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ESP CASE LAW EXPRESS

Johnson/Categorical Approach

U.S. v. Barragan, -F.3d-, 2017 WL 3927273 (9th Cir. Sep. 8, 2017) Section 11379 of the California Health and Safety Code (transporting, importing, selling, furnishing, administering, or giving away certain drugs) is a divisible statute. Under the modified categorical approach, the judicially noticeable records proved that the defendant's conviction was for selling methamphetamine, which qualifies as a controlled substance offense.

U.S. v. Ocampo-Estrada, -F.3d-, 2017 WL 3707900 (9th Cir. Aug. 29, 2017) The district court erred in finding that the defendant's conviction under § 11378 of the California Health and Safety Code (possession of a controlled substance for sale) was a felony drug offense under 21 U.S.C. § 851. While the statute is divisible, the government did not introduce any *Shepard* document proving that the defendant's conviction was for a plea to a controlled substance element that is included within the federal "felony drug offense" definition.

U.S. v. Geozos, -F.3d-, 2017 WL 3712155 (9th Cir. Aug 29, 2017) Florida armed robbery and unarmed robbery are not violent felonies under the force clause. While both Florida statutes require the victim to resist the force, neither statute requires that the force be violent.

U.S. v. Robinson, -F.3d-, 2017 WL 3648524 (9th Cir. Aug. 25, 2017) Washington second degree assault (9A.36.021) is an indivisible statute and is not a crime of violence under §4B1.2. The district court should not have applied the modified categorical approach.

U.S. v. Martinez-Lopez, 864 F.3d 1034 (9th Cir. 2017) (en banc) The modified categorical approach applies to California Health and Safety Code section 11352, which criminalizes a range of activities related to controlled substances.

U.S. v. Perez-Silvan, 861 F.3d 935 (9th Cir. 2017) Tennessee aggravated assault (§ 39-13-102(a)(1)) is a crime of violence under the force clause at §2L1.2(b)(1)(A)(ii). The statute is divisible and charging documents indicated defendant was convicted of intentional or knowing assault, which has the requisite use of force as an element.

U.S. v. Calvillo-Palacios, 860 F.3d 1285 (9th Cir. 2017) Texas aggravated assault (22.02(a)) is a crime of violence under §2L1.2's force clause. Although § 22.02(a) is an indivisible statute, both means of committing aggravated assault—1) causing serious bodily injury or (2) using or exhibiting a deadly weapon—involve the use of violent, physical force.

U.S. v. Strickland, 860 F.3d 1224 (9th Cir. 2017) Oregon's third degree robbery statute (§ 164.395(1)) is not a violent felony under the ACCA's force clause because, while the statute requires "physical force," it does not require the level of "violent force … capable of causing physical pain or injury".

U.S. v. Rivera-Muniz, 854 F.3d 1047 (9th Cir. 2017) Cal. Penal Code § 192(a) (manslaughter) matches the generic definition of "manslaughter" and is therefore categorically a crime of violence under §2L1.2(b)(1)(A)(ii).

U.S. v. Arriaga-Pinon, 852 F.3d 1195 (9th Cir. 2017) California Vehicle Code § 10851(a) (unlawful driving or taking car without owner's consent) is not a qualifying predicate offense for the §2L1.2(b)(1)(C) enhancement. Even if the statute were divisible, the conviction would fail under the modified categorical approach because the documents the court could consider would not establish whether the defendant was convicted as a principal or an accessory after the fact.

U.S. v. Chavez-Cuevas, 862 F.3d 729 (9th Cir. 2017) California robbery (§ 211) remains a crime of violence after *Mathis*.

U.S. v. Strickland, 860 F.3d 1224 (9th Cir. 2017) Oregon's third degree robbery is not a violent felony because "[s]tate cases show that Oregon does not require physically violent force." For example, it is possible for a shoplifter who attempts to pull away from a security guard to be convicted under the statute.

U.S. v. Acevedo-De La Cruz, 844 F.3d 1147 (9th Cir. 2017) Violation of a protective order involving an act of violence or credible threat of violence in violation of California Penal Code § 273.6(d) is a crime of violence for purposes of §2L1.2(b)(1)(A)(ii).

U.S. v. Benally, 843 F.3d 350 (9th Cir. 2016) 18 U.S.C. § 1112 (Involuntary Manslaughter) is not a crime of violence under 18 U.S.C. § 924(c).

U.S. v. Rocha-Alvarado, 843 F.3d 802 (9th Cir. 2016) Oregon attempted sexual abuse (§163.427(1)(a)(A)) is a divisible statute and under the modified categorical approach qualifies as sexual abuse of a minor at §2L1.2.

Drug Offenses

U.S. v. Job, 851 F.3d 889 (9th Cir. 2017) With respect to §2D1.1(b)(5), where a defendant is not personally involved with importation, "the increase [can] apply only if the district court determined that the importation was 'within the scope of jointly undertaken criminal activity,' 'in furtherance of that criminal activity,' and 'reasonably foreseeable in connection with that criminal activity' under §1B1.3(a)(1)(B).'" The court disagreed with the Fifth Circuit's view that the enhancement applies regardless of whether the defendant knew the methamphetamine was imported.

U.S. v. Pimental-Lopez, 859 F.3d 1134 (9th Cir. 2017)

Where the jury made an affirmative special finding that the quantity of drugs attributable to the defendant was less than 50 grams, the sentencing judge could not "nevertheless calculate defendant's sentence based on the judge's finding that the quantity involved was far in excess of 50 grams."

U.S. v. Rico, -F.3d-, 2017 WL 3080916 (5th Cir. July 20, 2017) The district court did not err in applying the maintaining a drug establishment enhancement at §2D1.1(b)(12). The statements of coconspirators were "sufficiently reliable to form the basis of a finding" where the PSR "specifically attribute[d] the information about storing drugs at the mother's house to 'coconspirators,'" the government "clarif[ied] in its response to Rico's objections that the specific source for the information was Godinez, [and] Rico acknowledged that Godinez was the source of this information at the sentencing hearing."

Sex Offenses

U.S. v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) A defendant convicted of 18 U.S.C. § 1594(c) (conspiracy to commit sex trafficking) is not subject to the same base offense level at §2G1.1 as a defendant who is convicted of the substantive count of sex trafficking (18 U.S.C. § 1591).

"[C]ommon sense, the plain language of the guidelines, and the Sentencing Commission's commentary, all show that U.S.S.G. § 2G1.1(a)(1) only applies to defendants who are subject to a fifteen-year mandatory minimum sentence under 18 U.S.C. § 1591(b)(1). Since Lin was not subject to 18 U.S.C. § 1591(b)(1)'s mandatory minimum, the district court erred in applying § 2G1.1(a)(1) to Lin."

Chapter Two Application

U.S. v. Simon, 858 F.3d 1289 (9th Cir. 2017) (en banc) Hobbs Act robbery conspiracy is not covered by §2B3.1 and the court was correct in applying §2X1.1, the general provision for inchoate offenses, to determine the guideline range.

Immigration

U.S. v. Martinez, - F.3d - (9th Cir. Sept. 15, 2017) The Ninth Circuit joined the Fifth Circuit in holding that the 2016 amendment to the immigration guideline did not change the operation of the guideline with respect to revocations that occurred after the first order of removal.

Restitution

U.S. v. Hankins, 858 F.3d 1273 (9th Cir. 2017) Under the MVRA, a defendant may not discharge a restitution judgment based on a private settlement between the victim and the defendant because restitution is a criminal sentence.

A court may direct restitution payments to the Crime Victims Fund when the victim disclaims further restitution based on a settlement with the defendant.

U.S. v. Kovall, 857 F.3d 1060 (9th Cir. 2017) A victim of a crime may not directly appeal the restitution component of a criminal defendant's sentence under the MVRA.

U.S. v. Johnson, -F.3d-, 2017 WL 4018078 (9th Cir. Apr. 21, 2017) The district court incorrectly held that under the MVRA, a court cannot order restitution for losses caused by conduct outside of the offense of conviction. The defendant was charged with a scheme to defraud, and "restitution may be ordered for all persons directly harmed by the entire scheme".

Supervised Release Conditions

U.S. v. Sims, 849 F.3d 1259 (9th Cir. 2017) Special condition of supervised release prohibiting defendant from possessing, distributing, inhaling, or ingesting synthetic cannabinoids was not unconstitutionally vague and was within court's discretion to impose even though it also imposed the standard condition prohibiting defendant from committing any federal, state, or local offense. The "terms leave little ambiguity as to what conduct is prohibited" and the "district court sought to ensure that all forms of synthetic marijuana are covered by the condition, and it provided a definition of that term sufficiently precise to avoid constitutional vagueness concerns."

Sentencing Procedure

U.S. v. Barragan, -F.3d-, 2017 WL 3927273 (9th Cir. Sep. 8, 2017) District court could use the preponderance of the evidence standard, and not the clear and convincing standard, to determine the defendant's sentence under §2E1.1 (RICO).

U.S. v. Doe, -F.3d-, 2017 WL 3996799 (9th Cir. Sep. 12, 2017) The district court erred in not sealing all documents related to the defendant's cooperation and by not striking references to §5K1.1 in the docket entry.

U.S. v. Torres, -F.3d-, 2017 WL 3880738 (9th Cir. Sep. 6, 2017) Under 21 U.S.C. § 851, a court can enhance the defendant's federal instant sentence by using a prior state conviction even if the state offense overlapped with the federal instant offense.

U.S. v. Pimental-Lopez, 859 F.3d 1134 (9th Cir. 2017) Hearsay statements attributed to co-defendants lacked sufficient indicia of reliability to support aggravating role adjustment.

U.S. v. Gasca-Ruiz, 852 F.3d 1167 (9th Cir. 2017) (en banc) Guideline application decisions should almost always be reviewed for abuse of discretion, except for crime of violence determinations, which are reviewed *de novo*.