

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 FIRST QUARTER OF 2018—

FIRST CIRCUIT

United States v. Rondón-García, 17-1098 (1st Cir. Mar. 23, 2018). The First Circuit affirmed the defendant's 18-month sentence for possession with intent to distribute cocaine, holding that the district court's sentence, which included an upward variance, was neither procedurally nor substantively unreasonable. Discussing the district court's failure to provide the defendant notice of its intent to use *ex parte* information, and its use of records of prior arrests and charges without convictions, the court concluded that any district court errors did not meet the burden of plain error review.

United States v. Sarmiento-Palacios, 885 F.3d 1 (1st Cir. Mar. 16, 2018). The First Circuit vacated and remanded the defendant's 135-month sentence for two cocaine-related charges under the Maritime Drug Law Enforcement Act. The court held that Amendment 794 to the sentencing guidelines, which included new criteria to be considered in applying the minor role adjustment at §3B1.2, was retroactively applicable to the defendant. Finding that the amendment was clarifying rather than substantive, the court remanded for the district court to determine whether the defendant should receive the minor role reduction.

United States v. Coleman, 884 F.3d 67 (1st Cir. Feb. 28, 2018). The First Circuit affirmed the defendant's 32-month sentence for distribution of cocaine base, upholding the district court's denial of a reduction for acceptance of responsibility. At issue was the defendant's participation in prostitution activities that the probation office and the court deemed to be relevant conduct to the defendant's drug offense. The First Circuit held that the legal issue of whether the prostitution activities were relevant conduct had been waived below, and that the defendant's false denials of the details of his prostitution-related activities supported the court's determination that the defendant had not taken responsibility "candidly" and showing "genuine contrition."

United States v. Colby, 882 F.3d 267 (1st Cir. Feb. 14, 2018). The First Circuit affirmed the defendant's 95-month sentence for possession of a firearm by a felon. The court upheld the application of three offense characteristics: (1) possession of a stolen gun, (2) possession of the gun in

connection with another felony, and (3) obstruction of justice. Upholding the stolen gun enhancement at §2K2.1(b)(4), the court disagreed with the defendant that the gun was not "stolen" because a friend had taken the gun from her mother's closet without permission and another friend took the gun from her friend's closet. The court stated that the term "stolen" should be read broadly, and that the gun at issue could be classified as "stolen" for purposes of §2K2.1(b)(4) the moment someone other than the owner took it without permission.

United States v. Steed, 879 F.3d 440 (1st Cir. Jan. 12, 2018). The First Circuit affirmed the defendant's 63-month sentence for possession with intent to distribute cocaine base and heroin, rejecting the government's contention that the defendant should have been sentenced as a career offender based on his prior state conviction for attempted second-degree robbery in New York. The court stated that the prior offense was not a crime of violence under the career offender's force clause because the New York statute, which encompasses nonviolent conduct such as purse snatching, could not categorically qualify after *Johnson v. United States*, 559 U.S. 133 (2010).

SECOND CIRCUIT

United States v. Betts, No. 17-231 (2d Cir. March 28, 2018). The Second Circuit affirmed in part and vacated in part the defendant's sentence for violation of supervised release, a 4-year term imposed after multiple violations of a previous term of supervised release stemming from a conviction for conspiracy to commit bank fraud. The court held that the length of the term was reasonable and a special condition requiring substance abuse testing was appropriate but a special condition prohibiting all alcohol use was not. It stated that imposition of a total ban on alcohol consumption was not reasonably related to the nature and circumstances of the defendant's conspiracy offense.

THIRD CIRCUIT

United States v. Douglas, 885 F.3d 124 (3d Cir. Mar. 15, 2018) (en banc). The Third Circuit reversed and remanded the defendant's 240-month sentence for conspiracy

to distribute cocaine and money laundering, holding that the defendant was not subject to the adjustment for abusing a position of trust at §3B1.3. The court stated that it was refining its longstanding approach to §3B1.3, and then addressed its refined two-part test. According to the court, the first step asks whether the defendant had the power to make decisions substantially free from supervision based on either a fiduciary or authoritative status that would lead his actions or judgment to be presumptively accepted; the next step asks whether the position of trust significantly facilitated the crime. The court concluded that the defendant's position as an airline mechanic did not meet the first requirement, finding no evidence that he possessed any decision-making authority substantially free from supervision or authoritative status that would lead his actions or judgment to be presumptively accepted. "Without some evidence that his position was characterized by professional or managerial discretion," the court held that the adjustment did not apply.

United States v. Huynh, 884 F.3d 160 (3d Cir. March 6, 2018). The Third Circuit affirmed the defendant's 70-month sentence for conspiracy to commit bank and wire fraud, ruling that the district court did not err in applying the enhancement at §2B1.1(b)(10)(A) for relocating a scheme to another jurisdiction to evade law enforcement. The Third Circuit stated that the determination of whether a scheme was relocated to evade law enforcement is fact-intensive and therefore should be reviewed for clear error rather than abuse of discretion. It also held that the government did not breach the plea agreement by not affirmatively opposing application of the relocation enhancement. On the facts, the court held that the district court did not clearly err in applying the relocation enhancement where the defendant targeted each store only once and engaged in fraudulent transactions mostly in other states to minimize suspicion and evade law enforcement. It also upheld application of the organizer/leader enhancement.

United States v. Metro, 882 F.3d 431 (3d Cir. Feb. 14, 2018). The Third Circuit vacated and remanded the defendant's 46-month sentence for insider trading and conspiracy to violate federal securities law. It held that the district court erred in attributing gains by a downstream trader to the defendant tipper where there was no supportable finding that the downstream trader was within the scope of the defendant's involvement in the scheme. The court emphasized that the scope of a defendant's involvement in a scheme is different than the scope of the overall conspiracy, stating that a specific finding as to the scope of the defendant's involvement is required. The court held that the district court thus erred by attributing the gains without resolving disputed questions of whether the defendant acted in concert with, or himself provided inside information to, the downstream trader.

United States v. Wilson, 880 F.3d 80 (3d Cir. Jan. 17, 2018). The Third Circuit affirmed the defendant's 151-month sentence for unarmed bank robbery, upholding the application of the career offender enhancement at §4B1.2 and the

threat-of-death enhancement at §2B3.1(b)(2)(F). Relying on *Johnson v. United States*, 559 U.S. 133 (2010), and applying the categorical approach, the court held that the offense of conviction had as an element the use, attempted use, or threatened use of physical force. It thus concluded that unarmed bank robbery by intimidation is categorically a crime of violence for purposes of the career offender guideline.

FOURTH CIRCUIT

United States v. McCollum, 885 F.3d 300 (4th Cir. March 20, 2018). The Fourth Circuit vacated and remanded the defendant's sentence for possession of a firearm by a felon, holding that the defendant's prior federal conviction for conspiracy to commit murder in aid of racketeering was not categorically a crime of violence and, therefore, did not qualify for the increase under §2K2.1(a)(4)(A). First, the court held that the categorical approach applies to predicate crimes under both state and federal law. Applying that approach, the court then found that the defendant's conviction for conspiracy under 18 U.S.C. § 1959(a)(5), which does not require an overt act, did not establish that he was found guilty of all the elements of generic conspiracy.

United States v. Middleton, 883 F.3d 485 (4th Cir. Feb. 26, 2018) as amended (Feb. 27, 2018). The Fourth Circuit reversed and remanded the defendant's 180-month sentence for being a felon in possession of firearms and ammunition, holding that his prior state conviction for involuntary manslaughter in South Carolina does not count categorically as a predicate violent felony for purposes of an Armed Career Criminal Act ("ACCA") enhancement. Citing a 1992 South Carolina case, which upheld an involuntary manslaughter conviction for a fatal car crash resulting from a defendant's illegal sale of alcohol to a minor, the court agreed with the defendant that South Carolina involuntary manslaughter is broader than the physical force required under the ACCA's force clause.

United States v. Smith, 882 F.3d 460 (4th Cir. Feb. 15, 2018). The Fourth Circuit affirmed the defendant's 180-month sentence for possession with intent to distribute cocaine hydrochloride and possession of ammunition by a convicted felon. The court held that the defendant's prior state conviction for North Carolina common law voluntary manslaughter categorically qualified as a crime of violence for purposes of an Armed Career Criminal Act enhancement. The court stated that the North Carolina voluntary manslaughter statute requires an intentional killing, rather than including negligent homicide, and "thus plainly involves 'the use, attempted use, or threatened use of physical force against the person of another.'"

United States v. Covington, 880 F.3d 129 (4th Cir. Jan. 18, 2018). On the government's appeal, the Fourth Circuit vacated and remanded the defendant's 37-month time-served sentence for distribution of heroin, holding that his prior

state conviction for unlawful wounding under West Virginia law should have counted as a predicate offense for purposes of the career offender enhancement. Applying the categorical approach, the court held that the West Virginia statute qualifies as a crime of violence under the force clause in §4B1.2(a)(1) because “the statute’s text . . . dictates that the minimum conduct required for conviction of unlawful wounding must at least involve physical force capable of causing physical injury to another person.”

FIFTH CIRCUIT

United States v. Marroquin, 884 F.3d 298 (5th Cir. Mar. 2, 2018). The Fifth Circuit vacated and remanded the defendant’s 25-month sentence for illegal reentry, holding that the district court plainly erred in calculating the defendant’s criminal history category. The court found that the district court committed plain error when it assigned separate criminal history points for two prior North Carolina sentences because the state court had consolidated the two prior cases into a single judgment and imposed a single sentence. The court stated that the “straightforward interaction” of the North Carolina statute and the guidelines demonstrated that the consolidated offense should have received a single score under §4A1.1, resulting in two criminal history points instead of four.

United States v. Brown, 884 F.3d 281 (5th Cir. Mar. 1, 2018). The Fifth Circuit vacated and remanded a 21-month sentence for intentional damage of a protected computer, holding that the sentencing court improperly applied to the defendant, a former bank employee, the enhancement for an offense that caused “substantial disruption of a critical infrastructure” at §2B1.1(b)(18)(A)(iii) & (B). After concluding that the defendant had preserved the argument about the enhancement by excluding the enhancement from a recommended guidelines calculation in his sentencing memorandum, the court interpreted the meaning of “substantial disruption.” Relying on the guidelines commentary as well as the underlying statutory directive, the court concluded that the enhancement applied to conduct that had a “serious impact” on national security, economic security, or public health. Because the defendant’s conduct had only caused “relatively minor financial losses” to a bank, the court concluded that the enhancement was improperly applied.

United States v. Herrold, 883 F.3d 517 (5th Cir. Feb. 20, 2018). The Fifth Circuit vacated and remanded the defendant’s 211-month sentence for being a felon in possession of a firearm, concluding that his prior state convictions under Texas’s burglary statute did not qualify as predicate violent felonies under the Armed Career Criminal Act (ACCA). First, the court held that the Texas statute is indivisible for the purposes of categorical analysis, overturning an earlier decision in *United States v. Uribe*, 838 F.3d 667 (5th Cir. 2016). Second, the court found that the Texas statute is broader than generic burglary because it criminalized unlawful entry followed by subsequent formation of intent to commit a crime.

United States v. Stanford, 883 F.3d 500 (5th Cir. Feb. 19, 2018). The Fifth Circuit affirmed the defendant’s 121-month sentence for conspiracy to introduce misbranded drugs into interstate commerce and conspiracy to engage in money laundering, rejecting the defendant’s arguments that the district court selected the wrong guideline and improperly applied a cross-reference to non-convicted conduct. The court concluded that the offense conduct—which involved a conspiracy to distribute “Mr. Miyagi,” a synthetic cannabinoid that contained a Schedule I Controlled Substance analogue—was more analogous to a violation of a food or drug regulation than a quintessential fraudulent scheme. Accordingly, it held that the district court had correctly applied §2N2.1 rather than §2B1.1. The court also concluded that the district court did not err by employing the cross-reference at §2N2.1(c)(2), which applies when “the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline.”

United States v. Broussard, 882 F.3d 104 (5th Cir. Feb. 5, 2018). The Fifth Circuit affirmed the defendant’s 54-month sentence for depriving another of his rights while acting under color of law. The court held that the district court correctly applied the base offense level of 14 for the underlying offense of aggravated assault for not intervening while a prisoner was beaten by other officers, as well as various enhancements. It also concluded that the district court adequately explained its reasons for applying a downward departure, noting the peculiarity of a defendant challenging a downward departure. Holding that the sentence was not procedurally unreasonable, it stated that “the record show[ed] that the district court heard testimony, heard an apology, and heard a Section 5K1.1 motion” before sentencing the defendant.

United States v. Johnson, 880 F.3d 226 (5th Cir. Jan. 23, 2018). The Fifth Circuit affirmed the defendant’s conviction and 180-month sentence for carjacking, being a felon in possession of a firearm, and brandishing a firearm in relation to a crime of violence, although it remanded for the district court’s correction of a clerical error. The court concluded that the defendant’s prior state felony convictions in Mississippi for armed carjacking qualified as crimes of violence for purposes of §2K2.1(a)(4)(A). The court rejected the defendant’s assertion that a defendant could be convicted of armed carjacking if a firearm was “readily available” but not visible to the victim, emphasizing that Mississippi’s Supreme Court had construed its armed carjacking statute to require the actual use of a firearm.

United States v. Fairley, 880 F.3d 198 (5th Cir. Jan. 22, 2018). The Fifth Circuit vacated the defendant’s conviction for theft of government property, affirmed his conviction for conspiracy to commit theft of government property, and remanded his 36-month sentence in light of the vacated convictions. The court found no error in the district court’s method of calculating loss or its determination of the loss amount, holding that the district court could consider loss associated with a contract that was eventually rescinded, where it likely would have been used to support another

fraudulent application for government funding. The court also upheld the application of a 2-level adjustment under §3B1.3 for abuse of a position of trust, concluding that the defendant occupied a position of trust with respect to the Department of Housing and Urban Development (“HUD”) because he directed a community organization that received HUD funding.

United States v. Murra, 879 F.3d 669 (5th Cir. Jan. 15, 2018). The Fifth Circuit affirmed the defendant’s 72-month sentence for forced labor and harboring illegal aliens for profit. Upholding the application of the vulnerable victim adjustment at §3A1.1(b)(1), the court disagreed with the defendant’s argument that the vulnerability attendant to being an illegal alien is taken into account in the base offense of harboring an illegal alien. Referencing authority from other circuit courts, the Fifth Circuit stated that the victims’ immigration status contributed to their vulnerability to forced labor.

United States v. Suarez, 879 F.3d 626 (5th Cir. Jan. 12, 2018). On appeal after a jury conviction for a drug trafficking conspiracy and firearms offenses, the Fifth Circuit vacated and remanded the defendant’s 180-month sentence, holding that the district court plainly erred by imposing a consecutive 10-year mandatory minimum sentence pursuant to 18 U.S.C. § 924(c) for possession of a sawed-off shotgun in furtherance of a drug conspiracy. Affirming all counts of conviction, including the conviction for possession of a firearm in furtherance of a drug trafficking crime, the court stated that the jury did not find whether the firearm involved in that offense was a sawed-off shotgun, which carries a 10-year mandatory minimum sentence, or a handgun, which would carry a 5-year mandatory minimum sentence. Accordingly, the Fifth Circuit held, and the government conceded, that the district court plainly erred in imposing the 10-year mandatory minimum sentence for possession of a sawed-off shotgun in furtherance of a drug trafficking offense. Citing the Supreme Court’s holding in *Alleyne v. United States*, 570 U.S. 99 (2013), the court reasoned that the possession of a sawed-off shotgun, which increased the mandatory minimum, was a fact issue that should have been submitted to a jury and found beyond a reasonable doubt. Instead, the court stated, the government failed to specifically charge, and the verdict form did not require the jury to specify, whether the conviction was based on a sawed-off shotgun or a handgun.

SIXTH CIRCUIT

United States v. Morris, 885 F.3d 405 (6th Cir. Mar. 15, 2018). The Sixth Circuit affirmed the defendant’s 180-month sentence for distribution of cocaine base, holding that his prior state convictions for felony domestic assault under Michigan law were crimes of violence for career offender purposes. Finding that the district court erred when it determined that felony domestic violence convictions under Michigan’s non-divisible statute qualified as crimes of violence under the elements clause of §4B1.2, the court held that the defendant was nonetheless a career offender

because the prior Michigan convictions qualified under §4B1.2’s then-existing residual clause. The Sixth Circuit based its reasoning on Supreme Court precedent and the risk of injury inherent in domestic violence offenses, noting that such offenses pose “an unusual risk of escalation.”

SEVENTH CIRCUIT

United States v. White, 883 F.3d 983 (7th Cir. Mar. 2, 2018). In a wire fraud and aggravated identify theft case, the Seventh Circuit vacated and remanded the defendant’s 59-month sentence and restitution order, holding that the district court’s loss calculation under §2B1.1(b)(1) was based on insufficient evidence. The court held that the defendant’s admission in a plea agreement that he was part of a wire fraud scheme that existed for four years did not establish that he was part of that scheme for its entire duration, particularly when he was in state custody for one of those years. The court vacated the restitution amount for the same reason, noting that the government’s burden was even higher under the Mandatory Victim Restitution Act, which limits the amount of restitution to the actual losses caused by the underlying offense of conviction.

United States v. House, 883 F.3d 720 (7th Cir. Feb. 27, 2018). The Seventh Circuit affirmed the defendant’s 108-month sentence for bank fraud resulting from his involvement in a fraudulent car loan scheme, upholding the application of a 3-level adjustment under §3B1.1(b) for being a manager or supervisor of the criminal scheme. Discussing the list of factors in the guideline’s commentary, the court stated that “none of the factors, individually, is a prerequisite to application” of the 3-level adjustment. According to the court, the adjustment can apply without an explicit finding that the defendant exercised direct control or authority over another participant. The defendant met the standard for the adjustment, the court found, based on his “role in devising the plan, using his business as the front, providing the necessary vehicle information, coordinating with his co-conspirators and the borrowers, and receiving and distributing the funds.”

United States v. Franklin, 884 F.3d 331 (7th Cir. Feb. 26, 2018). The Seventh Circuit affirmed the 180-month armed career criminal sentences imposed on two defendants convicted of possessing a firearm by a felon, holding that their prior state convictions for burglary in Wisconsin qualified as predicate violent felonies under the Armed Career Criminal Act. The court stated that the Wisconsin statute was broader than “generic burglary” because it contained subsections that criminalize unlawful entry into several types of vehicles. Finding that the statute was divisible, the court held that the district court had correctly applied the modified categorical approach to analyze the defendants’ prior convictions, which involved the subsection of the statute that criminalizes burglaries of buildings and dwellings.

United States v. Musgraves, 883 F.3d 709 (7th Cir. Feb. 26, 2018). The Seventh Circuit affirmed the defendant’s 240-month career offender sentence for using his home for

drug-related purposes and possessing ammunition by a felon. First, the court held that the district court did not clearly err by considering acquitted conduct when it had found by a preponderance of the evidence that the defendant had distributed cocaine and possessed a firearm, even though his convictions for those two offenses had been reversed in an earlier appeal. The court next addressed whether the defendant's conviction for using his house for drug-related purposes qualified as a predicate controlled substance offense for purposes of the career offender increase. It concluded that any error in the district court's determination was harmless, emphasizing that the district court stated on the record that it would have imposed the same sentence regardless of whether the defendant technically qualified as a career offender. In addition, the court held that the sentence was not substantively unreasonable, finding that the district court adequately explained its sentencing decision.

United States v. Anderson, 881 F.3d 568 (7th Cir. Feb. 2, 2018). The Seventh Circuit ordered a limited remand of the defendant's 96-month sentence for unlawful possession of a firearm by a felon, possession with intent to distribute crack cocaine, and possession of a firearm in furtherance of a drug trafficking offense. After affirming the conviction, the court ordered a limited remand to determine whether the defendant was entitled to a new sentencing hearing because of the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), which held that sentencing courts may consider a mandatory minimum sentence under § 924(c) when choosing the appropriate sentence for the predicate offenses. Because the record did not make clear whether the district court had relied on contrary pre-*Dean* precedent, the court remanded so that the district court could determine whether it would have imposed the same sentence in light of *Dean*.

United States v. Brown, 880 F.3d 399 (7th Cir. Jan. 19, 2018). The Seventh Circuit affirmed the 87- and 45-month sentences of two defendants for conspiracy to commit healthcare fraud and providing false statements, rejecting the defendants' challenges to their sentences. First, the court held that the district court did not err when it cited the need for general deterrence, relying on the belief that would-be white-collar criminals engage in cost-benefit analyses in deciding whether to engage in illicit activities. Second, the court found that the record supported the district court's loss calculation, which included fraudulent claims from the beginning of the conspiracy.

United States v. Mancillas, 880 F.3d 297 (7th Cir. Jan. 23, 2018). The Seventh Circuit vacated and remanded the defendant's 100-month sentence for possession of ammunition as a felon, finding that the district court improperly denied the defendant the right to represent himself at sentencing. The court held that the defendant clearly raised the issue of self-representation and, at that point, the district court should have performed a formal colloquy to address the request. It stated that, "[e]ven at sentencing, where the complexities of trial and the difficult strategic

choices are past, a court must respect the wishes of a defendant who unequivocally wishes to exercise his or her right to proceed pro se." The court also held that the defendant's prior state conviction for strangulation under Indiana law qualified as a violent felony under §2K2.1(a)(4) because the statute explicitly included violent force as an element.

United States v. Henshaw, 880 F.3d 392 (7th Cir. Jan. 18, 2018). The Seventh Circuit vacated and remanded the defendant's 5-year sentence of probation for possession with intent to distribute cocaine and marijuana, holding that the district court's 151-month downward variance from the low end of the career offender guideline range was substantively unreasonable. The court explained that the district court, among other things, did not adequately consider specific deterrence or just punishment, especially because the defendant had not been deterred by probation in the past. Citing the seriousness of the defendant's drug dealing, the court also noted that the defendant's own counsel recommended a sentence of 57 months.

United States v. Adams, 879 F.3d 826 (7th Cir. Jan. 16, 2018). The Seventh Circuit affirmed the defendant's 87-month sentence for unlawfully possessing a firearm as a felon, rejecting the argument that the district court impermissibly considered unreliable evidence that linked him to seven unsolved shootings. The court found that the district court had specifically acknowledged the shortcomings of the government's submission, including statements from confidential and jailhouse informants, and that it did not rely on it to make factual findings. It also observed that the court had given the defendant the opportunity to supplement the record and call his own witnesses.

United States v. Gumila, 879 F.3d 831 (7th Cir. Jan. 16, 2018). The Seventh Circuit affirmed the defendant's 72-month sentence for healthcare fraud and making false statements in connection with a healthcare matter, holding that there was no error in the calculation of loss and the sentence was not substantively unreasonable. The court stated, among other things, that the district court did not err by refusing to limit the loss calculation to the eight specific patients listed in the indictment, because these patients were "merely representative" of the thousands of patients for whom the defendant had submitted fraudulent claims.

EIGHTH CIRCUIT

United States v. Loyd, No. 16-4150 (8th Cir. Mar. 29, 2018). The Eighth Circuit affirmed the defendant's 324-month sentence for sex trafficking of a minor and production of child pornography, holding that the district court correctly applied a 25-year mandatory minimum based on his prior conviction for a crime specified in 18 U.S.C. § 2251(e). The court rejected the defendant's contention that his prior federal conviction for knowingly inducing a person to travel in interstate commerce to engage in prostitution was not a predicate offense. It held that, under the rule of the last

antecedent, section 2251(e) does not require that a prior federal conviction “relate to” one of the types of enumerated state offenses.

United States v. Peebles, 879 F.3d 282 (8th Cir. Jan. 2, 2018). The Eighth Circuit affirmed the defendant’s 105-month sentence for possession of ammunition by a felon, holding that the defendant’s prior state conviction for attempted murder in Iowa was a crime of violence for purposes of §2K2.1(a)(4)(A). The court rejected the defendant’s argument that, because the attempted murder could be committed by an act of omission, it did not categorically require the use of force, stating that an act of omission taken with the intent to cause harm is itself a forcible act. In addition, the court upheld a 4-level upward departure, which was imposed under §5K2.6 because the defendant had fired through the floor of his home into the apartment below.

NINTH CIRCUIT

United States v. Adkins, 883 F.3d 1207 (9th Cir. Mar. 5, 2018). The Ninth Circuit affirmed the defendant’s 210-month career offender sentence for a violent crime in aid of racketeering, holding that the defendant’s prior convictions for state burglary and false imprisonment in Hawaii each qualified as a crime of violence under §4B1.2’s residual clause. The defendant’s appeal was pending, according to the court, when the Sentencing Commission adopted Amendment 798, which struck the residual clause of the career offender guideline at §4B1.2. Finding that Amendment 798 was substantive, rather than clarifying, the court concluded that it does not apply retroactively.

United States v. Studhorse II, 883 F.3d 1198 (9th Cir. Mar. 2, 2018). The Ninth Circuit affirmed the defendant’s 84-month sentence for being a felon in possession of a firearm and body armor, holding that the defendant’s prior state conviction for attempted first degree murder under Washington state law constitutes a crime of violence for purposes of both 18 U.S.C. § 16 and §4B1.2. The court upheld the district court’s decision to impose a base offense level of 20 under §2K2.1(a)(4)(A), holding that Washington state attempted murder qualifies as a crime of violence because it has as an element threatened, attempted, or actual use of force. The court rejected the defendant’s argument that the commentary to §4B1.2 is not authoritative, and stated that attempted murder qualifies as a crime of violence under §4B1.2’s plain text.

United States v. Walton, 881 F.3d 768 (9th Cir. Feb. 1, 2018). The Ninth Circuit vacated and remanded the defendant’s sentence for being a felon in possession of a firearm, holding that he should not have been subject to an enhanced sentence under the Armed Career Criminal Act (ACCA) because two of his prior convictions did not qualify as violent felonies under ACCA’s force clause. First, the court held that first-degree robbery under Alabama Criminal Code § 13-A-8-41 does not require force sufficient to categorically qualify as a violent felony. Second, following *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), the

court held that second-degree robbery under California Penal Code § 211 does not qualify as a violent felony under the force clause, because it can be committed using negligent force and the statute is indivisible.

United States v. Brown, 879 F.3d 1043 (9th Cir. Jan 16, 2018). The Ninth Circuit vacated and remanded the defendant’s 60-month sentence for being a felon in possession of a firearm, holding that the defendant’s prior Washington state conviction for conspiracy to distribute methamphetamine was not a “controlled substance offense” for purposes of §2K2.1(a)(4)(A). The Ninth Circuit held that the district court erred because the Washington state conspiracy statute is broader than the generic federal definition of conspiracy. It explained that Washington state law allows for a conspiracy conviction when the only other party to the conspiracy is a law enforcement officer or informant who does not actually intend to take part in the conspiracy, which would not support a conviction for conspiracy under federal law. Further, it held that application of the guideline was not harmless error; although the defendant’s sentence was three months below the low end of the guideline range, it was 19 months above the upper end of the range without application of the enhancement.

United States v. Hulén, 879 F.3d 1015 (9th Cir. Jan. 10, 2018). The Ninth Circuit affirmed the district court’s revocation of the defendant’s supervised release term and imposition of a 6-month sentence, holding that the district court could consider the defendant’s admissions made to a counselor during mandatory sex offender treatment and base the revocation solely on that basis. The court held that a supervised release revocation proceeding is akin to a parole revocation hearing, which is noncriminal and thus unlike formal criminal case proceedings. Accordingly, it stated, the Fifth Amendment’s right against self-incrimination does not apply and the defendant’s statements could be used against him to revoke his release.

TENTH CIRCUIT

United States v. Ortiz-Lazaro, 884 F.3d 12591 (10th Cir. Mar. 16, 2018). In a case involving revocation of supervised release for illegal reentry after deportation, the Tenth Circuit affirmed the defendant’s 24-month above-guideline sentence for his violation of supervised release, which was imposed to run consecutively to his 12-month sentence for illegal reentry. The court found that the district court fulfilled its statutory obligation to comprehensively explain its sentence, even though it failed to submit a written statement for its reasons, and concluded that the sentence was procedurally and substantively reasonable.

ELEVENTH CIRCUIT

United States v. DeShazor, 882 F.3d 1352 (11th Cir. Feb. 20, 2018). The Eleventh Circuit affirmed the defendant’s 180-month sentence for being a felon in possession of a firearm, holding that his three prior state convictions in

Florida qualified as violent felonies under the Armed Career Criminal Act (ACCA). The court found that circuit precedent foreclosed the defendant's challenges to the status of his prior Florida convictions for aggravated assault and resisting an officer with violence. It also held that his prior conviction for attempted sexual battery was a violent felony, finding that the Florida sexual battery statute was divisible and, applying the modified categorical approach, determining that the elements of Florida sexual battery committed with a deadly weapon necessarily involved the use, attempted use, or threatened use of physical force, as required by the ACCA's violent felony definition. The court noted that the Florida offense qualified as a violent felony whether the "force" involved was "indirect" or "direct."

United States v. Llewlyn, 879 F.3d 1291 (11th Cir. Jan. 24, 2018). The Eleventh Circuit affirmed the defendant's 110-month sentence for conspiring to possess with intent to distribute cocaine, upholding the district court's denial of his motion for a sentence reduction based on Amendment 782. In 2000, a federal court in Florida sentenced the defendant to 110-months for cocaine trafficking and, several months later, a federal court in North Carolina sentenced him for another drug trafficking offense to an additional term of imprisonment, to run consecutively. The Eleventh Circuit concluded that the defendant was not entitled to a reduction because his Florida sentence had already been served, he had been separately sentenced for two unrelated offenses, and the second district court had explicitly directed that he serve the second term consecutively to any previously-imposed sentence.

United States v. Presendieu, 880 F.3d 1228 (11th Cir. Jan. 19, 2018). The Eleventh Circuit affirmed in part, vacated in part, and remanded the defendant's 51-month sentence for conspiracy to commit bank fraud and aggravated identify theft, holding that the sentencing court improperly applied relevant conduct principles in calculating the loss amount under §2B1.1. The Eleventh Circuit found that there was no evidence that losses caused by a coconspirator were within the "scope" of the jointly undertaken criminal activity, as required by §1B1.3(a)(1)(B), noting that there was no evidence that the defendant had ever met the coconspirator or was aware of his existence prior to their arrest. The court affirmed the application of the enhancement at §2B1.1(b)(1)(B)(i) for production of counterfeit or unauthorized access devices, stating that, although this enhancement ordinarily does not apply when the defendant

was separately convicted of aggravated identity theft, it applied here because the defendant produced (by ordering from overseas), rather than simply possessed or used, counterfeit access devices. It also affirmed the sophisticated means enhancement, noting that Amendment 792, which restricted application of the enhancement, did not apply retroactively to the defendant's conduct. Last, the court directed the district court to reexamine the request for a minor role reduction in light of Amendment 794.

United States v. Morales-Alonso, 878 F.3d 1311 (11th Cir. Jan. 5, 2018). The Eleventh Circuit affirmed the defendant's 63-month sentence for illegal reentry after deportation, concluding that the defendant's prior state conviction for aggravated assault in Georgia was a crime of violence for purposes of §2L1.2. After comparing the elements of the Georgia statute to the elements of generic aggravated assault, the court held that the Georgia offense satisfied the enumerated offenses clause of §2L1.2. Accordingly, it concluded, the 16-level enhancement was warranted.

United States v. Crabtree, 878 F.3d 1274 (11th Cir. Jan. 3, 2018). The Eleventh Circuit affirmed the defendant's 192-month sentence for healthcare fraud, ruling that the district court properly applied the 4-level organizer adjustment at §3B1.1(a) and the 2-level vulnerable victim adjustment at §3A1.1(b)(1). The court found no clear error in the district court's balancing of the §3B1.1 leadership factors, particularly given that the defendant "was in a pivotal position of management authority that enabled the fraud to succeed," regardless of the fact that he did not closely manage all operations. The court held that the vulnerable victim adjustment was correctly applied given that, in his role as a physician, the defendant abdicated his responsibility toward elderly patients with serious mental illnesses by "signing whatever medical documents [coconspirators] put in front of him" to further the fraudulent scheme.

D.C. CIRCUIT

No cases identified.



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