

# CASE LAW QUARTERLY

Vol. 2 || Issue 3 (July – September 2018)



**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 THIRD QUARTER OF 2018—

### FIRST CIRCUIT

**United States v. García-Ortiz, 904 F.3d 102 (1st Cir. Sept. 17, 2018).** The First Circuit affirmed the defendant's conviction, 252-month sentence and \$30,000 restitution order for aiding and abetting Hobbs Act robbery and felony murder while using or carrying a firearm in relation to a crime of violence. The court held, among other things, that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)'s force clause, and thus also qualifies as a crime of violence under 18 U.S.C. § 16, which similarly defines a crime of violence for the Mandatory Victims Restitution Act.

**United States v. Brake, 904 F.3d 97 (1st Cir. Sep. 14, 2018).** The First Circuit affirmed the defendant's 84-month sentence for being a felon in possession of a firearm. In a matter of first impression for the circuit, the court held that the district court did not impermissibly double count by applying enhancements under both §2K2.1(b)(4)(A), which provides a 2-level increase for possession of a stolen firearm, and §2K2.1(b)(6)(B), which provides a 4-level increase for using a firearm in connection with another felony. Although both enhancements are derived from the same set of operative facts and burglaries, the court reasoned, they respond to two distinct concerns.

**United States v. Rivera-Berrios, 902 F.3d 20 (1st Cir. Aug. 24, 2018).** The First Circuit affirmed the defendant's 48-month sentence for being a felon in possession of firearms and ammunition. In a matter of first impression for the circuit, the court held that the district court properly assigned criminal history points for a prison sentence imposed following revocation of probation, notwithstanding that the revocation-triggering conduct also provided the basis for the underlying conviction for the instant offense. Relying on the Sentencing Commission's commentary to support its decision, §4A1.2, comment. (n.11), the court noted that the Fifth, Sixth, Eighth, and Tenth Circuits had reached the same conclusion. The court also held that the sentence, which included an upward variance, was not substantively unreasonable.

**United States v. Arias-Mercedes, 901 F.3d 1 (1st Cir. Aug. 16, 2018).** The First Circuit affirmed the defendant's 87-month sentence for his role in a drug trafficking conspiracy, upholding the district court's finding that the defendant was not entitled to a §3B1.2(b) reduction for mitigating role. The court stated that Amendment 794, which revised the *Guidelines Manual's* commentary regarding the mitigating role adjustment, eliminated the need to compare a defendant's conduct to hypothetical participants in similar offenses. The court rejected the defendant's argument that Amendment 794 requires courts, when weighing mitigating role adjustments, to evaluate a defendant's role in the broader conspiracy as opposed to his role in the specific criminal activity for which he is being held accountable. The court also held that the sentence was not substantively unreasonable.

**United States v. Cates, 897 F.3d 349 (1st Cir. July 25, 2018).** The First Circuit affirmed the defendant's 120-month sentence for possessing child pornography, upholding the §2G2.2(b)(5) enhancement for engaging in "a pattern of activity" of sexual abuse. Although the district court indicated that acceptance of responsibility might be at issue if the defendant testified to contest the enhancement, the First Circuit held that the district court's warning did not chill the defendant's due process rights but instead was designed to "educate" him about the potential consequences. The court also held, among other things, that the defendant's forcing the minor to fondle him and then later perform a sex act were separate instances of conduct which together could constitute a "pattern of activity" under the application notes.

**United States v. Frates, 896 F.3d 93 (1st Cir. July 18, 2018).** The First Circuit vacated the defendant's 132-month sentence for armed bank robbery and remanded for the district court to reconsider his career offender status in light of Amendment 798, which removed the guideline's residual clause. The court stated that the district court had properly sentenced

the defendant as a career offender using predicate convictions that satisfied §4B1.1(a)(2)'s then-existing residual clause, but it would use its discretionary remand authority to permit the district court to consider whether the Sentencing Commission's intervening decision to eliminate the residual clause, which would have reduced the defendant's guideline range, would affect the district court's choice of sentence.

## SECOND CIRCUIT

**United States v. Barrett, 903 F.3d 166 (2d Cir. Sept. 10, 2018).** The Second Circuit affirmed the defendant's 90-year sentence for conspiracy to commit Hobbs Act robbery, substantive Hobbs Act robbery, and using firearms in the commission of those robberies, which in one case caused death. The court stated that the predicate felonies of substantive and conspiratorial Hobbs Act robbery are categorically crimes of violence within the meaning of 18 U.S.C. § 924(c)(3). The court also held that the residual clause in the definition of crime of violence at § 924(c)(3)(B) avoids the vagueness challenges of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 135 S. Ct. 2551 (2015), because § 924(c)(3) is concerned with pending prosecution rather than prior convictions.

**United States v. Pereira-Gomez, 903 F.3d 155 (2d Cir. Sept. 7, 2018).** The Second Circuit affirmed the defendant's 46-month sentence for illegal reentry. It held that, for purposes of an enhancement under §2L1.2, a prior conviction under New York law for attempted robbery in the second degree is not a crime of violence under the enumerated offenses clause but is a crime of violence under the force clause.

**United States v. Townsend, 897 F.3d 66 (2d Cir. July 23, 2018).** The Second Circuit vacated and remanded the defendant's 84-month sentence for possession with intent to distribute alprazolam and being a felon in possession of a firearm, holding that his prior state conviction for sale of a controlled substance in New York was not a qualifying predicate offense for purposes of §2K2.1(a)(2). The court found that the term "controlled substance" in §4B1.2(b) refers exclusively to those substances proscribed by the Controlled Substances Act. As a result, the court stated, the defendant's prior conviction for possession of Human Chorionic Gonadotropin (HCG), which is not a controlled substance under federal law, did not qualify as a prior controlled substance offense. The court noted that it was joining the Fifth, Eighth, and Ninth Circuits in reading the guidelines to refer only to controlled substances criminalized under federal law.

## THIRD CIRCUIT

**United States v. Mayo, 901 F.3d 218 (3d Cir. Aug. 22, 2018).** On the defendant's second 28 U.S.C. § 2255 motion, the Third Circuit vacated and remanded the defendant's 276-month sentence for being a felon in possession of a firearm, holding that his prior Pennsylvania state aggravated assault conviction does not qualify as a predicate offense under the Armed Career Criminal Act (ACCA). Holding that the state statute does not necessarily involve the element of physical force required by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the court found that it did not qualify as a predicate violent felony under the ACCA's elements clause.

**United States v. Peppers, 899 F.3d 211 (3d Cir. Aug. 13, 2018).** On the defendant's second 28 U.S.C. § 2255 motion, the Third Circuit vacated and remanded the defendant's 15-year mandatory minimum sentence for being a felon in possession of a firearm, holding that his prior Pennsylvania state robbery convictions are not violent felonies for purposes of the Armed Career Criminal Act (ACCA). Regarding the defendant's prior burglary conviction, the court held that it is not a predicate offense under the enumerated offenses clause of the ACCA but remanded to the district court to determine whether he was necessarily sentenced under the residual clause rendered unconstitutional by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

## FOURTH CIRCUIT

**United States v. Bell, 901 F.3d 455 (4th Cir. Aug. 28, 2018).** The Fourth Circuit affirmed the defendant's 480-month mandatory minimum sentence for possession with intent to distributed drugs and possession of a firearm in furtherance of drug trafficking. The court held, among other things, that the defendant's prior state convictions in Maryland for armed robbery categorically qualify as violent felonies under the force clause of the Armed Career Criminal Act.

**United States v. Hodge, 902 F.3d 420 (4th Cir. Aug. 22, 2018).** The Fourth Circuit reversed and remanded the defendant's 204-month Armed Career Criminal Act (ACCA) sentence for possession with intent to distribute crack and possession of a firearm by a felon. The court held that the government must identify at the time of sentencing all convictions it wishes to use to support a defendant's ACCA enhancement. The court stated that where one of the three prior convictions identified as ACCA predicates was later rendered ineligible by *Johnson v. United States*, 135 S. Ct. 2551 (2015), the government could not use a prior conviction that was not designated to preserve the ACCA enhancement. When the government or the sentencing court specifies which convictions listed in the PSR it is using to

support an ACCA enhancement, it stated, that narrows the defendant's notice of potential ACCA predicates to only those convictions specifically identified.

## FIFTH CIRCUIT

**United States v. Gomez, No. 17-10690 (5th Cir. Sept. 26, 2018).** The Fifth Circuit affirmed in part and remanded the defendant's aggregate 652-month sentence, which represented multiple consecutive drug trafficking sentences and mandatory minimum firearms offenses under 18 U.S.C. § 924(c). The court issued a limited remand for the district court to determine whether it wished to modify its sentence in light of the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), which held that courts may consider mandatory minimum sentences on other counts of conviction in formulating the sentences on counts that do not carry mandatory minimums. Among other holdings, the court held that a remand was necessary to determine whether the district court treated the guidelines as mandatory when it imposed a substantial sentence within the guidelines while also enforcing statutory mandatory minimums, and, in turn, whether it recognized its authority under *Dean* to consider the defendant's § 924(c) sentence.

**United States v. Davis, et al., 903 F.3d 483 (5th Cir. Sept. 7, 2018).** On remand from the U.S. Supreme Court for reconsideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Fifth Circuit affirmed in part and vacated in part two defendants' convictions and sentences for using or carrying a firearm in relation to a crime of violence, namely, Hobbs Act robbery, and knowingly using, carrying, or brandishing a firearm to aid and abet conspiracy to interfere with commerce by robbery. The court declined to extend the Supreme Court's holding in *Dimaya* to the elements clause of 18 U.S.C. § 924(c), and, in turn, reaffirmed circuit precedent that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). The court held, however, that the residual clause in § 924(c)(3)(B) is unconstitutionally vague because it is identical to the language in 18 U.S.C. § 16(b), and it vacated the defendants' conspiracy convictions and sentences because they would have qualified as crimes of violence only under the residual clause.

**United States v. Fuentes-Canales, 902 F.3d 468 (5th Cir. Aug. 30, 2018).** The Fifth Circuit upheld the defendant's 50-month sentence for illegal reentry, notwithstanding the district court's erroneous application of the crime of violence enhancement at former §2L1.2(b)(1)(A)(ii) for the defendant's prior Texas burglary of a habitation conviction. The court held that it would not correct the district court's error because, under plain error review, the error did not compromise the public reputation of judicial proceedings. It also held that, considering the facts of the case, the defendant's sentence was comparable to sentences imposed for similar conduct, stating that the defendant "actually

committed a crime just as serious as, if not more serious than, generic burglary."

**United States v. Richard, 901 F.3d 514 (5th Cir. Aug. 23, 2018).** The Fifth Circuit affirmed the defendant's 210-month sentence for transportation of child pornography. The court held, among other things, that the district court did not clearly err when it applied the cross-reference in §2G2.2(c)(1) for "causing a minor to engage in sexually explicit conduct," relying on an earlier Fifth Circuit case in which the defendant hid his cell phone in the bathroom to record a minor. The court also upheld an enhancement under §3C1.1 for obstructing justice, reasoning that the defendant's conduct with another minor was "part of the investigation into his offense of conviction," and his phone call to the minor's mother involved a "closely related offense" for purposes of the enhancement.

**United States v. Ponce-Flores, 900 F.3d 215 (5th Cir. Aug. 14, 2018).** The Fifth Circuit affirmed the defendant's 30-month enhanced sentence for unlawful presence in the United States following removal for an aggravated felony conviction. The court concluded that the district court did not plainly err in applying the 10-level §2L1.2(b)(2)(A) enhancement based on the defendant's three prior sentences that were imposed on the same day. Specifically, the court upheld application of the enhancement based on the "sentence-aggregation rule" in §4A1.2(a)(2), which instructs courts to "use the aggregate sentence of imprisonment" if a prior sentence is treated as a single sentence and the court imposed the sentences consecutively.

**United States v. Williams, 897 F.3d 660 (5th Cir. July 30, 2018).** The Fifth Circuit denied the defendant's application for a certificate of appealability concerning the dismissal of his motion under 28 U.S.C. § 2255, holding that the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), did not necessarily invalidate the residual clause of 18 U.S.C. § 924(c)(3). The court acknowledged that the Supreme Court had instructed courts of appeal to reconsider § 924(c)(3)(B) cases in light of *Dimaya* by vacating and remanding several cases. It held, however, that this instruction did not amount to a determination that § 924(c)(3)(B) is unconstitutional, and thus was not a new rule of constitutional law that would allow the defendant to file a successive § 2255 motion.

**United States v. Anchundia-Espinoza, 897 F.3d 629 (5th Cir. July 27, 2018).** The Fifth Circuit affirmed the defendant's 175-month sentence for conspiring to possess with the intent to distribute cocaine while aboard a vessel, affirming the district court's denial of safety valve and minor participant reductions. The court held that the safety valve provision of 18 U.S.C. § 3553(f), which allows a court to sentence a defendant below the statutory minimum sentence in certain instances, was strictly limited to offenses

enumerated in that statute. The court declined to accept the defendant's argument that an offense listed in 46 U.S.C. § 70503 merits safety valve relief because 21 U.S.C. § 960, which provides the penalties for § 70503, is enumerated in § 3553(f). Following the Ninth and Eleventh Circuits, the court reasoned that § 70503 is an offense penalized by an enumerated statute, but is not enumerated itself, and that Congress chose to exclude it from the safety valve statute.

**United States v. Burris, 896 F.3d 320 (5th Cir. July 16, 2018) (as revised, Aug. 3, 2018).** The Fifth Circuit vacated and remanded the defendant's 188-month sentence for possession of a firearm by a felon and possession with intent to distribute a controlled substance, holding that the defendant's prior Texas conviction for robbery does not qualify as a predicate violent felony offense under the Armed Career Criminal Act. The court reasoned that a defendant can commit simple robbery in Texas by causing a minor injury that impairs a physical condition but causes no or minimal pain, such as a bruise. This type of injury, the court held, does not necessarily require the "violent force" described in *Johnson v. United States*, 559 U.S. 133 (2010).

## SIXTH CIRCUIT

**United States v. Camp, 903 F.3d 594 (6th Cir. Sep. 7, 2018).** The Sixth Circuit affirmed in part, vacated in part and remanded the defendant's 372-month sentence for using a firearm during a crime of violence, being a felon in possession of a firearm, and Hobbs Act robbery. Although Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c), the court held, it is not a crime of violence for purposes of the career offender guideline. It explained that the minimum conduct necessary under the Hobbs Act statute, which criminalizes conduct that includes threats to property, is broader than the enumerated offenses of robbery and extortion. And because a crime of violence under §4B1.2 is limited to force against a person, the court stated, a Hobbs Act robbery is not a crime of violence under the force clause of the guideline.

**Raines v. United States, 898 F.3d 680 (6th Cir. July 31, 2018).** The Sixth Circuit reversed and remanded the district court's denial of the defendant's 28 U.S.C. § 2255 motion, vacating his 180-month sentence for possession of a firearm as a convicted felon and possession with intent to distribute cocaine. The court held that the defendant's prior federal conviction under 18 U.S.C. § 894(a)(1) for collecting credit by extortionate means did not qualify as a predicate offense under the Armed Career Criminal Act (ACCA) in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Concluding that the prior extortion offense does not qualify as a violent felony under the force clause or the enumerated-offenses clause, the court remanded to the district court for resentencing without the ACCA enhancement.

**United States v. Farrad, 895 F.3d 859 (6th Cir. July 17, 2018).** The Sixth Circuit affirmed the defendant's 188-month sentence for being a felon in possession of a firearm, holding that his eight prior convictions for federal drug trafficking qualified as predicate offenses for purposes of the Armed Career Criminal Act (ACCA). Among other things, the court held that the defendant was charged with violating federal drug-trafficking statutes, rather than merely aiding and abetting. It also concluded that the prior crimes were separate ACCA predicates, holding that the crimes were committed on different occasions, even though each offense was in the context of an ongoing conspiracy.

**United States v. Maynard, 894 F.3d 773 (6th Cir. July 3, 2018).** The Sixth Circuit affirmed the defendant's 108-month sentence for possessing an explosive as a felon, holding that his prior state conviction in Kentucky for assault under extreme emotional disturbance is a predicate crime of violence for purposes of the base offense level at §2K1.3(a)(2). Finding that §2K1.3 refers to the definition of crime of violence at §4B1.2, the court relied on authority interpreting the elements clause in the Armed Career Criminal Act's definition of crime of violence to conclude that the Kentucky conviction satisfies the elements clause because the plain language of the statute requires that the defendant intentionally cause physical injury.

## SEVENTH CIRCUIT

**United States v. Mohsin, 904 F.3d 580 (7th Cir. Sept. 25, 2018).** In a case involving conspiracy to distribute misbranded drugs, the Seventh Circuit vacated and remanded the 24-month and 10-month sentences imposed on the owner and cashier of a store that sold synthetic marijuana products mislabeled as incense or potpourri. The court held that the district court erred in applying the enhancement at §2B1.1(b)(15)(A) for conscious or reckless risk of death or serious bodily injury, holding that there was insufficient evidence that the defendants knew the products posed a risk of killing or seriously injuring customers, even though they knew their customers were smoking or ingesting the mislabeled products. The court noted that the district court could not rely on witness testimony given at the sentencing hearing because it severely limited the defendants' cross-examination of the witness and did not allow them to introduce contrary information.

**United States v. Lee, 897 F.3d 870 (7th Cir. July 30, 2018).** The Seventh Circuit affirmed the defendant's 30-month above-guideline sentence for revocation of supervised release, holding that the absence of a written statement of reasons did not, by itself, merit remand. First, the court held that the district court was not required to address an argument for mitigation the defendant did not make. It also stated that it is unclear whether district courts are re-

quired to complete a statement of reasons form when revoking supervised release, holding that the defendant was not prejudiced by the absence of the form. The court stated that district courts must explain a defendant's sentence so that reviewing courts can evaluate the adequacy of the underlying rationale. It concluded, however, that the statement of reasons form serves a record-keeping function for the Sentencing Commission, and that an adequate oral statement of reasons can be sufficient.

**United States v. De La Cruz, 897 F.3d 841 (7th Cir. July 30, 2018).** The Seventh Circuit affirmed the defendant's 210-month sentence for participating in a racketeering conspiracy, stating that a district court may adjust a defendant's sentence for a discharged state prison sentence, even if the underlying offense was relevant conduct to the instant offense. The court held that the district court did not abuse its discretion by denying a downward adjustment under §5K2.23 for the discharged sentence.

**United States v. Dehaan, 896 F.3d 798 (7th Cir. July 25, 2018).** The Seventh Circuit affirmed the defendant's 108-month sentence and \$2.8 million order of restitution for engaging in a scheme to defraud Medicare. The court concluded that the district court correctly held the defendant responsible for the loss and restitution associated with all his fraudulent certifications that patients were homebound, even though some of the patients may have in fact been homebound and could have qualified for home services. The court distinguished the case from those in which the loss amount should be reduced by the value of legitimate services provided to patients, reasoning that a proper certification is required for a patient to be eligible for Medicare services at all, whether the patient is actually homebound or not.

## EIGHTH CIRCUIT

**United States v. Schneider, No. 17-3034 (8th Cir. Sept. 28, 2018).** The Eighth Circuit reversed and remanded the defendant's 30-month sentence for possessing a firearm and ammunition as a felon, holding that the defendant's prior North Dakota conviction for aggravated assault was not a crime of violence for purposes of the higher base offense level at §2K2.1(a)(4)(A). The Eighth Circuit held that the defendant's prior assault conviction satisfied neither the force clause nor the enumerated offenses clause in the crime of violence definition, noting that an offender could violate the North Dakota statute with an ordinary recklessness *mens rea*.

**Russo v. United States, 902 F.3d 880 (8th Cir. Sep. 6, 2018).** The Eighth Circuit denied the defendant's post-conviction motion for relief from a 235-month career offender sentence on various drug and firearm offenses, rejecting the motion as untimely. Addressing the defendant's contention that

his pre-*Booker* career offender sentence was unconstitutional because the residual clause of that provision was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the court held that the right at issue in *Johnson* was specific to the Armed Career Criminal Act and did not address the pre-*Booker* career offender residual clause.

**United States v. Sebert, 899 F.3d 639 (8th Cir. Aug. 13, 2018).** The Eighth Circuit affirmed the defendant's 240-month sentence and 20-year term of supervised release for receipt of child pornography. Holding that the prison sentence was substantively reasonable, the court also upheld a special condition of supervised release that prohibited "pornography or erotica." Stating that the term "erotica" is not unconstitutionally vague or overbroad, it relied on prior precedent to hold that the condition was permissible.

**United States v. Bordman, 895 F.3d 1048 (8th Cir. July 17, 2018).** The Eighth Circuit affirmed the 600-month sentence and \$3,000 restitution order imposed on the defendant for sexual exploitation of a child and possession of child pornography. First, the court held that the defendant's within-guideline prison sentence was not procedurally or substantively unreasonable. Second, the court held that the district court, in determining the proper amount of restitution, did not misapply *Paroline v. United States*, 572 U.S. 464 (2014). The court also held that certain special conditions of supervised release restricting "pornography" and "erotica" were not unconstitutionally vague or overbroad under the First Amendment.

## NINTH CIRCUIT

**United States v. Franklin, 904 F.3d 793 (9th Cir. Sept. 13, 2018).** The Ninth Circuit vacated and remanded the defendant's 15-year sentence for being a felon in possession of a firearm, holding that his prior state drug crime does not qualify as a predicate offense under the Armed Career Criminal Act. Stating that Washington's accomplice liability statute renders its drug trafficking law broader than generic federal drug trafficking laws, the court reasoned that federal aiding and abetting requires specific intent to facilitate the underlying crime, while Washington law requires only knowledge that the defendant's actions will promote or facilitate commission of the crime.

**United States v. Bankston, 901 F.3d 1100 (9th Cir. Aug. 23, 2018).** On the government's appeal, the Ninth Circuit vacated and remanded the defendant's 33-month sentence for being a felon in possession of a firearm, instructing that on remand the defendant should be sentenced as a career offender because her prior robbery conviction under California Penal Code § 211 qualified as a crime of violence under the 2015 *Guidelines Manual*. The court held, however, that this same offense is no longer a crime of violence under the

amended crime of violence definition (Amendment 798), because it is no longer a categorical match to a combination of robbery and extortion under §4B1.2. The court also concluded that Amendment 798 does not apply retroactively, and, therefore, the defendant should be sentenced as a career offender pursuant to the unamended guideline.

**United States v. Hernandez, 894 F.3d 1104 (9th Cir. July 10, 2018).** The Ninth Circuit affirmed in part and vacated in part the defendant’s 248-month sentence for sexual exploitation of a child. The court affirmed application of the §2G2.1(b)(3) enhancement for distribution of pornography, holding that the defendant’s sharing of illicit images with the victim only, and not with any third party, qualified as “distribution” for purposes of the enhancement. However, it vacated the sentence and issued a limited remand, stating that the district court appeared to increase the defendant’s sentence, or withhold a reduction, based on the exercise of his Sixth Amendment right to proceed to trial.

**TENTH CIRCUIT**

**United States v. Sample, 901 F.3d 1196 (10th Cir. Aug. 27, 2018).** On the government’s appeal, the Tenth Circuit reversed the defendant’s 5-year probation sentence for defrauding, swindling and wire fraud, and remanded the case for resentencing. Finding the sentence substantively unreasonable, the court held that the district court gave improper weight to the defendant’s income and consequent ability to pay restitution to his victims. The court examined the sentencing factors in 18 U.S.C. § 3553(a) and stated: “Our system of justice has no sentencing discount for wealth.”

**United States v. Murphy, 901 F.3d 1185 (10th Cir. Aug. 24, 2018).** The Tenth Circuit affirmed the defendant’s 70-month sentence for drug trafficking and being a felon in possession of a firearm, upholding the district court’s application of the enhancement at §2D1.1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. The court held that, considering the totality of the circumstances, the defendant’s use of his home for occasional sales, a safe haven, a warehouse, and a headquarters for drug distribution was frequent and substantial enough to constitute a “primary use” and warrant the enhancement.

**ELEVENTH CIRCUIT**

No notable cases identified.

**D.C. CIRCUIT**

**United States v. Mosquera-Murillo, 902 F.3d 285 (D.C. Cir. Aug. 24, 2018).** The D.C. Circuit vacated and remanded the

defendants’ 10-year sentences for conspiring to distribute and possess with intent to distribute drugs in violation of the Maritime Drug Law Enforcement Act (MDLEA), holding that their statutes of conviction qualified for statutory safety valve relief under 18 U.S.C. § 3553(f). Stating that the defendants were sentenced pursuant to the 10-year mandatory minimum penalty at 21 U.S.C. § 960, the court held that an MDLEA offense is an “offense under” § 960 for purposes of statutory safety valve eligibility, even though no provision of the MDLEA itself is listed at § 3553(f). Accordingly, the court held that the district court erred in holding that the defendants were ineligible for safety valve relief, remanding to the district court to determine whether the defendants were otherwise eligible for relief. The D.C. Circuit noted that its holding differed from the Ninth and Eleventh Circuits, which held that MDLEA offenses do not qualify as “offenses under” § 960 for purposes of § 3553(f) safety valve relief.

**In re: Sealed Case, 901 F.3d 397 (D.C. Cir. Aug. 17, 2018).** The D.C. Circuit remanded the defendant’s 120-month consecutive sentences for conspiracy to distribute cocaine on board an aircraft registered in the United States and conspiracy to distribute and possess with intent to distribute 1,000 kilograms or more of marijuana, holding that the defendant’s generic appeal waiver did not waive claims regarding the effectiveness of counsel at sentencing. Explaining that the defendant had “executed a generic appeal waiver, with no explicit waiver of his right to appeal on ineffectiveness-of-counsel grounds,” the court concluded that the waiver did not prevent the defendant from appealing on that basis. The court remanded to the district court, stating that the merits of the defendant’s claim could not be resolved on the record. It noted that its decision conflicted with holdings from the Fourth, Fifth, Tenth, and Eleventh Circuits, which each held that a generic waiver does bar a defendant’s claim of ineffective assistance at sentencing.



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