

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 themselves 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.

SUMMARY OF SELECT APPELLATE CASES FOR THE FOURTH QUARTER OF 2017—

FIRST CIRCUIT

United States v. Robles-Alvarez, 874 F.3d 46 (1st Cir. Oct. 18, 2017). The First Circuit vacated the defendant's life sentence for drug trafficking and money laundering conspiracy, and remanded the case for resentencing. The court held that the district court procedurally erred when it failed to address or even mention the defendant's argument for a downward variance based on unwarranted disparity with his coconspirator. The First Circuit stated that the disparity argument was "potentially forceful" where the codefendant, who received a 46-month sentence, was the leader of the conspiracy, recruited the defendant to join, and participated in significantly more smuggling runs. It noted that, on remand, the district court would make the ultimate determination regarding relative culpability.

United States v. Torres-Rivera, 874 F.3d 40 (1st Cir. Oct. 18, 2017). In a drug conspiracy case, the First Circuit vacated and remanded the district court's denial of the defendant's motion for a reduction of his 102-month sentence based on Amendment 782, which retroactively reduced certain drug sentences. The First Circuit noted that the district court appeared to have based its denial, in part, on a falsely inflated and misleading summary of the prison disciplinary record provided by the government. The court determined that remand was necessary for the government to clarify the record and for the district court to elaborate on the role the defendant's disciplinary record played in its decision to deny the defendant's motion.

SECOND CIRCUIT

United States v. Singh, 877 F.3d 107 (2d Cir. Dec. 12, 2017). The Second Circuit vacated and remanded the defendant's 60-month sentence for illegally reentry following conviction for an aggravated felony, holding that the sentence was both substantively and procedurally unreasonable. The court explained that the sentence was substantively unreasonable because the defendant's guideline range, which was recommended by the government and probation office, was 15–21 months, the average sentence

for illegal reentry was 18 months, and the defendant's prior convictions did not involve violence or narcotics trafficking. It found the sentence procedurally unreasonable based on apparent factual errors that required clarification, including the defendant's criminal history. In addition, the court stated that the district court committed procedural error by increasing the defendant's punishment because of a perception that he did not fully accept responsibility when he attempted to explain his actions.

United States v. Jones, 878 F.3d 10 (2d Cir. Oct. 5, 2017). The Second Circuit affirmed the defendant's 180-month sentence for assaulting a federal officer. The court concluded that, following the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), the defendant's prior state conviction for New York first-degree robbery qualifies as a crime of violence under the residual clause of the career offender guideline. After finding the statute divisible and conducting a modified categorical approach analysis, the court held that New York Penal Law § 160.15(2) categorically qualifies as a crime of violence based on the "least of [the] acts" proscribed by the statute. The court also concluded that the sentence was substantively reasonable, noting the defendant's history of criminal and prison misconduct.

THIRD CIRCUIT

United States v. Graves, 877 F.3d 494 (3d Cir. Dec. 13, 2017). The Third Circuit affirmed the defendant's 100-month career offender sentence for unlawful possession of a firearm, holding that his two prior state convictions for common law robbery in North Carolina were crimes of violence for purposes of enhancing his sentence. The court concluded that North Carolina common law robbery is the equivalent of generic federal robbery for guideline purposes, even though it could be accomplished through *de minimis* force. In addition to holding that generic robbery requires no more than *de minimis* force, the court stated that the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime.

United States v. Ley, 876 F.3d 103 (3d Cir. Nov. 22, 2017). The Third Circuit vacated and remanded the defendant's 46-month sentence for possession of a firearm and ammunition by a felon, holding that the district court miscalculated his criminal history score because only custodial arrests constitute arrests under §4A1.2. Reversing the district court's determination that a traffic stop, followed by the issuance of a summons, constituted an intervening arrest for criminal history purposes, the court held that, under §4A1.2(a)(2)'s "single sentence" rule, an arrest is a formal, custodial arrest.

FOURTH CIRCUIT

United States v. Gattis, No. 877 F.3d 150 (4th Cir. Dec. 4, 2017). The Fourth Circuit affirmed the defendant's 70-month sentence for possession of a firearm by a felon, holding that the district court properly applied an enhanced base offense level under §2K2.1(a)(4)(A). The court concluded that the defendant's prior state conviction for common law robbery in North Carolina categorically qualifies as "robbery" as that term is used in §4B1.2(a)(2). The court reasoned that North Carolina robbery satisfies the force requirement of the generic, contemporary definition of "robbery," and therefore is a categorical match to the enumerated offense of "robbery" found in §4B1.2(a)(2).

United States v. Thompson, 874 F.3d 412 (4th Cir. Oct. 26, 2017). The Fourth Circuit affirmed the defendant's 120-month sentence, increased under §4B1.2, for possession with intent to distribute marijuana and possession of a firearm by a felon. Specifically, the court held that the defendant's prior state conviction in North Carolina for assault inflicting serious bodily injury categorically qualifies as a predicate crime of violence under §4B1.2. Applying both the "degree of risk" inquiry found in *James v. United States*, 550 U.S. 192 (2007), and the "similar in kind" inquiry found in *Begay v. United States*, 553 U.S. 137 (2008), the court found that assault inflicting serious bodily injury "typically" involves "purposeful, violent, and aggressive behavior," and therefore qualifies as a crime of violence under the residual clause of §4B1.2.

United States v. Zuk, 874 F.3d 398 (4th Cir. Oct. 24, 2017). The Fourth Circuit vacated and remanded the defendant's 26-month time-served sentence for possessing child pornography, holding that the sentence was substantively unreasonable under the 18 U.S.C. § 3553(a) sentencing factors. The court stated that, given the "egregious" nature of the defendant's conduct, it was substantively unreasonable to depart from the guideline range of 240 months to 26 months, a reduction of approximately 90 percent, based "almost exclusively" on the defendant's post-arrest diagnosis of mild autism. The court stated that the sentence was "simply below the bare minimum necessary" to reflect the seriousness of the offense, promote respect for the law and provide just punishment.

United States v. Salmons, 873 F.3d 446 (4th Cir. Oct. 12, 2017). The Fourth Circuit affirmed the defendant's felon in possession of a firearm sentence of 12 months and a day,

holding that his base offense level was properly calculated under §2K2.1(a)(4)(A) because his prior state conviction for aggravated robbery in West Virginia categorically qualified as a crime of violence under the force clause of the career offender guideline. The court reasoned that an aggravated robbery under W. Va. Code § 61-2-12 qualifies as a predicate crime of violence based on the text of the statute, circuit precedent on similar statutes from other states, and the fact that the West Virginia legislature "deliberately separated robbery from aggravated robbery in order to expressly delineate the more violent forms of the offense."

FIFTH CIRCUIT

United States v. Lerma, 877 F.3d 628 (5th Cir. Dec. 14, 2017). The Fifth Circuit affirmed the defendant's 180-month sentence for being a felon in possession of a firearm, holding that his prior state convictions for aggravated robbery in Texas qualified as violent felonies under the force clause of the Armed Career Criminal Act. Applying the modified categorical approach, the court stated that the crime of aggravated robbery under Texas Penal Code § 29.03(a)(2) has as an element the threatened use of physical force against the person of another.

United States v. Hernandez, 876 F.3d 161 (5th Cir. Nov. 22, 2017). The Fifth Circuit affirmed the defendants' 188-month and 121-month sentences for bank fraud, wire fraud and conspiracy, holding that the district court correctly applied the enhancement at §2B1.1(b)(11) for possessing or using an authentication feature to further a crime. The court rejected the argument that the enhancement was only intended for defendants who actively seek out authentication machines and did not apply to defendants who used authentication software available in the ordinary course of their employment. In addition, the Fifth Circuit upheld the district court's loss calculation and the reasonableness of its sentence.

United States v. Hankton, 875 F.3d 786 (5th Cir. Nov. 16, 2017). In a multi-defendant case involving RICO and drug conspiracy, the Fifth Circuit vacated the district court's order correcting the defendants' sentences, holding that the initial sentences were not "clear error" under Rule 35(a). The district court initially imposed sentences of 90 months, 173 months and 168 months, after giving each defendant credit for time served in state custody. Following the government's Rule 35(a) motion, the district court corrected the sentences, finding that the defendants were ineligible for adjustments because §5G1.3(b) only allows downward departures for undischarged sentences. The Fifth Circuit reversed, holding that a district court has the authority to reduce a sentence based on a defendant's previous time served for conduct related to the instant offense, even if the time served was discharged. It reinstated the original sentence for two of the defendants and remanded for the limited purpose of correcting the written sentence for the other defendant.

United States v. Soza, 874 F.3d 884 (5th Cir. Oct. 31, 2017). The Fifth Circuit affirmed in part, vacated in part, and remanded the defendant's 60-month sentence for unlawful possession of firearms with altered and obliterated serial numbers, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B). Addressing a circuit split, the court found that a defendant cannot be a fugitive from justice for purposes of the "prohibited person" enhancement at §2K2.1(a)(4)(B) without having fled for the intended purpose of avoiding prosecution or testimony. Holding that the evidence did not show that the defendant had fled the jurisdiction for that purpose, the court directed the district court to determine, on remand, whether to consider supplemental evidence on the intent issue.

United States v. Iverson, 874 F.3d 855 (5th Cir. Oct. 31, 2017). The Fifth Circuit affirmed in part, vacated in part, and remanded the defendant's 37-month sentence for failure to register under the Sex Offender Registration and Notification Act. The court addressed a circuit split about whether the §3C1.1 adjustment for obstruction of justice applies to false statements the defendant made to qualify for appointed counsel. Observing that "the appointment of counsel affects the entirety of the case," the court held that the adjustment was warranted based on the defendant's false statement to pretrial services about the value of his assets. In addition, the court held that the district court erred by imposing a special condition of supervised release that required the defendant to follow restrictions set by a private therapist without the court's approval. The court vacated that special condition, holding that the condition usurped the sentencing court's authority.

United States v. Pittsinger, 874 F.3d 446 (5th Cir. Oct. 26, 2017). The Fifth Circuit affirmed the defendant's 360-month sentence for sexually exploiting a minor, holding that the district court did not commit plain error by ruling on the defendant's motion for a downward variance before giving him the opportunity to speak at the sentencing hearing. The court concluded that the defendant had not sufficiently presented this error to the district court, because he had requested the opportunity to address the court, but not specifically asked to address the court before it ruled on the downward variance. The Fifth Circuit noted that "it may be the better practice to rule on any request for a *Booker* variance after the defendant has allocuted," but held that there was no error because the district court had not committed itself to imposing a particular sentence before the defendant's allocution and had not limited the content of the allocution. The court also held that the district court did not err by applying a 3-level reduction for acceptance of responsibility to the defendant's original offense level rather than to the final adjusted offense level.

United States v. McMahan, 872 F.3d 717 (5th Cir. Oct. 5, 2017). The Fifth Circuit affirmed the defendant's 188-month sentence for conspiracy to possess with intent to distribute a controlled substance, holding that the district court did not err by denying without a hearing the govern-

ment's Rule 35(b) motion to reduce the defendant's sentence based on his substantial assistance. The Fifth Circuit distinguished *United States v. Gangi*, 45 F.3d 28 (2d Cir. 1995), in which the Second Circuit held that a district court commits reversible error if it does not provide a defendant notice and an opportunity to be heard before ruling on a Rule 35(b) motion. Although the *Gangi* court had analogized between Rule 35(b) and §5K1.1, the Fifth Circuit observed that the portion of Rule 35(b) that required courts to interpret the rule "in accordance with the guidelines and policy statements issued by the Sentencing Commission" had been removed after the Supreme Court's decision in *Booker*.

SIXTH CIRCUIT

United States v. Jackson, 877 F.3d 231 (6th Cir. Dec. 5, 2017). The Sixth Circuit vacated and remanded the defendant's 100-month sentence for possession of a firearm by a felon and distribution of heroin, holding that it was procedural error to apply the 4-level enhancement under §2K2.1(b)(6)(B) for using or possessing firearms in connection with another felony offense. The court held that a gun was never actually or constructively possessed in connection with the defendant's drug sales, was not kept in close proximity to the drugs he sold, and did not facilitate the drug sales because each was a separate transaction for separate consideration. In addition, the court rejected the defendant's argument that the district court committed error by failing to reduce his sentence on the grounds of sentencing-factor manipulation.

Williams v. United States, 875 F.3d 803 (6th Cir. Nov. 15, 2017). The Sixth Circuit affirmed the defendant's 180-month sentence for possession of a firearm by a felon, holding that his prior state conviction in Ohio for attempted felonious assault qualified as a predicate violent felony under the Armed Career Criminal Act ("ACCA"). In an earlier opinion, the Sixth Circuit had authorized the district court to determine whether the prior attempted felonious assault still qualified as a violent felony under the ACCA after the Supreme Court found the residual clause unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court found that the conviction remained a qualifying predicate offense under the elements clause and, based on circuit precedent, the Sixth Circuit affirmed.

SEVENTH CIRCUIT

Perry v. United States, 877 F.3d 751 (7th Cir. Dec. 14, 2017). The Seventh Circuit affirmed the defendant's 216-month career offender sentence for conspiracy to distribute crack cocaine, holding that the residual clause of the career offender guideline is not unconstitutionally vague. The court rejected the defendant's contention that circuit law at the time of his post-*Booker* sentencing in 2007 did not make the guidelines sufficiently advisory for the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), to control. The court held that that the unsettled

nature of the circuit law at the time did not alter the legal force of the Supreme Court's holdings.

Hill v. United States, 877 F.3d 717 (7th Cir. Dec. 13, 2017). The Seventh Circuit affirmed the defendant's 276-month sentence for drug and firearms offenses, holding that his prior state offense of attempted murder in Illinois was a crime of violence under the Armed Career Criminal Act. When a substantive offense would be a violent felony under 18 U.S.C. § 924(e), the court explained, an attempt to commit that offense also is a violent felony. The court also held that all means of committing the Illinois offense of murder, including administering poison or placing a hapless person in danger, were sufficient uses of "physical force" to satisfy *Johnson v. United States*, 559 U.S. 133 (2010).

Smith v. United States, 877 F.3d 720 (7th Cir. Dec. 13, 2017). In two companion cases, the Seventh Circuit affirmed the defendants' 180-month Armed Career Criminal Act sentences for possessing firearms by felons, holding that the defendant's prior state convictions for residential burglary in Illinois qualify as predicate violent felonies under the ACCA's enumerated offenses clause. Relying on the Supreme Court's approach in *Taylor v. United States*, 495 U.S. 575 (1990), the court held that Illinois' residential burglary statute met the federal definition of "generic burglary," notwithstanding the state statute's inclusion of "mobile homes" and "trailers" in its definition of "dwelling."

United States v. Jehan, 876 F.3d 891 (7th Cir. Nov. 28, 2017). In a drug conspiracy case, the Seventh Circuit affirmed the district court's denial of the defendant's 18 U.S.C. § 3582(c)(2) motion for a reduction of his 300-month sentence. The court held that the defendant was ineligible for a reduction based on Amendment 782, which lowered the base offense level for certain drug offenses, because his sentence was based on a binding plea agreement rather than the guideline range affected by the amendment. Applying Justice Sotomayor's concurrence in *Freeman v. United States*, 131 S. Ct. 2685 (2011), the Seventh Circuit determined that the plea agreement was not based on the sentencing guidelines, noting that consideration of the guidelines does not mean that the negotiated plea agreement was based on the guidelines for purposes of a reduction.

EIGHTH CIRCUIT

United States v. Jordan, 877 F. 3d 391 (8th Cir. Dec. 7, 2017). The Eighth Circuit affirmed the defendant's sentence for being a felon in possession of a firearm. The court held that the district court did not commit plain error when it allowed the government to withhold a motion for a third acceptance of responsibility point under §3E1.1(b) based on the defendant's denial of relevant conduct at sentencing. The court explained that it was permissible to withhold the motion because the relevant conduct denial meant that the court and the government had not been able to efficiently allocate resources and required them to prepare for a contested sentencing hearing. The court reasoned that the Sentencing Commission did not preclude that basis for

withholding the third point in its 2013 amendment to §3E1.1.

United States v. Boman, 873 F.3d 1035 (8th Cir. Oct. 20, 2017). The Eighth Circuit reversed and remanded the defendant's 262-month sentence for possession of a firearm and ammunition by a felon under the Armed Career Criminal Act (ACCA). The court held that the defendant's prior violation of 18 U.S.C. § 924(c)(1) was not a crime of violence under the ACCA's force clause, stating that § 924(c)(1) is both indivisible and can be committed by a crime that involves the use of force against property. The court explained that force under the ACCA must be directed against a person and not property, preventing a categorical match. In addition, the court affirmed the 4-level enhancement for use or possession of a firearm in connection with another felony, pursuant to §2K2.1(b)(6)(B).

NINTH CIRCUIT

United States v. Jones, 877 F.3d 884 (9th Cir. Dec. 15, 2017). The Ninth Circuit reversed and remanded the defendant's 174-month sentence for being a felon in possession of a firearm, holding that the defendant's prior state conviction in Arizona for armed robbery did not qualify as a violent felony under either the force clause or enumerated felonies clause of the Armed Career Criminal Act (ACCA). The Ninth Circuit relied on its earlier holding in *United States v. Molinar*, 876 F.3d 953 (9th Cir. 2017), that Arizona armed robbery does not qualify as a crime of violence under §4B1.2's force clause, to hold that it is likewise not a violent felony under the identical force clause in the ACCA. It went on to hold that *Molinar*, which found Arizona robbery qualified under the career offender provision's enumerated felonies clause, did not extend to the ACCA because the ACCA does not contain the same commentary indicating that robbery qualifies as an enumerated felony.

United States v. Murillo-Alvarado, 876 F.3d 1022 (9th Cir. Dec. 4, 2017). The Ninth Circuit affirmed the defendant's 60-month sentence for illegal reentry, which included a 16-level enhancement under §2L1.2(b)(1)(A) for a prior state controlled substance conviction in California. The court held that possession or purchase of a designated controlled substance in violation of California Health and Safety Code § 11351, which includes some substances not on the federal list, is divisible as to its controlled substance requirement and, therefore, subject to the modified categorical approach. The court upheld application of the enhancement, finding that the government established that the defendant's prior controlled substance conviction involved cocaine and qualified as a predicate "drug trafficking offense" for purposes of the enhancement.

United States v. Molinar, 876 F.3d 953 (9th Cir. Nov. 29, 2017). The Ninth Circuit affirmed the defendant's 44-month sentence for possession of ammunition by a felon, which included an increase under §2K2.1(a)(4)(A), holding that the defendant's prior state conviction in Arizona for attempted armed robbery qualified as a predicate crime of

violence under §4B1.2's enumerated offenses clause. The Ninth Circuit explained that its past precedent, *United States v. Taylor*, 529 F.3d 1232 (9th Cir. 2008), which held that armed robbery was a crime of violence under §4B1.2's force clause, was irreconcilable with *Johnson v. United States*, 559 U.S. 133 (2010), and "effectively overruled." The court held, however, that Arizona robbery and, by extension, armed robbery, is a categorical match to generic robbery.

United States v. Slade, 873 F.3d 712 (9th Cir. Oct. 10, 2017). The Ninth Circuit vacated and remanded the defendant's 24-month sentence for being a felon in possession of a firearm, holding that the defendant's prior state second-degree assault conviction in Washington was not a crime of violence for purposes of the §2K2.1(a)(4)(a) enhancement. The Ninth Circuit explained that *United States v. Jennen*, 596 F.3d 594 (9th Cir. 2010), which determined that Revised Code of Washington § 9A.36.021 was divisible and that a conviction under subsection (1)(c) was a crime of violence, had been effectively overruled by *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016). Citing *Mathis* and more recent circuit precedent in *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), the Ninth Circuit reasoned that § 9A.36.021 is not divisible because subsection (1)(e) provides for conduct that is not covered by §2K2.1's definition of crime of violence.

United States v. Bonnett, 872 F.3d 1045 (9th Cir. Oct. 10, 2017). The Ninth Circuit affirmed the defendant's 15-year sentence for receipt and distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2). On an issue of first impression for the circuit, the court held that malingering may support an obstruction of justice enhancement under §3C1.1, stating that it was joining several other circuits in reaching this holding. The district court's finding of malingering was based on the defendant's court-ordered psychiatric evaluation, which determined that he was feigning incompetency.

TENTH CIRCUIT

United States v. O'Connor, 874 F.3d 1147 (10th Cir. Oct. 30, 2017). The Tenth Circuit vacated and remanded the defendant's 32-month sentence for being a felon in possession of a firearm, holding that the defendant's prior conviction for Hobbs Act robbery under 18 U.S.C. § 1951 is not a crime of violence for purposes of §2K2.1(a)(4)(A). The court explained that a crime of violence is limited to force against a person and, because § 1951 criminalizes conduct that includes threats to property, it does not categorically qualify as a crime of violence for purposes of §4B1.2.

ELEVENTH CIRCUIT

United States v. Castaneda-Pozo, 877 F.3d 1249 (11th Cir. Dec. 19, 2017). The Eleventh Circuit affirmed the defendant's 63-month sentence for bank fraud and conspiracy to commit bank fraud, upholding the loss calculation and the enhancement for substantial financial hardship under

§2B1.1(b)(2)(B). The court found no clear error in the district court's determination that the defendant was accountable for the scheme's entire intended loss amount, stating that the district court had discretion to find the testimony of the defendant less credible than other testimony. Stating that it was an issue of first impression for the Eleventh Circuit, the court affirmed the enhancement for substantial financial hardship, holding that the victims were "made insecure in life's basic necessities," even though the pecuniary loss "may not seem great."

United States v. Johnson, 877 F.3d 993 (11th Cir. Dec. 15, 2017). The Eleventh Circuit vacated the district court's summary denial of the defendant's motion for early termination of his 5-year term of supervised release, which was originally imposed for being a felon in possession of a firearm. The court held that a district court must indicate that it considered the relevant 18 U.S.C. § 3553(a) sentencing factors when denying a motion for early termination. Analogizing the provisions for early termination under 18 U.S.C. § 3583(e)(1) and the provisions for sentence reduction under § 3582(c)(2), the court explained that both require that the record indicate consideration of relevant sentencing factors, noting that such a record allows for meaningful appellate review.

United States v. Baptiste, 876 F.3d 1057 (11th Cir. Nov. 28, 2017). The Eleventh Circuit vacated the defendant's 65-month sentence for aggravated identify theft and possession of unauthorized access devices, remanding to the district court for resentencing using Criminal History Category I instead of II. The district court had assigned the defendant to Criminal History Category II based on the disposition of Florida charges for drug possession that were described as a *nolo contendere* plea for which "adjudication [was] withheld, [and] 198 days time served." The district court assigned this disposition two criminal history points based on §4A1.1(b), overruling the defendant's objection, which he raised again on appeal, that most of the "time served" was in served in immigration detention, and not pursuant to a state sentence. The Eleventh Circuit, finding that it need not resolve the immigration detention issue, stated that sentences imposed without an adjudication of guilt are not generally counted for criminal history purposes. Because the defendant had pled *nolo contendere*, the court reasoned that his conviction should be counted as a "diversionary disposition" pursuant to §4A1.2(f), which counts diversionary sentences "under §4A1.1(c)," assigning only a single criminal history point.

United States v. Davis, 875 F.3d 592 (11th Cir. Nov. 7, 2017). The Eleventh Circuit vacated and remanded the defendant's 188-month sentence for being a felon in possession of a firearm, holding that his prior state conviction in Alabama for first-degree sexual abuse did not qualify for an increased sentence under the Armed Career Criminal Act ("ACCA"). The court found that the defendant's prior conviction did not constitute a violent felony for purposes of the ACCA because the offense could be committed without the use, attempted use, or threatened use of violent

force against the person of another. Specifically, the court examined state case law to determine that although the statute appeared to require at least an “implied threat” of serious physical injury, that language had been interpreted to permit conviction based on an implied threat of “disciplinary action,” whether violent or not. Because Alabama courts had affirmed convictions under the statute on that basis, the Eleventh Circuit found that the offense was not a violent felony under the analysis required by the categorical approach.

United States v. Longoria, 874 F.3d 1278 (11th Cir. Nov. 1, 2017). The Eleventh Circuit affirmed the defendant’s 180-month sentence for being a felon in possession of a firearm, holding that the defendant qualified for an increased sentence under the Armed Career Criminal Act (“ACCA”). The defendant argued that his three predicate serious drug offenses had not been committed on occasions different from another, as required by the ACCA. The prior convictions were for one drug trafficking conspiracy and two substantive drug distribution offenses that both occurred within the span of the conspiracy. The court held that each offense was committed on an occasion different from the other offenses because the two substantive counts were separated by 90 days while the conspiracy extended at least a week after the second substantive count ended. Accordingly, the court stated that the offenses were “successive rather than simultaneous.”

United States v. Mathews, 874 F.3d 698 (11th Cir. Oct. 30, 2017). The Eleventh Circuit affirmed in part, reversed in part, and remanded the defendant’s 60-month sentence for intentionally causing damage to a protected computer and making a false entry with the intent to obstruct an investigation. The defendant, a nurse employed at a Veterans Affairs (VA) hospital, made false entries to a VA computer to conceal his failure to monitor a patient who later died. The court held that the district court properly applied the §2J1.2(b)(3)(B) enhancement for destruction of an “especially probative” record because the defendant knew that the medical chart he altered would be relied upon in an investigation of the patient’s death. It also held that the district court properly applied a §3A1.1(b)(1) vulnerable victim adjustment status based on the patient’s age and medical condition, even though the patient was not the direct victim of the offenses of conviction. The court explained that the government was not required to show that the defendant’s relevant conduct caused physical injury to the patient, so long as it posed a risk of such harm. In addition, the court held that the district court erred because it improperly concluded that it lacked the authority to grant a

§3E1.1 adjustment for acceptance of responsibility based on the defendant’s positive drug test while on pretrial release. The court explained that the district court retained discretion to grant or deny the adjustment, and remanded for reconsideration of that issue.

United States v. Dixon, 874 F.3d 678 (11th Cir. Oct. 23, 2017). The Eleventh Circuit affirmed the defendant’s 70-month sentence for being a felon in possession of a firearm, upholding application of the enhanced base offense level at §2K2.1(a)(2). The court held that the defendant’s prior state conviction for domestic battery by strangulation, in violation of Fla. Stat. § 784.041(2)(a), qualified as a crime of violence under §4B1.2, and rejected the argument that the Florida offense did not qualify as a crime of violence because it could be committed with *de minimis* force. It noted that the Florida offense required that a defendant have “knowingly and intentionally impeded the normal breathing or blood circulation” by either “applying pressure” to the victim’s throat or neck or “blocking” the victim’s nose or mouth, and in doing so creating a risk of “great bodily harm.” Stating that Florida law defines “great bodily harm” to exclude minimal harm and to require “severe physical injury,” the court found that a conviction for the Florida offense categorically involved the use of force against the person of another.

United States v. George, 872 F.3d 1197 (11th Cir. Oct. 6, 2017). The Eleventh Circuit vacated and remanded the defendant’s 259-month sentence for conspiracy to commit drug trafficking and Hobbs Act robbery, possession of a firearm by a felon, possession of unauthorized access devices and identify theft. The court held that the district court plainly erred by not informing the defendant of his right to allocute before it imposed his sentence. Although the sentencing court had asked if there was “anything further from either side,” the Eleventh Circuit stated, this did not fulfill its obligation to personally address the defendant and offer him a chance to “speak for himself.” In addition, the court affirmed application of the enhancements under §2D1.1(b)(1) for possession of a dangerous weapon and §2D1.1(b)(12) for maintaining premises for the purpose of manufacturing or distributing a controlled substance. Regarding the premises enhancement, the court found that a location could have more than one “primary” use, and the use of a premises for legitimate purposes did not bar a finding that the defendant also used it to distribute drugs on a more than incidental basis.

D.C. CIRCUIT

No cases identified.



UNITED STATES SENTENCING COMMISSION

One Columbus Circle, N.E.

Suite 2-500, South Lobby

Washington, DC 20002-8002

T: (202) 502-4500

F: (202) 502-4699

www.ussc.gov

@theusscgov