UNITED STATES SENTENCING COMMISSION ‖ OFFICE OF THE GENERAL COUNSEL

CASE LAW QUARTERLY

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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 is 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 . . .

Dean v. United States, No. 15-9260 (U.S. Apr. 3, 2017). The Supreme Court unanimously held that when a defendant is convicted of offenses that carry consecutive mandatory minimum penalties and other offenses that do not carry such penalties, the sentencing court may consider the existence and length of the consecutive minimum terms when sentencing on the other counts of conviction. The Court reversed the Eighth Circuit, which had held that when a defendant is convicted of possessing a firearm in connection with a "crime of violence" under 18 U.S.C. § 924(c), the sentencing court could not consider the mandatory consecutive term associated with that offense when selecting a sentence for additional robbery counts. The Supreme Court explained that a sentencing court may use the full breadth of the factors at 18 U.S.C. § 3553(a) to determine an appropriate sentence for each offense in a multicount case, and that nothing in § 924(c) prohibits the sentencing court from adjusting the length of the sentences on other counts in response to a § 924(c) mandatory consecutive sentence.

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

SUPREME COURT

Honeycutt v. United States, 137 S. Ct. 1626 (June 5, 2017). In a unanimous opinion written by Justice Sotomayor, the Supreme Court reversed the decision of the Sixth Circuit and held that 21 U.S.C. § 853(A)(1) (Criminal forfeitures) does not allow joint and several liability for forfeiture judgments. The Court held that, under the statute, forfeiture is limited to "the defendant who initially acquired the property and who bears responsibility for its dissipation." In this case, which involved conspiracy to distribute a product used in methamphetamine production, because the defendant had "no ownership interest" in the relevant property and "did not personally benefit" from the relevant sales, the Court held that he never obtained any tainted property as a result of the crime and forfeiture was not required.

FIRST CIRCUIT

United States v. Starks, No. 15-2365 (1st Cir. June 28, 2017). The First Circuit reversed and remanded for resentencing the defendant's 180-month sentence for being a felon in possession. The defendant's sentence was enhanced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on the defendant's prior convictions under Massachusetts law for armed robbery while masked, unarmed robbery, and armed assault with intent to rob. The court concluded that Massachusetts unarmed robbery is not a "violent felony" because the statute only requires force sufficient to make the victim aware of the theft and may involve no more force against the victim than a mere touching. Similarly, the court held that Massachusetts armed robbery is not a "violent felony" because the statute does not require the use of a

dangerous weapon and, therefore, there is no basis for concluding that armed robbery requires a greater degree of force than unarmed robbery.

United States v. Houston, 857 F.3d 427 (1st Cir. May 19, 2017). The First Circuit affirmed the defendant's 108-month sentence for transporting a minor across state lines with intent to engage in prostitution. The court held that the district court did not err in applying the enhancements for undue influence under §2G1.3(b)(2)(B) and use of a computer in third-party solicitation under §2G1.3(b)(3)(B). The court rejected the defendant's argument that §2G1.3(b)(3)(B), which involves using a computer to 'solicit a person to engage in prohibited sexual conduct with the minor,' does not apply because Application Note 4, which only mentions using a computer to communicate with a minor or a minor's caretaker, limits the enhancement's scope. Joining the Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits in holding that Application Note 4 is inconsistent with the plain text of the guideline, the court recognized that there is "obvious tension" between the plain text of subpart (b)(3)(B) and Application Note 4. The court concurred with the Fifth Circuit's reasoning in *United States v. Pringler*, 765 F.3d 445 (2014) that Application Note 4 was originally intended to apply only to subpart (b)(3)(A) and that amending it to apply to both subsections "was a mere drafting error." The court concluded that the district court did not err in disregarding the application note and applying the plain text of the enhancement.

United States v. Edwards, 857 F.3d 420 (1st Cir. May 19, 2017). The First Circuit affirmed the defendant's 15-year sentence for committing several federal firearms offenses under 18 U.S.C. § 922(g). The defendant's sentence was enhanced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his prior convictions under Massachusetts law for assault with a dangerous weapon, distribution of a controlled substance, and armed assault with intent to murder. The court held that Massachusetts assault with a dangerous weapon qualifies as a "violent felony" based on circuit precedent, and the defendant conceded that his conviction for distribution of a controlled substance is a serious drug offense. The court also held that Massachusetts armed assault with intent to murder counts as a "violent felony" because the "intent-to-murder" element makes it implausible that a defendant could be convicted under the statute based on an offensive-touching approach (as the defendant had argued).

United States v. González, 857 F.3d 46 (1st Cir. May 15, 2017). The First Circuit affirmed the defendant's 10-year sentence for being a felon in possession of a firearm. The court held that the district court did not err in applying the 2-level increase for a stolen firearm under §2K2.1(b)(4)(A) without proof that the defendant knew the firearm was stolen. The court concluded, as a matter of first impression, that imposition of the enhancement without proof of *mens rea* did not violate the defendant's right to due process because the guidelines are advisory and the sentencing court retains discretion to impose an enhanced or reduced sentence within the statutory range set by the defendant's crime of conviction. The court reasoned that no finding of knowledge was required as Application Note 8(B) provides that the increase "applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen." The court also held that the absence of a *mens rea* requirement for application of the enhancement is not contrary to the purposes of the Gun Control Act or the Sentencing Reform Act.

United States v. Matos-de-Jesús, 856 F.3d 174 (1st Cir. May 5, 2017). The First Circuit affirmed the defendant's 72-month sentence for being a felon in possession of firearms and unlawful possession of machine guns. The court concluded that the district court did not err in imposing an above-guidelines sentence based in part on the defendant's possession of two firearms, and that the district court's decision to vary upwards based on that fact did not amount to impermissible double-counting. The court reasoned that because §2K2.1 only provides for an enhancement if the offense involved three or more firearms and makes no provision for possession of only two firearms, the district court was permitted to take the second firearm into account as part of the mix of factors to consider in imposing sentence.

United States v. Mulkern, 854 F.3d 87 (1st Cir. Apr. 14, 2017). The First Circuit vacated and remanded the defendant's 15-year sentence, enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), for being a felon in possession of ammunition. The court concluded that two of the defendant's prior convictions under Maine law do not qualify as predicates under the ACCA. First, the defendant's prior conviction for robbery is not a "violent felony" under the ACCA because, although the Maine statute requires the use of "physical force," Maine's highest court previously held that "any physical force" suffices to raise a theft offense to the level of robbery, which makes clear that the crime does not require a showing of "violent force." Second, the defendant's prior conviction for "unlawful trafficking in scheduled drugs" does not qualify as a "serious drug offense" under the ACCA because the Maine statute criminalizes the possession of a requisite amount of heroin with no intent to manufacture or distribute and nothing in the *Shepard* documents shows that defendant was convicted of intending to manufacture or distribute heroin.

United States v. Faust, 853 F.3d 39 (1st Cir. April 5, 2017). The First Circuit affirmed in part and vacated in part the defendant's 180-month sentence for being a felon in possession of ammunition. The district court enhanced the defendant's sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on two uncontested prior convictions for "serious drug offenses" and two additional prior convictions for resisting arrest and assault and battery on police officer (ABPO) under Massachusetts law. The First Circuit held that the Massachusetts crime of resisting arrest did not qualify as a "violent felony" under the ACCA, because the Massachusetts statute was indivisible and merely listed two different means of committing a single element of "resisting." The court held that the Massachusetts ABPO statute is divisible because it includes both intentional and reckless forms of the crime, but that the intentional form is overbroad and categorically cannot count as a predicate for purposes of the ACCA. The court remanded for the district court to determine whether the defendant pled guilty to the reckless

form and whether reckless conduct qualifies as the "use" of force under the ACCA.

SECOND CIRCUIT

United States v. Burden, Nos. 15-1080, 15-1183 (2nd Cir. Jun. 19, 2017). The Second Circuit affirmed the defendants' 365-month sentences for, *inter alia*, racketeering, violent crimes in aid of racketeering, and conspiracy to distribute cocaine base, but vacated the defendants' life terms of supervised release. The court concluded that retribution, the purpose ascribed to the district court's decision to impose lifetime supervised release on the defendants, was relevant to establishing the appropriate term of incarceration but not to establishing the appropriate term of supervised release. The court distinguished its decision from *United States v. Williams*, 443 F.3d 35 (2d Cir. 2006), where the district court determined the term of supervised release by properly focusing not on the seriousness of the offense, but on the need to reflect the risk to the public that the seriousness of the offense suggested. In this case, the district court determined the supervised release terms by improperly focusing on the need to reflect the seriousness of the offense itself. In remanding, the court advised sentencing courts to state separate reasons for the term of supervised release in addition to the seriousness of the offense.

United States v. Valente, No. 15-3912 (2nd Cir. April 24, 2017). The Second Circuit vacated and remanded the defendant's 240-month sentence for securities fraud, mail fraud, and obstructing and impeding the due administration of internal revenue laws. The court concluded that the district court properly analyzed the defendant's prior convictions for driving while ability impaired ("DWAI") in calculating his criminal history score and determined that they were "clearly more serious" that the offenses for which a criminal history point is not assessed. The district court however, failed to properly analyze whether the defendant's prior conviction for use of a vehicle without an interlock was categorically more serious than the paradigm offenses listed in §4A1.2(c). The court also held that the district court left unresolved the status of the defendant's state court sentence for his recidivist DWAI offense and instructed that it be resolved on remand.

United States v. Jenkins, 854 F.3d 181 (2nd Cir. April 17, 2017). The Second Circuit vacated and remanded the defendant's 225-month sentence for possession and transportation of child pornography. The court held that the term of imprisonment was "shockingly high" and the conditions of the 25-year term of supervised release were "excessively severe." The court cited prior circuit decisions emphasizing that district courts must take particular care to reconcile sentences under §2G2.2 with the factors set forth in 18 U.S.C. § 3553(a) because the guideline has been developed "at the direction of Congress" rather than by the expertise of the Sentencing Commission. The court noted that the sentencing range produced by §2G2.2 approached the statutory maximum and failed to distinguish between the most dangerous defendants and others. The Second Circuit determined that despite the defendant's large collection of child pornography, his refusal to accept responsibility, his disrespect for the law, and his likelihood of reoffending, the district court's failure to consider these concerns resulted in a substantively unreasonable sentence.

THIRD CIRCUIT

United States v. Rodriguez, 855 F.3d 526 (3d Cir. April 28, 2017). The Third Circuit affirmed the district court's denial of a reduction of the defendant's 123-month sentence for conspiracy to distribute cocaine and conspiracy to possess firearms in furtherance of drug trafficking under 18 U.S.C. § 3582(c). The court first rejected the government's novel claim that the court lacked jurisdiction to consider whether a discretionary denial of a section 3582(c) reduction was substantively unreasonable. It concluded that it has jurisdiction under 18 U.S.C. § 1291 to review the district court's ruling because it is a "final order," and 18 U.S.C. § 3742, which governs appeals of an otherwise final sentence, does not bar such a review for reasonableness. The court concluded, on the merits, that the defendant's sentence was not substantively unreasonable.

FOURTH CIRCUIT

United States v. Reid, No. 16-4325 (4th Cir. June 28, 2017). The Fourth Circuit affirmed the defendant's 15-year mandatory minimum sentence under the Armed Career Criminal Act for possession of a firearm by a felon, based on his three prior convictions for assault under Virginia Code § 18.2-55. The court held that a conviction under § 18.2-55 categorically qualifies as a predicate "violent felony" because it has as an element that the defendant "knowingly and willfully inflict[ed] bodily injury" on the victim. Accordingly, the court concluded that the prior Virginia assault offenses squarely fall within the ambit of the force clause in the ACCA.

United States v. Concha, 861 F.3d 116 (4th Cir. June 26, 2017). The Fourth Circuit vacated the defendant's 126-month sentence for conspiracy to distribute at least five kilograms of cocaine, stating that the district court improperly considered factors unrelated to the defendant's post-arrest assistance when it granted the government's motion for a downward departure for substantial assistance under §5K1.1. In granting the government's motion, which reduced the guideline sentence by 40 percent, the district court expressed concern about the defendant's significant culpability in the conspiracy. The Fourth Circuit held that the district court abused its discretion by considering the defendant's culpability, stating that any factor considered by the court on a §5K1.1 motion must relate to the nature, extent, and significance of the defendant's assistance.

United States v. Cammorto, 859 F.3d 311 (4th Cir. June 13, 2017). The Fourth Circuit affirmed the defendant's 41-month sentence for failing to register in Virginia as a sex offender, holding that the district court properly sentenced the defendant as a Tier III sex offender based upon his previous conviction under the Georgia rape statute, Ga. Code Ann. § 166-1 (1996). The district court applied the categorical approach by matching the elements of the Georgia rape offense with the elements of federal aggravated sexual abuse,

18 U.S.C. § 2241, and then used that "categorical match" as the basis for sentencing the defendant as a Tier III offender under USSG §2A3.5(a)(1). On appeal, the defendant challenged his classification as a Tier III offender, arguing that the court erred in its application of the categorical approach because the Georgia statute is broader than the federal offense of aggravated sexual abuse. The Fourth Circuit affirmed the district court by applying the categorical approach and finding that the Georgia statute is "comparable to or more severe than" the federal crime, and therefore categorically qualifies as a predicate offense for a defendant to be sentenced as a Tier III offender.

United States v. Ritchie, 858 F.3d 201 (4th Cir. May 30, 2017). The Fourth Circuit affirmed the district court's order of restitution in the amount of $1,385,444.83, entered as part of the defendant's 12-month and 1-day sentence for making a false statement under 18 U.S.C. § 1001. The defendant argued that the "categorical approach" should apply to the definition of "offense against property," found in the Mandatory Victim's Restitution Act, 18 U.S.C. § 3663A, which triggers mandatory restitution. The defendant contended that under such an analysis a violation of § 1001 for false statements would not categorically constitute an "offense against property" and, therefore, the restitution order was improper. The court disagreed, concluding that a fact-specific inquiry is instead required to determine if an offense is "an offense against property" under the MVRA and the categorical approach has no role to play.

United States v. Riley, 856 F.3d 326 (4th Cir. May 9, 2017). The Fourth Circuit affirmed the defendant's 210-month sentence for four counts of possession with intent to distribute a controlled substance. The court held that a prior conviction for robbery with a dangerous weapon in Maryland qualifies categorically as a "crime of violence" under the career offender guideline in effect at the time of sentencing. Citing *Beckles v. United States*, 137 S. Ct. 886 (2017), the court rejected the defendant's argument that Maryland robbery would not qualify because it fell under the residual clause of the career offender definition, which the defendant asserted was void for vagueness under *Johnson v. United States,* 135 S. Ct. 2551 (2015). Because simple robbery under Maryland law, which entails "violence or putting in fear," plainly qualifies as a "crime of violence" under the residual clause, robbery with a dangerous weapon is "a fortiori a crime of violence."

United States v. Mack, 855 F.3d 581 (4th Cir. May 1, 2017). The Fourth Circuit affirmed the defendant's 70-month sentence for possession of a firearm, holding that a prior conviction for attempt and conspiracy to commit first-degree burglary in North Carolina qualifies categorically as a "crime of violence" under §4B1.2(a). Because the defendant's prior conviction was for attempt and conspiracy, he argued that it would fall under the residual clause rather than the enumerated clause of the "crime of violence" definition in effect at the time of sentencing. The defendant then asserted that the residual clause was void for vagueness under *Johnson v. United States,* 135 S. Ct. 2551 (2015). The court rejected the defendant's vagueness challenge, citing *Beckles v. United States*, 137 S. Ct. 886 (2017). The court stated that under the commentary to §4B1.2 attempts and conspiracies to commit predicate crimes qualify as "crimes of violence." Finding that first-degree burglary in North Carolina qualifies as a "crime of violence" under the categorical approach, the court concluded that conspiracy and attempt to commit first-degree burglary also qualify.

Castendet-Lewis v. Sessions, 855 F.3d 253 (4th Cir. Apr. 25, 2017). The Fourth Circuit held that the Virginia burglary statute, VA Code § 18.2-91, does not categorically constitute an "aggravated felony," and therefore denied the Attorney General's motion to dismiss the petition for review of the Board of Immigration Appeals decision, vacated the Department of Homeland Security's removal order, and remanded the case for further proceedings. Abrogating its prior decision in *United States v. Foster,* 622 F.3d 291 (4th Cir. 2011), the court held that the Virginia burglary statute is broader than the federal generic definition of burglary and not divisible in light of *Mathis v. United States,* 136 S. Ct. 2243 (2016).

FIFTH CIRCUIT

United States v. Leatch, 858 F.3d 974 (5th Cir. Jun. 6, 2017). The Fifth Circuit affirmed the defendant's 235-month drug trafficking sentence after a resentencing based on Amendment 782, which retroactively lowered certain drug sentences. The court disagreed with the defendant's argument that his new sentence should have included the downward criminal history departure he received at his original sentencing. The court determined that at resentencing a district court must "determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines . . . had been in effect at the time the defendant was sentenced." Relying on the language in §1B1.10 and its commentary, the court found that departures are not part of the applicable "guideline range" and, as such, the guidelines disallow the consideration at resentencing of a prior criminal history departure for a sentence reduction. The Fourth Circuit joined with other circuits in finding that the guidelines' policy prohibits consideration of a prior criminal history departure at resentencing, noting that the First and Second Circuits have criticized that policy.

United States v. Guzman-Reyes, 853 F.3d 260 (5th Cir. Apr. 5, 2017). The Fifth Circuit affirmed the defendant's 360-month sentence for possession with intent to distribute methamphetamine and illegal reentry. The court concluded that the district court did not clearly err in applying the enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance under §2D1.1(b)(12). The court stated that the district court should typically consider whether the defendant (1) has an ownership or leasehold interest in the premises, (2) was in charge of the premises, or (3) exercised "supervisory control" over the premises. Based on the facts in this case, the court concluded that the defendant's level of access, dominion and control over the "stash house" was sufficient to support the enhancement.

United States v. Massey, 858 F.3d 380 (5th Cir. May 31, 2017). The Fifth Circuit affirmed the defendant's 15-year

and 8-month sentence for being a felon in possession of a firearm under the Armed Career Criminal Act. The court concluded that the defendant's prior conviction for attempting to take a weapon from a peace officer under Texas Penal Code § 38.14 is a "violent felony" for purposes of the ACCA. The court found that, even if the defendant argued that the Texas statute could be violated with the use of less than "physical force," it qualifies as a "violent felony" because it has as an element the "threatened use of force."

United States v. Sanchez-Villareal, 857 F.3d 714 (5th Cir. May 23, 2017). The Fifth Circuit reversed the defendant's 155-month sentence for possession with intent to distribute cocaine. The court concluded that the district court erred in denying a §3B1.2 mitigating role adjustment on the sole basis that the defendant's role was critical to the drug trafficking operation. Less than two months after the defendant's sentencing hearing, the Sentencing Commission promulgated Amendment 794, which clarified in the application notes that a defendant's "essential or indispensable role in the criminal activity is not determinative" and such a defendant may receive a mitigating role adjustment if otherwise eligible. The Fifth Circuit, agreeing with the Sixth, Ninth and Eleventh Circuits, found that Amendment 794 is clarifying and, therefore, retroactive.

United States v. Garcia, 857 F.3d 708 (5th Cir. May 23, 2017). The Fifth Circuit vacated the defendant's 51-month sentence for Hobbs Act robbery, finding that the district court erred in applying an enhancement for physical restraint of a victim pursuant to §2B3.1(b)(4)(B). Although the robbers stood by the door with a firearm, instructed victims to get on the ground, and exchanged gunfire, the court found that the defendant's conduct during the robbery was not different in any meaningful way from a typical armed robbery. The court concluded that such conduct does not satisfy the guidelines' definition of physical restraint, which requires that the victims be subjected to the type of "*physical* restraint that victims experience when they are tied, bound, or locked up."

Unites States v. Enrique-Ascencio, 857 F.3d 668 (5th Cir. May 19, 2017). The Fifth Circuit affirmed the defendant's 56-month sentence for illegal reentry, including a 16-level enhancement under §2L1.2(b)(1)(A) based on a prior felony drug trafficking offense "for which the sentence imposed exceeded 13 months." For the prior conviction at issue, the defendant was sentenced to 120 days in the county jail's work release program, followed by 36 months of probation. After he violated the terms of his probation, he was sentenced to an additional 365 days in the county jail. The defendant argued that his work release sentence was not actual incarceration and therefore does not constitute a "sentence of imprisonment." The court disagreed, concluding that the work release program is a "sentence of imprisonment" because the defendant was sentenced to 120 days in the county jail with eligibility to serve his sentence through a work release program, and his participation in the program instead of incarceration was at the discretion of law enforcement.

United States v. Martinez-Rodriguez, 857 F.3d 282 (5th Cir. May 12, 2017). The Fifth Circuit reversed and remanded the defendant's 30-month sentence for illegal reentry, which included an 8-level aggravated felony increase under §2L1.2(b)(1)(C). The court held that defendant's prior conviction for causing injury to a child under Texas Penal Code § 22.04(a) did not qualify as a "crime of violence" and thus was not an aggravated felony for purposes of §2L1.2(b)(1)(C). In doing so, the court revisited its prior decision in *Perez-Munoz v. Keisler*, 507 F.3d 357 (5th Cir. 2007), which held under the modified categorical approach that the same statute was a "crime of violence." Under the guidance of *Mathis v. United States*, 136 S. Ct. 2243 (2016), the court concluded that the Texas statute is indivisible because the law lists acts and omissions of the offense as alternative means and not as elements of the offense and, therefore, the modified categorical approach is not applicable.

United States v. Velasco, 855 F.3d 691 (5th Cir. May 5, 2017) The Fifth Circuit affirmed the defendant's 36-month sentence for misprision of a felony. The court concluded that the district court did not clearly err in applying the dangerous weapon enhancement at §2A2.2(b)(2)(B) where the defendant used his shoes to stomp an inmate's head against the hard prison floor, causing serious injuries. The court reasoned that a "dangerous weapon" can include an instrument not ordinarily used as a weapon when it is used with the intent to commit bodily injury, and that the intent to do bodily harm is measured objectively "by what someone in the victim's position might reasonably conclude from the assailant's conduct." The court concluded it was reasonable in this case for the victim to believe that the assailants' intent was to do him serious bodily harm.

SIXTH CIRCUIT

United States v. Stitt, 860 F.3d 854 (6th Cir. June 27, 2017). The Sixth Circuit reversed and remanded *en banc* the defendant's 290-month sentence, enhanced under the Armed Career Criminal Act, for being a felon in possession of a firearm. The court concluded that the defendant's six prior convictions for aggravated burglary under Tennessee law do not categorically qualify as "violent felony" predicate offenses under the ACCA, overruling circuit precedent in *United States v. Nance*, 181 F.3d 882 (6th Cir. 2007). Applying the categorical approach and comparing the statutory elements of the Tennessee aggravated burglary offense to generic burglary under the ACCA, the court found that the elements of the Tennessee aggravated burglary statute were broader than generic burglary. Specifically, the court determined that the Tennessee statute defines aggravated burglary as the burglary of a "habitation," which includes mobile homes, trailers, and tents, whereas the Supreme Court in *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016), determined that vehicles and movable enclosures fall outside the definition of "building or other structure" found in generic burglary under the ACCA.

United States v. Southers, No 15-6395 (6th Cir. May 8, 2017). The Sixth Circuit affirmed the defendant's 110-month sentence for being a felon in possession of ammunition. The court concluded the district court did not err in finding that the defendant's two prior Tennessee convictions for robbery

and attempted aggravated robbery qualify as predicate offenses for purposes of the Armed Career Criminal Act, even though they occurred on the same day, because the *Shepard* documents established that the robberies occurred at two different business locations.

United States v. Harris, 853 F.3d 318 (6th Cir. April 4, 2017). The Sixth Circuit affirmed the defendant's 115-month sentence for being a felon in possession of a firearm. The court concluded that a Michigan statute prohibiting assault with a dangerous weapon requires a finding of two elements together, including at least the attempted or threatening offensive touching and the use of a dangerous weapon, to add up to violent force. The court concluded that the statute is a "crime of violence" under the elements clause for purposes of the Armed Career Criminal Act. The court joined other circuits in concluding that the elements clause of the ACCA is met when a state statute prohibiting assault with a dangerous weapon requires both the use of a weapon and the threatened use of force to cause harm.

United States v. Patterson, 853 F.3d 298 (6th Cir. April 3, 2017). The Sixth Circuit vacated and remanded the defendant's sentence for being a felon in possession of a firearm, 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 court concluded that the defendant's prior convictions for aggravated robbery with a deadly weapon pursuant to an Ohio statute are "violent felonies" under the Armed Career Criminal Act, because convictions under the statute require proof of elements involving the threat to harm and use of deadly weapon.

SEVENTH CIRCUIT

United States v. Smith, 860 F.3d 508 (7th Cir. June 19, 2017). The Seventh Circuit, for the second time, vacated the defendant's below-guideline 14-month sentence for violating 18 U.S.C. § 242, holding that the sentence was procedurally unreasonable. The court held that the district court did not sufficiently explain or justify the sentence, which was significantly below the guideline range of 33–41 months. First, the court highlighted an apparently unwarranted application of a downward departure under §5K2.10 (Victim Conduct), given that there was no evidence of provocation by the victims. Second, the court noted that although the district court cited the nature and circumstances of the offense as justifying the sentence, it cited no mitigating factors and none were apparent from the record. Third, the court held that because there was no expression of the defendant's acceptance or remorse in the record, it was procedural error to reduce the sentence based on acceptance. Finally, the court rejected several other purported explanations for the reduced sentence relating to the history and characteristics of the defendant.

United States v. Jennings, 860 F.3d 450 (7th Cir. June 16, 2017). The Seventh Circuit affirmed the defendant's 180-month sentence for possessing a firearm following a felony conviction, holding that both Minnesota crimes of simple robbery and felony domestic assault categorically qualify as "crimes of violence" under the force clause of both the Armed Career Criminal Act and the guidelines.

United States v. Chagoya-Morales, 859 F.3d 411 (7th Cir. June 9, 2017). The Seventh Circuit affirmed the defendant's 48-month sentence for illegal reentry, holding that the district court properly applied the 16-level increase for a "crime of violence" under §2L1.2(b)(1)(A)(ii). Relying on *Beckles v. United States*, 137 S. Ct. 886 (2017), the court rejected the defendant's argument that the enhancement was void for vagueness under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The court concluded that the defendant's predicate conviction under a prior version of the Illinois aggravated robbery statute, which entails "the use of force" or "threatening the imminent use of force," satisfied the force clause of the guideline.

United States v. Montez, 858 F.3d 1085 (7th Cir. June 5, 2017). The Seventh Circuit affirmed the defendant's 210-month sentence for possession with intent to distribute cocaine, holding that the district court did not err in applying the career-offender enhancement. The court concluded that, because the defendant did not contest the facts of the prior offense contained in the presentence report, the district court was permitted to rely on those facts in applying the modified categorical approach to determine whether the prior conviction qualified as a "crime of violence," even though the government failed to present *Shepard* documents.

United States v. Paulette, 858 F.3d 1055 (7th Cir. May 30, 2017). The Seventh Circuit affirmed the defendant's 300-month sentence for drug trafficking offenses, including conspiracy to distribute controlled substances. The court rejected the defendant's assertion that the district court wrongly counted certain years of drug dealing and rejected the government's argument that a defendant's guilty plea "amounted to an admission to the truth of every detail alleged in the conspiracy count of the indictment," and held that a plea of guilty "admits only the essential elements of the offense." Nonetheless, the court affirmed the sentence, because the defendant admitted in his plea agreement the quantity of drugs alleged in the conspiracy on which his sentence was based.

EIGHTH CIRCUIT

United States v. Kelley, No. 16-2696 (8th Cir. June 30, 2017). The Eighth Circuit affirmed the defendant's concurrent 124-month sentences for four counts of receiving child pornography and one count of possessing child pornography. The court also affirmed the imposition of a $2,000 fine and $5,000 special assessment under the Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014. At sentencing, the defendant contended that his use of appointed counsel established his indigency and corresponding exemption from the financial sanctions. The Eighth Circuit rejected the claim, holding that the nature of the appointment of counsel differs from other indigency determinations because it implicated the constitutional requirement for a fair trial. The court held that the inquiry into exemption from financial sanctions

should instead be akin to that of other post-conviction assessments which consider a defendant's future ability to pay and not just the defendant's present financial standing.

United State v. Johnson, 860 F.3d 1133 (8th Cir. June 29, 2017). The Eighth Circuit affirmed the defendant's 30-year sentence for aggravated sexual abuse, assault with a dangerous weapon, simple assault, and domestic assault by a habitual offender. The district court applied the 2-level enhancement for obstruction of justice at §3C1.1 based on the defendant's threat to harm the victim if she contacted police or sought help. The defendant contended that the enhancement could not apply where all obstructive conduct occurred before the completion of the offense. The Eighth Circuit disagreed, noting that that there was no authority to support the defendant's proposition and that Application Note 4(K) includes, as an example of conduct that triggers §3C1.1, threats to prevent the victim from reporting the offense.

United States v. Moore, 860 F.3d 1076 (8th Cir. June 23, 2017). The Eighth Circuit affirmed the defendant's 12-month-and-1-day sentence for making a false statement in connection with the purchase of a firearm. The court held that, to establish the applicability of the "sporting purposes" reduction at §2K2.1(b)(2), it was insufficient to simply offer evidence of the defendant's interest in hunting, fishing, and gun competitions. The court also found that the defendant could not establish that the firearms were used solely for sporting or collecting purposes because he acknowledged that he also possessed firearms for protection. In addition, the court upheld a supervised release condition requiring anger control/domestic violence treatment, holding that a 10-year-old conviction for terroristic threats constituted a sufficient factual basis for the requirement.

United States v. Davis, 859 F.3d 572 (8th Cir. June 12, 2017). The Eighth Circuit affirmed the defendant's 210-month sentence for attempted manufacture of, and aiding and abetting the manufacture of, methamphetamine. At the time of his federal sentencing, the defendant had pending probation revocation proceedings on unrelated state matters. The district court explicitly stated that it did not consider the pending probation revocation matters in arriving at the sentence and further recommended that any future sentence in those matters run consecutively with the federal sentence. The Eighth Circuit held that the district court did not err in refusing to consider the possibility that the defendant would receive additional prison terms on his state probation revocations. The court held that the provisions of §5G1.3, which concerns imposition of sentences for defendants with undischarged or anticipated state prison terms, are only applicable to undischarged terms of imprisonment. The court accepted that the defendant, having not yet been sentenced, had no undischarged prison term to consider and held that the potential future imposition of a state sentence was not a factor "available at the time of sentencing" under 18 U.S.C. § 3353(a).

United States v. White, 859 F.3d 569 (8th Cir. June 12, 2017). The Eighth Circuit affirmed the defendant's 152-month sentence for conspiracy to distribute crack cocaine. Defendant was originally sentenced to a below-guidelines sentence pursuant to §§5K2.23 and 5G1.3(b) because of a discharged, 36-month sentence served on a case that constituted relevant conduct for the federal offense. Subsequently, the Commission promulgated a retroactive amendment to the guideline applicable to the defendant's federal distribution sentence. At the resentencing, the district court held that the 36-month reduction below the guideline range could not be applied to the amended guideline range because §1B1.10(b)(2)(B) only permits departures from retroactively amended guidelines based on substantial assistance. The Eighth Circuit agreed, holding that §5K2.23 is a downward departure provision and thus is not a basis for a below-amended-guidelines sentence at a resentencing.

United States v. Sims, 854 F.3d 1037 (8th Cir. April 27, 2017). The Eighth Circuit vacated and remanded the defendant's 210-month sentence for being a felon in possession of a firearm. The court held that the defendant's prior convictions for residential burglary under Arkansas law did not qualify as predicate "violent felonies" pursuant to the Armed Career Criminal Act ("ACCA"). The court used the categorical approach to analyze the Arkansas statute and concluded that it swept more broadly than generic burglary and thus could not qualify as an ACCA predicate offense.

United States v. Sullivan, 853 F.3d 475 (8th Cir. Apr. 5, 2017). The Eighth Circuit vacated and remanded the defendant's 41-month sentence for wire fraud, but dismissed his appeal of a $48,000 restitution order. The court concluded that the district court committed procedural error when it departed upward from criminal history category (CHC) II to CHC VI without sufficient explanation after adopting in its entirety the presentence investigation report, which assigned defendant CHC II. The court held that the failure to explain why CHC VI more accurately represented the seriousness of defendant's criminal history than a lower category constituted reversible error. The court dismissed defendant's appeal of the district court's restitution order because defendant knowingly and voluntary waived his right to appeal that aspect of his sentence.

NINTH CIRCUIT

United States v. Perez-Silvan, No. 16-10177 (9th Cir. June 28, 2017). The Ninth Circuit affirmed the defendant's 77-month sentence for illegal reentry. The court held that a prior conviction for aggravated assault under Tenn. Code Ann. § 39-13-102(a)(1) qualifies as a "crime of violence" under the force clause for purposes of the 16-level enhancement under §2L1.2(b)(1)(A)(ii) (2015). The defendant contended that the assault conviction could not qualify as a predicate offense because Tenn. Code Ann. § 39-13-102 covers both reckless behavior and "offensive touching." The court determined that because subsections (a)(1) and (a)(2) carry different penalties, section 39-13-102 is a divisible statute, allowing the court to review the charging documents. The charging documents indicated that the defendant was convicted of subsection (a)(1), which prohibits intentional or knowing assault, unlike subsection (a)(2), which prohibits reckless as-

sault. The court further determined that all means of violating subsection (a)(1) required the use of violent force, not merely offensive touching as the defendant contended.

United States v. Strickland, 860 F.3d 1224 (9th Cir. June 26, 2017). The Ninth Circuit vacated and remanded defendant's 180-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 two uncontested predicate offenses and an Oregon state conviction for third degree robbery. The district court had determined that the robbery conviction qualified as a violent felony under the ACCA's residual clause. After defendant was sentenced, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2251, 2563 (2015), that the residual clause of the ACCA was unconstitutionally vague. On appeal, the Ninth Circuit held that Oregon's third degree robbery statute, Or. Rev. Stat. § 164.395(1), is not a predicate offense 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" as required by *Johnson v. United States*, 559 U.S. 133, 140 (2010).

United States v. Pimentel-Lopez, No. 14-30210 (9th Cir. June 1, 2017). The Ninth Circuit denied the government's petition for rehearing *en banc* and a panel of the Ninth Circuit issued an amended decision vacating the defendant's 240-month sentence for possession with intent to distribute and conspiracy to possess with intent to distribute methamphetamine. The panel held that 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 cannot contradict the jury finding and attribute to the defendant a greater amount. As it had in the original decision, *United States v. Pimentel-Lopez*, 828 F.3d 1173 (9th Cir. 2016), the panel remanded with instructions to sentence the defendant based on a drug quantity of less than 50 grams. Six judges dissented from the denial of rehearing *en banc*, writing that the panel's holding was incorrect as a matter of logic and Supreme Court case law, and would have far- reaching implications for the prosecution of drug crimes. The dissent relied on *United States v. Watts*, 519 U.S. 148, 157 (1997), which held that a sentencing court may consider acquitted conduct so long as the conduct is proved by a preponderance of the evidence. The dissent stated that this case appears to conflict with decisions issued by four other circuits, which held that a jury's special-verdict finding that the quantity of drugs was less than a specific amount did not preclude the judge from finding a greater quantity at sentencing.

United States v. Alexis Simon, 858 F.3d 1289 (9th Cir. June 8, 2017). The Ninth Circuit affirmed *en banc* the defendant's 192-month sentence for conspiracy to commit Hobbs Act robbery, which was enhanced for other inchoate offenses under §2X1.1. Stating that §2X1.1 does not apply if the attempt, solicitation, or conspiracy is "expressly covered" by another offense guideline section, the court held that a guideline other than §2X1.1 "expressly cover[s]" an inchoate offense only if the guidelines themselves so indicate, overturning its previous decision in *United States v. Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999). The court determined that sentencing an inchoate crime should begin with §2X1.1's Application Note 1, which contains a "non-exclusive list" of guideline sections covering inchoate crimes. It clarified that sentencing courts should not limit themselves to this list, and may look to other relevant guideline provisions to determine whether a guideline section "expressly covers" an inchoate offense. Applying this new framework to the defendant's sentence, the court determined that robbery conspiracy is not "expressly covered" by §2B3.1, and that §2X1.1 Application Note 1 and the text of §2B3.1 offer no indication that §2B3.1 "expressly covers" conspiracies. Accordingly, in the absence of a separate guideline "expressly covering" robbery, the default provisions under §2X1.1 applied to defendant's case.

United States v. Rivera-Muniz, 854 F.3d 1047 (9th Cir. Apr. 20, 2017). The Ninth Circuit affirmed the defendant's 27-month sentence for illegal reentry, including a 16-level enhancement under §2L1.2(b)(1)(A)(ii). The enhancement was based on the defendant's prior conviction for voluntary manslaughter under Cal. Penal Code § 192(a). The court held that Cal. Penal Code § 192(a) matches the generic definition of "manslaughter" and is therefore categorically a "crime of violence" under §2L1.2(b)(1)(A)(ii).

United States v. Arriaga-Pinon, 852 F.3d 1195 (9th Cir. Apr. 7, 2017). The Ninth Circuit vacated and remanded the defendant's 18-month sentence for illegal reentry, holding that a joyriding conviction under Cal. Vehicle Code § 10851(a) does not qualify as a predicate offense for the §2L1.2(b)(1)(C) enhancement. The court declined to resolve the question of whether its past precedent, *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013)—which held that Cal. Vehicle Code § 10851(a) is divisible because it imposes criminal liability on both principals and accessories after the fact—is clearly irreconcilable with *United States v. Mathis*, 136 S. Ct. 2243 (2106). The court found that even if statute is 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 of an accessory after the fact.

United States v. Gasca-Ruiz, 852 F.3d 1167 (9th Cir. Apr. 5, 2017). The Ninth Circuit held that "as a general rule" the district court's application of the sentencing guidelines should be reviewed for abuse of discretion, resolving an intra-circuit conflict about whether an abuse of discretion or *de novo* review standard applies. While abuse of discretion standard generally applies, the determination of whether a prior conviction qualifies as a "crime of violence," remains subject to *de novo* review.

TENTH CIRCUIT

United States v. Jordan, 853 F.3d 1334 (10th Cir. April 18, 2017). The Tenth Circuit reversed and remanded an order denying the defendant's 18 U.S.C. § 3582(c)(2) petition to reduce his 168-month sentence for conspiracy to distribute five or more kilograms of cocaine. The defendant was sentenced based on a Fed. R. Crim. P. 11(c)(1)(C) plea agreement that proposed an offense level of 35 and a sentencing range of 135 to 168 months. The district court accepted the agreement

and sentenced him to 168 months. The defendant subsequently sought to reduce his sentence based on Amendments 782 and 788, which retroactively lowered the base offense levels for certain drug quantities. The district court denied the motion after concluding the defendant's sentence was based on the Rule 11(c)(1)(C) agreement, not the sentencing guidelines. In reversing, the Tenth Circuit relied on *Freeman v. United States*, 564 U.S. 522 (2011), which states that if a Rule 11(c)(1)(C) plea agreement calls for a defendant to be sentenced within a guideline range and the district court's acceptance of the agreement obligates it to sentence the defendant accordingly, there is no doubt that the sentence the court imposes is "based on" the agreed upon sentencing range within the meaning of § 3582(c)(2). The court concluded that the defendant's plea agreement plainly contemplated a sentence "based on" a particular range.

United States v. Chavez-Meza, 854 F.3d 655 (10th Cir. April 14, 2017). The Tenth Circuit affirmed a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), in which the district court reduced the defendant's original sentence for conspiracy to distribute methamphetamine from 135 months to 114 months based on Amendment 782. The Tenth Circuit stated that, absent any indication that the district court at sentencing failed to consider the 18 U.S.C. § 3553(a) factors, a district court completing form AO-247 ("Order Regarding Motion for Sentence Reduction") is not required to provide further explanation. Although the circuits are split on the degree of explanation necessary to satisfy § 3582(c)(2), the Tenth Circuit held that no additional explanation is needed when a court imposes a guideline sentence and affirmatively states in its decision that it considered the § 3553(a) factors.

ELEVENTH CIRCUIT

Ovalles v. United States, No. 17-10172 (11th Cir. June 30, 2017). The Eleventh Circuit affirmed the denial of a defendant's 28 U.S.C. § 2255 motion contesting her 228-month sentence for Hobbs Act robbery and related offenses. The court rejected the defendant's contention that the "residual clause" at 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). It held that *Johnson*, which invalidated the "residual clause" of the Armed Career Criminal Act, was distinguishable for two reasons: first, the residual clause of § 924(c) did not contain a confusing list of examples that the sentencing court must compare to the predicate offense; and second, § 924(c) requires the sentencing court to evaluate the nature of a defendant's instant federal offense, rather than a long-ago conviction under state law. Thus, the court explained, there was no history of confusion in applying the § 924(c)(3)(B) residual clause, in stark contrast to the history of applying the Armed Career Criminal Act residual clause prior to *Johnson*. The court explained that it joined the Second, Sixth, and Eighth Circuits in upholding the § 924(c) residual clause, and disagreed with the Seventh Circuit's contrary decision.

United States v. Alberts, 859 F.3d 979 (11th Cir. June 13, 2017). The Eleventh Circuit affirmed a defendant's 120-month sentence in a child pornography receipt and possession case. The court of appeals found that the district court correctly applied the enhancement at §2G2.2(b)(5) based on the defendant having "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." The court found that the enhancement was factually justified based on the defendant's own admissions to law enforcement officers, and was not legally barred by the length of time that had elapsed since the pattern of activity, or by the defendant having been a minor himself at the time of some of the incidents. The court noted that "sexual abuse or exploitation" was defined to include conduct prohibited by several statutes that permit convictions of minors, so long as a prescribed age difference between the victim and the perpetrator existed. Because the defendant's admitted conduct would have violated those statutes, he qualified for the enhancement.

United States v. Doyle, 857 F.3d 1115 (11th Cir. May 25, 2017). The Eleventh Circuit vacated a defendant's 262-month sentence for crack cocaine distribution, holding that the failure of the district court to inform the defendant of his right to allocution at sentencing was presumptively prejudicial even when the defendant had been sentenced at the bottom of the advisory guidelines range. In doing so, the court distinguished its prior cases, decided under the pre-*Booker* mandatory guidelines, which had held that there was no presumption of prejudice when a defendant was not informed of the right to allocution but received a guideline-minimum sentence. The court explained that under the advisory guidelines, the district court retains the discretion to impose a sentence below the guidelines minimum, and not infrequently does so. Accordingly, the fact that the defendant received a guideline-minimum sentence did not eliminate the presumption of prejudice that typically applies when a defendant is not informed of the right to allocution.

United States v. Collins, 854 F.3d 1324 (11th Cir. Apr. 26, 2017). Affirming the district court's $251,860.31 restitution order, the Eleventh Circuit held that the defendant's conviction for conspiracy to violate 18 U.S.C. § 215 (accepting gratuities with the intent to be influenced or rewarded in connection with a bank transaction) was an "offense against property" within the meaning of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(A)(ii). The court held that it was appropriate to examine the facts of the offense, rather than applying the categorical approach, in determining whether a conviction qualified as an offense against property. Doing so, it found that the defendant's intent to derive an "unlawful pecuniary gain" from the offense was sufficient to qualify it as an offense against property. The court cautioned that a qualifying offense must have property as its "object," and offenses involving only incidental property damage or loss will not qualify.

United States v. Osman, 853 F.3d 1184 (11th Cir. Apr. 12, 2017). The Eleventh Circuit affirmed an award of $16,250 in restitution in a child sexual abuse case. The court held that 18 U.S.C. § 2259 (the Mandatory Restitution for Sexual Exploitation of Children Act) authorizes restitution orders for reasonable estimates of the cost of future psychiatric therapy. It held that victims are not required to wait until they procure such therapy and then seek restitution pursuant to 18 U.S.C. § 3664, so long as a reasonable estimate is possible in advance. The court also held that the concerns discussed

in *Paroline v. United States*, 134 S. Ct. 1710 (2014), about the difficulty of apportioning restitution among multiple perpetrators in child pornography cases were not relevant when the defendant had committed contact sexual abuse against the victim.

United States v. Pridgeon, 853 F.3d 1192 (11th Cir. Apr. 12, 2017). The Eleventh Circuit affirmed the defendant's 84-month sentence for methamphetamine distribution offenses. The district court determined that a prior Florida conviction for sale or delivery of a controlled substance was a "controlled substance offense" within the meaning of the career offender guideline, §4B1.2(b), and sentenced the defendant as a career offender. The court of appeals agreed, finding that the guidelines definition does not require any *mens rea* in order for a conviction to qualify as a controlled substance offense. The court rejected the defendant's argument that the Sentencing Commission exceeded its authority in establishing such a definition and held that even if 28 U.S.C. § 994(h) did not authorize the inclusion of drug offenses with no *mens rea* requirement, the Commission's general authority under 28 U.S.C. § 994(a) authorized the inclusion of such offenses in the career offender guideline.

United States v. Monzo, 852 F.3d 1343 (11th Cir. Apr. 7, 2017). The Eleventh Circuit affirmed the defendant's 120-month sentence for methamphetamine trafficking offenses. The court held that the district court did not err in denying of a minor role adjustment under §3B1.2 because the defendant was a drug courier. The court rejected the argument that "courier" status alone was sufficient to merit the adjustment, noting that Application Note 3(C) to §3B1.2 contains a detailed list of factors to consider in assessing whether a reduction is merited, and emphasizing that a sentencing court must consider the totality of the circumstances surrounding the defendant's involvement in the offense. In this case, the defendant admitted involvement in packaging "very pure" methamphetamine as well as processing payments for it, allowing the district court to find that he was not entitled to the minor role adjustment.

United States v. Gonzalez-Murillo, 852 F.3d 1329 (11th Cir. Apr. 4, 2017). The Eleventh Circuit vacated an 87-month sentence imposed in a proceeding pursuant to 18 U.S.C. § 3582, finding that the district court may have incorrectly characterized a determination under §5G1.3(b) as a "departure" prohibiting additional reduction in sentence. The court explained that a defendant who, at the time of his initial federal sentencing, had undischarged time on a state sentence arising from the same offense (or its relevant conduct) must be given credit for that time pursuant to §5G1.3(b). By contrast, a defendant whose state sentence for the same offense (or its relevant conduct) had been fully discharged may be given credit for the time served in state custody through the departure provision at §5K2.23. In a subsequent proceeding applying a retroactive guidelines amendment pursuant to 18 U.S.C. § 3582(c)(2), a defendant who was in the first situation may have his sentence further reduced to a range that accounts for the time spent in state custody, but a defendant who was in the second situation cannot have his sentence reduced to such a lower range. This is because §1B1.10 requires calculation of the reduced guideline range that would result from a retroactive amendment prior to any departure or variance. Because it was unclear from the record whether the defendant had any time remaining on his state sentence at the time of his original federal sentencing, and thus whether the district court's accounting for that sentence was a departure, the court remanded the case for reconsideration.

D.C. CIRCUIT

NO CASES IDENTIFIED

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