INTERACTIVE

Case Law Update

JANUARY – DECEMBER 2022

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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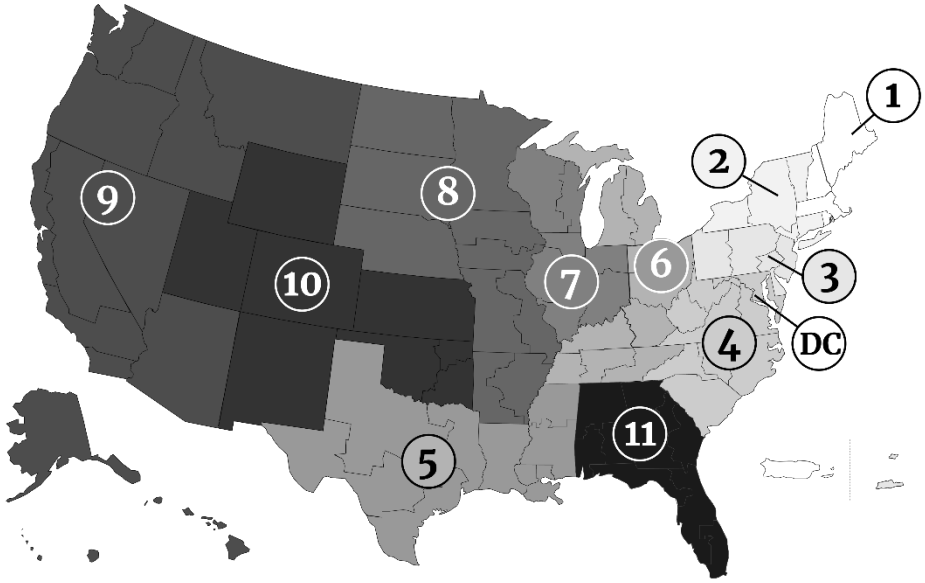

Cases appear in descending chronological order within a circuit.

U.S. Supreme Court

Concepcion v. United States, 142 S. Ct. 2389 (2022)	When a district court adjudicates a motion pursuant to section 404 of the First Step Act of 2018, the district court "may consider other intervening changes of law (such as changes to the [s]entencing [g]uidelines) or changes of fact (such as behavior in prison)" in determining whether and to what extent to reduce an eligible defendant's sentence. However, the district court need not accept such arguments.
United States v. Taylor, 142 S. Ct. 2015 (2022)	Attempted Hobbs Act robbery is not a "crime of violence" under the "elements" clause of 18 U.S.C. § 924(c)(3)(A) because taking a substantial step towards Hobbs Act robbery does not categorically require the use, attempted use, or threatened use of physical force.
Wooden v. United States, 142 S. Ct. 1063 (2022)	Offenses that arise from a single criminal episode do not occur on different "occasions," given the term's ordinary meaning, and thus count as only one prior conviction for purposes of 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA"). Whether offenses occurred on different occasions depends on multiple factors, including timing, location, and the character and relationship of the offenses.

Appellate Court

Career Offender

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

United States v. Gibson, 55 F.4th 153 (2d Cir. 2022)	To determine whether a prior state offense is a "controlled substance offense" under §4B1.1, courts should not compare the substance involved to the Controlled Substances Act schedules in effect at the time of the prior offense. Rather, the proper point of reference is either the time of the instant federal offense or the time of federal sentencing. Under either framework, the defendant in this case was not a career offender.
United States v. Chappelle, 41 F.4th 102 (2d Cir. 2022)	Hobbs Act robbery is not a "crime of violence" under §4B1.2(a) because its force element may be satisfied by force against property in addition to force against persons; consequently, neither is conspiracy to commit Hobbs Act robbery.

United States v. Castillo, 36 F.4th 431 (2d Cir. 2022)	Attempted second-degree gang assault under New York law is not a "crime of violence" under the "force" clause of §4B1.2(a) because it is not a coherent offense—it requires intent to cause unintended serious physical injury—and none of the coherent elements of the offense otherwise involve the use, attempted use, or threatened use of physical force. Additionally, the offense falls outside of the generic definition of "attempt," as used in Application Note 1 to §4B1.2, and the generic definition of "aggravated assault," as included in the "enumerated offenses" clause of §4B1.2(a).
Third Circuit	
United States v. Abreu, 32 F.4th 271 (3d Cir. 2022)	Conspiracy to commit a crime of violence is not a "crime of violence" for purposes of §2K2.1. Section 2K2.1's commentary defines "crime of violence" by reference to §4B1.2(a), the guideline text of which excludes conspiracy offenses.
United States v. Dawson, 32 F.4th 254 (3d Cir. 2022)	Pennsylvania drug trafficking is a "controlled substance offense" under §4B1.2(b) because the Pennsylvania statute does not criminalize more conduct than the guidelines.
Fourth Circuit	
United States v. Boyd, 55 F.4th 272 (4th Cir. 2022)	Where the South Carolina statute under which the defendant had a prior conviction was divisible, the district court did not clearly err in finding that the state sentencing sheet showed that the defendant was convicted of possession with intent to distribute—a "controlled substance offense" within meaning of the career offender guideline—rather than mere purchase or conspiracy.
United States v. Rice, 36 F.4th 578 (4th Cir. 2022)	North Carolina assault inflicting physical injury by strangulation is categorically a "crime of violence" within the meaning of §4B1.2(a)(1) because it "can only be committed with an intentional, knowing or purposeful state of mind."
United States v. Campbell, 22 F.4th 438 (4th Cir. 2022)	The addition of attempt crimes to the commentary to §4B1.2 is not authoritative under *Stinson v. United States*, 508 U.S. 36 (1993), because it is plainly "inconsistent" with the guideline. Deference to the commentary is also not warranted under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), because the guideline is not "genuinely ambiguous." This holding is in conflict with the court's opinion in *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022).
Fifth Circuit	
United States v. Kelley, 40 F.4th 276 (5th Cir. 2022)	Pursuant to *Borden v. United States*, 141 S. Ct. 1817 (2021), Texas assault on a public servant is not a "crime of violence" under the "force" clause of §4B1.2(a)(1) because the statute "includes three indivisible mental states, one of which is recklessness."

United States v. Vargas, 35 F.4th 936 (5th Cir. 2022)	*Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which does not discuss the sentencing guidelines, did not unequivocally overrule Fifth Circuit precedent holding that §4B1.1's career-offender enhancement includes inchoate offenses such as conspiracy.
United States v. Garner, 28 F.4th 678 (5th Cir. 2022)	Louisiana aggravated assault with a firearm is not categorically a "crime of violence" under §4B1.2(a) because it is a general intent crime that can be committed recklessly or negligently.

Sixth Circuit

United States v. Clark, 46 F.4th 404 (6th Cir. 2022)	Courts assess the meaning of the term "controlled substance" for purposes of determining whether a prior conviction is a "controlled substance offense" under §4B1.2 by looking to the drug schedules in place at the time of the prior conviction, rather than the time of the instant federal sentencing. Thus, the removal of hemp from the drug schedules after the defendant's predicate conviction but before his federal sentencing did not impact that the predicate was a "controlled substance offense." In so holding, the Sixth Circuit declined to follow precedent from the First, Fourth, Ninth, and Eleventh Circuits. In an opinion filed the same day, discussed *infra*, the Eighth Circuit agreed with the First, Fourth, Ninth, and Eleventh Circuits.
United States v. Butts, 40 F.4th 766 (6th Cir. 2022)	One form of Ohio robbery, assumed to be divisible, is not a "crime of violence" under §4B1.2(a)'s "force" clause because it includes negligent or reckless infliction of harm; the court declined to consider whether it might qualify under the "enumerated offenses" clause of §4B1.2(a).
United States v. Miller, 34 F.4th 500 (6th Cir. 2022)	Tennessee drug delivery constitutes a "controlled substance offense" under §4B1.2(b) because it includes only completed deliveries of narcotics (*i.e.*, actual, constructive, or attempted transfers of narcotics), not attempted deliveries. The Sixth Circuit's *en banc* decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (per curiam) (en banc), *reconsideration denied* 929 F.3d 317 (Mem.), did not bind the panel to the opposite conclusion because the *Havis* court merely accepted a stipulation by the parties as to the reach of the Tennessee drug delivery statute and did not independently examine and make a holding on that issue.

Seventh Circuit

United States v. Johnson, 47 F.4th 535 (7th Cir. 2022)	Pursuant to circuit precedent, since the definition of "controlled substance offense" in §4B1.2 does not incorporate or refer to the Controlled Substances Act, the federal definition of "controlled substance" does not control the interpretation of the term in the guideline.

United States v. Dixon, 27 F.4th 568 (7th Cir. 2022)	Iowa intimidation with a dangerous weapon qualifies as a "crime of violence" for purposes of the guidelines because the statute requires "reasonable apprehension of serious injury." Such a requirement "necessarily includes a 'threatened use of physical force,'" and therefore, meets the definition of "crime of violence" under the "elements" clause of §4B1.2(a)(1).
United States v. Thomas, 27 F.4th 556 (7th Cir. 2022)	Wisconsin child abuse is a "crime of violence" for purposes of the career offender guidelines because it requires intentionally inflicting bodily harm on a child, which is consistent with circuit precedent. The court held that it would not reconsider such precedent based on a circuit split regarding whether "overt violent force" is required by the definition of "violent felony" in 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA") or the definition of "crime of violence" in §4B1.2(a).
United States v. Shaffers, 22 F.4th 655 (7th Cir. 2022)	A conviction for Illinois aggravated assault that incorporates the prong of the divisible Illinois battery statute requiring "fear of causing bodily harm" is a "crime of violence" under the "elements" clause of §4B1.2(a)(1).

Eighth Circuit

United States v. Frazier, 48 F.4th 884 (8th Cir. 2022)	In light of *Borden v. United States*, 141 S. Ct. 1817 (2021), the first alternative of intimidation with a dangerous weapon under Iowa Code § 708.6(2) does not qualify as a "crime of violence" under the "force" clause of §4B1.2(a) because a defendant may violate the first alternative by intentionally firing a gun inside a building "but only recklessly caus[ing] an occupant to fear serious injury." The second, or "threat," alternative of section 708.6(2) also does not qualify as a "crime of violence" because threatening to commit an act that does not satisfy the "force" clause likewise does not satisfy the "force" clause, even if the threat itself is intentional.
United States v. Kent, 44 F.4th 773 (8th Cir. 2022)	Iowa interference with official acts is a "crime of violence" under §4B1.2(a) because it includes as an element the infliction of bodily injury, which cannot be committed recklessly.
United States v. Burnett, 35 F.4th 1147 (8th Cir. 2022)	The 2009 version of the Arkansas assault-by-suffocation-or-strangulation statute, which is nearly identical to the current version, qualifies as a "crime of violence" for purposes of §2K2.1(a)(4), which incorporates the definition of such term in §4B1.2(a).
United States v. Lopez-Castillo, 24 F.4th 1216 (8th Cir. 2022)	Arizona aggravated assault constitutes a "crime of violence," as defined in §4B1.2(a) and incorporated at §2K2.1(a)(2), because it requires the use of physical force against another person.

Ninth Circuit

United States v. Tagatac, 36 F.4th 1000 (9th Cir. 2022)	Hawai'i's second-degree robbery statute is divisible, and the defendant was convicted under the part of the statute that qualifies as a "crime of violence" under the "force" clause of §4B1.2(a).
United States v. House, 31 F.4th 745 (9th Cir. 2022)	Montana possession of dangerous drugs with intent to distribute is not a "controlled substance offense" under §4B1.2(b) because the Montana statute criminalizes more conduct than its federal analogue. Specifically, the federal definition of marijuana at 21 U.S.C. § 802(16) was amended in 2018 to expressly exclude hemp, whereas the Montana statute's definition does not exclude hemp.

Tenth Circuit

United States v. Harbin, No. 21-8038, 2022 WL 17929938 (10th Cir. Dec. 27, 2022)	It was not plain error for the district court to apply §4B1.1 where state law included hemp as a controlled substance at the time of the defendant's prior state drug conviction, but not at the time of his federal sentencing. Any error was not clear or obvious because circuit precedent "did not resolve the question whether a prior state drug conviction should be defined by reference to current rather than former state law," out-of-circuit opinions rejected the defendant's position, and the Supreme Court has yet to address the issue.
United States v. Adams, 40 F.4th 1162 (10th Cir. 2022)	Kansas aggravated battery includes conduct that "sweeps beyond" the definition of "crime of violence" in §4B1.2(a)(1) because it could stem from battery against a fetus. The definition's reference to force "against the *person* of another" refers "only to individuals born alive; fetuses aren't included."
United States v. Wilkins, 30 F.4th 1198 (10th Cir. 2022)	The district court would not have obviously erred by considering the Texas aggravated robbery statute of which the defendant previously was convicted to be divisible and by deeming its statutory components to be elements. The defendant pleaded guilty to the set of elements that meet the guidelines' definition of "crime of violence."

Eleventh Circuit

	No cases selected by Commission staff.

Categorical Approach

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Mulkern, 49 F.4th 623 (1st Cir. 2022)	Because the defendant conceded at sentencing that his two prior Maine drug trafficking convictions involved cocaine, which categorically qualify as "serious drug offense[s]" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA"), he waived his argument on appeal that the government was required to offer additional documents under *Shepard v. United States*, 544 U.S. 13 (2005), to show "under which prong of Maine's drug trafficking statute [he] was convicted."
United States v. Doe, 49 F.4th 589 (1st Cir. 2022)	The Massachusetts drug distribution statute is categorically a "serious drug offense" for purposes of 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA"). Despite adding "dispensing" to the categories of prohibited conduct, the Massachusetts statute sufficiently involves the types of conduct specified in 18 U.S.C. § 924(e)(2)(A)(ii).

Second Circuit

United States v. Ragonese, 47 F.4th 106 (2d Cir. 2022)	A New York law prohibiting sexual intercourse with a child who is less than 11 years old "relates to" sexual abuse of a minor for purposes of sentencing enhancements in 18 U.S.C. § 2252A(b)(1) and (2) because it is defined in terms of sexual conduct. These sentencing enhancements are not void for vagueness.
Stone v. United States, 37 F.4th 825 (2d Cir. 2022)	Where a jury finds a defendant guilty of violating 18 U.S.C. § 924(c) based on two predicates, only one of which can lawfully serve as a predicate, the error is harmless if the jury would have found the defendant guilty of the allowable predicate beyond a reasonable doubt. Further, second-degree murder under New York law is categorically a "crime of violence" for purposes of section 924(c).
United States v. Pastore, 36 F.4th 423 (2d Cir. 2022)	Substantive violent crimes in aid of racketeering (VICAR) offenses are divisible offenses subject to the modified categorical approach. A substantive VICAR conviction for attempted murder in aid of racketeering that is predicated on attempted murder in violation of New York law is a "crime of violence" for purposes of 18 U.S.C. § 924(c).
United States v. Laurent, 33 F.4th 63 (2d Cir. 2022)	A substantive RICO violation is a "crime of violence" for purposes of 18 U.S.C. § 924(c) "[i]f one of the two racketeering acts required for [the] violation conforms to the definition of a crime of violence." However, under Second Circuit precedent, conspiracy to commit Hobbs Act robbery is not a "crime of violence" under section 924(c).

Third Circuit

United States v. Bentley, 49 F.4th 275 (3d Cir. 2022)	For an underlying conviction to be considered on collateral review as a predicate offense under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA"), it must have been "reasonably on the menu of options as an ACCA predicate during the original criminal case." It must have been identified as an ACCA predicate in—among other things—a charging document, plea memorandum, pretrial notice, sentencing filing, the presentence report (PSR), or the sentencing hearing so that the sentencing court had reasonable opportunity to consider it. A crime listed in the criminal history section of the PSR, but never mentioned as an ACCA predicate during the direct criminal case, may not be considered on collateral review.
United States v. Brown, 47 F.4th 147 (3d Cir. 2022)	Absent contrary statutory language, district courts must look to the federal law in effect at the time a defendant commits a federal offense, not the federal law in effect when the defendant is sentenced for such offense, when employing the categorical approach in the context of 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA").

Fourth Circuit

United States v. Mack, No. 21-4191, 2022 WL 17843867 (4th Cir. Dec. 22, 2022)	South Carolina first degree assault and battery is categorically a crime of violence under §4B1.2(a)(1) because it necessarily requires force that is sufficient to "overcome a victim's physical resistance," *Stokeling v. United States*, 139 S. Ct. 544 (2019), and involves conduct "directed or targeted at another," *Borden v. United States*, 141 S. Ct. 1817 (2021).
United States v. Davis, 53 F.4th 168 (4th Cir. 2022)	Because 18 U.S.C. § 844(f) (1994) criminalized arson of property fully owned by the defendant and is therefore broader than 18 U.S.C. § 924(c)(3)(A), which defines a "crime of violence" to include certain offenses against the property "of another," it is not categorically a predicate crime of violence.
United States v. Manley, 52 F.4th 143 (4th Cir. 2022)	Offenses that can be committed with a *mens rea* of extreme recklessness are "crime[s] of violence" for purposes of 18 U.S.C. § 924(c).
United States v. Proctor, 28 F.4th 538 (4th Cir. 2022)	A Maryland conviction for assault with intent to prevent lawful apprehension or detainer is not a "violent felony" under the "force" clause of 18 U.S.C. § 924(e) because it can be committed with the *de minimis* touching of someone to prevent arrest.
United States v. Hope, 28 F.4th 487 (4th Cir. 2022)	A 2013 conviction for possession of marijuana with intent to distribute in proximity of a school under South Carolina Code § 44-53-445 is not a "serious drug offense" under 18 U.S.C. § 924(e) because section 445 is indivisible as to drug type and the federal and South Carolina drug schedules do not categorically match. Even if section 445 were divisible by

	drug type, South Carolina's definition of "marijuana" in 2013 was broader than the federal definition of "marijuana" at the time of the defendant's sentencing on the instant case.
United States v. White, 24 F.4th 378 (4th Cir. 2022)	Virginia common law robbery is not a "violent felony" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA") because it can be committed by means of threatening to accuse the victim of having committed sodomy.

Fifth Circuit

United States v. Thompson, 54 F.4th 849 (5th Cir. 2022)	The Mississippi offense of burglary of a dwelling is a valid predicate under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA"). The element of this offense requiring that the defendant enter "a dwelling house" does not sweep more broadly than the requirement in ACCA's generic definition of burglary that a defendant enter "a building or other structure."
United States v. Clark, 49 F.4th 889 (5th Cir. 2022)	Valid predicate offenses under the ACCA include the Texas offenses of aggravated assault by threat of bodily injury (a "violent felony"), burglary (a "violent felony"), and possession with intent to distribute a controlled substance (a "serious drug offense"). But the Texas offense of aggravated assault by bodily injury is not categorically a "violent felony" under the ACCA because it can be committed with a mens rea of recklessness.
United States v. Perry, 35 F.4th 293 (5th Cir. 2022)	Applying circuit precedent, the district court committed plain error by allowing the jury to convict the defendants under 18 U.S.C. §§ 924(c), (j), and (o) based on a RICO conspiracy as a "crime of violence" predicate.
United States v. Stoglin, 34 F.4th 415 (5th Cir. 2022)	Because Texas aggravated assault can be committed recklessly, it does not qualify as a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F)(ii).

Sixth Circuit

United States v. Harrison, 54 F.4th 884 (6th Cir. 2022)	Complicity to commit murder under Kentucky law is a "serious violent felony" as defined in 18 U.S.C. § 3559(c)(2) because it always requires the use of physical force, even when the murder is committed through omission. Moreover, the Kentucky statute requires a mental state of "wantonness," which is more than recklessness, and so does not implicate *Borden v. United States*, 141 S. Ct. 1817 (2021). Thus, the district court properly applied a heightened statutory minimum under 21 U.S.C. § 841 based on the defendant's prior conviction for complicity to commit murder under the Kentucky statute.
United States v. Fields, 53 F.4th 1027 (6th Cir. 2022)	Although a prior panel had held that the word "involving" in the definition of "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) required only that a prior offense "relate to or connect

	with" conduct listed in that statute, the Supreme Court's decision in *Shular v. United States*, 140 S. Ct. 779 (2020), requires instead that the offense "necessarily entails" the listed conduct. A Kentucky statute forbidding possession of a methamphetamine precursor with intent to manufacture methamphetamine does not "necessarily entail" manufacturing conduct because the statute applies even where the defendant is not capable of manufacturing methamphetamine.
United States v. Paulk, 46 F.4th 399 (6th Cir. 2022)	Michigan third-degree home invasion constitutes a "violent felony" for purposes of 18 U.S.C. § 924(e) because there is no realistic probability that Michigan would predicate a conviction for third-degree home invasion on an offense that lacks an intent element.
United States v. Belcher, 40 F.4th 430 (6th Cir. 2022)	The Supreme Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), did not undermine circuit precedent establishing that Tennessee robbery is a "violent felony" for purposes of 18 U.S.C. § 924(e) because the statute does not include instances where the defendant recklessly or negligently, rather than intentionally, caused fear through a threat of force.
United States v. Williams, 39 F.4th 342 (6th Cir. 2022)	Kentucky second-degree robbery is a "violent felony" for purposes of 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA") because it involves force sufficient to overcome the victim's will, which is necessarily physical force, and it requires the force be used with specific intent to accomplish theft, rather than recklessness. Further, the district court appropriately determined that the defendant's four Kentucky second-degree robberies occurred on separate occasions because they were separated by a minimum of six days, occurred in at least three locations, and, although committed by the same people, were not committed "in the exact same manner."

Seventh Circuit

United States v. Turner, 47 F.4th 509 (7th Cir. 2022)	When there is an apparent textual mismatch between a state statute's definition of an offense and the definition of "serious drug offense" or "violent felony" in 18 U.S.C. § 924(e), the court must determine whether the mismatch "stem[s] from conduct that is factually impossible." If so, then no real mismatch exists. The categorial approach does not "require courts to ignore whether mismatched 'conduct' is actually impossible as a matter of scientific fact."
Aguirre-Zuniga v. Garland, 37 F.4th 446 (7th Cir. 2022)	The defendant's prior 2018 Indiana conviction for dealing in methamphetamine is not an "aggravated felony" for purposes of removability under 8 U.S.C. § 1227(a)(2)(A)(iii) because the Indiana statute at the time of conviction criminalized optical, positional, and geometric

	isomers of methamphetamine, while the corresponding federal offense only prohibits optical isomers. Therefore, the statute of conviction was facially overbroad. In addition, a court may only apply the "realistic probability" test to a statute if the court finds the statute ambiguous.
Johnson v. United States, 24 F.4th 1110 (7th Cir. 2022)	The defendant's prior conviction for Indiana criminal deviate conduct qualifies as a "violent felony" under 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA"). At the time of the defendant's conviction, the Indiana statute was divisible, and the forcible compulsion part of the statute, under which the defendant was convicted, required sufficient force to qualify as a "violent felony" under the ACCA.

Eighth Circuit

United States v. Perez, 46 F.4th 691 (8th Cir. 2022)	The defendant's prior Iowa convictions for delivery of cocaine do not qualify as "serious drug offenses" under 18 U.S.C. § 924(e) because Iowa's drug schedule at the time of the prior convictions was broader than the federal schedule at the time of the defendant's federal offense. The categorical approach "requires comparison of the state drug schedule at the time of the prior state offense to the federal schedule at the time of the federal offense."
United States v. Hutchinson, 27 F.4th 1323 (8th Cir. 2022)	Texas burglary qualifies as a "violent felony" under 18 U.S.C. § 924(e) because it "contains the [necessary] generic specific intent requirement" that the defendant unlawfully enter with intent to commit a crime.
United States v. Fisher, 25 F.4th 1080 (8th Cir. 2022)	The Minnesota first-degree burglary statute is divisible, and first-degree burglary with assault ("subdivision 1(c)" of the statute) qualifies as a "serious violent felony" for purposes of the enhanced penalties provided under 21 U.S.C. § 841(b)(1)(A).
United States v. Matthews, 25 F.4th 601 (8th Cir. 2022)	Minnesota attempted second-degree murder qualifies as a "violent felony" under 18 U.S.C. § 924(e) because the second-degree murder statute requires that the defendant intend to cause the death of a human being, and attempt convictions require that the defendant have the specific intent to commit the underlying offense.
United States v. Williams, 24 F.4th 1209 (8th Cir. 2022)	Nebraska offense of making terroristic threats is not a "violent felony" under 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA") because it can be committed with a mental state of "reckless disregard." The Supreme Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), which held that an offense that can be committed with a *mens rea* of recklessness does not qualify as a "violent felony," abrogated *Fletcher v. United States*, 858 F.3d 501 (8th Cir. 2017), which had held that the Nebraska offense of making terroristic threats categorically qualified as a "violent felony."

Ninth Circuit

United States v. Linehan, No. 21-50206, 2022 WL 17840703 (9th Cir. Dec. 22, 2022)	Transportation of an explosive device (18 U.S.C. § 844(d)) is a predicate crime of violence under 18 U.S.C. § 373(a), the federal solicitation statute, because it requires the "attempted use" of physical force and is "categorically a substantial step toward the use of violent force" that is "capable of causing physical pain or injury to another person," *Johnson v. United States*, 559 U.S. 133 (2010). Using an interstate commerce facility with intent that murder be committed (18 U.S.C. § 1958(a)) is not because it can occur without the required force.
United States v. Begay, 33 F.4th 1081 (9th Cir. 2022) (en banc)	The Supreme Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), solely foreclosed offenses requiring only a *mens rea* of "ordinary" recklessness from qualifying as "violent felonies" under the "elements" clause of 18 U.S.C. § 924(e)(2)(B). Accordingly, second-degree murder under 18 U.S.C. § 1111(a), which requires that a defendant act "with recklessness that rises to the level of extreme disregard for human life" rather than with "ordinary recklessness," is a "crime of violence" under the similarly worded "elements" clause of 18 U.S.C. § 924(c)(3)(A).

Tenth Circuit

United States v. Winrow, 49 F.4th 1372 (10th Cir. 2022)	The Oklahoma offense of aggravated assault and battery is not categorically a predicate "violent felony" under the ACCA because it can be committed by way of the slightest touch, no requiring "force capable of causing physical pain or injury."
United States v. Williams, 48 F.4th 1125 (10th Cir. 2022)	The defendant's prior state offenses were categorically broader than the definition of "serious drug offense" in 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA") because they applied to hemp, which was not federally controlled at the time of his instant federal offense. "Consistent with the First, Fourth, Eighth, Ninth, and Eleventh Circuits, we hold a defendant's prior state conviction is not categorically a 'serious drug offense' under the ACCA if the prior offense included substances not federally controlled at the time of the instant federal offense."

Eleventh Circuit

United States v. Jackson, 55 F.4th 846 (11th Cir. 2022)	The definition of the term "serious drug offense" within 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA") "incorporates the version of the controlled-substances list in effect when the defendant was convicted of his prior state drug offense," rather than the one in effect at the time of his federal offense. This decision creates a circuit split with the Third, Fourth, Eighth, and Tenth Circuits.

United States v. Gardner, 34 F.4th 1283 (11th Cir. 2022)	For purposes of the definition of "serious drug offense" in 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA"), the phrase "maximum term of imprisonment," with respect to a prior offense under Alabama law, means the statutory maximum term of imprisonment for such offense, not the "high end" of the sentencing range calculated under Alabama's presumptive sentencing guidelines.

Chapter Three Adjustments

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Gauthier, 53 F.4th 674 (1st Cir. 2022)	The district court did not err in refusing to grant an adjustment under §3E1.1 to a defendant who offered to plead guilty to two of five charged offenses, proceeded to trial on four of them, and was convicted by a jury on the two counts to which he offered to plead guilty. "[W]here . . . a defendant 'retain[s] the option to plead guilty' to one or more charges while contesting others, and instead chooses 'to roll the dice[]'" by proceeding to trial, "a sentencing court acts within its discretion in finding that the defendant is not entitled to the acceptance of responsibility credit."
United States v. Perry, 49 F.4th 33 (1st Cir. 2022)	The district court did not err in applying a 3-level adjustment under §3C1.3 for the defendant's commission of the instant offense while on bail for a different federal offense in another district. The adjustment did not result in a double jeopardy violation or "impermissible double counting" because the other district court judge "did *not* apply that [adjustment] in estimating the guidelines range," and though she mentioned how the defendant "had committed multiple federal offenses (including the offense in this case) while on bail," she "did so in selecting a suitable sentence under the [18 U.S.C.] § 3553(a) factors."
United States v. Chin, 41 F.4th 16 (1st Cir. 2022)	The district court supportably found that the victims of the defendant's offense were "unusually vulnerable [under §3A1.1(b)(1)] because their pain led them to 'entrust medical personnel to inject a foreign substance into their spine[s],' recognizing that 'vulnerability can equally refer to one's . . . inability to protect one's self under the circumstances." Further, "nothing in the text [of §3A1.1(b)(1)] bars the application of the [adjustment] to a medical supplier who knew or should have known that he was distributing unsafe drugs that would be used by vulnerable patients."

United States v. McCarthy, 32 F.4th 59 (1st Cir. 2022)	While criminal conduct that occurred before a guilty plea can be considered in a §3E1.1 acceptance-of-responsibility analysis, a court should only look to conduct that occurred after the "lodging of a federal charge." In addition, the commentary to §3E1.1 makes clear that the weight accorded to criminal conduct in such an analysis depends on the "nature and extent of the misconduct"; thus, any criminal conduct, regardless of its classification as a felony or a misdemeanor, may be relevant to the authenticity of a defendant's acceptance of responsibility.
United States v. Brown, 31 F.4th 39 (1st Cir. 2022)	Application of §3C1.2 requires flight from arrest plus reckless conduct, which is satisfied when a defendant physically struggles to resist arrest while possessing a loaded firearm and during the struggle that firearm falls to the ground; the risk of an accidental firing results in potential serious injury to the law enforcement officer.

Second Circuit

United States v. Capelli, 37 F.4th 833 (2d Cir. 2022)	The defendant's trial counsel did not provide ineffective assistance in failing to argue for a downward adjustment under §3E1.1 because, although his counsel conceded at trial that there was sufficient evidence of one of four counts, the defendant went to trial on all four counts and contested factual issues. Additionally, there was no indication that the defendant accepted responsibility pre-trial, which is a valid consideration for the 2-level decrease under §3E1.1(a), not just the additional 1-level decrease under §3E1.1(b).
United States v. Wynn, 37 F.4th 63 (2d Cir. 2022)	When a defendant is sentenced for a RICO violation, the application of a mitigating role adjustment under §3B1.2 will be evaluated based on his role in the overall RICO enterprise.
United States v. Gershman, 31 F.4th 80 (2d Cir. 2022)	The district court properly applied §3C1.1 to the entirety of the defendant's RICO conviction by applying it after calculating the highest base offense level among the underlying racketeering acts under §2E1.1, rather than applying §3C1.1 only to certain racketeering acts and then comparing the resulting offense levels under §2E1.1.
United States v. Zhong, 26 F.4th 536 (2d Cir. 2022)	The vulnerable victim adjustment under §3A1.1(b) may be applied based on victims' membership in a class where the class is defined by characteristics that make the victims "unusually vulnerable" or "particularly susceptible" to the criminal conduct at issue.

Third Circuit

United States v. Adair, 38 F.4th 341 (3d Cir. 2022)	Application Note 4 to §3B1.1, which provides a multi-factor test for determining whether a defendant is an "organizer" or "leader" of a criminal activity warranting an aggravating-role adjustment, is no longer binding. Reevaluating the guideline under the process of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), as required by *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021), the court examined the text, structure, purpose, and history of §3B1.1 and found that they "compel the conclusion that the terms 'organizer' and 'leader' are not genuinely ambiguous." In addition, the amendments made to Application Note 6 to §3E1.1 by Amendment 775 are no longer controlling because (1) Amendment 775 impermissibly altered §3E1.1(b); (2) Amendment 775 exceeded the Commission's delegated powers; and (3) Amendment 775 represented the Commission's "legal interpretation" of §3E1.1(b) and was not the product of "agency subject-matter expertise," thus prohibiting the amendment from qualifying for controlling deference under any framework.

Fourth Circuit

United States v. Shivers, No. 21-4091, 2022 WL 17956802 (4th Cir. Dec. 27, 2022)	The district court committed clear error when it applied the enhancement for reckless endangerment during flight under §3C1.2—which applies when the defendant "created a substantial risk of death or serious bodily injury to another person"—based on risk of harm to the defendant himself and the risk of accidental discharge or discovery by a community member of a firearm he discarded while fleeing pursuing law enforcement officers.
United States v. Hasson, 26 F.4th 610 (4th Cir. 2022)	The Commission properly amended the terrorism adjustment under §3A1.4 pursuant to a congressional directive, and the adjustment does not require that a defendant be convicted of a "[f]ederal crime of terrorism," as defined in 18 U.S.C. § 2332b(g).
United States v. Barringer, 25 F.4th 239 (4th Cir. 2022)	In a tax fraud case, the abuse-of-trust adjustment under §3B1.3 applied to a company's vice president and board member who managed nearly all the company's financial affairs and thus occupied a "position of trust." Applying the adjustment did not constitute impermissible double counting because the elements required to show the defendant was a "responsible person" for purposes of her tax fraud conviction did not include proof of a "position of trust."

Fifth Circuit

United States v. Kelley, 40 F.4th 276 (5th Cir. 2022)	The district court did not clearly err in applying a 2-level reckless endangerment adjustment under §3C1.2. "A reasonable person would not have discarded a pistol with 21 rounds in the

	magazine in a public area while running from police," and in doing so, the defendant "created a number of unjustified risks to himself and others."
United States v. Lara, 23 F.4th 459 (5th Cir. 2022)	The use of a child as a diversionary tactic during the commission of a previously planned crime is an affirmative act sufficient for the application of §3B1.4's adjustment for using a minor to commit a crime.

Sixth Circuit

United States v. Wells, No. 21-5890, 2022 WL 17843853 (6th Cir. Dec. 22, 2022)	The "organizer or leader" aggravating role enhancement under §3B1.1(a) applied even though the defendant was incarcerated for most of the conspiracy, where evidence and the defendant's admissions established that he had decision-making authority over co-conspirators, recruited others through his subordinates, participated in planning of the conspiracy, and had a co-conspirator who carried out his activities when he was incarcerated.
United States v. Mosley, 53 F.4th 947 (6th Cir. 2022)	As indicated in its application notes, §3C1.1 does not apply to a perfunctory denial of guilt, but whether a defendant's letter including a denial of guilt "exceeds [this] narrow tolerance" is "quintessentially fact specific."
United States v. Iossifov, 45 F.4th 899 (6th Cir. 2022)	The district court properly applied §3C1.1 to a defendant who, shortly before trial, sent or caused to be sent false IRS forms to the district court judge, prosecutor, and clerk of court indicating they owed him millions of dollars.
United States v. Ozomaro, 44 F.4th 538 (6th Cir. 2022)	The district court properly applied §3C1.1 where the defendant refused to leave his holding cell with the purpose of avoiding trial.
United States v. Wellman, 26 F.4th 339 (6th Cir. 2022)	An adjustment for obstruction of justice under §3C1.1 may properly be applied to a defendant convicted of an obstruction offense where the adjustment is based upon different conduct than the conduct underlying the offense of conviction.

Seventh Circuit

United States v. Haas, 37 F.4th 1256 (7th Cir. 2022)	A district court does not plainly err in grouping several counts of transmitting threats in interstate commerce against "federal employees, whom it regarded in the aggregate as one victim," separately from others involving "nonspecific threats directed to no identifiable victim (other than society itself)." Application Note 2 to §3D1.2 "leaves room for the atypical

	case . . . where the victim is neither society at large nor a single identifiable individual, but rather a victim category such as 'federal employees.'"
United States v. Mikulski, 35 F.4th 1074 (7th Cir. 2022)	The obstruction adjustment at §3C1.1 applies where a defendant obstructs a state investigation that is "based on the same facts" as the eventual federal conviction, even if the federal investigation of the offense of conviction had not begun at the time of the obstruction. In addition, such an adjustment t is also warranted where a defendant attempts to hinder an investigation of his offense of conviction but is unsuccessful.

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

United States v. Rodriguez, 44 F.4th 1229 (9th Cir. 2022)	When determining whether a defendant qualifies for a minor role adjustment under §3B1.2, the court must first take into account the culpability of every co-participant, including leaders, organizers, and average participants, and second, because the purpose of the five factors in the commentary is to determine the defendant's role "relative to other participants," must analyze the degree to which each of the factors apply to the defendant.

Tenth Circuit

United States v. Nevarez, No. 21-1286, 2022 WL 17744594 (10th Cir. Dec. 19, 2022)	The defendant was not entitled to an offense-level reduction for acceptance of responsibility pursuant to §3E1.1, where he admitted pretrial to possessing the drugs involved in the offense of conviction but put the government to its burden of proof at trial.
United States v. Wells, 38 F.4th 1246 (10th Cir. 2022)	The district court erred to the extent it concluded that the defendant's violation of a domestic "no-contact order is obstruction per se because a no-contact order is analogous to the types of restraining orders" outlined in Application Note 4(J) to §3C1.1 (concerning drug abuse prevention and control). In addition, to the extent the government sought a per se rule that "any violation of a no-contact order in a case involving domestic violence amounts to obstruction, regardless of the nature or content of the violative contact[, t]he potential adoption of such a rule seems like a matter best presented to a policy making body like the Sentencing Commission."
United States v. Arellanes-Portillo, 34 F.4th 1132 (10th Cir. 2022)	The district court plainly erred by basing an aggravating role adjustment under §3B1.1(b) on relevant conduct for the defendant's drug offenses and not exclusively for his money

	laundering offenses. Under Application Note 2(C) to §2S1.1, only money laundering relevant conduct may justify a Chapter Three adjustment for money laundering convictions.

Eleventh Circuit

	No cases selected by Commission staff.

Compassionate Release

D.C. Circuit

United States v. Jenkins, 50 F.4th 1185 (D.C. Cir. 2022)	Nonretroactive changes to statutory penalties are not "extraordinary and compelling reasons" supporting compassionate release under 18 U.S.C. § 3582(c)(1)(A). This case deepens a circuit split between the First, Fourth, Ninth, and Tenth Circuits, which allow such changes to be considered, and the Third, Seventh, and Eighth Circuits, which do not. Intervening changes in law, including both those that amount to "legal errors at sentencing . . . made clear through the retroactive application of intervening judicial decisions" and those that "might have affected the negotiation of a plea bargain by reducing the defendant's exposure" are not "extraordinary and compelling reasons" supporting compassionate release under 18 U.S.C. § 3582(c)(1)(A). Challenges based on such changes must be pursued on direct appeal or collateral review under 28 U.S.C. § 2255.

First Circuit

United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022)	While the policy statement found at §1B1.13 is inapplicable to prisoner-initiated motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A), it "may serve as a non-binding reference" for such motions and remains applicable to compassionate release motions brought by the Bureau of Prisons. Also, "in the absence of a contrary directive in an applicable policy statement," a district court is not precluded from considering a non-retroactive change in the law "as part of the 'extraordinary and compelling' calculus" on a case-by-case basis. This case deepens the circuit split on both issues.
United States v. Texeira-Nieves, 23 F.4th 48 (1st Cir. 2022)	Although the compassionate release provision at 18 U.S.C. § 3582(c)(1)(A) provides authority for a district court to reduce a sentence to time served and impose home confinement as a condition of probation or supervised release, the provision does not provide authority for a district court to order that an unmodified sentence be served on home confinement.

Second Circuit

United States v. Orena, 48 F.4th 61 (2d Cir. 2022)	"[W]hen considering a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A), a district court does not have discretion to consider new evidence proffered for the purpose of attacking the validity of the underlying conviction in its balancing of the 18 U.S.C. § 3553(a) factors." Such evidence or arguments must instead be presented through 28 U.S.C. § 2255 or 28 U.S.C. § 2241.
United States v. Halvon, 26 F.4th 566 (2d Cir. 2022)	Defendants who received a statutory mandatory minimum sentence are eligible for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit

United States v. Bethea, 54 F.4th 826 (4th Cir. 2022)	The district court's denial of the defendant's motion for compassionate release was not an abuse of discretion where the court considered the 18 U.S.C. § 3553(a) sentencing factors in a single hearing on both the defendant's resentencing on remand and his subsequent request for compassionate release.
United States v. Ferguson, 55 F.4th 262 (4th Cir. 2022)	A compassionate release motion cannot be used to challenge the validity of a defendant's conviction or sentence. A petition under 28 U.S.C. § 2255 is the exclusive remedy for challenging a federal conviction or sentence after the conclusion of the period for direct appeal. That a defendant "may be procedurally barred from raising his arguments in a § 2255 petition does not qualify as an 'extraordinary and compelling reason[]' for compassionate release."
United States v. Hargrove, 30 F.4th 189 (4th Cir. 2022)	The determination of whether a defendant demonstrates extraordinary and compelling reasons for compassionate release under 18 U.S.C. § 3582(c)(1)(A) is a multifaceted inquiry conducted on the totality of the relevant circumstances. Further, in deciding whether to reduce a sentence under section 3582(c)(1)(A), it is proper for a district court to consider 18 U.S.C. § 3553(a)(2)(A)'s retributive factors, even where the sentence was in part a revocation sentence.

Fifth Circuit

United States v. Handlon, 53 F.4th 348 (5th Cir. 2022)	"[A] court cannot deny a second or subsequent motion for compassionate release 'for the reasons stated' in a prior denial where the subsequent motion presents changed factual circumstances and it is not possible to discern from the earlier order what the district court thought about the relevant facts." "[J]udges have an obligation to say enough that the public can be confident that cases are decided in a reasoned way."

Sixth Circuit

United States v. McCall, No. 21-3400, 2022 WL 17843865 (6th Cir. Dec. 22, 2022) (en banc)	Resolving an intracircuit split, the Sixth Circuit sitting en banc held that nonretroactive changes in sentencing law cannot constitute "extraordinary and compelling" reasons justifying compassionate release. In so holding, the Sixth Circuit joined the Third, Seventh, Eighth, and D.C. Circuits, and split with the First, Fourth, Ninth, and Tenth Circuits.
United States v. McKinnie, 24 F.4th 583 (6th Cir. 2022)	The court's holding in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (providing that an attempt crime cannot be a predicate "controlled substance offense" for purposes of the career offender enhancement at §4B1.1), was a nonretroactive judicial decision, and therefore, cannot serve as an "extraordinary and compelling reason" justifying compassionate release under 18 U.S.C. § 3582(c)(1)(A), whether offered alone or in combination with other factors. This case deepens the intra-circuit split over the propriety of considering changes in law in combination with other factors as grounds for a sentence reduction.

Seventh Circuit

United States v. Peoples, 41 F.4th 837 (7th Cir. 2022)	Although successful rehabilitation may be considered "'as one among other factors' warranting a reduced sentence under [18 U.S.C.] § 3582(c)(1)(A)," it "'cannot serve as a stand-alone reason' for compassionate release."
United States v. King, 40 F.4th 594 (7th Cir. 2022)	"*Concepcion* [*v. United States*, 142 S. Ct. 2389 (2022),] is irrelevant to the threshold question whether any given prisoner has established an 'extraordinary and compelling' reason for release" under 18 U.S.C. § 3582(c)(1)(A). "[T]he older policy statements [in §1B1.13 and Application Note 1] remain useful to guide district judges' discretion" in assessing eligibility for compassionate release, and they "do not hint that the sort of legal developments

	routinely addressed by direct or collateral review qualify a person for compassionate release."
United States v. Brock, 39 F.4th 462 (7th Cir. 2022)	"Judicial decisions, whether characterized as announcing new law or otherwise, cannot alone amount to an extraordinary and compelling circumstance allowing for a sentence reduction" under 18 U.S.C. § 3582(c)(1)(A). "To permit otherwise would allow [section] 3582(c)(1)(A) to serve as an alternative to a direct appeal or a properly filed post-conviction motion under 28 U.S.C. § 2255."
United States v. Sarno, 37 F.4th 1249 (7th Cir. 2022)	A district court does not plainly err in denying a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) if counsel fails to alert the court to any problem contacting his client until he moves for reconsideration and the proffered information from the client would not have changed the court's decision to deny the motion on 18 U.S.C. § 3553(a) grounds.
United States v. Newton, 37 F.4th 1207 (7th Cir. 2022)	Although a remand on a compassionate release motion under 18 U.S.C. § 3582(c)(1)(A) is not a full resentencing, it is "a risky procedure for a district court to rule on [such] a motion without the input of the parties" following numerous changes in intervening law.
United States v. Shorter, 27 F.4th 572 (7th Cir. 2022)	Release from prison to home confinement renders a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) that was filed prior to such release moot. The argument that a return to prison would pose a "very high medical risk" if the defendant violated such home confinement is "too speculative to provide [the defendant] with a constitutionally cognizable stake in this case."
United States v. Rucker, 27 F.4th 560 (7th Cir. 2022)	Notwithstanding the court's conclusion in *United States v. Broadfield*, 5 F.4th 801 (7th Cir. 2021), that "the availability of vaccines had effectively eliminated the risks of COVID-19 to most federal prisoners," district courts must assess an inmate's individual circumstances in deciding whether compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) is warranted.
United States v. Barbee, 25 F.4th 531 (7th Cir. 2022)	Remand of the district court's denial of the defendant's compassionate release motion under 18 U.S.C. § 3582(c)(1)(A), which was based in part on his risk of contracting COVID-19, would be inappropriate because such a remand would not result in a decision in the defendant's favor "[g]iven the current data and the availability of safe and effective vaccines."

Eighth Circuit

United States v. Crandall, 25 F.4th 582 (8th Cir. 2022)	A non-retroactive change in the law, whether offered alone or in combination with other factors, cannot contribute to a finding of "extraordinary and compelling reasons" for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). This case deepens the circuit split over the propriety of considering changes in law in combination with other factors as grounds for a reduction in sentence.

Ninth Circuit

United States v. Chen, 48 F.4th 1092 (9th Cir. 2022)	With respect to defendant-filed motions for compassionate release, the district court "may consider the First Step Act's non-retroactive changes to sentencing law" along with other particularized factors in determining whether extraordinary and compelling reasons exist for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The two limitations Congress placed on extraordinary and compelling reasons do not prohibit consideration of non-retroactive changes in sentencing law. This case deepens the circuit split over considering such changes as grounds for a reduction in sentence.
United States v. Wright, 42 F.4th 1063 (9th Cir. 2022)	Even if a district court errs by construing §1B1.13 as a binding constraint with respect to a defendant-filed motion under 18 U.S.C. § 3582(c)(1)(A), the error is harmless if the court properly relies on the 18 U.S.C. § 3553(a) sentencing factors as an alternative basis for denying the defendant's compassionate release motion.
United States v. Fower, 30 F.4th 823 (9th Cir. 2022)	Compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) is not available to defendants prior to incarceration.
United States v. King, 24 F.4th 1226 (9th Cir. 2022)	Inmates who committed crimes before November 1, 1987, cannot move for compassionate release under 18 U.S.C. § 3582(c)(1). Rather, such inmates remain subject to 18 U.S.C. § 4205(g), which was repealed and replaced by section 3582(c)(1), effective on such date, and provides that only the Bureau of Prisons may seek compassionate relief on behalf of inmates.

Tenth Circuit

	No cases selected by Commission staff.

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	
	No cases selected by Commission staff.
Fifth Circuit	
	No cases selected by Commission staff.
Sixth Circuit	
	No cases selected by Commission staff.
Seventh Circuit	
United States v. Hubbert, 35 F.4th 1068 (7th Cir. 2022)	The defendant's prior state conviction for possession with intent to distribute was not relevant conduct to his instant federal distribution offenses because the instant offenses occurred five years after the prior offense, involved significantly larger quantities of drugs, and involved a co-conspirator.
United States v. Bravo, 26 F.4th 387 (7th Cir. 2022)	The district court erred in counting the defendant's 2014 convictions for Illinois "streetgang contact" towards his criminal history score because (1) the crime is equivalent to disorderly conduct, an offense that is excluded under §4A1.2(c)(1) if certain requirements are met, and (2) the defendant met those requirements.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

No cases selected by Commission staff.

Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

No cases selected by Commission staff.

Drug Offenses

D.C. Circuit

No cases selected by Commission staff.

First Circuit

United States v. Soto-Villar, 40 F.4th 27 (1st Cir. 2022)	The district court did not clearly err in applying a 2-level "stash house" enhancement under §2D1.1(b)(12). The district court "supportably found that the defendant rented the apartment [at issue]," "had a possessory interest in it," continuously used it "as the nerve center of [his drug trafficking] conspiracy's operations," and stored on its premises the supplies needed for those operations; accordingly, this activity "constituted a principal use of the apartment."

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Skaggs, 23 F.4th 342 (4th Cir. 2022)	A prior state drug conviction for which a sentence of 26 months was imposed concurrently with five other 26-month concurrent sentences qualifies as a "serious drug felony" under 21 U.S.C. § 841(b)(1)(A). Such a sentence satisfies the definition's requirement that the defendant "served a term of imprisonment of more than 12 months" because it remains a distinct term of imprisonment even when served simultaneously with other sentences.

Fifth Circuit

United States v. Lujan, 25 F.4th 324 (5th Cir. 2022)	The district court clearly erred when it applied the "wholesale" price of methamphetamine (the price the drug could be purchased for), rather than its "retail" price (the price the drug could be sold for), to convert the defendant's illicit profits to a methamphetamine quantity. While a court may consider the "wholesale" price of a drug in lieu of its "retail" price, which is more commonly used, to conduct a cash-to-drug-quantity conversion, the district court in this case erred because it "implausibly" assumed the defendant would have used all her illicit profits for future methamphetamine purchases.

Sixth Circuit

United States v. Fields, 53 F.4th 1027 (6th Cir. 2022)	The statute setting forth the procedure for increased mandatory minimums in certain drug cases, 21 U.S.C. § 851, requires consideration of "incarceration-related facts" about prior convictions, such as the length of time served and when a defendant's prior sentence expired. A court may, in a bifurcated trial, send these factual questions to the jury prior to a section 851 hearing. Because the court did so here, the defendant could not maintain a Sixth Amendment challenge.
United States v. Wallace, 51 F.4th 177 (6th Cir. 2022)	The enhancement for possessing a dangerous weapon during a drug trafficking crime, §2D1.1(b)(1), applied to a police officer's possession of a firearm while planting methamphetamine on a suspect. It was not double counting to apply this increase alongside a §2H1.1(b)(1) enhancement for committing an offense under color of law, even though the firearm was carried as part of the defendant's law enforcement duties.
United States v. Gardner, 32 F.4th 504 (6th Cir. 2022)	The district court properly applied the drug-premises enhancement under §2D1.1(b)(12) to a defendant's sentence because one of the defendant's "primary and principal uses for his home" was drug distribution.

United States v. Sadler, 24 F.4th 515 (6th Cir. 2022)	But-for causation under 21 U.S.C. § 841(b)(1)(C), which imposes an enhanced sentence for a drug distribution conviction that results in death or serious bodily injury, does not require evidence from a blood toxicology test.

Seventh Circuit

United States v. Jones, et al., Nos. 20-1405, 20-1442, 20-2112, 20-2304, 20-2420, 20-2458, 20-2462, 20-2498, 20-2499, 20-3266, & 21-1002, 2022 WL 17842985 (7th Cir. Dec. 22, 2022)	The application of an enhancement pursuant to §2D1.1(b)(1) for possession of a firearm was clearly erroneous where the firearm was possessed by a person other than a co-conspirator (the buyer's wife) and was not reasonably foreseeable to the defendant. Her possession was foreseeable "only in the sense that parties to any drug transaction might be armed," and §2D1.1(b)(1) "requires more specific evidence tied to the case."
United States v. Ford, 22 F.4th 687 (7th Cir. 2022)	In determining whether to apply the enhancement in §2D1.1(b)(12) for maintaining a drug premises, courts should, consistent with guideline commentary, consider how often a defendant used the premises for controlled substance distribution, the scope of the enterprise, and the degree of control the defendant had over access to and activities on the premises.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

No cases selected by Commission staff.

Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

No cases selected by Commission staff.

Economic Crimes

D.C. Circuit

No cases selected by Commission staff.

First Circuit	
United States v. Chin, 41 F.4th 16 (1st Cir. 2022)	In construing the enhancement under §2B1.1(b)(16)(A) for an offense involving "the conscious or reckless risk of death or serious bodily injury," the court determined that the phrase "reckless risk" requires "proof only that the risk would have been obvious to a reasonable person in [the defendant's] position," not an "actual, subjective awareness of a risk."
United States v. Gordon, 37 F.4th 767 (1st Cir. 2022)	Under Application Note 3(E)(i) to §2B1.1, a defendant is not entitled to leniency for refunds he made to victims after receiving a demand letter from his state attorney general's office, which put him on notice that his offenses had been detected.
Second Circuit	
	No cases selected by Commission staff.
Third Circuit	
United States v. Banks, 55 F.4th 246 (3d Cir. 2022)	The term "loss" as used in §2B1.1 is unambiguous and means "actual loss." Accordingly, the loss-enhancement commentary in §2B1.1 is entitled to no weight because it improperly expands the definition of "loss" to include "intended loss."
United States v. Xue, 42 F.4th 355 (3d Cir. 2022)	The district court did not procedurally err by declining to apply an enhancement under §2B1.1 for the "loss" of trade secrets where the government failed to prove that the defendants intended to cause pecuniary loss and the victim did not incur an actual monetary loss from the trade secret theft.
Fourth Circuit	
	No cases selected by Commission staff.
Fifth Circuit	
United States v. Aderinoye, 33 F.4th 751 (5th Cir. 2022)	For purposes of §2B1.1(b)(2)(A)(iii), a loss qualifies as "substantial financial hardship" if it significantly impacts the victim's resources. Also, the enhancement at §2B1.1(b)(9)(A) applies when an offender unaffiliated with a charitable organization steals from the organization by pretending to have authority over its accounts.

Sixth Circuit	
United States v. Hills, 27 F.4th 1155 (6th Cir. 2022)	The district court correctly applied §2C1.1 (relating to bribes), rather than §2C1.2 (relating to gratuities), to the defendants' underlying racketeering activity to determine their base offense level under §2E1.1, even though Appendix A of the *Guidelines Manual* references both §§2C1.1 and 2C1.2 for the statutes criminalizing the defendants' underlying racketeering activity. The district court did not err in finding that the defendants were "public officials" for purposes of §2C1.1 because Application Note 1's definition of the term includes unelected public officials. The district court also did not err in finding that one of the defendants held a "high level decision-making position" pursuant to Application Note 4 to §2C1.1 based on his position as "the [] chair of [a] [d]ental [d]epartment of a county-owned hospital," even though such position was not elected, served below a board, and did not have final say on the matter in question and even though the offenses of conviction "did not directly involve" the chair's authority.
Seventh Circuit	
United States v. Nitzkin, 37 F.4th 1290 (7th Cir. 2022)	Pursuant to Application Note 8(B) to §2B1.1, as revised by Amendment 617, the enhancement in §2B1.1(b)(9)(A) applies to a "diversion of funds raised by a legitimate officer of a legitimate charity."
Eighth Circuit	
United States v. Matheny, 42 F.4th 837 (8th Cir. 2022)	A court may extrapolate from a representative sample to make "a reasonable estimate" of loss under §2B1.1 when an offender's scheme encompassed many fraudulent acts over a long period of time, even if the sample may capture only a small percentage of the fraud.
Ninth Circuit	
United States v. Lonich, 23 F.4th 881 (9th Cir. 2022)	The government failed to prove by clear and convincing evidence that the defendants' actions caused a bank's failure. As a result, the defendants' §2B1.1 enhancements for loss amount, number of victims, and jeopardizing the safety and soundness of a financial institution were infirm.
Tenth Circuit	
	No cases selected by Commission staff.

Eleventh Circuit

	No cases selected by Commission staff.

Firearms

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

	No cases selected by Commission staff.

Fifth Circuit

United States v. Luna-Gonzalez, 34 F.4th 479 (5th Cir. 2022)	The failure to prove that a large-capacity magazine is compatible with an offender's firearm precludes the application of §2K2.1(a)(4)(B), which imposes an enhanced base offense level if an offense involved a semiautomatic firearm "capable of accepting a large capacity magazine."

Sixth Circuit

United States v. Gates, 48 F.4th 463 (6th Cir. 2022)	The district court's failure to calculate a defendant's guideline range for violating 18 U.S.C. § 924(c) was reversible procedural error. The district court's repeated references to the 60-month statutory minimum sentence, which was the same as the recommended sentence in the *Guidelines Manual*, were insufficient to satisfy the court's "affirmative obligation" to calculate the defendant's guideline range.

United States v. McKenzie, 33 F.4th 343 (6th Cir. 2022)	The phrase "reason to believe," for purposes of §2K2.1(a)(4)(B), requires, "at most, that a straw purchaser know of facts creating a fair probability that the true buyer could not possess a firearm." It does not require the government to affirmatively rule out possible "innocent" explanations for such facts.

Seventh Circuit

United States v. Prado, 41 F.4th 951 (7th Cir. 2022)	Under §2K2.1(b)(4), a defendant may receive either a 2-level enhancement for an offense involving a stolen firearm or a 4-level enhancement for an offense involving a firearm with an altered or obliterated serial number, but not both.
United States v. Ingram, 40 F.4th 791 (7th Cir. 2022)	The 4-level enhancement at §2K2.1(b)(6)(B) applies "where there are indications that [a defendant's possession of a] firearm emboldened a felony drug-possession offense." Therefore, the district court did not clearly err by applying the enhancement where the defendant was in a "known drug-trafficking area," "chose to carry a loaded gun and drugs in public[,] and then fled with the gun when confronted by the police."
United States v. Price, 28 F.4th 739 (7th Cir. 2022)	The district court properly applied the enhancement at §2K2.1(b)(1)(A) for offenses involving "three or more firearms" based on the two firearms related to the defendant's underlying possession charges and a rental gun "briefly possessed" by the defendant at a store for guns and ammunition because the possession offenses were similar, the three instances of possession sufficiently constituted regularity, and the defendant possessed the gun "at the 'same place' and at the 'same time' as other charged firearms." In addition, the Supreme Court's opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), requiring scienter for a conviction under 18 U.S.C. § 922(g) does not extend to sentencing enhancements under §2K2.1(b)(4)(A) for offenses involving stolen firearms.

Eighth Circuit

United States v. Perkins, 52 F.4th 742 (8th Cir. 2022)	State law violations can trigger the cross reference in §2K2.1(c)(1), which applies when a firearm is used in connection with "another offense." Application Note 14(C) to §2K2.1, which defines "another offense" to include "any federal, state, or local offense," is "authoritative" and "binding" under *Stinson v. United States*, 508 U.S. 36 (1993), as it is not "inconsistent with, or a plainly erroneous reading of," the guideline it interprets.

United States v. Sewalson, 36 F.4th 832 (8th Cir. 2022)	The plain language of the cross-reference at §2K2.1(c)(1), which applies if a defendant "used or possessed" a firearm in connection with the commission of another offense, does not require "active use of the firearm" for the cross-reference to apply. This case deepens a circuit split with the Ninth and Tenth Circuits.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
United States v. Sanchez, 22 F.4th 940 (10th Cir. 2022)	The district court did not clearly err in applying the enhancement in §2K2.1(b)(6)(B) for possession of a firearm in connection with another felony offense where the defendant's possession of a loaded firearm had the potential to facilitate his possession of a stolen vehicle.
Eleventh Circuit	
United States v. Stines, 34 F.4th 1315 (11th Cir. 2022)	The higher base offense level in §2M5.2 applies if an offense involves weapons parts for more than two operable firearms.

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. Shields, 48 F.4th 183 (3d Cir. 2022)	In light of *Concepcion v. United States*, 142 S. Ct. 2389 (2022), the district court erred in refusing to consider the defendant's argument that, due to intervening changes in law, he

	would no longer qualify as a career offender under the guidelines, based on the mistaken belief that consideration of intervening changes in law or the guidelines is prohibited with respect to sentence reduction motions under section 404(b) of the First Step Act of 2018. Further, although the district court was not required to hold an in-person resentencing hearing on the defendant's First Step Act motion, the district court erred by denying the defendant both a hearing and a reasonable opportunity to present his resentencing arguments in writing.
United States v. Mitchell, 38 F.4th 382 (3d Cir. 2022)	Section 403 of the First Step Act of 2018 applies to defendants whose sentences on 18 U.S.C. § 924(c) counts are vacated and remanded for resentencing after the Act's enactment.

Fourth Circuit

United States v. Payne, 54 F.4th 748 (4th Cir. 2022)	The First Step Act's authorization for a court to "impose a reduced sentence" does not empower courts to "retroactively declare that a conviction for a felony was in fact a conviction for a misdemeanor."
United States v. Roane, 51 F.4th 541 (4th Cir. 2022)	Continuing criminal enterprise convictions under 21 U.S.C. § 848(e)(1)(A)—even those predicated on 21 U.S.C. § 841(b)(1)(A) drug distribution—are not covered offenses under section 404 of the First Step Act of 2018 because the statutory penalties associated with section 848(e)(1)(A) were not modified by the Fair Sentencing Act of 2010.
United States v. Swain, 49 F.4th 398 (4th Cir. 2022)	Where the defendant's re-calculated guideline range under section 404 of the First Step Act of 2018 was significantly lower, the district court's decision not to reduce his sentence—thus retaining a sentence that effectively varied five to ten years above the amended range—lacked sufficient explanation in light of the First Step Act's remedial purpose and was substantively unreasonable.
United States v. Goodwin, 37 F.4th 948 (4th Cir. 2022)	The defendant was ineligible for relief under section 404 of the First Step Act of 2018 because his sentence previously was imposed in accordance with the Fair Sentencing Act of 2010.
United States v. Thomas, 32 F.4th 420 (4th Cir. 2022)	A continuing criminal enterprise conviction under 21 U.S.C. §§ 848(a) and (c) does not qualify as a "covered offense" under section 404 of the First Step Act of 2018.

Fifth Circuit

United States v. Rollins, 53 F.4th 353 (5th Cir. 2022)	The district court did not abuse its discretion in denying compassionate release to a defendant who "cannot perform basic functions without assistance" and who, if he underwent a recommended surgery, would "need around the clock care for the foreseeable future." The defendant's heroin trafficking and weapons offenses occurred "while [he was] 'stricken with severe medical issues and confined to a wheelchair,'" giving the district court valid concern that he "may continue criminal activity and pose a danger to the public after release."
United States v. Palomares, 52 F.4th 640 (5th Cir. 2022)	The word "and" in the statutory safety valve's expanded criminal history provision at 18 U.S.C. § 3553(f)(1) operates disjunctively to exclude a defendant who meets any single disqualifying condition. "Congress's use of an em-dash following 'does not have' is best interpreted to 'distribute' that phrase to each following subsection."
United States v. Lyons, 25 F.4th 342 (5th Cir. 2022)	The district court did not abuse its discretion when it considered all conditions present at the defendant's original sentencing, including an unused sentencing enhancement and the plea agreement, and denied the defendant's motion for a sentence reduction under section 404 of the First Step Act of 2018.

Sixth Circuit

United States v. Haynes, No. 22-5132, 2022 WL 17750939 (6th Cir. Dec. 19, 2022)	The word "and" in the statutory safety valve's expanded criminal history provision at 18 U.S.C. § 3553(f)(1) operates in a distributive sense to exclude a defendant who meets any of the listed disqualifying conditions. In so holding, the Sixth Circuit joined the Fifth, Seventh, and Eighth Circuits and split with the Ninth and Eleventh Circuits.
United States v. Bailey, 27 F.4th 1210 (6th Cir. 2022)	The district court did not abuse its discretion by providing a brief explanation for its denial of the defendant's motion for a sentence reduction under section 404 of the First Step Act of 2018 or by concluding that the defendant's career offender designation under §4B1.1 meant that the First Step Act of 2018 did not affect his guideline range.
United States v. Johnson, 26 F.4th 726 (6th Cir. 2022)	The district court abused its discretion in denying the defendant's motion for a sentence reduction pursuant to section 404 of the First Step Act of 2018. Given that the defendant's guideline range had decreased from a range of 200 to 235 months to a range of 160 to 185 months, the district court's justification for leaving intact the defendant's 300-month sentence was insufficient, rendering the sentence substantively unreasonable.

Seventh Circuit

United States v. Newbern, 51 F.4th 230 (7th Cir. 2022)	The district court committed procedural error when it failed to address the defendant's argument concerning his good conduct in prison while deciding a motion for sentencing relief under the First Step Act of 2018. Because the Supreme Court held in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), that district courts have discretion to consider any information relevant to the 18 U.S.C. § 3553(a) factors, even if that information does not relate to the crack-to-powder sentencing ratio, district courts can properly consider such an argument when deciding a First Step Act motion.
United States v. Clay, 50 F.4th 608 (7th Cir. 2022)	The district court did not abuse its discretion in denying defendants' motions for a sentence reduction under section 404(b) of the First Step Act of 2018 even though their co-conspirators' sentences were reduced by a different judge. The district court adequately evaluated the 18 U.S.C. § 3553(a) factors and, under *Gall v. United States*, 552 U.S. 38 (2007), the defendants' within-guidelines sentences "inherently addresse[d] the need to avoid unwarranted disparities."
United States v. Pace, 48 F.4th 741 (7th Cir. 2022)	The word "and" in the statutory safety valve's expanded criminal history provision at 18 U.S.C. § 3553(f)(1) operates disjunctively to exclude a defendant who meets any single disqualifying condition. The placement of "and" along with the use of an em-dash following "the defendant does not have" in subsection (f)(1) supports a disjunctive reading.
United States v. McSwain, 25 F.4th 533 (7th Cir. 2022)	A multidrug conspiracy involving cocaine base and another substance constitutes a "covered offense" for purposes of section 404 of the First Step Act of 2018.

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

United States v. Carter, 44 F.4th 1227 (9th Cir. 2022)	The district court erred when it granted in part and denied in part the defendant's motion for resentencing under the First Step Act of 2018 without explanation. In *Concepcion v. United States*, 142 S. Ct. 2389 (2022), the Supreme Court held that the First Step Act requires a court to first consider any nonfrivolous arguments, including any intervening changes raised by the parties, and then provide a statement of reasons to prove it had considered those arguments.

United States v. Merrell, 37 F.4th 571 (9th Cir. 2022)	The version of 18 U.S.C. § 924(c)(1) in effect after the enactment of the First Step Act of 2018, not the pre-Act version of section 924(c)(1), applies at post-Act resentencing hearings of defendants whose sentences were imposed before the Act's passage and subsequently vacated.

Tenth Circuit

United States v. Price, 44 F.4th 1288 (10th Cir. 2022)	The defendant had standing to seek a sentence reduction under the First Step Act of 2018, where his sentence length for multiple offenses was driven by a covered drug offense, for which he was sentenced to life imprisonment under the then-mandatory guidelines via a cross-reference to §2A1.1. Because "no policy statements from the Sentencing Commission limit a district court's discretion when considering a sentence reduction under the First Step Act," the court could vary below the guidelines and sentence the defendant to less than life imprisonment. As a result, the defendant had a redressable injury and constitutional standing.
United States v. Burris, 29 F.4th 1232 (10th Cir. 2022)	In ruling on a motion for a sentence reduction under section 404 of the First Step Act of 2018, a district court is obligated to correctly calculate a defendant's revised guideline range "*prior* to deciding, in its discretion, whether to reduce [the] defendant's sentence." The district court's failure to do so in this case was not harmless error, as its "exercise of discretion was untethered from the correct calculation of [the defendant's] revised [guideline] range."

Eleventh Circuit

United States v. Garcon, 54 F.4th 1274 (11th Cir. 2022) (en banc)	The word "and" connecting the enumerated criminal history conditions at 18 U.S.C. § 3553(f)(1)(A)–(C) is conjunctive, and, therefore, "a defendant must have all three before he is ineligible for [safety valve] relief." This case deepens a circuit split between the Ninth Circuit, with which the Eleventh Circuit agrees, and the Fifth, Seventh, and Eighth Circuits.
United States v. Smith, 30 F.4th 1334 (11th Cir. 2022)	The district court violated due process by alternatively denying the defendant's motion for a sentence reduction under section 404 of the First Step Act of 2018 without giving the defendant an opportunity to present his arguments in support of the reduction.

United States v. Williams, 25 F.4th 1307 (11th Cir. 2022)	The defendant's conviction under 21 U.S.C. § 841(a) does not constitute a "covered offense" under section 404 of the First Step Act of 2018 because the penalties for his offense were set by 21 U.S.C. § 841(b)(1)(C) via a cross-reference in 21 U.S.C. § 860(a), and the penalties in section 841(b)(1)(C) were not modified by the Fair Sentencing Act of 2010. In so holding, the court relied on the Supreme Court's reasoning in *Terry v. United States*, 141 S. Ct. 975 (2021).

Relevant Conduct

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Soto-Villar, 40 F.4th 27 (1st Cir. 2022)	The district court did not clearly err in its drug-quantity finding by attributing to the defendant the total quantity of heroin and fentanyl seized from an apartment searched after a co-conspirator's traffic stop. Rather, the district court appropriately applied §1B1.3(a)(1) by supportably determining that the defendant "reasonably could foresee that the drugs inside the apartment were to be distributed in the ordinary course of [his drug trafficking] conspiracy's operations."

Second Circuit

United States v. Sainfil, 44 F.4th 99 (2d Cir. 2022)	The district court did not clearly err in concluding that it was "reasonably foreseeable" to the defendant that his co-conspirators would use physical restraints and body armor during their bank robbery because it was "meticulously planned" and they had knowledge that an armed guard might be present. Thus, the enhancement for physical restraint under §2B3.1(b)(4)(B) and adjustment for use of body armor under §3B1.5 were properly applied as relevant conduct under §1B1.3(a)(1)(B).

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit

United States v. Elbaz, 52 F.4th 593 (4th Cir. 2022)	Though the district court "may have erred when considering losses from purely foreign conduct when setting its initial sentencing range" because "purely foreign conduct was not a violation of U.S. criminal law" as covered under §1B1.3's definition of relevant conduct, any error was harmless because the district court stated that it would have imposed the same sentence based on the 18 U.S.C. § 3553(a) factors.
United States v. McDonald, 28 F.4th 553 (4th Cir. 2022)	The defendant's possession of firearms in three different incidents qualified as the same course of conduct as, and therefore relevant conduct to, his instant offense of possession of ammunition by a convicted felon. The three incidents were temporally connected and involved a pattern of sufficiently similar conduct (illegal possession of similar types of firearms).

Fifth Circuit

United States v. Cantu-Cox, 53 F.4th 324 (5th Cir. 2022)	Under §1B1.3(a)(2) and (a)(3), a kidnapping resulting in death that the defendants "committed, induced, and counseled on the exchange of methamphetamine" was relevant conduct to their drug conspiracy convictions, allowing for application of the cross-reference in §2D1.1(d)(1). The kidnapping overlapped in time with the drug conspiracy, shared a common accomplice, and involved the use of methamphetamine as payment to that accomplice, rendering it "part of the same course of conduct or common scheme or plan as the offense of conviction."

Sixth Circuit

United States v. Gates, 48 F.4th 463 (6th Cir. 2022)	The amount of drugs a defendant is responsible for as part of a drug conspiracy may include drugs sold before the defendant attains 18 years of age.

Seventh Circuit

United States v. Boyle, 28 F.4th 798 (7th Cir. 2022)	The conduct underlying the defendant's state offense for sexual assault of a child was not relevant conduct to his instant federal offense for producing and possessing child pornography. Therefore, the district court did not err in imposing the defendant's 50-year federal sentence consecutive to his 40-year state sentence pursuant to §5G1.3(d).

United States v. Asbury, 27 F.4th 576 (7th Cir. 2022)	The district court committed reversible error when it relied on additional drug quantities through relevant conduct not sufficiently proved by the government that increased the drug quantity for which the defendant was held responsible at sentencing. The district court's assertion that it would impose the same sentence absent errors in the guideline calculation did not render such error harmless.
United States v. McClinton, 23 F.4th 732 (7th Cir. 2022)	In determining the defendant's sentence for robbery and brandishing a firearm, the district court properly considered the murder of a co-defendant, for which the defendant was acquitted, as relevant conduct because, even though the defendants were a safe distance away from the robbery scene when the murder occurred, the murder "clearly occurred" in the course of the robbery.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

No cases selected by Commission staff.

Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

No cases selected by Commission staff.

Restitution

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

United States v. Greebel, 47 F.4th 65 (2d Cir. 2022)	Pursuant to 18 U.S.C. § 3613, the government may garnish retirement funds that a defendant has a right to access for purposes of enforcing the defendant's restitution obligations.
United States v. Yalincak, 30 F.4th 115 (2d. Cir. 2022)	Under 18 U.S.C. § 3664(h), district courts may combine apportionment of liability to impose "hybrid restitution" orders limiting the restitution obligation for some participants in an offense while holding other participants in the offense responsible for the full amount of the loss. Such hybrid restitution obligations are not satisfied until either a defendant has paid as much as she has been ordered to pay, or the victim has been made whole.
United States v. Afriyie, 27 F.4th 161 (2d Cir. 2022)	The Supreme Court's decision in *Lagos v. United States*, 138 S. Ct. 1684 (2018), did not undermine Second Circuit precedent holding that victims of certain offenses may recover under 18 U.S.C. § 3663A(b)(4) (the "Mandatory Victims Restitution Act" or the "MVRA") attorneys' fees incurred while participating in government investigations of the offenses. However, expenses incurred while participating in a noncriminal investigation by the Securities and Exchange Commission are not recoverable under the MVRA.

Third Circuit

United States v. Norwood, 49 F.4th 189 (3d Cir. 2022)	The retroactive application of the liability period in 18 U.S.C. § 3613(b) to increase the duration of the defendant's restitutionary liability violated the Constitution's *Ex Post Facto* Clause. Because the defendant's offenses occurred before section 3613(b) took effect, his restitution order was governed by the Victim and Witness Protection Act of 1982, which required his liability period to expire 20 years after the entry of judgment.

Fourth Circuit

United States v. Elbaz, 52 F.4th 593 (4th Cir. 2022)	The district court erred in including foreign victims of the defendant's fraud scheme, who had no nexus to the defendant's criminal conduct in the United States, in its restitution calculation under 18 U.S.C. § 3663A (the "Mandatory Victims Restitution Act").

Fifth Circuit

	No cases selected by Commission staff.

Sixth Circuit	
United States v. Ruiz-Lopez, 53 F.4th 400 (6th Cir. 2022)	For restitution under the Victim and Witness Protection Act (VWPA), the conduct causing injury need not be an element of the offense; rather, the offense must have directly and proximately caused the victim's harm. Thus, restitution was properly ordered where the defendant was convicted of unlawfully possessing a firearm and his reckless handling of the firearm, resulting in its discharge, caused injury. In so holding, the Sixth Circuit disagreed with decisions from the Fourth, Fifth, and Ninth Circuits that take an "elements-only" approach.
Seventh Circuit	
United States v. Protho, 41 F.4th 812 (7th Cir. 2022)	The district court did not abuse its discretion in ordering the defendant to pay restitution projected to cover the victim's psychotherapy expenses for the next eight years. The victim had already undergone more than 24 months of treatment and was still suffering the effects of the trauma from the offense, which involved her having been "snatched by a total stranger on her walk home from school, threatened with death, and sexually assaulted."
United States v. Eaden, 37 F.4th 1307 (7th Cir. 2022)	A district court plainly errs in ordering a defendant to pay restitution to his former employer equal to the amount that the employer paid a customer to remedy the defendant's fraudulent overbilling. "[R]estitution is limited solely to 'actual losses caused by the specific conduct underlying the offense,'" and a former employer's mere repayment of "unearned funds it had obtained" from a customer "solely by reason of [the defendant's] fraud" is "not a loss" to the employer.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
United States v. Casados, 26 F.4th 845 (10th Cir. 2022)	Section 3663A of title 18, United States Code (the "Mandatory Victims Restitution Act" or the "MVRA"), requires certain defendants to reimburse their victims for transportation expenses incurred while attending proceedings related to the defendants' offenses. While

United States v. Anthony, 25 F.4th 792 (10th Cir. 2022)	the MVRA permits a victim's representative to "assume the victim's rights," the representative's own expenses may not be substituted for those of the victim. Restitution is a component of a criminal sentence and therefore is part of a defendant's "judgment of conviction." Where restitution is determined after a defendant's initial sentencing, the judgment of conviction does not become final—and trigger a one-year window to file a motion under 28 U.S.C. § 2255—until the restitution proceedings are final. In addition, in a deferred restitution case, a defendant may appeal the conviction and sentence within 14 days of either (1) the entry of the initial judgment, or (2) the entry of the amended judgment containing the restitution amount.

Eleventh Circuit

	No cases selected by Commission staff.

Sentencing Procedure

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

United States v. Fletcher, No. 20-1131, 2022 WL 17974680 (1st Cir. Dec. 28, 2022)	Though courts cannot "entirely abandon the nomenclature" distinguishing departures and variances, each approach to sentencing "can always" guide a court "to every place that the other may lead," and these concepts are not "as different as some presume." Here, the defendant suffered no prejudice from the court's alleged failure to follow certain departure procedures; "whether labeled a departure or a variance, [the defendant's] sentence was going to be the same."
United States v. Doe, 49 F.4th 589 (1st Cir. 2022)	The district court did not abuse its discretion in declining to hold an evidentiary hearing to assess whether the government refused in bad faith to make substantial assistance motions under 18 U.S.C. § 3553(e) and §5K1.1. "The government's several representations to the court about the reasons for its dissatisfaction with the limited nature of [the defendant's] assistance more than constituted a facially valid reason for it to decide not to file substantial assistance motions."

United States v. Rivera-Ruiz, 43 F.4th 172 (1st Cir. 2022)	The district court procedurally erred by basing its upwardly variant sentence, in part, on several unadjudicated administrative complaints filed against the defendant during his career as a police officer. These complaints were "simply accusations of misconduct that *sometimes* launch an investigation and result in adjudication" and "could have been filed by anyone." Further, there was "no presumption that the charges were at least supported by probable cause." Therefore, the court could not infer unlawful behavior from them, and the government failed to show by a preponderance of the evidence that the underlying misconduct occurred.
United States v. Flores-Gonzalez, 34 F.4th 103 (1st Cir. 2022)	A district court's variance from a defendant's guideline range, driven solely by a community-based characteristic, does not reflect an exercise of discretion under *Kimbrough v. United States*, 552 U.S. 85 (2007), to vary from the guideline range based on a categorical policy disagreement with the guidelines. While a community-based characteristic of an offense may be relevant to sentencing and relied upon as *a* factor in varying upward under 18 U.S.C. § 3553(a), courts must still connect the sentence imposed to factors that specifically relate either to the defendant's personal characteristics or to the nature of the defendant's conduct.
United States v. Procell, 31 F.4th 32 (1st Cir. 2022)	When a discrepancy exists between an oral sentencing pronouncement and a written judgment, appellate courts tend to honor the oral pronouncement, especially when it is "unambiguous and lawful."
United States v. Torres-Melendez, 28 F.4th 339 (1st Cir. 2022)	The district court erred and imposed a procedurally unreasonable sentence when it varied upward to a sentence that was twice the top of the guideline range for possession of a machine gun after finding the defendant "has *a track record of engaging in drug offenses and weapon violations*" based on two arrests for offenses dismissed for lack of a speedy trial. Absent the requisite preponderance of the evidence, a court cannot "rely on an arrest record as evidence of a defendant's conduct" without "some reliable indication that the underlying conduct actually occurred."

Second Circuit

United States v. Peña, 55 F.4th 367 (2d Cir. 2022)	Following the grant of a motion for collateral relief under 28 U.S.C. § 2255, a court is not required to engage in a *de novo* resentencing. The district court did not abuse its discretion in

	declining to do so where any sentencing would have been "strictly ministerial" as the defendant remained subject to mandatory life sentences.
United States v. Sealed Defendant One, 49 F.4th 690 (2d Cir. 2022)	For a sentencing hearing conducted by videoconference under seal, the district court did not need to provide an on-the-record explanation of why the sentencing could not be delayed, as required for remote sentencings under the CARES Act. The CARES Act applies where a remote sentencing would be barred by Federal Rules of Criminal Procedure 43 and 53. Because Rule 53 relates only to public broadcast of a criminal proceeding, it does not bar a sentencing in a sealed case held by private videoconference, so the CARES Act does not apply.
Al-'Owhali v. United States, 36 F.4th 461 (2d Cir. 2022)	The concurrent sentence doctrine, which allows a court to decline to consider a challenge to a "conviction for which an appellant's sentence runs concurrently with that for another, valid conviction," applies to a collateral challenge to a conviction for which the sentence runs consecutively to an unchallenged life sentence.
United States v. Leroux, 36 F.4th 115 (2d Cir. 2022)	A defendant's oral statement consenting to sentencing by videoconference and confirming he conferred with counsel about his right to be present "will usually be enough to establish the defendant's consent" under the CARES Act. A district court's findings that proceeding by videoconference would allow a defendant the opportunity to promptly appeal his sentence and would facilitate the defendant's designation to a correctional facility are sufficient to show that delaying the sentencing would harm the interests of justice.
Third Circuit	
	No cases selected by Commission staff.
Fourth Circuit	
United States v. Benton, 24 F.4th 309 (4th Cir. 2022)	To find that the defendant qualified for a sentencing enhancement under 18 U.S.C. § 942(e) (the "Armed Career Criminal Act" or the "ACCA"), the district court erred in relying on prior convictions that were not identified as ACCA predicates in the defendant's presentence report. Under circuit precedent, the government must identify all convictions it wishes to rely upon for an ACCA enhancement at the time of sentencing so that a defendant has notice and the opportunity to challenge the convictions. Therefore, at a collateral proceeding, the government may not rely on predicates that were not identified at sentencing to preserve an ACCA enhancement that can no longer be sustained by the original predicates.

Fifth Circuit

United States v. Hernandez, 48 F.4th 367 (5th Cir. 2022)	A district court does not err by considering, on remand, additional evidence in support of a sentencing enhancement that has been vacated in an earlier appeal. "[W]hen [a] case is remanded for resentencing without specific instructions, the district court *should* consider any new evidence from either party relevant to the issues [previously] raised on appeal."
United States v. Perez-Espinoza, 31 F.4th 988 (5th Cir. 2022)	There is no material difference between the oral pronouncement at sentencing that the defendant must report to the nearest U.S. Probation Office within 72 hours of reentering the United States and the written judgment, issued one week later, clarifying that he must report immediately; therefore, the written judgment does not need to be amended to reflect the oral pronouncement.
United States v. Alfaro, 30 F.4th 514 (5th Cir. 2022)	A district court's failure to accept the government's concessions regarding money returned, fair market value of the property returned, or services rendered by the defendant when determining the total loss amount under §2B1.1 results in an erroneous assessment of total loss and an erroneous guideline range calculation.
United States v. Jackson, 30 F.4th 269 (5th Cir. 2022)	It does not violate due process to retroactively apply circuit precedent treating a Texas burglary-of-a-habitation conviction as a "violent felony" under 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or the "ACCA").
United States v. Hammond, 24 F.4th 1011 (5th Cir. 2022)	A district court is not required to put a defendant on notice that it might upwardly depart pursuant to Application Note 4 to §7B1.4 when determining the sentence to impose upon revocation of supervised release.

Sixth Circuit

United States v. Maddux, 37 F.4th 1170 (6th Cir. 2022)	Federal Rule of Criminal Procedure 32.2, which provides the procedure for entering a forfeiture order in a criminal case, is a mandatory claims processing rule (which must be strictly adhered to), rather than a time-related directive (which need not be). This case deepens the circuit split between the Eighth Circuit, with which the Sixth Circuit agrees, and the Second and Fourth Circuits.
In re: United States of America, 32 F.4th 584 (6th Cir. 2022)	The district court was not permitted to generally reject the plea agreement, which contained appeal waivers, on the grounds that such waivers (among other things) "effectively 'coerce' guilty pleas with offers 'too good to refuse,' and 'inhibit[] the development of the [s]entencing

	[g]uidelines'" because those are categorical concerns rather than case-specific considerations.

Seventh Circuit

United States v. Davis, 43 F.4th 683 (7th Cir. 2022)	The district court committed a "significant procedural error" by first declining to apply a 4-level enhancement under §2K2.1(b)(6)(B) and then imposing an above-range sentence "largely by reference to [its] finding that [the defendant had] participated in [a] shoot-out." The court's acceptance of the probation officer's "determination that the evidence was insufficient to support a finding that [the defendant had] possessed [a firearm] in connection with another felony offense" and its subsequent finding that the defendant "was in fact a participant in the shoot-out" reflected "an inscrutable inconsistency in the factual findings on which the judge based his choice of sentence."
United States v. Prado, 41 F.4th 951 (7th Cir. 2022)	If a district court errs in calculating the guideline range but the properly calculated guideline range still exceeds the statutory maximum penalty, "the error could not have affected the court's choice of sentence" and, thus, is harmless.
United States v. Moore, 50 F.4th 597 (7th Cir. 2022)	In a resentencing proceeding under the First Step Act of 2018, the district court did not mistakenly characterize the defendant's drug conspiracy and firearms convictions as "violent" when it weighed the 18 U.S.C. § 3553(a) factors. "The court was not applying the 'categorical approach' for classifying offenses and prior convictions" but "was saying only that the array of weapons found at [the defendant's] home undermined any contention that his drug trafficking did not involve weapons."
United States v. Childs, 39 F.4th 941 (7th Cir. 2022)	In a revocation case, the district court did not commit procedural error by inferring that the defendant was a danger to others. The defendant repeatedly violated the conditions of his supervised release by committing new driving offenses and using alcohol and controlled substances, and it was "eminently reasonable" for the court to conclude that the defendant would "again combine driving with the consumption of alcohol and controlled substances," as he had done in the past.
United States v. Shaw, 39 F.4th 450 (7th Cir. 2022)	Because *Tapia v. United States*, 564 U.S. 319 (2011), "applies to both the imposition of a prison sentence and the lengthening of one," a district court errs "by relying on rehabilitation as the sole basis for an upward variance."

United States v. Swank, 37 F.4th 1331 (7th Cir. 2022)	The district court's ambiguous statement concerning general deterrence and its "tether[ing]" of that factor to the guidelines neither ran afoul of the parsimony principle nor indicated that it applied a presumption of reasonableness to the guideline range. The context of the district court's statements demonstrated its belief that a within-guidelines sentence satisfied the sentencing goals of 18 U.S.C. § 3553(a).
United States v. Hernandez, 37 F.4th 1316 (7th Cir. 2022)	The district court did not plainly err in proceeding by video under the CARES Act absent a finding that sentencing could not be further delayed without serious harm to the interests of justice; "[n]othing suggests that the district judge discounted [the defendant's] allocution or otherwise viewed his sentencing arguments less favorably merely because he made them remotely."
United States v. Garcia, 37 F.4th 1294 (7th Cir. 2022)	The district court plainly erred when it considered prior convictions of the defendant that did not receive any criminal history points in calculating the defendant's base offense level; this miscalculation affected the defendant's total offense level and resulting guideline range through the application of the grouping rules.
United States v. Nitzkin, 37 F.4th 1290 (7th Cir. 2022)	A district court plainly errs in imposing an enhancement under §2B1.1(b)(9)(A) and an adjustment under §3B1.3 if the enhancement and adjustment do not reflect different conduct. Application Note 8(E)(i) to §2B1.1 does not permit double counting "[i]f the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under §3B1.3."
Eighth Circuit	
United States v. Combs, 44 F.4th 815 (8th Cir. 2022)	The district court committed procedural error by sentencing the defendant based on allegations in the presentence report without resolving the defendant's objections to those same allegations.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
United States v. Farley, 36 F.4th 1245 (10th Cir. 2022)	The district court plainly erred by stating that it would have to depart downward by ten offense levels from the presentence report's recommendation (1080 months) to impose the

	40-year sentence sought by the government. The court further erred by stating that it had varied downward by six levels to impose a 630-month sentence. In fact, the court would have had to vary by only one level (from 43 to 42) to impose the 40-year sentence. The defendant had a "reasonably likely chance at a lower sentence if a proper method [had been] used to determine the extent of the downward variance."
United States v. Moore, 30 F.4th 1021 (10th Cir. 2022)	The district court plainly erred by offering the defendant the choice between either "(1) an immediate 51-month sentence of imprisonment; or (2) a 48-month sentence of probation, subject to *at least* 84 months' imprisonment for any future probation violation." This "sentence-in-advance system" was procedurally unreasonable because it did not comport with required resentencing procedures. The district court could not have known whether a future probation violation would justify the increase to the original sentence offer.
United States v. Warren, 22 F.4th 917 (10th Cir. 2022)	Motions for reconsideration may be filed under 18 U.S.C. § 3582(c), but such motions must be filed within the time to appeal the order that is the subject of the motion. Untimeliness is not a jurisdictional bar, however, and thus may be waived by the government.
United States v. Cozad, 21 F.4th 1259 (10th Cir. 2022)	Under 18 U.S.C. § 3553(a), it is procedurally unreasonable for a court to impose a harsher sentence based on a defendant's decision to plead guilty without a plea agreement.

Eleventh Circuit

United States v. Howard, 28 F.4th 180 (11th Cir. 2022)	The district court erred and issued a substantively unreasonable sentence when it imposed probation for a physician who committed health care crimes, failing to properly consider and weigh the 18 U.S.C. § 3553(a) sentencing factors and giving weight to "improper factors" such as the loss of a professional license and becoming a felon.
United States v. Maurya, 25 F.4th 829 (11th Cir. 2022)	The district court violated the *ex post facto* clause of the Constitution by using the 2018 *Guidelines Manual* to sentence the defendant because the 2-level enhancement for substantial financial hardship at §2B1.1(b)(2)(A)(iii) did not exist during the timeframe in which the defendant committed her offense.

Sex Offenses

D.C. Circuit

United States v. Davis, 45 F.4th 73 (D.C. Cir. 2022)	The enhancement at §2A3.1(b)(2)(A) for offenses involving a victim who is under 12 years old applies to fictitious victims so long as the "defendant intended to sexually abuse an individual the defendant thought 'had not attained the age of twelve years.'"

First Circuit

United States v. Messner, 37 F.4th 736 (1st Cir. 2022)	The defendant suffered no prejudice from his counsel's failure to object on *ex post facto* grounds to the application of the sexual-abuse-of-a-toddler enhancement under §2G2.2(b)(4)(B) because the presentence report and record made clear that both the probation officer and government believed that a §2G2.2(b)(4) enhancement would be appropriate under either subparagraph (A) or (B) of §2G2.2(b)(4) and there was uncontested evidence sufficient under circuit precedent "to support the application of the sadistic-or-masochistic enhancement under §2G2.2(b)(4)(A)."

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Morehouse, 34 F.4th 381 (4th Cir. 2022)	The enhancement at §2G2.2(b)(3)(B) for distribution "in exchange for any valuable consideration, but not for pecuniary gain," requires a four-part showing: that the defendant "(1) agreed . . . to an exchange with another person under which (2) the defendant knowingly distributed child pornography to that other person (3) for the specific purpose of obtaining something of valuable consideration (4) from that same other person."

Fifth Circuit

No cases selected by Commission staff.

Sixth Circuit

United States v. Phillips, 54 F.4th 374 (6th Cir. 2022)	Application Note 6(B) to §2G2.2, which explains that a video is 75 "images" for purposes of §2G2.2(b)(7), is authoritative because the guideline text is ambiguous, the application note is a permissible interpretation within the "zone of ambiguity," and the application note is the official, considered position of the Commission in its area of expertise.
United States v. Zabel, 35 F.4th 493 (6th Cir. 2022)	The district court did not abuse its discretion in determining that the isolated location of the defendant's abusive sexual contact in the victim's workplace and the conduct itself justified an upward variance to reflect the seriousness of the offense and the offense conduct.
United States v. Meek, 32 F.4th 576 (6th Cir. 2022)	The district court did not err in denying a reduction under §2G2.2(b)(1) for conduct limited to the "receipt or solicitation" of child pornography because the defendant used LimeWire to download child pornography and admitted at sentencing that "he may have inadvertently shared or traded child pornography." Additionally, the denial of a reduction under §2G2.2(b)(1) does not necessitate the application of the distribution enhancement under §2G2.2(b)(3)(F) because "it is conceivable that a defendant could unknowingly distribute child pornography, making him ineligible for both a §2G2.2(b)(1) reduction and a §2G2.2(b)(3)(F) enhancement."
United States v. Gould, 30 F.4th 538 (6th Cir. 2022)	A FaceTime call is a "visual depiction" under §2G1.3(c)(1) because the plain meaning of the term does not include a permanency requirement. In addition, for purposes of §2G1.3(c)(1), an offense involves "offering by advertisement a minor to engage in sexually explicit conduct" if a defendant responds to such an advertisement.

Seventh Circuit

United States v. Hyatt, 28 F.4th 776 (7th Cir. 2022)	The district court erred in applying the 2-level increase at §2G2.2(b)(3)(F) for knowing distribution of child pornography based solely on the fact that the defendant uploaded images to Dropbox, a file-sharing platform. Notably, no circuit has held that the enhancement may apply "based solely on the upload of files to cloud-based storage."
United States v. Skaggs, 25 F.4th 494 (7th Cir. 2022)	The district court's imposition of a life sentence based on the belief that such a sentence was required by 18 U.S.C. § 3559(e) was harmless error because the district court stated, along with its reasoning and analysis of the 18 U.S.C. § 3553(a) factors, that it would have nevertheless imposed the same sentence.

Eighth Circuit

United States v. Rivas, 39 F.4th 974 (8th Cir. 2022)	Imposing the 10-year mandatory minimum for a violation of 18 U.S.C. § 2422(b) for knowingly attempting to persuade, induce, and entice an individual under 18 years old to engage in sexual activity, without consideration of the mitigating circumstances particular to the defendant, does not violate the Eighth Amendment. Congress has the power to enact criminal penalties without granting courts sentencing discretion to deviate from the mandatory minimum penalty.

Ninth Circuit

United States v. Randall, 34 F.4th 867 (9th Cir. 2022)	To be eligible for the 5-level enhancement under §2G2.2(b)(3)(B), which applies when an offender distributes child pornography "in exchange for any valuable consideration," the offender need not actually receive the "valuable consideration."
United States v. Rosenow, 33 F.4th 529 (9th Cir. 2022)	The special instruction in §2G2.1(d)(1) makes clear that, if an offense referenced to §2G2.1 involved the exploitation of more than one minor, a district court must apply the guidelines applicable to multiple counts "as if the exploitation of each minor had been contained in a separate count of conviction."

Tenth Circuit

United States v. Cifuentes-Lopez, 40 F.4th 1215 (10th Cir. 2022)	The "pattern of activity involving prohibited sexual conduct" enhancement under §4B1.5(b)(1) can be applied to either "repeated abuse of a single minor or to separate abuses of multiple minors." In this case, applying a 5-level increase under §4B1.5(b)(1) in addition to a 2-level multiple count increase under §3D1.4 was not double counting because the guidelines "expressly intend cumulative application, and the enhancements serve different sentencing goals."

Eleventh Circuit

	No cases selected by Commission staff.

Supervised Release

D.C. Circuit

United States v. Turner, 21 F.4th 862 (D.C. Cir. 2022)	At a sentencing for revocation of supervised release, the guideline range determined under Chapter 7's Revocation Table is the total recommended punishment, regardless of whether an offender's supervised release is revoked while serving a single term of supervised release or multiple concurrent terms of supervised release. It is procedural error to impose multiple within-range revocation terms reflecting each count of conviction that carried a supervised release term.

First Circuit

United States v. Ramos-Carreras, 55 F.4th 51 (1st Cir. 2022)	The district court procedurally erred by "improperly relying on factual allegations that were not in the record" in imposing an upwardly variant revocation sentence. Whether the district court gleaned these facts from a "Spanish-language charging document" or an *ex parte* communication with the probation officer, "the averments were brand new to the record in the revocation proceedings," and "[r]eciting extraneous non-record avowals without identifying the source or providing notice to [the defendant] that these asserted details would be considered . . . was a clear error."
United States v. Cruz, 49 F.4th 646 (1st Cir. 2022)	The standard risk-notification condition of supervised release found in §5D1.3(c)(12) is neither unconstitutionally vague nor an unconstitutional delegation of judicial authority to probation officers.
United States v. Serrano-Berrios, 38 F.4th 246 (1st Cir. 2022)	The district court improperly relied on the defendant's state charges in varying upward from the guideline range for his revocation sentence because the magistrate judge had found no probable cause to conclude the defendant had committed any of the charged crimes and had dismissed the alleged corresponding violation of supervised release.
United States v. Cintron-Ortiz, 34 F.4th 121 (1st Cir. 2022)	On plain error review, assuming the defendant's condition of supervised release requiring him to remain at his residence 12 hours per day constitutes "home confinement" under 18 U.S.C. § 3563(b)(19), it is not "clear or obvious" that the condition is also equivalent to "imprisonment" for purposes of the statutory maximum term of imprisonment for revocation sentences under 18 U.S.C. § 3583(e)(3). The statutory text "does not plainly show that such a

	condition constitutes imprisonment," and further, the question is an unsettled question of law in the circuit and has led to a conflict among other circuits.
Second Circuit	
United States v. Peguero, 34 F.4th 143 (2d Cir. 2022)	As established by circuit precedent, district courts' authority under 18 U.S.C. § 3583(e)(3) to revoke a term of supervised release on a finding that a defendant committed a criminal offense while on supervised release does not unconstitutionally contravene the defendant's rights to indictment by a grand jury, confront witnesses, be tried by a jury, and remain free unless proven guilty beyond a reasonable doubt. Supervised release revocation proceedings are not criminal prosecutions, so defendants are not entitled to "the full panoply of rights" they would be in a criminal prosecution.
Third Circuit	
	No cases selected by Commission staff.
Fourth Circuit	
United States v. Rios, No. 21-4059, 2022 WL 17814621 (4th Cir. Dec. 20, 2022)	The district court had jurisdiction to revoke the supervision of a defendant who, after having been deported pursuant to a prisoner-transfer treaty to complete his federal sentence in Mexican custody, was released early and reentered the United States in violation of the conditions of his supervised release.
United States v. Morris, 37 F.4th 971 (4th Cir. 2022)	In deciding the defendant's motion under 18 U.S.C. § 3583(e)(2) to modify his supervised release conditions, the district court had jurisdiction to consider the restrictions on internet use because intervening decisions "altered the law surrounding internet-use conditions."
United States v. Nelson, 37 F.4th 962 (4th Cir. 2022)	The district court plainly erred in concluding that §7B1.3(g)(2), which replicates the statutory text in 18 U.S.C. § 3583(h), required a five-year mandatory minimum term of supervised release upon the defendant's release from imprisonment for a revocation sentence.
Fifth Circuit	
United States v. Barcenas-Rumualdo, 53 F.4th 859 (5th Cir. 2022)	The district court abused its discretion by imposing three years of supervised release "solely out of fear that a lower sentence would moot an appeal." "The timing of an appeal is not a factor that courts are tasked with considering in imposing supervised release."

United States v. Prado, 53 F.4th 316 (5th Cir. 2022)	A written special condition that required a defendant to "take all mental-health medications that are prescribed by [his] treating physician" was stricken because it conflicted with an orally pronounced condition that the defendant "*should* participate in a mental health program that gives him access to medication" (not "that he *must take* those medications").
United States v. Badillo, 36 F.4th 660 (Mem) (5th Cir. 2022)	Pursuant to circuit precedent, district courts lack authority under 18 U.S.C. § 3583(d) to impose a condition of supervised release ordering offenders convicted of illegal reentry to self-deport after they are released from confinement.
United States v. Mejia-Banegas, 32 F.4th 450 (5th Cir. 2022)	The Western District of Texas's standard risk-notification condition of supervised release is not an improper delegation of authority to probation officers.

Sixth Circuit

United States v. Zabel, 35 F.4th 493 (6th Cir. 2022)	The district court did not abuse its discretion in determining that lifetime supervised release was appropriate in light of the defendant's conduct and the district court's conclusion that the lack of indicators in his background explaining the offense warranted lifetime supervision. "For the same reasons," the lifetime supervised release was "also constitutional under the Eighth Amendment."
United States v. Sears, 32 F.4th 569 (6th Cir. 2022)	Time served for prior violations of supervised release "is not credited toward and does not limit the statutory maximum that a court may impose" for a subsequent violation of supervised release under 18 U.S.C. § 3583(e).

Seventh Circuit

United States v. Childs, 39 F.4th 941 (7th Cir. 2022)	"A court is not required to provide a 'compelling' justification for imposing a [revocation] sentence above the recommendation of the [*Guideline Manual*'s] non-binding policy statements."
United States v. Patlan, 31 F.4th 552 (7th Cir. 2022)	The district court did not err in treating the defendant's failed drug screening as a Grade B, rather than a Grade C, violation because the defendant stipulated to the violations alleging possession and use of amphetamine and methamphetamine based on such screening.

Eighth Circuit

United States v. Corn, 47 F.4th 892 (8th Cir. 2022)	The district court did not abuse its discretion in imposing a revocation sentence that exceeded the statutory maximum authorized by the defendant's statute of conviction because the defendant "invited" the court's alleged error.

Ninth Circuit

United States v. Montoya, 54 F.4th 1168 (9th Cir. 2022)	Ordering rehearing en banc and vacating prior panel opinion in *United States* v. *Montoya*, 48 F.4th 1028 (9th Cir. 2022). The prior panel had held that a district court does not need to orally pronounce conditions of supervised release that are either mandatory under 18 U.S.C. § 3583(d) or recommended as standard conditions under §5D1.3, although three other circuits apply a different framework and the "better practice" is to do so.
United States v. Nishida, 53 F.4th 1144 (9th Cir. 2022)	The district court committed plain error where special conditions of supervised release improperly delegated authority over the nature and extent of the defendant's treatment to the probation officer. By stating that the probation officer, in consultation with the treatment provider, was to "supervise [] participation in the program (such as provider, location, modality, duration, and intensity)," the treatment condition improperly gave the probation officer discretion to determine whether the defendant must participate in inpatient or outpatient treatment.
United States v. Magdaleno, 43 F.4th 1215 (9th Cir. 2022)	The district court did not violate the defendant's fundamental right to familial association by imposing a special condition of supervised release prohibiting association with street gang members without an exclusion for siblings who might be gang members. A defendant's relationship with a sibling or half-sibling does not inherently constitute an "intimate relationship" and thus does not give rise to a "particularly significant liberty interest."
United States v. Oliver, 41 F.4th 1093 (9th Cir. 2022)	An offender on supervised release who provides to his probation officer a monthly supervision report with false statements that is subsequently submitted to a judge is not entitled to the exemption at 18 U.S.C. § 1001(b) for statements "submitted to a judge or magistrate." Adopting such an expansive definition of "submission" would undermine Congress's intent in section 1001(a) to proscribe false statements made in "any matter" of the "judicial branch."
United States v. Wells, 29 F.4th 580 (9th Cir. 2022)	The defendant's special condition of supervised release prohibiting the possession or use of a computer is unconstitutionally vague because the condition's definition of the term

	"computer" would cause "men of common intelligence [to] necessarily guess at its meaning and differ as to its application." Because the special condition violates a constitutional right that was not expressly and specifically waived by the defendant's valid appeal waiver, it is an "illegal" sentence that the defendant may challenge.
United States v. Ponce, 22 F.4th 1045 (9th Cir. 2022)	The correct legal standard for deciding a motion for early termination of supervised release is set forth in 18 U.S.C. § 3583(e), which makes clear that a district court enjoys discretion to consider a wide range of circumstances.

Tenth Circuit

	No cases selected by Commission staff.

Eleventh Circuit

United States v. Coglianese, 34 F.4th 1002 (11th Cir. 2022)	A supervised release condition restricting the defendant's possession of an "electronic data storage medium" was not overbroad and did not "impose a greater deprivation of liberty than necessary" because the condition did not constitute a total ban on such a medium and was reasonably related to the defendant's offenses of conviction.
United States v. Moore, 22 F.4th 1258 (11th Cir. 2022)	The district court did not plainly err in imposing a revocation sentence and a new term of imprisonment that resulted in a combined sentence that exceeded the statutory maximum for the original offense because the text of 18 U.S.C. § 3583(e) does not indicate that "the full panoply of rights provided for in the Fifth or Sixth Amendments apply to [section] 3583(e) revocation proceedings," and neither the Supreme Court nor the Eleventh Circuit have directly resolved the issue.

General Application Issues

D.C. Circuit

United States v. Khatallah, 41 F.4th 608 (D.C. Cir. 2022)	The defendant's 22-year sentence was "substantively unreasonably low in light of the gravity of his crimes of terrorism." Although the district court was permitted to "vary downward to discount [the defendant's] acquitted conduct," the court's disregard of the acquitted conduct alone could not "account for its dramatic downward departure from the Sentencing Guidelines' recommendation" of life imprisonment plus ten years.

First Circuit

United States v. Benito Lara, No. 22-1063, 2022 WL 17985968 (1st Cir. Dec. 29, 2022)	Because the defendant failed to establish that law enforcement "acted in bad faith or based on an improper motive" by extending its drug investigation or "used 'excessive pressure' to overbear his will" and cause him to commit more serious offenses, he failed to show any "sentencing factor manipulation" that would warrant a downward departure.
United States v. Espinoza-Roque, 26 F.4th 32 (1st Cir. 2022)	The district court clearly erred when it applied a higher base offense level under §2K2.1(a)(4)(B) to the defendant's firearms offenses based on its conclusion that the defendant was an "unlawful user of or addicted to any controlled substance" at the time he committed those offenses. The district court had relied on the defendant's statement that he "used marijuana every day without interruption to get to sleep" to find the requisite temporal nexus needed to apply the higher base offense level, but that reliance was erroneous given other "undisputed evidence" in the defendant's record.

Second Circuit

	No cases selected by Commission staff.

Third Circuit

	No cases selected by Commission staff.

Fourth Circuit

United States v. Moses, 23 F.4th 347 (4th Cir. 2022)	The district court properly applied Application Note 5(C) to §1B1.3 because guideline commentary is authoritative and binding even if the guideline is unambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (limiting deference to an executive agency's interpretation of its regulations), did not alter the authoritative weight afforded to guideline commentary under *Stinson v. United States*, 508 U.S. 36 (1993). This holding is in conflict with the court's opinion in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022).

Fifth Circuit

United States v. Ramirez, 37 F.4th 233 (5th Cir. 2022)	Application Note 3 to §2L1.1 explains that courts should not apply the §3C1.2 adjustment for reckless endangerment during flight in addition to the §2L1.1(b)(6) enhancement for reckless endangerment if the enhancement is premised "solely on the basis of conduct related to fleeing from a law enforcement officer."

United States v. Cordova-Lopez, 34 F.4th 442 (5th Cir. 2022)	Application Note 3 to §2L1.2 is not in tension with the guidelines; rather, it "merely describes what the [g]uidelines' text and structure would unambiguously require even in its absence." In so holding, the court declined to decide the deference owed to guideline commentary.
United States v. Castelo-Palma, 30 F.4th 284 (5th Cir. 2022)	Whether an undisputed fact is sufficient to apply the reckless endangerment enhancement at §2L1.1(b)(6) is a legal question subject to *de novo* review. Further, circuit precedent has identified five factors to consider when reviewing the application of the enhancement to the base offense level for unlawful transportation of aliens into the United States via a motor vehicle: (1) the availability of oxygen, (2) any exposure to temperature extremes, (3) the aliens' ability to communicate with the vehicle's driver, (4) the aliens' ability to exit the vehicle quickly, and (5) the danger to the aliens if an accident occurs.

Sixth Circuit

United States v. Nedelcu, 46 F.4th 446 (6th Cir. 2022)	The defendant's guilty plea to a RICO offense included a stipulation to facts constituting money laundering under 18 U.S.C. § 1956. Therefore, under §1B1.2(c), his guideline range was properly calculated as though he had been convicted of a count under 18 U.S.C. § 1956, including increases that require a conviction under that section; although Application Note 1 to §1B1.2 requires explicit agreement for a stipulation for purposes of the selection of the applicable Chapter 2 guideline, it does not require such agreement for enhancements within a guideline properly reached through a cross-reference.
United States v. Gardner, 32 F.4th 504 (6th Cir. 2022)	Conspiracy to distribute and possess with intent to distribute narcotics is not an offense consisting of the "distribution of a controlled substance" for purposes of the federal benefits ban under 21 U.S.C. § 862(a); the district court committed legal error in concluding otherwise. However, the district court correctly denied safety-valve relief for a defendant who did not admit her culpable mental state.
United States v. Nunley, 29 F.4th 824 (6th Cir. 2022)	The cumulative application of the enhancement under §2K2.1(b)(6)(B) for use of a firearm in connection with another felony offense and the adjustment under §3A1.2(c)(1) for assaulting a law enforcement officer does not constitute impermissible double counting, even where the conduct underlying the enhancement and adjustment is the same.

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

United States v. Alibegic, 34 F.4th 1122 (8th Cir. 2022)	The statutory text in effect at the time the defendant committed his instant offense is the relevant statutory text for determining whether his offense conduct qualifies as "another felony offense" under §2K2.1(b)(6)(B); later amendments to the statute are irrelevant.
United States v. Fisher, 25 F.4th 1080 (8th Cir. 2022)	The district court did not plainly err in concluding that §5K2.23 does not authorize a court to downwardly depart below a statutory minimum penalty. The court further indicated that it was "inclined to agree with the other circuits that have decided this issue" were the question raised on *de novo* review.

Ninth Circuit

United States v. Kirilyuk, 29 F.4th 1128 (9th Cir. 2022)	Because Application Note 3(F)(i) to §2B1.1 provides that "loss" for use of counterfeit credit cards must be calculated at not less than $500 per credit card used, the application note expands the meaning of "loss" in a manner inconsistent with the guideline language and acts as an enhanced punishment rather than an assessment of "loss" tied to the facts of the case. Therefore, Application Note 3(F)(i) is not binding under *Stinson v. United States*, 508 U.S. 36 (1993), which provides that the role of a guideline's application notes is to explain the sentencing guidelines, not enact policy changes to them.

Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

No cases selected by Commission staff.

Other Offense Types

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	
	No cases selected by Commission staff.
Fifth Circuit	
United States v. Ferris, 52 F.4th 235 (5th Cir. 2022)	The district court improperly applied the cross-reference in §2J1.4(c)(1), which applies "[i]f the impersonation was to facilitate another offense," to a defendant convicted of impersonating an FBI agent while getting prescriptions for fentanyl patches filled. No evidence in the record showed that the defendant caused the pharmacist to fill unauthorized prescriptions or that he amassed his fentanyl prescriptions for the purpose of drug trafficking, so cross-referencing to §2D1.1 was improper.
United States v. Hernandez, 48 F.4th 367 (5th Cir. 2022)	Pursuant to circuit precedent, "[t]ransporting aliens in a manner that significantly hinders their ability to exit [a] vehicle quickly creates a substantial risk of death or bodily injury." Thus, the district court reasonably applied the §2L1.1(b)(6) enhancement where it "expressly found that aliens in the cargo area could not exit the [defendant's] vehicle quickly" and the defendant was unable to open the back door of his vehicle even with his keys.
Sixth Circuit	
United States v. Ziesel, 38 F.4th 512 (6th Cir. 2022)	A verbal instruction by a bank robber to get on the ground, without a change in location, use of actual restraints, or threat of use of a dangerous weapon, does not constitute "physical restraint" for purposes of §2B3.1(b)(4)(B). The inquiry focuses "on the defendant's action, not the victim's reaction."
Seventh Circuit	
United States v. Hernandez, 37 F.4th 1316 (7th Cir. 2022)	The district court did not clearly err in concluding that the defendant should be held responsible for conspiracy to commit murder as part of his RICO conspiracy conviction because evidence in the presentence report showed that the defendant was a gang leader

	responsible for enforcing "violent policies, which sometimes required shooting rival gang members" and "that he had also directly furthered those policies by offering lethal weapons to his fellow gang members and by personally participating in the gang's 'security' activities."
Eighth Circuit	
United States v. Stimac, 40 F.4th 876 (8th Cir. 2022)	The district court did not commit procedural error in applying the 2-level enhancement at §2Q2.1(b)(1)(B). After finding that the language of §2Q2.1(b)(1)(B) is ambiguous as to whether the phrase "pattern of similar violations" applies to a defendant's applicable prior violations or violations committed as part of the defendant's instant offense, the Eighth Circuit determined that the defendant's actions warranted the enhancement under either interpretation.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
United States v. Logsdon, 26 F.4th 854 (10th Cir. 2022)	The district court properly applied the cross-reference in §2B1.1(c)(2), which applies if "the offense involved arson," to a defendant convicted of making a false statement to an arson investigator, even though the defendant did not mention arson in her statement and there was no evidence that she committed arson. The false statement offense "involved arson" because an underlying arson launched the investigation in which she made a materially false statement that led to her prosecution.
Eleventh Circuit	
	No cases selected by Commission staff.

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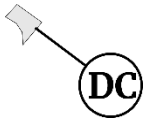

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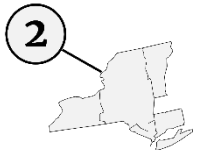

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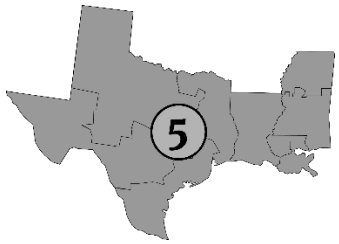

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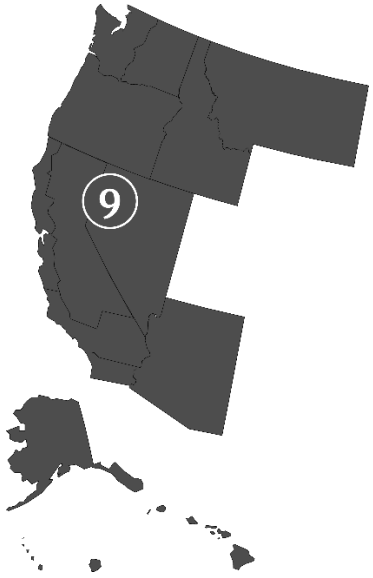

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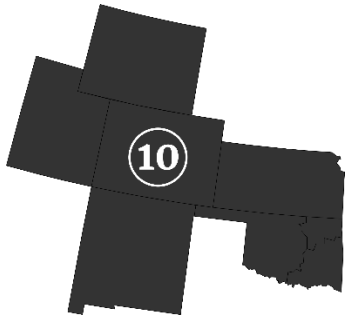

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