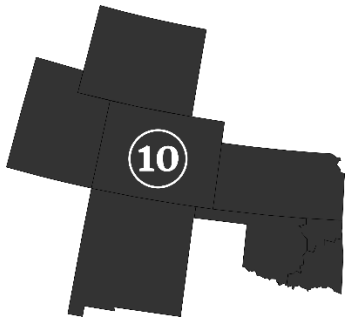

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