

CASE LAW QUARTERLY

Vol. 1 || Issue 1 (January – March 2017)



CASE LAW QUARTERLY provides brief summaries of select appellate court decisions issued each quarter of the year that involve the guidelines and other aspects of federal sentencing. The list of cases and the summaries are not intended to be comprehensive. Instead, this document summarizes only a few of the relevant cases, focusing on selected sentencing topics that may be of current interest. The Commission's legal staff publishes this document to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive.

IN THE SPOTLIGHT THIS QUARTER . . .



***Beckles v. United States*, 137 S. Ct. 886 (March 6, 2017).** Justice Thomas, joined by four other justices, wrote for the Supreme Court holding that the sentencing guidelines, including the residual clause of §4B1.2(a), are not subject to vagueness challenges under the Constitution's Due Process Clause. Affirming the Eleventh Circuit, the Court noted that, unlike the Armed Career Criminal Act's residual clause, the advisory guidelines merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range as opposed to fixing the permissible range of sentences. Justices Ginsburg and Sotomayor wrote separate opinions, concurring in the judgment but disagreeing with the Court's reasoning.

SUMMARY OF SELECT APPELLATE DECISIONS FOR THE FIRST QUARTER OF 2017—

FIRST CIRCUIT

***United States v. Gordon*, No. 15-2395 (1st Cir. Mar. 29, 2017).** The First Circuit affirmed the defendant's 132-month sentence for conspiracy to possess with intent to distribute and possession with intent to distribute crack cocaine. The court concluded that the district court did not err in applying a 2-level increase for offenses committed "as part of a pattern of criminal conduct engaged in as a livelihood" under §§2D1.1 and 4B1.3 where the defendant's primary occupation was drug trafficking. The court reasoned that because "derived income" in §4B1.3 Application Note 2(A) is designed to approximate the annual income of an employee earning the federal minimum wage, a gross figure, it is reasonable to infer that the \$14,500 gross income threshold shows that the guideline intends for a defendant's income to be measured on a gross basis. Therefore, courts may use the defendant's gross, rather than net, income derived from drug trafficking to determine the applicability of the enhancement.

***United States v. Thompson*, 851 F.3d 129 (1st Cir. Mar. 22, 2017).** The First Circuit affirmed the defendant's convictions for drug conspiracy and arson, and 327-month sentence as a career offender under §4B1.2. The defendant's career offender status was predicated upon a prior state conviction for assault and battery with a dangerous weapon that qualified as a "crime of violence" under the residual clause of the sen-

tencing guidelines. Although the government conceded that *Johnson v. United States*, 135 S. Ct. 2251 (2015) (invalidating the residual clause under the Armed Career Criminal Act), applied to the federal sentencing guidelines, the First Circuit concluded that the government's concession was "incorrect," in light of the Supreme Court's more recent decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that *Johnson* does not apply to the sentencing guidelines. The court stated that "*Johnson's* applicability to the career offender guideline has proven to be a frequently recurring issue in this circuit and, in light of *Beckles*, the proper resolution of this issue is crystal clear." The court ignored the government's concession and determined that it would follow the Supreme Court's "clear precedent."

***United States v. Sihai Cheng*, 849 F.3d 516 (1st Cir. Mar. 1, 2017).** The First Circuit affirmed the defendant's 108-month sentence for illegally exporting pressure transducers (sensitive goods with nuclear applications). The defendant's base offense level under §2M5.1 was 23 with a Criminal History Category I, resulting in a sentencing range of 46 to 57 months of imprisonment, however the district court departed upward six levels based on Application Note 2 to §2M5.1. The First Circuit upheld the upward departure reasoning that the guidelines did not prohibit the district court from considering the degree to which an export

violation threatens national security interests to determine the appropriate base offense level and the applicability of an upward departure.

***United States v. Valenzuela*, 849 F.3d 477 (1st Cir. Feb. 24, 2017).** The First Circuit affirmed the defendant's 210-month sentence for conspiracy to distribute and possession with intent to distribute controlled substances. The court held that the district court did not err in denying the defendant's request for a 3-level mitigating role reduction under §3B1.2(b), reasoning that the defendant, who was a financial advisor and lawyer with close personal ties to the leader of the Sinaloa Drug Cartel, played a significant role in negotiating the drug transactions during the undercover FBI sting operation, and was a leading voice in discussing the money laundering aspects of the conspiracy. The court also held that the sentence imposed was not substantively unreasonable, even though a coconspirator received a shorter sentence, because it was not clear from the record that the coconspirator played a more central role than the defendant and the coconspirator received a 3-level reduction for acceptance of responsibility.

***United States v. Cotto-Negrón*, 845 F.3d 434 (1st Cir. Jan. 9, 2017).** The First Circuit vacated and remanded the defendant's 120-month sentence for Hobbs Act robbery, concluding that the district court procedurally erred in applying a 2-level enhancement for bodily injury under §2B3.1(b)(3)(A) based

on clearly erroneous facts. The court reasoned that there was no support in the record that the defendant was more culpable than his codefendants where the plea agreements and presentence reports of the three codefendants showed all three played identical roles in the robbery. The court concluded that even if the enhancement could have been applied to the codefendants, that did not justify the disparity in applying the enhancement to the defendant.

SECOND CIRCUIT

United States v. Ramirez, 846 F.3d 615 (2d Cir. Jan. 25, 2017). The Second Circuit affirmed denial of a sentence reduction under 18 U.S.C. § 3582(c)(2). The defendant filed the § 3582(c)(2) motion to reduce his sentence for conspiracy to distribute cocaine based on Amendments 782 and 788 (2014), which he argued lowered his guideline range from 360 months to life imprisonment to 324 to 405 months of imprisonment. The district court denied the reduction because Amendment 759 to §1B1.10(b) (2011) prohibits a reduction where the defendant's sentence is below the minimum of the amended guidelines range. The amendment also required the district court to use the *Guidelines Manual* in effect at the time of the reduction. The Second Circuit rejected the defendant's argument that applying Amendment 759 violates the *Ex Post Facto* Clause of the Constitution. Applying the "one-book" rule, the court held that the version of the *Guidelines Manual* in effect at the time of the § 3582(c)(2) proceeding, which authorized a reduction under Amendment 782 but limited the extent of the reduction under Amendment 759, did not result in a "more onerous penalty" because Amendment 782 did not exist in the version of the *Guidelines Manual* in effect at the time of the defendant's initial sentence.

THIRD CIRCUIT

United States v. Steiner, 847 F.3d 103 (3d Cir. Feb. 1, 2017). The Third Circuit vacated and remanded for resentencing the defendant's 87-month sentence for being a felon in possession of ammunition, in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016) (applying "categorical approach" to determine if elements of Iowa burglary law are broader than those of generic burglary). The district court used the defendant's prior 1993 Pennsylvania burglary conviction to enhance his base offense level under §2K2.1 from level 14 to level 20, resulting in a guideline range of 70 to 87 months of imprisonment. The Third Circuit held that under the categorical approach, the Pennsyl-

vania burglary statute is not a "crime of violence" under §4B1.2 and, therefore, the district court erred in using the defendant's prior burglary conviction as a predicate "crime of violence" to enhance his sentence.

United States v. Mateo-Medina, 845 F.3d 546 (3d Cir. Jan. 9, 2017). The Third Circuit vacated and remanded the defendant's 12-month plus one-day sentence for illegal reentry, concluding that the district court plainly erred in misstating and relying on the defendant's arrest record in determining his sentence, and that the error was reversible because it affected the entire sentencing hearing.

FOURTH CIRCUIT

United States v. Winston, 850 F.3d 677 (4th Cir. Mar. 13, 2017). The Fourth Circuit vacated and remanded the defendant's 275-month sentence for being a felon in possession of a firearm on a successive motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). As an initial matter, the court held that a prisoner may file a successive § 2255 motion by making a prima facie case that his claim relies on a new rule of constitutional law by showing that his sentence may have been predicated on application of the now-void residual clause of the Armed Career Criminal Act. On the merits, the court held that the defendant's prior Virginia robbery conviction, which was used to enhance his sentence under the ACCA, does not qualify as a predicate violent felony under the ACCA's force clause. The court reasoned that the Virginia common law robbery can be committed by using only a "slight" degree of force that need not harm the victim and therefore does not necessarily include the use, attempted use, or threatened use of violent force capable of causing physical pain or injury to another person.

United States v. Evans, 848 F.3d 242 (4th Cir. Feb. 2, 2017). The Fourth Circuit affirmed the defendant's 216-month sentence for robbery and carjacking. The Fourth Circuit held that the defendant's conviction under the federal carjacking statute, 18 U.S.C. § 2119(2) (taking a motor vehicle from another "by force and violence or by intimidation") was categorically a "crime of violence" under 18 U.S.C. § 924(c). The court reasoned the term "intimidation" in the carjacking statute necessarily includes a threat of violent force within the meaning of the "force clause" of 18 U.S.C. § 924(c)(3).

United States v. Tate, 845 F.3d 571 (4th Cir. Jan. 11, 2017). The Fourth Circuit upheld an appeal waiver and affirmed the defendant's 57-month sentence for possession with

intent to distribute and distribution of cocaine base. Pursuant to the plea agreement, the government recommended a sentence at the lowest end of the guideline range found by the court. The defendant claimed the government breached the plea agreement, thereby invalidating his appeal waiver, because the government should have recommended a sentence at the lowest end of the correct guideline range, which the defendant argued was lower than the range found by the district court. The Fourth Circuit disagreed, reasoning that under the Guidelines, the "applicable guideline range" is the guideline range set by the court. The court concluded that because the plea agreement referred only to the applicable guideline range and not the correct guideline range, the government fulfilled its obligation to recommend a sentence at the lowest end of the guideline range found by the court. The government, therefore, did not breach the plea agreement.

FIFTH CIRCUIT

United States v. Jordan, 851 F.3d 393 (5th Cir. Mar. 14, 2017). The Fifth Circuit affirmed the defendant's sentence for filing false liens or encumbrances under 18 U.S.C. § 1521. The court held that a 6-level increase under §2A6.1(b)(1) for offenses involving "any conduct evidencing an intent to carry out such threat" was warranted where evidence in the record showed the defendant threatened to file the liens against the prosecutor and judge and took overt actions to carry out the threats by making the filings. The court reasoned that although the text of §2A6.1(b)(1) is ambiguous in its reference to "such threat," the commentary indicates that applicability of §2A6.1(b)(1) is not limited to offenses that contain the word "threat" in the statute of conviction. Accordingly, a sentencing court may consider "conduct that occurred prior to or during the offense" that was "substantially and directly connected to the offense."

United States v. Alay, 850 F.3d 221 (5th Cir. Mar. 3, 2017). The Fifth Circuit affirmed the defendant's 41-month sentence for illegal reentry. The court held that the defendant's prior rape conviction under California law (Cal. Penal Code § 261(a)(3)) categorically qualifies as a forcible sex offense that is a "crime of violence" within the meaning of §2L1.2(b)(1)(A)(ii). Although a conviction under § 261(a)(3) may be committed with a negligent mental state, the guidelines definition of forcible sex offense is broad and does not include a requirement of *mens rea*, or any specific mental state.

United States v. Grant, 850 F.3d 209 (5th Cir. Mar. 1, 2017). The Fifth Circuit affirmed the defendant's three concurrent 15-

month sentences for making false statements under penalty of perjury in a bankruptcy proceeding. The court held that the district court did not err in applying the perjury guideline at §2J1.3 for a violation of 18 U.S.C. § 152(3). The court recognized that circuit courts are divided over the method to use to determine which of three possible guidelines, §2B1.1 (fraud), §2B4.1 (bribery), or §2J1.3 (perjury), applies to a violation under § 152(3). The Seventh and Tenth Circuits look at the defendant's conduct, while the Fourth Circuit focuses on the allegations in the indictment. The court concluded that applying the perjury guideline is appropriate under either approach because the defendant's conduct more closely aligned with perjury and the indictment charged the defendant with making false statements under the penalty of perjury.

United States v. Shepherd, 848 F.3d 425 (5th Cir. Feb. 9, 2017). The Fifth Circuit affirmed the defendant's 46-month sentence for being a felon in possession of a firearm. The court held that the district court erred in calculating the guideline range because the defendant's prior state conviction for delivery of a controlled substance does not qualify as a predicate controlled substance offense under §4B1.2, but the error was harmless because the district court imposed a much lower sentence that would have been at the bottom of the correct guideline range had the court granted the defendant's objection.

United States v. Mendez-Henriquez, 847 F.3d 214 (5th Cir. Jan. 30, 2017). The Fifth Circuit affirmed the defendant's 44-month sentence for illegal reentry. The court held that the California statute for maliciously and willfully discharging a firearm at an occupied motor vehicle was categorically a crime of violence under §2L1.2. The court reasoned that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), Cal. Pen. Code § 245 is divisible because it enumerates alternative elements for the offense, rather than alternative means of satisfying a particular element of the crime. The court recognized that circuit courts disagree on whether "directing physical force at an occupied vehicle, without more," permits application of the crime of violence enhancement. The court held that where a defendant acted "maliciously and willfully," as opposed to "wantonly or maliciously" in other circuits, the defendant committed a crime of violence under §2L1.2, satisfying the "threatened use of force against a person" prong.

United States v. Solano-Hernandez, 847 F.3d 170 (5th Cir. Jan. 26, 2017). The Fifth Circuit affirmed the defendant's 30-month sentence for illegal reentry. The court held under plain-error review that the district

court committed an error in finding that the defendant's prior New Jersey conviction for endangering the welfare of a child is a crime of violence under §2L1.2, because in applying the modified categorical approach, the district court improperly considered facts stated in the "Reasons for Sentence" where there was no indication that the defendant assented to those facts. The court held, nonetheless, that even assuming the error was plain and affected substantial rights, the error was not the type that warranted reversal because the defendant had repeatedly been deported, had a prior conviction for illegal reentry, and, in addition to his prior illegal reentry and child endangerment convictions, had a prior conviction for aggravated assault with a deadly weapon.

United States v. Tanksley, 848 F.3d 347 (5th Cir. Jan. 18, 2017). The Fifth Circuit, on panel rehearing, vacated and remanded the defendant's sentence for being a felon in possession of a firearm. The court held that, in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), the district court erred in applying the modified categorical approach to determining whether the defendant's prior Texas offense of possession with intent to deliver a controlled substance qualified as a controlled substance offense under the career offender enhancement. The court concluded that Texas Health and Safety Code § 481.112(a) is an indivisible statute that lists several different means for committing the offense of drug distribution and, therefore, under the categorical approach does not qualify as a controlled substance offense under §4B1.1.

United States v. Casillas-Casillas, 845 F.3d 623 (5th Cir. Jan. 15, 2017). The Fifth Circuit affirmed the defendant's 15-month sentence for using a fraudulently-obtained United States passport card to unlawfully reenter the country. The court held that the district court properly applied the four-level enhancement under §2L2.2 for "fraudulently used or obtained a United States passport." In rejecting the defendant's arguments relating to the distinction between a passport card and a "regular" passport, the court concluded that a passport card is a United States passport within the meaning of §2L2.2(b)(3)(a).

SIXTH CIRCUIT

United States v. King, 853 F.3d 267 (6th Cir. Mar. 30, 2017). The Sixth Circuit vacated and remanded the defendant's 188-month sentence for being a felon in possession of a firearm. The defendant's sentence was enhanced under the Armed Criminal Career Act based on three prior state robbery convictions. The indictments stated only that the offenses were committed on the same

day; they did not state the times or locations of each offense. The district court relied instead on the bill of particulars for each case, which stated the time and location of the offense, to determine the offenses were committed on different occasions. The Sixth Circuit held that a sentencing court may rely only on the evidentiary sources and information approved by the Supreme *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005) to determine whether prior offenses were "committed on occasions different from one another" under the ACCA. The court concluded that because there was no indication that the defendant admitted the times and places asserted in the bills of particulars when he pleaded guilty to the prior offenses, the district court erred in considering the facts in the bills in determining that the defendant's prior offenses were committed on occasions different from one another.

United States v. Quarles, 850 F.3d 836 (6th Cir. Mar. 10, 2017). The Sixth Circuit affirmed the defendant's 204-month sentence for being a felon in possession of a firearm. The defendant's sentence was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), based on the defendant's prior state conviction for home invasion. At the defendant's original sentencing, the district court determined that the home invasion conviction qualified as a violent felony under ACCA's residual clause. After the case was remanded in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court imposed the same 204-month sentence, finding that the prior home invasion conviction was the "functional equivalent of generic burglary." The Sixth Circuit agreed, holding that Michigan Compiled Laws §750.110a(4) was categorically equivalent to generic burglary and qualified as a predicate "violent felony" under the ACCA. The court reasoned that the term "dwelling" in the state statute does not encompass more than the generic burglary definition that includes "buildings or structures" as defined in *Taylor v. United States*, 495 U.S. 575 (1990).

SEVENTH CIRCUIT

United States v. Lynn, 851 F.3d 786 (7th Cir. Mar. 24, 2017). The Seventh Circuit affirmed the defendant's 204-month sentence for conspiracy to manufacture methamphetamine and possess pseudoephedrine. The court upheld the district court's determination that the defendant's two prior Illinois convictions for aggravated battery qualify as crimes of violence under §4B1.2(a)(1) (Career Offender). The court concluded that the district court did not err

in using the modified categorical approach because the Illinois aggravated battery statute is divisible, and did not err in relying on the PSR because the defendant did not object to the facts in the PSR establishing that his prior convictions for aggravated battery involved the element of causing bodily harm.

United States v. Minhas, 850 F.3d 873 (7th Cir. Mar. 10, 2017). The Seventh Circuit affirmed the defendant's partially concurrent sentences for mail and wire fraud totaling 114 months of imprisonment. The court held that the enhancement for "substantial financial hardship" under §2B1.1(b)(2) was appropriate where the district court focused on the aggregation of the victims' financial losses as loss to a savings or investment fund (consistent with Application Note 4(F)(iii)), and that the term "substantial" was relative to the victims. The court reasoned that for purposes of the "substantial financial hardship" enhancement, the same dollar harm to one victim may result in a substantial financial hardship, while for another victim it may be only a minor hiccup. Accordingly, the term "substantial" introduces a measure of relativity to the question of loss, meaning the loss or hardship must be significant relative to each individual victim's financial situation.

United States v. Jenkins, 849 F.3d 390 (7th Cir. Feb. 24, 2017). The Seventh Circuit affirmed the defendant's conviction for federal kidnapping, but reversed the conviction for using or carrying a firearm to commit a federal crime of violence and vacated and remanded the defendant's sentence. The court held that federal kidnapping, as defined in 18 U.S.C. § 1201(a), does not qualify as a crime of violence as defined under the "force clause" of 18 U.S.C. § 924(c)(3)(A), and prior circuit precedent extended the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (invalidating the residual clause in the Armed Career Criminal Act) to the similarly worded "residual clause" in § 924(c)(3)(B).

United States v. Anglin, 846 F.3d 954 (7th Cir. Jan. 25, 2017). The Seventh Circuit affirmed the defendant's 110-month sentence for Hobbs Act robbery, conspiracy, and being a felon in possession of a firearm and ammunition, and consecutive 120-month sentence for discharging a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), but remanded for conditions of supervised release. The court joined other circuits in concluding that a Hobbs Act robbery qualifies as a predicate crime of violence under the "force clause" of § 924(c)(3)(A), supporting the defendant's § 924(c)(1)(A)(iii) conviction. The court also concluded that the district court's failure to

orally pronounce each condition of supervised release or invite substantive objections to the conditions was plain error, warranting remand for the limited purpose of amending and orally pronouncing the supervised release conditions.

EIGHTH CIRCUIT

United States v. Koons, 850 F.3d 973 (8th Cir. Mar. 10, 2017). The Eighth Circuit affirmed the district court's denial of a reduction of the defendants' sentences under 18 U.S.C. § 3582(c)(2) in five cases that were consolidated for appeal. The court declined to follow the Fourth Circuit's decision in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), which held that a defendant is eligible for § 3582(c)(2) relief when his sentencing range is lowered by an amendment to the guidelines, irrespective of application of a statutory minimum. The court relied instead on the Supreme Court's reasoning in *Freeman v. United States*, 564 U.S. 522 (2011) (holding defendant ineligible for § 3582(c)(2) relief where his sentence was based on the plea agreement and not based on a lowered sentencing range), to conclude that the defendants' original sentences were "based on" the mandatory minimum and their substantial assistance, and not "based on" a sentencing range that has been subsequently lowered by the Sentencing Commission.

United States v. Sherwood, 850 F.3d 391 (8th Cir. Mar. 6, 2017). The Eighth Circuit modified the defendant's sentence in a sexual abuse case to delete special conditions of supervised release. The court concluded that the special financial conditions were "inappropriately taken verbatim" from §5D1.3(d) and failed to reflect the individualized inquiry the court requires, and the absence of advance notice precluded the sentencing record from being developed sufficiently to ensure that any financial conditions were reasonably related to sentencing.

United States v. Irons, 849 F.3d 743 (8th Cir. Feb. 27, 2017). The Eighth Circuit affirmed the defendant's 180-month mandatory minimum sentence for being a felon in possession of a firearm. The defendant's sentence was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), based on a prior 2012 Missouri conviction (under Mo. Rev. Stat. § 217.385, subd. 1) for violence against another inmate. The court concluded that the district court, appropriately applying the modified categorical approach, did not err in determining that the defendant's prior conviction qualifies as predicate violent felony under the ACCA, and qualifies as a "crime of violence" under the Guidelines.

United States v. Swisshelm, 848 F.3d 1157 (8th Cir. Feb. 22, 2017). On appeal by the government, the Eighth Circuit vacated and remanded the defendant's 12-month plus one-day sentence for bank fraud and money laundering. The court held that the defendant materially breached his plea agreement by arguing for a below-guidelines sentence, and that the breach was not harmless. The court recognized a difference among the circuits on the appropriate remedy for a defendant's breach of the plea agreement, but declined to decide the proper remedy for any future defendant's breach of a plea agreement. The court decided instead to treat the defendant's breach in this case the same as it would a breach by the government, by holding the defendant accountable to the terms of the plea agreement.

United States v. Thigpen, 848 F.3d 841 (8th Cir. Feb. 15, 2017). The Eighth Circuit affirmed the defendant's 120-month sentence for being a felon in possession of a firearm and ammunition. The court held that the district court's determination that the defendant's prior Iowa burglary conviction, which was used as a predicate crime of violence to enhance the defendant's base offense level under §2K2.1(a)(2), was harmless error. The court reasoned that although the district court mistakenly believed the defendant's total offense level would be 27 if the prior Iowa conviction was not a crime of violence (rather than the correct total offense level of 25), it expressly stated it was imposing a nonguideline sentence based on the factors in 18 U.S.C. § 3553(a) and would impose the same sentence regardless of the guideline calculation. The court also concluded that the district court did not plainly err in stating that it was imposing a nonguideline sentence and then imposing a guidelines sentence, reasoning that the defendant failed to show that but for the error he would have received a more favorable sentence. The court further upheld a 4-level increase under §2K2.1(b)(4)(B) for an obliterated or altered serial number, even though only one of the three firearms had an obliterated or altered serial number, and a 4-level increase under §2K2.1(b)(6)(B) for possession of a firearm "in connection with another felony offense."

NINTH CIRCUIT

United States v. Job, 851 F.3d 889 (9th Cir. Mar. 14, 2017). The Ninth Circuit affirmed in part and reversed in part the defendant's controlled substance convictions, and vacated his 365-month sentence. The court concluded that the district court failed to resolve, as required by Fed. R. Crim. P. 32, the defendant's objections to a 2-level increase for importation of methamphetamine

(§2D1.1(b)(5)), 2-level increase for maintaining a premises for the purpose of manufacturing or distributing a controlled substance (§2D1.1(b)(12)), and 2-level increase for unlawful discharge of a toxic substance (§2D1.1(b)(13)(A)). The court held that an increase under §2D1.1(b)(5) applies to a defendant who was not personally involved in the importation of illegal drugs only if the district court determines 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 thus declined to adopt the Fifth Circuit's conclusion in *United States v. Serfass*, 684 F.3d 548, 553 (5th Cir. 2012), that §2D1.1(b)(5) applies to a defendant who possessed methamphetamine that had itself been unlawfully imported, regardless of whether the defendant had actual knowledge of the importation.

United States v. Sims, 849 F.3d 1259 (9th Cir. Mar. 7, 2017). The Ninth Circuit affirmed the defendant's sentence for distributing methamphetamine. At issue was the district court's imposition of a special condition of supervised release prohibiting the defendant from possessing, distributing, inhaling, or ingesting any synthetic cannabinoid. The court found the special condition was not unconstitutionally vague and the district court was within its discretion to impose a special condition prohibiting the use of marijuana, whether in natural or synthetic form, given the defendant's extensive history of marijuana use and the role it played in his commission of the underlying offense.

United States v. Acevedo-De La Cruz, 844 F.3d 1147 (9th Cir. Jan. 5, 2017). The Ninth Circuit affirmed the defendant's 46-month sentence for illegal reentry. The court held that the defendant's prior California conviction for violation of a protective order involving an act of violence or credible threat of violence was categorically a "crime of violence," supporting a 16-level increase under §2L1.2(b)(1)(A)(ii).

TENTH CIRCUIT

United States v. Titties, 852 F.3d 1257 (10th Cir. Mar. 24, 2017). The Tenth Circuit vacated and remanded the defendant's 188-month sentence for being a felon in possession of a firearm, which was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). The court held that the defendant's prior Oklahoma conviction prohibiting pointing a firearm at another does not categorically qualify as a predicate violent felony under the ACCA. The court reasoned that under *Mathis v.*

United States, 136 S. Ct. 2243 (2016), the district court must first determine whether a statute is divisible, that is, whether the statute's disjunctive phrases are means or elements, before using the modified categorical approach. Because Okla. Stat. tit. 21 § 1289.16 lists alternative means, not alternative elements, the district court improperly applied the modified categorical approach.

United States v. Wireman, 849 F.3d 956 (10th Cir. Feb. 28, 2017). The Tenth Circuit affirmed the defendant's six concurrent 240-month sentences for distribution and possession of child pornography. The court held that the defendant's within-guidelines sentence was procedurally reasonable. The court rejected the defendant's claim that the district court did not adequately address his policy critiques of §2G2.2, concluding that the district court's explanation showed it was aware of the defendant's arguments for a downward variance, the district court did not err by not explicitly responding to the defendant's arguments for a more lenient sentence, and the district court was not required to defend §2G2.2 or otherwise do or say anything more. The court, nonetheless, encouraged district courts to go beyond the bare minimum and directly address a defendant's arguments for leniency even if not required to do so.

United States v. Collins, 848 F.3d 911 (10th Cir. Feb. 14, 2017). On appeal by the government, the Tenth Circuit vacated and remanded the defendant's 12-month sentence imposed upon his second revocation of supervised release. The court held that the statutory-maximum prison sentence under 18 U.S.C. § 3583(e)(3) for a defendant who has violated not only the first, but also a second or subsequent term of supervised release, is based on the original criminal offense for which the defendant was convicted. Because the maximum prison term the defendant could serve under subsection (e)(3) is three years based on his original offense, the district court erred in determining it was limited to a 1-year maximum prison term based upon the conduct that resulted in the first revocation.

United States v. Thornton, 846 F.3d 1110 (10th Cir. Jan. 20, 2017). The Tenth Circuit affirmed the defendant's 78-month sentence for being a felon in possession of a firearm. The court held that, although the district court erred in basing the defendant's sentence, in part, on the need for rehabilitative treatment in prison, in violation of *Tapia v. United States*, 564 U.S. 319 (2011), the error was not plain. The court reasoned that prior circuit precedent lacked clear guidance on how to consider a defendant's rehabilitation-based arguments as grounds

for leniency. The court thus clarified that a district court may address rehabilitation in evaluating a defendant's argument that such rehabilitation would lessen the defendant's danger to the community and thereby justify a shorter term of imprisonment, but may not then base the length of imprisonment on the desire to promote the defendant's rehabilitation.

United States v. Harris, 844 F.3d 1260 (10th Cir. Jan. 4, 2017). The Tenth Circuit affirmed the defendant's 180-month sentence for being a felon in possession of a firearm. The sentence was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), based on the defendant's prior Colorado robbery conviction. The court held that Colorado's robbery statute, Colo. Rev. Stat. § 18-4-301(1), is a violent felony under the force clause of the ACCA. The court reasoned that "violent force" in Colorado's common law definition of robbery matches the definition of "physical force" in the ACCA as provided by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

United States v. Walker, 844 F.3d 1253 (10th Cir. Jan. 4, 2017). On appeal by the government, the Tenth Circuit reversed and remanded the district court's sentence of time-served as substantively unreasonable for two convictions of bank robbery. The court held that the district court abused its discretion when it varied down all the way to time served, after giving credit for 33 days in pretrial detention, and imposed a sentence that was unreasonably short. The court concluded that by declining to impose any prison time, the district court "effectively failed to give any weight to the congressional values of punishment, general deterrence, incapacitation, respect for the law, and avoidance of unwarranted sentence disparities" in 18 U.S.C. § 3553(a).

ELEVENTH CIRCUIT

United States v. Hughes, 849 F.3d 1008 (11th Cir. Feb. 27, 2017). The Eleventh Circuit affirmed denial of a sentence reduction under 18 U.S.C. § 3582(c)(2). The court held that the district court did not abuse its discretion when it determined the defendant was not eligible for a reduction because his sentence was not based on a sentencing guideline range. The court determined that Justice Sotomayor's concurring opinion in *Freeman v. United States*, 564 U.S. 522 (2011), was controlling because she concurred in the judgment on the narrowest grounds. Applying the reasoning in that opinion, the court concluded that because the defendant's plea agreement stipulated a 180-month sentence, which was below the guideline range of 188 to 235 months, the

defendant was sentenced “based on” the plea agreement, not on a guideline range.

United States v. Scheels, 846 F.3d 1341 (11th Cir. Jan. 31, 2017). The Eleventh Circuit affirmed the defendant’s 600-month sentence for production and receipt of child pornography. The court held that the district court did not err by imposing a 4-level increase under §2G2.1(b)(4) where the images involving “sadistic or masochistic conduct or other depictions of violence” that were directed at the defendant rather than the child victim. The court reasoned that, while previous decisions focus on images depicting sadistic conduct towards children, the plain language of §2G2.1(b)(4) requires only that the offense “involved” conduct that is sadistic or masochistic or other depictions of violence, regardless of whether it is directed at the defendant or the child.

United States v. Golden, No. 15-15624 (11th Cir. Jan. 24, 2017). The Eleventh Circuit affirmed the defendant’s sentence, holding that its precedent in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), compels the conclusion the defendant’s prior Florida conviction for aggravated assault (Fla. Stat. § 784.021) qualifies as a “crime of violence” under §2K2.1(a)(2), which incorporates the elements clause of the definition of a “crime of violence” from §4B1.2(a)(1). A concurring opinion suggested the court reconsider its precedent in *Turner* in light of recent Supreme Court precedent.

United States v. Stein, 846 F.3d 1135 (11th Cir. Jan. 18, 2017). The Eleventh Circuit affirmed the defendant’s convictions for mail fraud, wire fraud, and securities fraud, but vacated and remanded the 204-month sentence. The court concluded that the evidence did not support the district court’s

loss calculation for the 24-level increase under §2B1.1(b)(1) or its restitution order under the Mandatory Victims Restitution Act (MVRA). The court reasoned that the government’s evidence of two investors who relied on the defendant’s fraudulent information was not sufficiently “reliable and specific” for the district court to infer such reliance for all 2,415 investors identified, and the district court failed to resolve the issue of whether intervening events may have affected the amount of actual loss.

United States v. Garcia-Martinez, 845 F.3d 1126 (11th Cir. Jan. 11, 2017). The Eleventh Circuit vacated and remanded the defendant’s 36-month sentence for illegal reentry. The court held that the district court erred in applying a 16-level increase under the former version of §2L1.2(b)(1)(A)(ii) because the defendant’s prior Florida conviction for second degree burglary of a dwelling (Fla. Stat. § 810.02(3)) does not categorically qualify as a “crime of violence” because Florida’s definition of burglary of a dwelling is broader than generic burglary of a dwelling, and the locational element of the Florida statute is indivisible, precluding use of the modified categorical approach.

D.C. CIRCUIT

United States v. Jackson, 848 F.3d 460 (D.C. Cir. Feb. 14, 2017). The District of Columbia Circuit affirmed the defendant’s above-guidelines 42-month sentence for willful failure to pay federal employment taxes. The court held that the district court adequately explained imposing an above-guidelines sentence where the defendant committed the instant offense while being sentenced and placed on probation for a nearly identical crime, and the district court stated that the defendant was obvi-

ously not deterred by the probationary sentence and that a guideline range sentence was not adequate in this case. The court also rejected the defendant’s claim that the Statement of Reasons was deficient, concluding that a judge’s statement of reasons is an administrative function to assist the Sentencing Commission’s data-gathering function, and does not “confer on a sentenced defendant some after-the-fact procedural protection.” Nonetheless, the court declined to decide whether a deficient statement of reasons could ever affect the validity of an otherwise valid sentence; deciding instead that because the district court’s oral explanation is sufficient, any alleged deficiency in the statement of reasons did not affect the defendant’s substantial rights and therefore does not warrant vacating and remanding the defendant’s sentence.

United States v. Jones, 846 F.3d 366 (D.C. Cir. Jan. 24, 2017). The District of Columbia Circuit affirmed denial of the defendant’s motions for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on Amendment 782. After determining it had jurisdiction under 28 U.S.C. § 1291 to review the reasonableness of a denial of § 3582(c)(2) relief, the court concluded that the district court did not act unreasonably in considering the factors in 18 U.S.C. § 3553(a) and deciding that the defendants’ original sentences were appropriate based on the seriousness of the conspiracy, the defendant’s critical roles in the drug ring, and the substantial harm to the community.



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