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 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.

IN THE SPOTLIGHT THIS QUARTER . . .

Rosales-Mireles v. United States, 138 S. Ct. 1897 (June 18, 2018)

The Supreme Court held that a miscalculation that affects a defendant's sentencing guideline range will, in the ordinary case, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief under plain error review. In so holding, the Court reversed the Fifth Circuit's judgment that, while the district court's error was plain and affected the defendant's substantial rights, relief was not warranted unless the error or the resulting sentence would "shock the conscience." The Court concluded that the Fifth Circuit's heightened standard is an inaccurate description of *United States v. Olano,* 507 U.S. 725 (1993), which governs when a court of appeals should exercise its discretion under Federal Rule of Criminal Procedure 52(b) to correct errors that were not raised in the district court.

Chavez-Meza v. United States, 138 S. Ct. 1959 (June 18, 2018)

Affirming the Tenth Circuit's decision to uphold the district court's less-than-proportional sentence reduction under 18 U.S.C. § 3582(c)(2), the Supreme Court held that the district court adequately explained its new sentence. The Court stated that, based on the record, the sentencing court had properly considered the § 3553(a) factors, along with the initial sentencing record, even though it had checked a box on a form order certifying that it had "considered" petitioner's "motion" and had "tak[en] into account" the § 3553(a) factors and the relevant guideline policy statements. How much explanation is required at resentencing, the Court stated, depends on the circumstances of each case.

Koons v. United States, 138 S. Ct. 1783 (June 4, 2018)

The Supreme Court affirmed the denial of the defendants' motions for sentence reduction under 18 U.S.C. § 3582(c)(2), where the top end of the guideline range at the original sentencing fell below the applicable mandatory minimum and the defendants received sentences below the mandatory minimum because of their substantial assistance to the government. For a sentence to be based on a sentencing range later lowered by the Sentencing Commission, the Court noted, the range must have at least played a relevant part in the framework the district court used in imposing the sentence. The Court held that the defendants did not qualify for sentence reductions under § 3582(c)(2) because their sentences were not "based on" their lowered guideline ranges but, instead, were "based on" their mandatory minimums and on their substantial assistance to the government.

Hughes v. United States, 138 S. Ct. 1765 (June 4, 2018)

The Supreme Court reversed and remanded the denial of the defendant's motion for sentence reduction under 18 U.S.C. § 3582(c)(2). It held that, in the ordinary case, a defendant is eligible for a sentence reduction even if he or she entered a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) (Type-C). The Court reasoned that a sentence imposed pursuant to a Type-C plea agreement is no exception to the general rule that the sentencing guidelines form the basis of a defendant's ultimate sentence. It relied in part on §6B1.2(c), which prohibits district courts from accepting Type–C plea agreements without first evaluating the agreement's recommendations alongside the defendant's sentencing guideline range.

Sessions v. Dimaya, 138 S. Ct. 1204 (April 17, 2018)

The Supreme Court affirmed the Ninth Circuit's decision granting a lawful permanent resident's petition for review of his deportation order. It held that the residual clause in 18 U.S.C. § 16, which defines "crime of violence" in many criminal statutes and is incorporated by reference in the Immigration and Nationality Act's mandatory removal provisions, is void for vagueness. The court concluded that § 16(b) possesses the same flaws as the residual clause in the Armed Career Criminal Act, which the court invalidated in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

SUMMARY OF SELECT APPELLATE CASES FOR THE SECOND QUARTER OF 2018—

FIRST CIRCUIT

United States v. Cabrera-Rivera, 893 F.3d 14 (1st Cir. June 20, 2018). The First Circuit affirmed the defendant's 108-month sentence for possessing child pornography but vacated for reconsideration on remand a condition of supervised release that effectively barred the defendant from having contact with his minor children without approval of a probation officer. Among other things, the court held that impairment of a defendant's relationship with his children is a significant deprivation of liberty that requires increased justification.

United States v. Rentas-Muniz, 887 F.3d 1 (1st Cir. Apr. 3, 2018). The First Circuit affirmed the defendant's 202-month sentence for drug conspiracy and possessing a firearm in furtherance of a crime, upholding the district court's decision to make the sentence consecutive to the lengthy state sentence the defendant was already serving. Applying §5G1.3 and relevant conduct principles, the court concluded that the district court's decision to make the sentence wholly consecutive was adequately supported by the § 3553(a) sentencing factors.

SECOND CIRCUIT

Villanueva v. United States, 893 F.3d 123 (2d Cir. June 22, 2018). On the government's appeal, the Second Circuit remanded to vacate the defendant's time served sentence for being a felon in possession of a firearm, holding that his prior state convictions in Connecticut for first degree assault qualified as predicate violent felonies for purposes of the Armed Career Criminal Act enhancement. Relying on the Supreme Court's reasoning in *United States v. Castleman*, 571 U.S. 1045 (2013), the court held that the relevant inquiry regarding "force" is the causation of a consequence, rather than the physical act of initiating an action that leads to a consequence.

United States v. Brooks, 889 F.3d 95 (2d Cir. May 2, 2018). In a drug distribution and possession case, the Second Circuit vacated in part and remanded the defendant's sentence for violating the terms of his supervised release, holding that a life term of supervised release, imposed to follow a 1-year prison term, was substantively and procedurally unreasonable. Noting that it was the defendant's first revocation of supervised release and his violation centered on a non-violent drug habit, the court held that the district court's explanation was not sufficient to justify the term of supervised release and created an unwarranted disparity with similarly-situated defendants.

THIRD CIRCUIT

United States v. Ramos, 892 F.3d 599 (3d Cir. June 15, 2018). On the government's appeal from a resentencing, the Third Circuit vacated and remanded the defendant's 105-month sentence for various drug and weapon offenses. The court held that the defendant's prior state conviction for second degree aggravated assault in Pennsylvania qualified as a predicate crime of violence under the elements clause of the career offender guideline.

FOURTH CIRCUIT

United States v. Shephard, 892 F.3d 666 (4th Cir. June 15, 2018). The Fourth Circuit affirmed the defendant's 96-month sentence for wire fraud, money laundering, and aiding and abetting, concluding that the district court had properly applied the vulnerable victim enhancement based on the defendant's participation in a telemarketing scheme in which victims were told that they could win a prize after paying a "refundable insurance fee." The court acknowledged that the scheme did not initially seek out particularly vulnerable victims, but held that the enhancement was appropriate based on the use of "reloading," which retargets for further solicitation victims who made an initial payment.

United States v. Fluker, 891 F.3d 541 (4th Cir. June 5, 2018). The Fourth Circuit vacated and remanded the defendant's 308-month sentence for possession with intent to distribute cocaine base, carrying a firearm in relation to a drug trafficking crime, and possession of a firearm by a convicted felon. Among other things, the court held that the defendant's prior state robbery convictions in Georgia did not constitute predicate crimes of violence under the Armed Career Criminal Act because Georgia robbery can be committed by mere "sudden snatching," which is not a categorical match to the generic definition of robbery. Finding that the defendant's sentence should have been calculated without the career offender designation, the court also held that the district court committed procedural error by using the wrong *Guidelines Manual*.

FIFTH CIRCUIT

United States v. Godoy, 890 F.3d 531 (5th Cir. May 14, 2018). The Fifth Circuit affirmed the defendant's 27-month sentence for illegal reentry. The court rejected the defendant's contention that the cross-reference in the 2015 version of §2L1.2(b)(1)(C) to 18 U.S.C. § 16(b)—the residual clause in the federal definition of "crime of violence"— is unconstitutionally vague. The court recognized that this

clause was unconstitutional under *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), but concluded that *Dimaya* could not be applied to the advisory guidelines under *Beckles v. United States*, 137 S. Ct. 886 (2017). The court also held that the defendant's convictions for burglary of a habitation under Texas law do not trigger the 16-level enhancement under §2L1.2(b)(1)(A)(ii) (2015) but do qualify as "aggravated felonies" for purposes of §2L1.2(b)(1)(C) (2015).

United States v. Rodriguez-Aparicio, 888 F.3d 189 (5th Cir. Apr. 23, 2018). The Fifth Circuit affirmed the defendant's 27-month sentence for illegal reentry, holding that the district court did not err by failing to correct the defendant's misconception that he would receive an automatic sentencing enhancement for testifying. Although the district court had not explicitly corrected the defendant's misunderstanding, the Fifth Circuit held that the district court had no duty to correct it, emphasizing that the district court had not "actively misinformed the defendant," that the conversation had occurred during an unrelated pretrial proceeding rather than at sentencing, and that the imposition of such a duty would be unworkable.

United States v. Maturino, 887 F.3d 716 (5th Cir. Apr. 12, 2018). The Fifth Circuit affirmed the defendant's 120-month sentence for possession of an unregistered silencer and an unregistered destructive device, holding that, under §2K2.1(b)(1), a district court may enhance a defendant's sentence based on the number of firearms he attempted to obtain, even if he actually obtained far fewer. Noting that "guidelines commentary is not hortatory fluff," the court cited the instructions in Application Note 5 to §2K2.1. It also held that neither the guidelines nor the Double Jeopardy clause prevents a district court from enhancing a defendant's sentence under both §2K2.1(b), for the number of firearms, and §2K2.1(b)(3), for an offense involving a "destructive device," even if the court considers the same device for each enhancement.

SIXTH CIRCUIT

United States v. Cradler, 891 F.3d 659 (6th Cir. June 5, 2018). The Sixth Circuit vacated and remanded the defendant's 222-month sentence for being a felon in possession of a firearm, holding that his prior state conviction in Tennessee for third-degree burglary was not a violent felony for purposes of the Armed Career Criminal Act (ACCA). The court stated that the Sixth Circuit's earlier decision in *United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2006), which held that Tennessee burglary was a predicate violent felony for ACCA purposes, was no longer controlling authority in light of the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

United States v. Malone, 889 F.3d 310 (6th Cir. May 8, 2018), *reh'g denied*. The Sixth Circuit affirmed the defendant's 180-month Armed Career Criminal Act sentence for being a felon in possession of a firearm and witness intimidation. The court held that the defendant's prior state conviction under Kentucky's second-degree burglary statute categorically qualified as generic burglary under the enumerated offense clause of the Armed Career Criminal Act. Applying the categorical approach under *Mathis v. United States*, 136 S. Ct. 2243 (2016), the court found that the Kentucky statute's definition of "burglary," which included a definition of a "dwelling" with no qualifier, used the ordinary meaning of the terms "burglary" and "building."

SEVENTH CIRCUIT

United States v. Moose, No. 16-3536 (7th Cir. June 27, 2018). The Seventh Circuit affirmed the defendant's 24-month sentence for wire fraud but vacated and remanded several conditions of supervised release, holding that the district court erred by not explaining its reasons for imposing those terms. The court vacated a condition requiring the defendant to undergo routine drug testing and a condition permitting a probation officer to visit the defendant's workplace. The district court's reasons for imposing these conditions were not obvious from the record, the court reasoned, particularly because the defendant did not have a history of drug abuse. Accordingly, the court held that the district court should have directly addressed the defendant's objections and provided enough information so anyone acquainted with the facts of the case could understand why it had not accepted the defendant's argument.

United States v. Canfield, 893 F.3d 491 (7th Cir. June 25, 2018). The Seventh Circuit affirmed the defendant's 6-month sentence for violating supervised release but vacated and remanded several special conditions of supervised release. Specifically, the court vacated a requirement that the defendant notify any individuals or entities of any risk associated with his history of possessing child pornography, holding that the district court must define with greater specificity the identities or categories of individuals and the types of risks to which the notification condition would apply. The court also vacated two other conditions—one requiring that the defendant not possess otherwise legal adult pornography and another requiring him to undergo substance abuse treatment—holding that the district court should have included its rationale for imposing these conditions.

United States v. Lamon, 893 F.3d 369 (7th Cir. June 19, 2018). The Seventh Circuit affirmed the defendant's 84-month sentence for possessing cocaine base with the intent to distribute, being a felon in possession of firearms, and possessing firearms in furtherance of a drug trafficking

crime, holding that the district court had not erred by failing to group the defendant's drug trafficking and felon-in-possession counts under §3D1.2(c). The court refused to overturn *United States v. Sinclair*, 770 F.3d 1148, 1157–58 (7th Cir. 2014), in which the Seventh Circuit held that a drug-trafficking count under 21 U.S.C. § 841(a) and a felon-in-possession count under § 922(g) cannot be grouped when accompanied by an offense under 18 U.S.C. § 924(c). The court stated that out-of-circuit cases that interpreted §3D1.2 differently did not provide compelling justification to reconsider *Sinclair*.

Cross v. United States, 892 F.3d 288 (7th Cir. June 7, 2018). The Seventh Circuit reversed and remanded the denial of the defendants' petitions for relief under 28 U.S.C. § 2255, holding that the residual clause in a previous version of §4B1.2(a)(2) is unconstitutionally vague insofar as it determined the mandatory sentencing ranges for pre-*Booker* defendants. The court first held that one defendant's prior conviction for simple robbery in Wisconsin did not qualify as a predicate crime of violence under the elements clause of the career offender guideline. It then found that the defendants' motions to vacate were timely because they were filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause in the Armed Career Criminal Act. Finally, it relied on *Johnson* to hold that the identically-worded residual clause in the mandatory guidelines implicates the void-for-vagueness doctrine because the mandatory guidelines fixed sentencing ranges and the Supreme Court's ruling in *Beckles v. United States*, 137 S. Ct. 886 (2017), only applies to the advisory guidelines.

United States v. Peterson, 891 F.3d 296 (7th Cir. May 29, 2018). The Seventh Circuit affirmed the defendant's 24-month sentence for financial institution and bankruptcy fraud, concluding that the district court did not err in imposing a sophisticated means enhancement, and that it did not improperly impose discretionary conditions of supervised release. The court approved of the sophisticated means enhancement because the case involved allegations of "planning and concealment," that "exceeded that of the 'garden variety' mortgage fraud scheme." The court also concluded that the district court did not plainly err when it failed to state its reasons for imposing certain discretionary conditions of supervised release, because it incorporated the discretionary conditions directly from the presentence report (PSR) and explicitly adopted the PSR and its reasoning at the sentencing hearing.

Van Cannon v. United States, 890 F.3d 656 (7th Cir. May 16, 2018). The Seventh Circuit reversed and remanded the defendant's 15-year sentence for possession of a firearm by a felon, holding that the defendant's prior state crime of second-degree burglary in Minnesota does not qualify as a predicate offense under the Armed Career Criminal Act (ACCA). Finding that the defendant's motion to vacate was timely because he filed it within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), the court held his prior Minnesota conviction no longer qualified as a predicate violent felony under the ACCA after *Johnson*, nor did it qualify as a predicate offense under the ACCA's enumerated offense clause.

Perrone v. United States, 889 F.3d 898 (7th Cir. May 14, 2018). The Seventh Circuit affirmed the denial of the defendant's petition for relief under 28 U.S.C. § 2255, in which the defendant challenged his conviction for distribution of a controlled substance resulting in death or serious bodily injury under 21 U.S.C. § 841(b)(1)(C). Relying on the Supreme Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014), the court held that the "death results" enhancement is an element that must be submitted to the jury and found beyond a reasonable doubt, and, accordingly, that the defendant's claim addressed his innocence of a crime rather than his sentence. The court concluded that the defendant failed to carry his burden of proof under *Burrage*'s but-for causation standard, and that his counsel did not provide ineffective assistance.

Arreola-Castillo v. United States, 889 F.3d 378 (7th Cir. May 3, 2018). The Seventh Circuit reversed the district court's denial of the defendant's § 2255 petition, which challenged his mandatory life sentence imposed under the recidivism provisions of 21 U.S.C. § 841. The court held that 21 U.S.C. § 851, which prohibits a defendant from challenging "the validity of any prior conviction alleged under this section" if the conviction occurred more than five years before the government seeks the recidivism enhancement, does not prohibit a defendant from arguing that the underlying state conviction has been vacated. Agreeing with two other circuits, the court concluded that the statutory text of § 851 distinguishes between a challenge to the validity of a prior conviction and a dispute about whether a prior conviction exists.

United States v. Redman, 887 F.3d 789 (7th Cir. Apr. 17, 2018). The Seventh Circuit affirmed the defendant's 157-month sentence for wire fraud, aggravated identity theft, furnishing false and fraudulent material information in documents required under the federal drug laws, and distributing controlled substances. The court agreed with the application of the sophisticated means enhancement, noting that the defendant used the falsified credentials he created to pose as a psychiatrist. It also held that the enhancement for reckless disregard of a risk of death or serious bodily injury under §2B1.1(b)(15)(A) did not require actual injury, finding that the enhancement was warranted because the defendant's conduct put his patients at risk.

United States v. Sunmola, 887 F.3d 830 (7th Cir. Apr. 16, 2018). The Seventh Circuit affirmed the defendant's 324-month sentence for conspiracy, mail fraud, wire fraud, and

interstate extortion, concluding that the district court had correctly enhanced his sentence based on the vulnerability of the victims, their "substantial financial hardship," the defendant's misrepresentation that he was acting on behalf of a government agency, the defendant's role as the organizer or leader, and the need for general deterrence. The court held that the defendant's victims—middle-aged women seeking companionship on internet dating sites—were vulnerable even though they "were middle-aged rather than elderly," because they were "otherwise susceptible" to the defendant's deceitful tactics. It also concluded that the defendant's misrepresentation that he was involved with the U.S. military justified a 2-level enhancement to his sentence under §2B1.1(b)(9)(A), even if the defendant was primarily engaged in a "romance scheme" to defraud and extort women over the internet.

United States v. Williams, 887 F.3d 326 (7th Cir. Apr. 10, 2018). The Seventh Circuit affirmed the defendant's 3-year sentence for violating the terms of his supervised release, concluding that the court had adequately considered, and rejected, the policy statements in the guidelines and had also considered the defendant's arguments in mitigation. The court noted that, given the "informal" nature of revocation proceedings, a defendant is entitled to present mitigating arguments at a revocation hearing but the district court is not required to directly address them.

EIGHTH CIRCUIT

United States v. Washington, No. 17-2004 (8th Cir. June 27, 2018). The Eighth Circuit affirmed the defendant's 27-month sentence for possession with intent to distribute marijuana within 1,000 feet of a school but it remanded a special condition of supervised release concerning gang association and activity. The court found unconstitutionally vague a special condition that barred the defendant from "knowingly associat[ing] with any member, prospect, or associate member of any gang" and that assumed association with a gang if the defendant was "found to be in the company of such individuals while wearing the clothing, colors, or insignia of the gang . . . ." First, the court held that the condition was vague because it did not define "gang," a phrase which can also extend to law-abiding groups. Second, the court held that the phrase "associate member" was ambiguous and could even be interpreted to include probation officers who supervise gang members. Third, the court held that the condition was deficient because it did not include a *mens rea* requirement in circumstances where the defendant was wearing the colors of a gang, creating the potential for accidental violation.

United States v. Helm, 891 F.3d 740 (8th Cir. June 6, 2018). The Eighth Circuit affirmed the denial of the defendant's motion for reduction of his 96-month sentence for conspiracy to distribute methamphetamine, holding that he was not eligible for a reduction based on Amendment 782, which retroactively reduced the offense level for many drug offenses. The court explained that, although a17–month adjustment for an undischarged sentence in the defendant's initial sentence reduced the bottom of his guideline range of 130 to 162 months, that adjustment did not enter into the calculation of the amended guideline range. Accordingly, the Eighth Circuit concluded, the defendant's current sentence of 96 months was less than his guideline range of 110 to 137 months under the amendment.

Levering v. United Stated, 890 F.3d 738 (8th Cir. May 21, 2018). The Eighth Circuit affirmed the defendant's concurrent sentences of 240 months for possession of a firearm by a previously convicted felon and 120 months for unlawful possession of a stolen firearm. Affirming the enhanced sentence under the Armed Career Criminal Act ("ACCA"), the court held that each of the defendant's two prior state assaults in Iowa constituted a separate felony for purposes of the ACCA. Even though the two assaults occurred during the same highspeed chase and shared the same motivation for evading arrest, the court reasoned that they occurred at different times in different counties against different victims, and that the length of the chase gave the defendant sufficient time to discontinue his criminal activity. The court also held that the sentence was not substantively unreasonable.

United States v. Grimes, 888 F.3d 1012 (8th Cir. May 1, 2018). The Eighth Circuit affirmed the defendant's 228-month sentence for attempted distribution of child pornography, attempted receipt of child pornography, and possession of child pornography, holding that the district court correctly applied an enhanced minimum and maximum sentence pursuant to 18 U.S.C. § 2252(b)(1) and (2). The court held that the defendant's prior state conviction in New York for second-degree sodomy "relate[d] to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," as required to trigger §2252(b)(1) and (2). Noting that only one conviction was required to trigger the enhanced sentencing provision, the court held that a specific intent showing as to the victim's age was not required to trigger the enhancement. The court also affirmed the application of the pattern-of-activity enhancement under §2G2.2(b)(5).

United States v. Naylor, 887 F.3d 397 (8th Cir. Apr. 5, 2018) (en banc). The *en banc* Eighth Circuit vacated and remanded the defendant's 180-month sentence for being a felon in possession of a firearm, holding that his prior state convictions for second-degree burglary in Missouri did not qualify as violent felonies under the Armed Career Criminal Act. The court held that Missouri's second-degree burglary statute is indivisible and broader than generic burglary, stating that the district court erred in relying on the

modified categorical approach for classifying the defendant's prior offenses.

NINTH CIRCUIT

United States v. Vera, 893 F.3d 689 (9th Cir. June 25, 2018). The Ninth Circuit vacated two defendants' sentences imposed on remand in a drug trafficking conspiracy case, holding that the district court erred by relying on co-conspirator plea agreements to determine the drug quantities attributable to the defendants. The court held that a district court may not rely solely on statements in a co-conspirator's plea agreement that are not self-inculpatory to determine a defendant's drug quantity liability. The court recognized that co-defendant plea agreements could have probative value if supported by sufficient indicia of reliability, but found that the statements were not sufficiently corroborated in this case, and the district court had relied on the plea agreements as the "single most important data source."

United States v. Reinhart, 893 F.3d 606 (9th Cir. June 18, 2018). On the government's appeal, the Ninth Circuit affirmed the defendant's 78-month sentence for possession of child pornography, holding that neither of the defendant's prior state convictions in California triggered a 10-year mandatory enhanced penalty under 18 U.S.C. § 2252(b)(2) because both prior state offenses prohibit a broader range of conduct than the federal child pornography statute. Stating that the categorical approach applies to determine whether a prior state conviction "relating to" the possession of child pornography triggers an enhanced penalty under § 2252(b)(2), the court held that Calif. Penal Code § 311.3(a) (sexual exploitation of a child) and § 311.11(a) (possession of child pornography) are indivisible and overbroad.

United States v. Swallow, 891 F.3d 1203 (9th Cir. June 11, 2018). The Ninth Circuit vacated and remanded the defendant's sentence for assault resulting in serious injury, holding that the court erred in applying an enhancement under §2A2.2(b)(5), which applies if "the assault was motivated by a payment or offer of money," where no evidence supported a finding that the defendant had been paid. In addition, the court upheld the application of an enhancement under §2A2.2(b)(2)(B) for use of a dangerous weapon during the commission of an offense where the defendant stomped the victim's head onto pavement. The court stated that tennis shoes, though not inherently dangerous, can qualify as dangerous weapons when used in this manner, agreeing with the Fifth, Eighth, and Tenth Circuits.

United States v. Edling, 891 F.3d 1190 (9th Cir. June 8, 2018). The Ninth Circuit vacated and remanded the defendant's sentence for being a felon in possession of a firearm, finding that two of three prior state convictions that increased the defendant's sentence under §2K2.1(a) did not qualify as crimes of violence. The court analyzed the Nevada statutes for assault with a deadly weapon, robbery, and coercion and held that: (1) assault with a deadly weapon under the Nevada statute categorically qualifies as a crime of violence under the elements clause of §4B1.2; (2) the Nevada robbery statute is not a categorical crime of violence under the elements clause or a match for generic robbery under the enumerated offense clause; and (3) coercion under the Nevada statute does not qualify as a crime of violence under the enumerated or elements clauses.

United States v. Briones, 890 F.3d 811 (9th Cir. May 16, 2018). The Ninth Circuit affirmed the defendant's life sentence for a felony murder that occurred when the defendant was 17. At his original sentencing, the defendant was sentenced, under the then-mandatory guidelines, to life imprisonment without possibility of parole on the felony murder count, in addition to 10-year and 20-year sentences, to run concurrently, on each of two non-homicide counts. Following *Miller v. Alabama*, 567 U.S. 460 (2012), which held that the Eighth Amendment does not allow life imprisonment without possibility of parole for juvenile offenders, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which clarified that *Miller* "bar[s] life without parole . . . for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility," the defendant sought resentencing and was again sentenced to a term of life imprisonment. Reviewing the resentencing, the Ninth Circuit upheld the life sentence, holding, first, that the district court did not err by starting with the guidelines sentence of life imprisonment and, second, on a plain error and abuse of discretion review, that the court had sufficiently considered the "hallmark features" of youth as required by *Miller* and *Montgomery*.

TENTH CIRCUIT

United States v. Driscoll, 892 F.3d 1127 (10th Cir. June 14, 2018). The Tenth Circuit reversed the district court's denial of the defendant's 28 U.S.C. § 2255 motion, remanding to the district court with instructions to vacate, pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), his 180-month Armed Career Criminal Act (ACCA) sentence for firearms offenses, and resentence him. Applying the Tenth Circuit's "more likely than not" burden of proof at the merits stage of a first § 2255 motion based on *Johnson*, the court held that the defendant adequately demonstrated that it was more likely than not that he was sentenced under the ACCA's residual clause, even though his sentencing did not contain any mention of the residual clause.

United States v. Washington, 890 F.3d 891 (10th Cir. May 15, 2018). The Tenth Circuit affirmed the district court's dismissal of the defendant's second 28 U.S.C. § 2255 mo-

tion to vacate his 15-year Armed Career Criminal Act sentence based on the Supreme Court's opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The court held that the defendant did not establish that the district court relied on the residual clause for any of his Armed Career Criminal Act (ACCA) predicate offenses. In so holding, the Tenth Circuit stated that the burden is on the defendant to show by a preponderance of the evidence that his claim relies on *Johnson*, that is, that it was more likely than not that the district court enhanced his sentence by relying on the ACCA's residual clause. It noted that it was joining the First and Eleventh Circuits in holding that the burden is on the defendant to show by a preponderance of the evidence that his claim relies on *Johnson*.

United States v. Salas, 889 F.3d 681 (10th Cir. May 4, 2018). The Tenth Circuit remanded with instructions to vacate the defendant's conviction for using a destructive device in furtherance of a crime of violence under 18 U.S.C. § 924(c), holding that the residual clause in the statute's definition of a crime of violence was unconstitutionally vague. The court relied on the Supreme Court's opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held that the same definition of a crime of violence in 18 U.S.C. § 16(b) was unconstitutionally vague in light of its reasoning in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the similarly-worded residual clause in the Armed Career Criminal Act (ACCA). Stating that the definition of crime of violence in § 924(c)(3)(B) "possesses the same features" as the ACCA's residual clause and § 16(b), the Tenth Circuit concluded that § 924(c)(3)(B) also was unconstitutionally vague.

United States v. Green, 886 F.3d 1300 (10th Cir., Apr. 6, 2018). The Tenth Circuit affirmed the district court's denial of the defendant's second 18 U.S.C § 3582(c)(2) motion for sentence reduction based on Amendment 782, which retroactively reduced the offense level for many drug offenses. Among other things, the Tenth Circuit held that the district court had jurisdiction to consider a second motion to modify his sentence based on a retroactive amendment to the guidelines. The court stated that, absent a clear statement by Congress, § 3582(c)(2) did not divest the district court of jurisdiction to consider a second motion for sentence modification under the same amendment, noting its holding comports with the holdings of five other circuits that have considered second or successive § 3582(c)(2) motions.

ELEVENTH CIRCUIT

United States v. Lee, 886 F.3d 1161 (11th Cir. Apr. 2, 2018). The Eleventh Circuit vacated and remanded the district court's grant of an Armed Career Criminal Act defendant's 28 U.S.C. § 2255 motion, holding that his prior Florida robbery convictions qualified as violent felonies under the elements clause of the Armed Career Criminal Act. The Eleventh Circuit explained that it was bound by circuit precedent holding that Florida robbery was a violent felony, but it noted that the prior holding was "unsupported by any legal analysis," and that the defendant's arguments that it should be reconsidered had "some force."

D.C. CIRCUIT

United States v. Haight, 892 F.3d 1271 (D.C. Cir. June 22, 2018). The D.C. Circuit affirmed the defendant's conviction and, on the government's cross-appeal, reversed and remanded the defendant's 152-month sentence for several drug and gun-related charges. The court held that the defendant was subject to a 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA) because both his D.C. assault with a dangerous weapon and Maryland first-degree assault convictions qualified as violent felonies under the ACCA. With respect to the D.C. assault with a dangerous weapon conviction, the court, citing *United States v. Castleman*, 134 S. Ct. 1405 (2014), and ten other federal courts of appeals, rejected the defendant's argument that indirect force does not qualify as violent force under *Johnson v. United States*, 559 U.S. 133, 140 (2010), and held, citing *Voisine v. United States*, 136 S. Ct. 2272 (2016), and four other circuit courts of appeal, that the use of violent force includes the reckless use of violent force. The D.C. Circuit also agreed with the Fourth Circuit that Maryland first-degree assault, which requires the use of a firearm or the intention to cause serious physical injury, requires the use of physical force and qualifies as a violent felony under the ACCA.

United States v. Winstead, 890 F.3d 1082 (D.C. Cir. May 25, 2018). The D.C. Circuit remanded the defendant's 360-month sentence for being a felon in possession of a firearm, possession with intent to distribute cocaine, and possession of a firearm during a drug trafficking offense, holding that the defendant received ineffective assistance of counsel at sentencing and that his sentence as a career offender was therefore improper. The court held that the defendant received ineffective assistance at sentencing, as a matter of law, based on counsel's failure to raise the argument that *attempted* controlled substance offenses—the basis for the defendant's career offender status—do not qualify as predicate offenses. Reviewing the issue *de novo* for purposes of the ineffective assistance claim, the court concluded that attempted controlled substance offenses do not qualify as predicate offenses for purposes of career offender status. It explained that "section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses," and concluded that the commentary, which includes attempted offenses, was inconsistent with the guideline itself.

United States v. Miller, 890 F.3d 317 (D.C. Cir. May 18, 2018). The D.C Circuit affirmed in part, reversed in part, and remanded the defendant's 120-month sentence for drug conspiracy, which was part of a larger sentence in a multiple-count RICO conspiracy case. Among other things, the court held that the district court plainly erred in applying §2D1.1(b)(1) for possession of a firearm because it made no factual finding regarding the nexus between the drug convictions and the firearms, which were discovered in a post-arrest search of his residence, along with a glass vial that had the odor of PCP and chemicals that can be used to dilute PCP. The court acknowledged that "[w]hile Note 11 [to §2D1.1(b)(1)] states that '[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense,' that principle does not obviate the 'nexus' requirement . . . ." The court also held that the district court erred in treating the defendant's sentencing range as life rather than 360-months-to-life on the RICO conspiracy count (following the reversal of one of the defendant's convictions); erred in applying the 4-level enhancement for acting as an organizer or leader, rather than the 3-level enhancement for acting as a manager or supervisor, under §3B1.1; and upheld the district court's drug quantity finding.

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