INTERACTIVE

Case Law Update

JANUARY – MARCH 2023

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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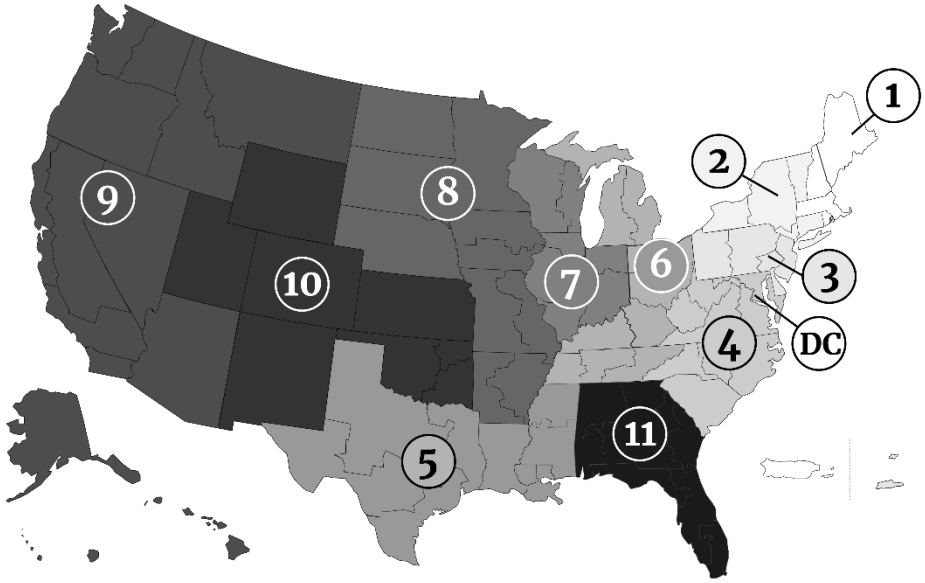

Cases appear in descending chronological order within a circuit.

U.S. Supreme Court

	No cases selected by Commission staff.

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, 60 F.4th 720 (2d Cir. 2023)	On panel rehearing, the Second Circuit declined the government's request to classify as dicta its prior ruling that in deciding whether a prior state offense is a "controlled substance offense" under §4B1.2(b), courts should not use the time of the prior offense as the comparison point between the state and federal controlled substance schedules.

Third Circuit

United States v. Henderson, 64 F.4th 111 (3d Cir. 2023)	As previously held in *United States v. Abreu*, 32 F.4th 271 (3d Cir. 2022), §4B1.2(a)'s definition of "crime of violence" excludes conspiracies. Contrary to the government's suggestion, *United States v. Preston*, 910 F.2d 81 (3d Cir. 1990)—which held that conspiracy to commit robbery qualified as a predicate under the Armed Career Criminal Act—no longer controls because it conflicts with the Supreme Court's later decisions in *United States v. Mathis*, 579 U.S. 500 (2016), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
United States v. Brasby, 61 F.4th 127 (3d Cir. 2023)	A state crime that can be committed with extreme indifference recklessness qualifies as a "crime of violence" for purposes of §4B1.2(a). Applying the categorical approach, the Third Circuit examined the Model Penal Code, learned treatises, and its own multijurisdictional survey and found that the elements of the defendant's prior New Jersey aggravated assault offense were a categorical match with the elements of the generic federal offense of aggravated assault. Accordingly, the prior offense qualified under §4B1.2(a).

United States v. Lewis, 58 F.4th 764 (3d Cir. 2023)	A "controlled substance" for purposes of the definition of "controlled substance offense" in §4B1.2 includes substances regulated by either state or federal law at the time of the prior conviction, not at the time of the instant sentencing.
Fourth Circuit	
	No cases selected by Commission staff.
Fifth Circuit	
	No cases selected by Commission staff.
Sixth Circuit	
	No cases selected by Commission staff.
Seventh Circuit	
	No cases selected by Commission staff.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
	No cases selected by Commission staff.
Eleventh Circuit	
United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc)	"[T]he plain language definition of 'controlled substance offense' in §4B1.2 unambiguously excludes inchoate offenses," and there is "no need to consider, much less defer to, the commentary in Application Note 1." The court overruled its prior precedent, which had held that "the commentary in Application Note 1 constitutes a binding interpretation of §4B1.2(b)," concluding that its prior holdings were "incongruous with *Kisor* [*v. Wilkie*, 588 U.S. __ (2019)]." This case deepens a circuit split between the Third (en banc), Fourth, Sixth (en banc), and D.C. Circuits—with which the Eleventh Circuit agrees—and the First, Second, Seventh, Eighth (en banc), and Ninth Circuits.

United States v. Harrison, 56 F.4th 1325 (11th Cir. 2023)	Georgia's robbery statute is divisible under *Mathis v. United States*, 579 U.S. 500 (2016), and robbery by intimidation qualifies as a "crime of violence" under the enumerated clause in §4B1.2(a)(2).

Categorical Approach

D.C. Circuit

	No cases selected by Commission staff.

First Circuit

	No cases selected by Commission staff.

Second Circuit

United States v. Eldridge, 63 F.4th 962 (2d Cir. 2023)	Kidnapping in the second degree under New York law is not categorically a crime of violence under 18 U.S.C. § 924(c)(3)(A) because it can be committed through deception. Accordingly, the defendant's kidnapping in aid of racketeering charge, which was based on this offense, could not serve as a predicate under 18 U.S.C. § 924(c)(1)(A)(ii).
United States v. Collymore, 61 F.4th 295 (2d Cir. 2023)	The holding of *United States v. Taylor*, 142 S. Ct. 2015 (2022), that attempted Hobbs Act robbery is not a crime of violence required that the court vacate the defendant's convictions for violating 18 U.S.C. §§ 924(c) (possession of a firearm during a crime of violence) and 924(j)(1) (causing a death during a section 924(c) violation) premised upon an attempted Hobbs Act robbery.
United States v. Morris, 61 F.4th 311 (2d Cir. 2023)	A VICAR assault offense is divisible into assault with a deadly weapon and assault resulting in serious bodily injury; assault with a deadly weapon is further divisible based on the underlying statute. Accordingly, a defendant's conviction of 18 U.S.C. § 924(c) was supported where the predicate VICAR assault with a deadly weapon was in turn predicated on a state crime that met the definition of a "crime of violence."
United States v. McCoy, 58 F.4th 72 (2d Cir. 2023)	Following *United States v. Taylor*, 142 S. Ct. 2015 (2022), 18 U.S.C. § 924(c) convictions premised on completed Hobbs Act robberies remain valid. Recent circuit precedent holding that Hobbs Act robbery is not a "crime of violence" under §4B1.1, which limits the term to force against a person, is not inconsistent because section 924(c)'s definition of "crime of violence" includes force against a person or property.
Hall v. United States, 58 F.4th 55 (2d Cir. 2023)	The holding of *United States v. Davis*, 139 S. Ct. 2319 (2019)—that the residual clause in 18 U.S.C. § 924(c) is unconstitutionally vague—applies retroactively to cases on collateral review. Applying *Davis* and *United States v. Taylor*, 142 S. Ct. 2015 (2022), the defendant's

	prior offenses of conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery do not qualify as "crimes of violence" under section 924(c).
Third Circuit	
United States v. Stoney, 62 F.4th 108 (3d Cir. 2023)	A completed Hobbs Act robbery is categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because it requires proof of "the use, attempted use, or threatened use of physical force."
Fourth Circuit	
United States v. Ivey, 60 F.4th 99 (4th Cir. 2023)	Because Hobbs Act robbery requires intentional conduct and cannot be committed recklessly, *United States v. Borden*, 141 S. Ct. 1817 (2021), does not undermine circuit precedent holding that Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).
Fifth Circuit	
United States v. Hill, 63 F.4th 335 (5th Cir. 2023)	"[T]he substantive equivalence of aiding and abetting liability with principal liability means that aiding and abetting Hobbs Act robbery is, like Hobbs Act robbery itself, a crime of violence" under the elements clause of 18 U.S.C. § 924(c). However, in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), "*attempted* Hobbs Act robbery does not qualify as a crime of violence under the elements clause."
Sixth Circuit	
United States v. White, 58 F.4th 889 (6th Cir. 2023)	Ohio aggravated robbery convictions do not qualify as "violent felonies" for purposes of 18 U.S.C. § 924(e) because Ohio aggravated robbery does not require that force is used knowingly or intentionally, rather than recklessly.
Seventh Circuit	
United States v. Hatley, 61 F.4th 536 (7th Cir. 2023)	Hobbs Act robbery is a "violent felony" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or "ACCA"). Where committed by force against property, Hobbs Act robbery fits within ACCA's enumerated offense of "extortion" because the generic definition of extortion—taking through wrongfully induced consent—encompasses a taking against someone's will. This holding is "broadly consistent" with the Ninth, Tenth, and Fifth Circuits and a criminal law treatise, while the Fourth and Sixth Circuits have found a "categorical mismatch based partly on the same discrepancy between a nonconsensual taking and a taking with a victim's wrongfully induced consent."

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Williams, 61 F.4th 799 (10th Cir. 2023)	When assessing whether a prior state drug conviction categorically qualifies as a "serious drug offense" under the ACCA—which defines a "controlled substance" by reference to the federal Controlled Substance Act—courts must compare "the state drug schedules in effect at the time of [the] prior convictions and the federal drug schedules in effect at the time [of] the instant federal offense." In so holding, the Tenth Circuit joined the Third and Eighth Circuits, and split from the Eleventh Circuit (time of prior state conviction) and the Fourth Circuit (time of federal sentencing).

Eleventh Circuit

United States v. Penn, 63 F.4th 1305 (11th Cir. 2023)	A Florida sale-of-cocaine offense qualifies as a "serious drug offense" under 18 U.S.C. § 924(e) (commonly known as the "Armed Career Criminal Act" or the "ACCA") because "attempted transfers of a controlled substance[,] [which the Florida statute prohibits,] are 'distributing' as ACCA uses the term."

Chapter Three Adjustments

D.C. Circuit

	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. Melendez, 57 F.4th 505 (5th Cir. 2023)	A defendant who discarded several ounces of methamphetamine from a vehicle during a police chase and did not "ensure that the discarded drugs could not be consumed and pose a danger to others" plausibly had "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." Therefore, the district court correctly applied a two-level adjustment under §3C1.2.

Sixth Circuit

No cases selected by Commission staff.

Seventh Circuit

No cases selected by Commission staff.

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.

Compassionate Release

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Mangarella, 57 F.4th 197 (4th Cir. 2023)	Because it was unclear whether the district court considered the defendant's particular heightened susceptibility to COVID-19 under the 18 U.S.C. § 3553(a) factors, the district court did not set forth enough analysis to allow for meaningful appellate review of its denial of compassionate release.
United States v. Malone, 57 F.4th 167 (4th Cir. 2023)	The district court abused its discretion by failing to sufficiently consider relevant 18 U.S.C. § 3553(a) factors that "clearly favor release"—including the defendant's degenerated health, advanced age, and placement on home confinement by the Bureau of Prisons pursuant to the CARES Act—while deciding the defendant's successive request for compassionate release.
United States v. Bond, 56 F.4th 381 (4th Cir. 2023)	The district court did not abuse its discretion when it denied the defendant's request for compassionate release after properly considering, among other sentencing factors, the benefit negotiated pursuant to his original plea agreement.

Fifth Circuit

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

Sixth Circuit

No cases selected by Commission staff.

Seventh Circuit

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

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

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

Eleventh Circuit

	No cases selected by Commission staff.

Criminal History

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Fowler, 58 F.4th 142 (4th Cir. 2023)	The district court did not plainly err when it assigned one criminal history point pursuant to §4A1.1(c) for a prior criminal domestic violence offense involving a diversionary disposition in reliance on limited information contained in the PSR where the defendant made no showing that the information was unreliable.

Fifth Circuit

No cases selected by Commission staff.

Sixth Circuit

No cases selected by Commission staff.

Seventh Circuit

No cases selected by Commission staff.

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. Melendez-Rosado, 57 F.4th 32 (1st Cir. 2023)	"[A] premises that serves both as a family's place of residence and as the hub of a drug-distribution enterprise has two principal uses." And "[t]he fact that one principal use is for drug distribution permits a sentencing court to impose the stash-house enhancement" under §2D1.1(b)(12).

Second Circuit

United States v. Helm, 58 F.4th 75 (2d Cir. 2023)	Section 1B1.3(a)(1)(A) does not include a scienter requirement as to the drug type involved in a nonpossessory context, such as where a defendant "who—without ever coming into actual or constructive possession—agrees to purchase a quantity of drugs." A court at sentencing must consider the quantity of drugs with which a defendant is directly and personally involved even if he lacks knowledge of the specific drug type and did not personally possess all the drugs involved.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

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

Fifth Circuit

No cases selected by Commission staff.

Sixth Circuit

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

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

United States v. Salazar, 61 F.4th 723 (9th Cir. 2023)	The district court erred when it failed to make a finding under 18 U.S.C. § 3553(f) that the defendant had made a truthful proffer before applying the safety valve, having found such a proffer would be futile. "[T]here is no futility exception to the proffer requirement" under section 3553(f)(5), and defendants need to provide all information relevant to the offense, whether or not relevant or useful to the government.

Tenth Circuit

	No cases selected by Commission staff.

Eleventh Circuit

	No cases selected by Commission staff.

Economic Crimes

D.C. Circuit

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

	where the money laundering was sophisticated for separate reasons than the sophisticated means for the underlying bank fraud.
First Circuit	
	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. Hagen, 60 F.4th 932 (5th Cir. 2023)	The district court correctly applied a two-level increase for "sophisticated [money] laundering" under §2S1.1(b)(3) because the defendants "bifurcated, mislabeled, and prepaid" invoices related to illegal kickbacks. Because this conduct was not the basis for a different enhancement, the limitation in Application Note 5(B) did not foreclose the increase.
Sixth Circuit	
	No cases selected by Commission staff.
Seventh Circuit	
United States v. Klund, 59 F.4th 322 (7th Cir. 2023)	Where the defendant delivered some, but not all, promised goods under fraudulent contracts, "[t]he district court did not clearly err in calculating the intended loss [under §2B1.1] by including the bid price of [the] outstanding contracts" and declining to offset that amount by the cost of unshipped goods the defendant argued he would have delivered.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
	No cases selected by Commission staff.

Tenth Circuit

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

Eleventh Circuit

No cases selected by Commission staff.

Firearms

D.C. Circuit

No cases selected by Commission staff.

First Circuit

United States v. Bishoff, 58 F.4th 18 (1st Cir. 2023)	"Plainly read, the enhancement [under §2K2.1(b)(5)] applies if [the defendant] transferred two or more guns while having reason to believe that at least one of them would be used or possessed unlawfully." The district court correctly applied the enhancement where the defendant sold several unserialized firearms to an undercover officer, the sales were conducted in clandestine locations, and the defendant and the undercover officer discussed drugs during one of the sales, "create[ing] a reasonable inference that the desire to purchase the custom, untraceable weapons . . . stemmed from a desire to use them to unlawful ends." The district court did not abuse its discretion in applying an enhancement under §2K2.1(b)(6) for the defendant's possession of firearms "in connection with another felony." Statements by the defendant's supplier established that the defendant "gave him drugs in exchange for guns, for either the firearms themselves or just their assembly."

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Waters, 64 F.4th 199 (4th Cir. 2023)	Because *Rehaif v. United States*, 139 S. Ct. 2191 (2019), announced a new substantive rule narrowing the scope of a criminal statute by interpreting its terms, it applies retroactively to cases on collateral review through an initial 28 U.S.C. § 2255 motion.
United States v. Dix, 60 F.4th 61 (4th Cir. 2023)	The district court correctly applied the §2K2.1(b)(6)(B) enhancement for use or possession of a firearm "in connection with another felony offense"—namely failure to stop when signaled by law enforcement—because the firearm "emboldened" the defendant's flight from law enforcement and rendered it more dangerous.

Fifth Circuit

United States v. Sharp, 62 F.4th 951 (5th Cir. 2023)	The four-level enhancement at §2K2.1(b)(4)(B) "does not apply when there is no evidence that [a] firearm ever had a serial number." "The text of §2K2.1(b)(4)(B) is clear that it only applies when the firearm 'had an altered or obliterated serial number,'" and "something cannot be 'altered or obliterated' if it never existed in the first place."
United States v. Rahimi, 59 F.4th 163 (5th Cir. 2023)	The provision in 18 U.S.C. § 922(g)(8), which prohibits persons subject to domestic violence restraining orders from possessing firearms, is unconstitutional under the Second Amendment, in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

Sixth Circuit

United States v. Hitch, 58 F.4th 262 (6th Cir. 2023)	There was no impermissible double counting in applying the enhancement for stolen firearms, §2K2.1(b)(4)(A), and the enhancement for possessing a firearm in connection with another felony offense, §2K2.1(b)(6)(B), where the defendant stole firearms from a federally licensed firearms dealer because the enhancements punished "distinct aspects" of the conduct. Nor was there double counting in calculating the base offense level and enhancements for the defendant's conviction of 18 U.S.C. § 922(u) because the offense level was calculated based upon his conviction for 18 U.S.C. § 922(g) (felon in possession), and the offenses grouped.

Seventh Circuit

No cases selected by Commission staff.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

United States v. Munoz, 57 F.4th 683 (9th Cir. 2023)	A firearm is "unlawfully possessed" as described in the commentary providing which firearms are to be counted for an enhancement under §2K2.1(b)(1) ("offense involved three or more firearms") if the defendant's possession of that firearm was unlawful under a specific provision of either federal law or state law.

Tenth Circuit

United States v. Leib, 57 F.4th 1122 (10th Cir. 2023)	The district court did not err when it enhanced the defendant's offense level under §2K2.1(b)(6)(B) for use of a firearm "in connection with another felony offense" after finding by a preponderance of the evidence that the totality of the circumstances indicated that his conduct supported a felony conviction under New Mexico law.

Eleventh Circuit

No cases selected by Commission staff.

First Step Act of 2018

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

United States v. Brow, 62 F.4th 114 (3d Cir. 2023)	The First Step Act does not permit district courts to reduce the sentence for a separate, noncovered offense that was administratively aggregated with the sentence for a covered offense, nor to reduce a sentence on a covered offense that has been fully served.

Fourth Circuit

United States v. Troy, 64 F.4th 177 (4th Cir. 2023)	Under *Concepcion v. United States*, 142 S. Ct. 2389 (2022), "while a district court may consider other changes in the law when determining what reduction, if any, is appropriate" under section 404 of the First Step Act, the proper "benchmark" for the court's analysis is "the impact of the Fair Sentencing Act on the defendant's [g]uidelines range." *Concepcion* thus

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

Fifth Circuit

	No cases selected by Commission staff.

Sixth Circuit

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

Seventh Circuit

No cases selected by Commission staff.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

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

Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

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

Relevant Conduct

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

No cases selected by Commission staff.

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

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Taylor, 62 F.4th 146 (4th Cir. 2023)	A defendant convicted of Hobbs Act robbery could not avoid mandatory restitution where some of the victims' losses included cash and personal property that they had obtained through illegal activity.

Fifth Circuit

United States v. Hagen, 60 F.4th 932 (5th Cir. 2023)	"[T]he categorical approach does not control the analysis of whether a Title 18 offense is 'against property'" for purposes of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. Rather, "[t]he text, structure, and purpose of the MVRA permit a sentencing court to consider the factual circumstances in which an offense was committed in deciding whether the offense was against property."

Sixth Circuit

No cases selected by Commission staff.

Seventh Circuit

No cases selected by Commission staff.

Eighth Circuit

No cases selected by Commission staff.

Ninth Circuit

No cases selected by Commission staff.

Tenth Circuit

United States v. Salti, 59 F.4th 1050 (10th Cir. 2023)	In ordering restitution, a district court may combine joint and several liability with apportionment in order to fully compensate the victim. After satisfying the restitution judgment against him, defendant was not entitled to a pro rata refund of codefendant's payment.

Eleventh Circuit

No cases selected by Commission staff.

Sentencing Procedure

D.C. Circuit

No cases selected by Commission staff.

First Circuit

United States v. Muñoz-Fontanez, 61 F.4th 212 (1st Cir. 2023)	"When imposing a significant variance, a sentencing court must make clear *which* specific facts of the case motivated its decision and *why* those facts led to its decision." Here, the district court's "mere listing of the facts of the [defendant's] arrest, without emphasis on any particular circumstance, ma[de] it impossible to tell whether it was the [defendant's possession of an] automatic weapon [in connection with a drug crime] or something else that motivated its decision" to impose a sentence that was "nearly two and a half times" higher than the guideline range.

Second Circuit

No cases selected by Commission staff.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

No cases selected by Commission staff.

Fifth Circuit

United States v. Gonzalez, 62 F.4th 954 (5th Cir. 2023)	"[W]hen a district court accepts a Rule 11(c)(1)(C) agreement and binds itself to impose a sentence specified in the agreement, the sentence imposed may be unreasonable," and thus reviewable on appeal under 18 U.S.C. § 3742(a)(1). "[A] Rule 11(c)(1)(C) agreement 'does not discharge the district court's independent obligation to exercise its discretion' under '[f]ederal sentencing law . . . to impose "a sentence sufficient, but not greater than necessary to comply with" the purposes of federal sentencing.' " In holding that a Rule 11(c)(1)(C) sentence may be reviewed for substantive reasonableness, the Fifth Circuit joins the Third, Sixth, Eighth, and Ninth Circuits, and splits with the Fourth, Seventh, and Tenth Circuits.

Sixth Circuit

United States v. Simmonds, 62 F.4th 961 (6th Cir. 2023)	The government did not breach a plea agreement by providing factual information to the court resulting in a higher base offense level, where it answered the court's questions but did not request a base offense level higher than that agreed in the plea agreement. And the district court did not err, plainly or otherwise, in imposing the higher base offense level recommended in the PSR rather than the base offense level specified in the plea agreement.

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

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

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Jimenez, 61 F.4th 1281 (10th Cir. 2023)	The district court did not err when it announced that it would impose a sentence within the guideline range before allowing the defendant to allocute, because the pronouncement was not a "clear and unambiguous enunciation of a specific sentence."
United States v. Slinkard, 61 F.4th 1290 (10th Cir. 2023)	The district court erred by "definitively announcing" the sentence it would impose—a specific sentence in accordance with the applicable guideline term of life imprisonment—before allowing the defendant to allocute.

Eleventh Circuit

No cases selected by Commission staff.

Sex Offenses

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

No cases selected by Commission staff.

Third Circuit

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

Fourth Circuit	
United States v. Ebert, 61 F.4th 394 (4th Cir. 2023)	The district court did not err in applying the 5-level enhancement under §4B1.5(b)(1), correctly finding a pattern of activity involving criminal sexual conduct based on victim testimony, which the defendant sought—but failed—to discredit.
Fifth Circuit	
	No cases selected by Commission staff.
Sixth Circuit	
United States v. Preece, No. 22-5297, 2023 WL 395028 (6th Cir. Jan. 25, 2023)	"[T]he text of §4B1.5(b) does not limit a sentencing court to considering only the offense of conviction." Unlike Chapters Two and Three of the *Guidelines Manual*, which are subject to the limitations in §1B1.3(a), under §1B1.3(b), courts apply Chapters Four and Five "on the basis of the conduct and information specified in the respective guidelines"—in the case of §4B1.5(b), a "pattern of activity involving prohibited sexual conduct." So conduct beyond the offense of conviction, including uncharged conduct, is properly considered in applying §4B1.5.
Seventh Circuit	
	No cases selected by Commission staff.
Eighth Circuit	
United States v. Perez, 61 F.4th 623 (8th Cir. 2023)	The district court erred in applying the enhancement under §4B1.5(b)(1), which may apply if the defendant's instant offense of conviction is a "covered sex crime," because the defendant was convicted of receipt and distribution of child pornography and of transportation of child pornography—offenses that are expressly excluded from the definition of "covered sex crime."
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
	No cases selected by Commission staff.
Eleventh Circuit	
	No cases selected by Commission staff.

Supervised Release

D.C. Circuit

No cases selected by Commission staff.

First Circuit

No cases selected by Commission staff.

Second Circuit

United States v. Farooq, 58 F.4th 687 (2d Cir. 2023)	A special condition of supervised release requiring a defendant to seek court approval before disseminating any information about his extortion victims did not violate the First Amendment where it was closely related to the charged conduct and to the defendant's history of disclosures (including in violation of court orders), limited to two individuals and to several months, and the court could grant the defendant permission if he requested it.

Third Circuit

No cases selected by Commission staff.

Fourth Circuit

United States v. Castellano, 60 F.4th 217 (4th Cir. 2023)	The district court abused its discretion by imposing a lifetime condition of supervision prohibiting access to all pornography, pictures displaying nudity, and magazines portraying juvenile models because it was overbroad and not reasonably related to the underlying transportation of child pornography offense.
United States v. Sueiro, 59 F.4th 132 (4th Cir. 2023)	The district court procedurally erred when it imposed burdensome lifetime special conditions of supervised release not sufficiently connected to the defendant's underlying child pornography convictions without particularized explanation.

Fifth Circuit

United States v. Greer, 59 F.4th 158 (5th Cir. 2023)	"The district court committed a reversible procedural error by sentencing [the defendant] to two consecutive nine-month terms of imprisonment for violating two conditions of his supervised release." Under 18 U.S.C. § 3583(e)(3), a court is limited "to imposing one term of imprisonment upon revoking one term of supervised release," so it "cannot impose *multiple* terms of imprisonment, concurrent or consecutive, upon revoking a single term of supervised release."

Sixth Circuit

United States v. Robinson, 63 F.4th 530 (6th Cir. 2023)	The exclusionary rule, which bars the government from using evidence obtained in violation of the Fourth Amendment, does not apply in supervised release proceedings. Nor does the right to a jury trial apply to the mandatory revocation of supervised release for possession of a controlled substance or firearm or for refusal to comply with drug testing, under 18 U.S.C. § 3583(g).

Seventh Circuit

	No cases selected by Commission staff.

Eighth Circuit

	No cases selected by Commission staff.

Ninth Circuit

	No cases selected by Commission staff.

Tenth Circuit

United States v. Booker, 63 F.4th 1254 (10th Cir. 2023)	District courts "may not modify or revoke a term of supervised release based on the need for retribution." Because 18 U.S.C. § 3583(e) uses "mandatory language to direct a court to consider some, but not all, [18 U.S.C.] § 3553(a) sentencing factors, it is procedural error to consider an unenumerated factor."
United States v. Prestel, 60 F.4th 616 (10th Cir. 2023)	The defendant's plea agreement allowing "appeal from a sentence which exceeds the statutory maximum" did not permit challenge to the lifetime conditions of his supervised release; unlike a term of release, a condition cannot exceed a statutory maximum.

Eleventh Circuit

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General Application Issues

D.C. Circuit

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First Circuit

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Second Circuit

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Third Circuit

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Fourth Circuit

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Fifth Circuit

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Sixth Circuit

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Seventh Circuit

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Eighth Circuit

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Ninth Circuit

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Tenth Circuit

No cases selected by Commission staff.

Eleventh Circuit

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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. Huerta-Rodriguez, 64 F.4th 270 (5th Cir. 2023)	"When a defendant has a prior illegal-reentry conviction under [8 U.S.C. §] 1326(b)(2) that came *before* any intervening change in law calling into question the aggravated-felony status of the predicate offense, a district court does not err in sentencing the defendant under § 1326(b)(2) [for a new illegal-reentry conviction]. Under these circumstances, the prior illegal-reentry conviction is *itself* an aggravated felony that supports a subsequent § 1326(b)(2) sentence."
Sixth Circuit	
	No cases selected by Commission staff.
Seventh Circuit	
	No cases selected by Commission staff.
Eighth Circuit	
	No cases selected by Commission staff.
Ninth Circuit	
	No cases selected by Commission staff.
Tenth Circuit	
United States v. Linares, 60 F.4th 1244 (10th Cir. 2023)	Defendant was not entitled to a reduction of his offense level under §2X1.1(b)(1) for an attempt because his efforts to complete the substantive offense (carjacking) were

interrupted by events beyond his control, namely the victim's 911 call. The district court correctly applied the §2B3.1(b)(5) enhancement for an "offense [that] involved carjacking" because the commentary definition includes carjackings committed "by force and violence or by intimidation," and does not require the same intent to cause death or serious bodily harm as the federal carjacking statute, 18 U.S.C. § 2119.

Eleventh Circuit

No cases selected by Commission staff.

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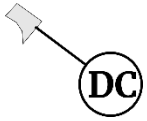

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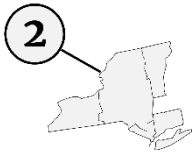

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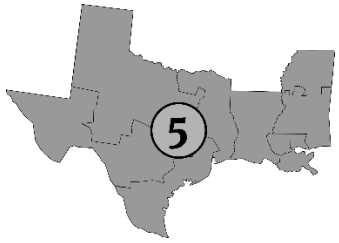

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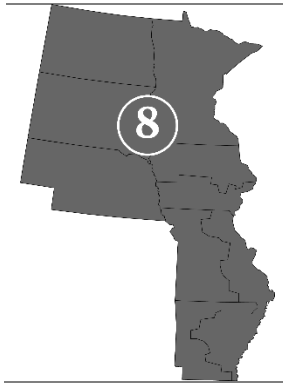

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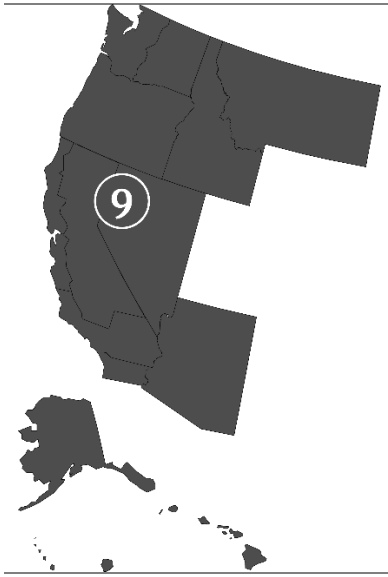

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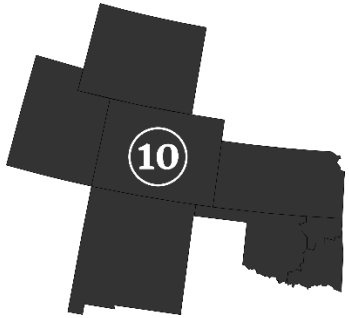

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