

# 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 . . .

**Stokeling v. United States, 139 S. Ct. 544 (Jan. 15, 2019).** The Supreme Court held that the level of force necessary for a robbery offense to qualify as a violent felony under the elements clause of the Armed Career Criminal Act (ACCA) is “force sufficient to overcome a victim’s resistance.” The Court found this level of physical force consistent with the prevailing state law definitions of robbery at the time of the ACCA’s enactment, with the amendment history of the ACCA, and with the opinion in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). The Court concluded that the defendant’s prior conviction under Florida’s robbery statute, which requires force necessary to overcome the victim’s resistance, is a predicate violent felony under the ACCA.



## SUMMARY OF SELECT APPELLATE CASES FOR THE FIRST QUARTER OF 2019—

### FIRST CIRCUIT

**United States v. Vazquez-Mendez, 915 F.3d 85 (1st Cir. Feb. 8, 2019).** The First Circuit vacated and remanded the defendant’s sentence for revocation of supervised release, holding that the district court erred in relying on the defendant’s rehabilitation needs when it imposed an upward variance 15 months above the guideline range. The court explained that, under the Sentencing Reform Act, a court “may not impose or lengthen a prison sentence in order to promote a defendant’s rehabilitation” or enable him to complete a prison rehabilitation program. Stating that the same rule applies to resentencing after a revocation, it held that the district court’s “statements show that it did or likely did rely on rehabilitation in fixing the sentence.”

### SECOND CIRCUIT

**United States v. Moore, 916 F.3d 231 (2d Cir. Feb. 25, 2019).** The Second Circuit affirmed the defendant’s 135-month career offender sentence for federal bank robbery under 18 U.S.C. § 2113(a). It held that the district court properly determined that both federal bank robbery and

New York third-degree robbery are crimes of violence under §4B1.2. The court held that federal bank robbery “by force and violence, or by intimidation” qualifies as a crime of violence because it is specifically enumerated in the commentary to §4B1.2, and third-degree New York robbery is a violent felony under the force clause of §4B1.2(a)(1).

**United States v. Valente, 915 F.3d 916 (2d Cir. Feb. 15, 2019).** The Second Circuit vacated the defendant’s 240-month term of imprisonment, affirmed the \$8,616,113 restitution order, and remanded for resentencing, holding that the district court erred by assigning criminal history points for a sentence the defendant had not yet served, contrary to Application Note 2 to §4A1.2. Stating that the language of the application note was unambiguous, the court held that the district court’s error resulted in a higher guideline range, prejudicing the defendant, and required remand for resentencing using the correct guideline range.

**United States v. Eaglin, 913 F.3d 88 (2d Cir. Jan. 11, 2019).** The Second Circuit reversed and remanded the defendant’s 12-month sentence for violating supervised release. The court held that two special conditions, one amounting to a total ban on internet access and a second prohibiting the

defendant from viewing or possessing legal adult pornography, were not reasonably related to the sentencing factors and a greater restriction than reasonably necessary to achieve the goals of sentencing. In reversing these conditions, the Second Circuit held that the district court's justification did not sufficiently warrant the deprivation of the First Amendment rights impacted by the special conditions.

### THIRD CIRCUIT

No notable cases identified.

### FOURTH CIRCUIT

**United States v. Hawley, 919 F.3d 252 (4th Cir. Mar. 26, 2019).** The Fourth Circuit affirmed the defendant's 57-month sentence for being a felon in possession of a firearm and distributing heroin, holding that the district court properly counted in criminal history his prior uncounseled misdemeanor offense, which resulted in 30 days of imprisonment. Although the background commentary to §4A1.2 specifically includes "uncounseled misdemeanor sentences where imprisonment was not imposed," the court stated, it does not exclude uncounseled misdemeanor sentences where imprisonment *was* imposed. Rather, the court reasoned, the word "including" delineates the start of a non-exhaustive list of examples.

**United States v. Simmons, 917 F.3d 312 (4th Cir. Mar. 4, 2019) (as amended, Mar. 6, 2019).** The Fourth Circuit vacated and remanded the defendant's 36-month revocation sentence, imposed after the defendant committed a North Carolina state offense of assault with a deadly weapon on a government official. The court held that the state statute does not categorically constitute a crime of violence under §7B1.1, and that the district court therefore erred in classifying the defendant's supervised release violation as a Grade A violation. Reasoning that the state offense for assault with a deadly weapon on a government official can be committed negligently, the court held that it lacked the necessary *mens rea* to be considered a crime of violence under the guidelines.

**United States v. Martin, 916 F.3d 389 (4th Cir. Feb. 26, 2019).** In this consolidated case, the Fourth Circuit vacated and remanded the denial of two defendants' motions for sentence reduction under 18 U.S.C. § 3582(c)(2) because the district court failed to give individualized explanations for its rulings on their respective motions. Citing *United States v. Chavez-Meza*, 138 S. Ct 1959 (2018), the court recognized that the level of explanation required in ruling on a section 3582(c)(2) motion is dependent upon the

circumstances of the individual case. However, the court concluded that "given the complex record full of new mitigation evidence and the lack of the original sentencing transcript, . . ." it required more explanation.

**United States v. Simms, 914 F.3d 229 (4th Cir. Jan. 24, 2019) (en banc).** The *en banc* Fourth Circuit reversed and remanded the defendant's 199-month sentence for conspiracy to commit Hobbs Act robbery and brandishing a firearm during a crime of violence, holding that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. The court reasoned that section 924(c)(3)(B) requires a court to imagine the "idealized ordinary case of a crime, while providing no guidance on how to do so," and then "assess its speculation using a vague standard of 'substantial risk.'" The court concluded that, much like the statutes at issue in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), section 924(c)(3)(B) is void for vagueness.

**United States v. Hammond, 912 F.3d 658 (4th Cir. Jan. 4, 2019).** The Fourth Circuit affirmed the defendant's 168-month sentence for attempted bank robbery and bank robbery, holding that the defendant's prior state conviction for first-degree robbery in New York qualifies as a predicate crime of violence under the §4B1.1 career offender enhancement. The court concluded that "New York statutory robbery, irrespective of the degree of the offense, is a crime of violence, because it necessarily involves the 'use, attempted use, or threatened use of physical force against the person of another.'"

### FIFTH CIRCUIT

**United States v. Salinas, 918 F.3d 463 (5th Cir. Mar. 20, 2019) (per curiam).** The Fifth Circuit affirmed two brothers' 100-month and 78-month sentences for conspiring to transport illegal aliens by motor vehicle, holding that the district court properly applied the 10-level increase at §2L1.1(b)(7) when an alien they transported died from a heart attack while fleeing law enforcement. The court reasoned the enhancement was properly applied because testimony indicated that the heart attack was caused by the "intensity of the situation and the stress that running" put on his heart, even though the alien already had a blockage and other health issues contributing to the heart attack. In its holding, the court stated that the enhancement only requires "but-for" causation, and that it was "bound by" Supreme Court and Fifth Circuit precedent and "[its] fidelity to the text of the Guidelines."

**United States v. Garcia-Sanchez, 916 F.3d 522 (5th Cir. Feb. 22, 2019).** The Fifth Circuit affirmed the defendant's

37-month sentence for illegal reentry, upholding the district court's 8-level increase under §2L1.2(b)(3)(B) for a sentence imposed of two years or more. The court held that the district court properly applied the single sentence rule to aggregate the defendant's two prior felony convictions, resulting in the 8-level increase.

**United States v. Lord, 915 F.3d 1009 (5th Cir. Feb. 15, 2019).** Affirming the judgment of two codefendants, the Fifth Circuit reversed and remanded the sentence of a codefendant convicted of conspiracy to distribute and possess with intent to distribute controlled substances. Among other things, the court held that the district court erred in imposing a §2D1.1 increase for maintaining a premises and a §3B1.3 increase for use of special skill. It stated that the defendant lacked ownership or control over the premises, even though he acquired and stored a pill press and met with someone on the premises to calibrate and produce pills. It also held that the defendant lacked the education, skills, training, licensing, or experience to support a §3B1.3 adjustment for use of special skills.

**United States v. Najera, 915 F.3d 997 (5th Cir. Feb. 14, 2019).** The Fifth Circuit affirmed in part, and vacated and remanded in part, the defendant's 48-month sentence for transporting undocumented immigrants and conspiring to transport undocumented immigrants, holding that the court erred in denying the defendant an acceptance of responsibility adjustment. Among other things, the court held that a "defendant who proceeds to trial on an admission or a stipulation of the facts necessary for conviction *while expressly reserving the right to appeal from an adverse suppression ruling*" remains eligible for a reduction under §3E1.1. According to the court, "every action the defendant took was designed to concede factual guilt," thus demonstrating his acceptance of responsibility.

**United States v. Eaden, 914 F.3d 1004 (5th Cir. Feb. 5, 2019).** The Fifth Circuit vacated and remanded the defendant's sentence for possession of ammunition by a felon, holding that there was insufficient evidence to support imposition of the 4-level enhancement at §2K2.1(b)(6)(B). Although there was evidence that ammunition was in close proximity to illegal drugs, the court stated, the government must show additional evidence that the nearby ammunition "facilitated, or had the potential of facilitating" the other offense.

## SIXTH CIRCUIT

**United States v. Oliver, 919 F.3d 393 (6th Cir. Mar. 26, 2019).** The Sixth Circuit vacated and remanded the defendant's 210-month sentence for distribution of child pornography, holding that the district court erroneously applied

the 5-level enhancement at §2G2.2(b)(3)(B) for distributing child pornography in exchange for valuable consideration. The court explained that, based on the 2016 amendment to the guideline, the defendant's personal belief or expectation is no longer sufficient for application of the enhancement, and the distribution must be part of the defendant's obligations under an agreement with another person.

**United States v. Eason, 919 F.3d 385 (6th Cir. Mar. 22, 2019).** After the government's appeal, the Sixth Circuit reversed and remanded the defendant's 46-month sentence for being a felon in possession of a firearm, holding that his five prior Tennessee state convictions for promotion of methamphetamine manufacture were predicate serious drug offenses under the Armed Career Criminal Act (ACCA). Stating that the prior offenses involved purchasing an ingredient that could be used to produce methamphetamine with a reckless disregard of its intended use, the court held that they were serious drug offenses involving the manufacture of a controlled substance under the ACCA.

**United States v. Jackson, 918 F.3d 467 (6th Cir. Mar. 12, 2019).** In this consolidated case involving carjacking and firearms offenses, the Sixth Circuit held, among other things, that the defendants' convictions for carjacking qualify as crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3). After citing its prior decisions regarding bank robbery, the court held that carjacking by intimidation necessarily involves the threatened use of violent physical force and, thus, constitutes a crime of violence under section 924(c)(3).

**United States v. Burris, 912 F.3d 386 (6th Cir. Jan. 3, 2019) (en banc).** The *en banc* Sixth Circuit affirmed the defendant's 90-month career offender sentence for drug trafficking offenses, holding that his prior state convictions in Ohio for felonious assault and aggravated assault qualify as crimes of violence under the career offender guideline. The court first overruled its earlier opinion in *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012), stating that it wrongly held that convictions under the Ohio assault statutes do not "categorically qualify as violent-felony predicates" because those statutes do not require bodily injury. Using the modified categorical approach, the court then held that the Ohio convictions for felonious assault and aggravated assault qualify as predicate crimes of violence under the elements clause of the career offender guideline.

## SEVENTH CIRCUIT

**United States v. Briggs, 919 F.3d 1030 (7th Cir. Mar. 27, 2019).** The Seventh Circuit vacated and remanded the defendant's 84-month sentence for being a felon in possession

of a firearm, holding that the district court did not make sufficient findings to warrant a 4-level §2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with a felony. The Seventh Circuit explained that the district court applied the enhancement solely based on the defendant's felony possession of less than half of a gram of cocaine, but it "simply assumed" that the firearms were connected to the drug offense. The court concluded that the mere contemporaneous possession of firearms and drugs, without additional facts, is insufficient to support the enhancement.

**D'Antoni v. United States, 916 F.3d 658 (7th Cir. Feb. 21, 2019).** The Seventh Circuit reversed the district court's denial of a section 2255 motion to vacate a career offender sentence of 264 months for possession of cocaine, and remanded with instructions to order resentencing. Stating that the Seventh Circuit had previously held that the residual clause of the pre-*Booker* career offender guideline was unconstitutionally vague, the court held that the petitioner's prior federal conviction for conspiracy to kill a government witness did not qualify as a predicate offense under the pre-*Booker* career offender guideline.

**United States v. Moody, 915 F.3d 425 (Feb. 7, 2019).** In a case arising out of the sale of a shipment of guns stolen from a train, the Seventh Circuit vacated and remanded a 93-month sentence for possession of a firearm as a felon, possession of stolen firearms, and cargo theft. The court held that the district court committed plain error in imposing the §2K2.1(b)(5) enhancement for transferring firearms to others with knowledge or reason to believe that recipients' possession or use would be unlawful. According to the court, the only evidence relating to the unlawfulness of the recipients' possession or use of the firearms was the defendant's statement that he sold the guns to "different people who heard about it," from which the district court inferred that the defendant had reason to believe that his buyers were barred from possessing the guns legally or that they intended to use them in crimes.

## EIGHTH CIRCUIT

**United States v. Waits, 919 F.3d 1090 (8th Cir. Mar. 29, 2019).** The Eighth Circuit affirmed the defendant's 175-month sentence for conspiracy to commit wire fraud, wire fraud, bribery of an agent of a program receiving federal funds, and money laundering. The court held that the district court properly applied a §3C1.1 obstruction of justice enhancement based on the defendant's threats to retaliate against co-conspirators if they testified against him. It also affirmed the district court's calculation of the defendant's

criminal history score, and remanded the case to correct errors in the forfeiture order.

**United States v. Heaton, 918 F.3d 598 (8th Cir. Mar. 20, 2019).** On the government's appeal in a racketeering conspiracy case, the Eighth Circuit reversed the district court's order reducing the defendant's sentence from 115 to 98 months. The court held that the district court, in granting the defendant's motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) and Amendment 782 to the guidelines, impermissibly imposed a sentence below the properly-calculated guideline range of 110–137 months. Specifically, the court held that the district court erred in establishing a guideline range of 92–119 months by subtracting 18 months from the 110-month low end under §5G1.3(b) for time the defendant had served in state custody for conduct related to the instant offense. According to the court, §5G1.3(b) "does not enter into the calculation of an amended guideline range" under §1B1.10(b).

**United States v. Coleman, 918 F.3d 592 (8th Cir. Mar. 18, 2019).** The Eighth Circuit reversed the defendant's 180-month sentence for being a felon in possession of a firearm. The court held that the defendant's prior state conviction in Arkansas for kidnapping did not constitute a violent felony under 18 U.S.C. § 924(e)(2)(B) and that, as such, the defendant should not have been sentenced to the 15-year mandatory minimum required by the Armed Career Criminal Act.

**United States v. Meux, 918 F.3d 589 (8th Cir. Mar. 18, 2019) (per curiam).** The Eighth Circuit affirmed the defendant's 210-month sentence for being a felon in possession of a firearm, holding that the district court properly sentenced the defendant as an armed career criminal under 18 U.S.C. § 924(e) because his prior state drug convictions in Arkansas qualified as "serious drug offenses." The court also held that, for purposes of establishing an increased offense level under §4B1.4(b)(3)(A) and (c)(2), the district court properly determined that the defendant possessed a gun in connection with a crime of violence, where he had pointed the gun at a person attempting to repossess his car.

**United States v. Roman, 917 F.3d 1043 (8th Cir. Mar. 7, 2019).** The Eighth Circuit affirmed the defendant's 220-month sentence for conspiring to distribute methamphetamine. The court held that the district court properly sentenced the defendant as a career offender under §4B1.1 based on its determination that the defendant's prior Illinois conviction for aggravated battery on a public way constituted a crime of violence under §4B1.2(a)(1).

**United States v. Reyes-Ramirez, 916 F.3d 1146 (8th Cir. Mar. 6, 2019).** The Eighth Circuit affirmed the defendant's 144-month sentence for conspiring to distribute methamphetamine. The court held that the district court properly applied a 3-level aggravating role enhancement under §3B1.2(b) when it found that the defendant was the “key link” between the conspiracy’s source of supply and its local distributors, and that he recruited his sister to assist with deliveries.

**United States v. Peithman, 917 F.3d 635 (8th Cir. Feb. 27, 2019).** The Eighth Circuit affirmed two defendants’ convictions and sentences for conspiring to distribute drug paraphernalia, conspiring to commit mail fraud, investment of illicit drug profits, conspiring to distribute misbranded drugs, and conspiring to structure financial transactions. The court held that the district court properly relied on acquitted conduct in applying an enhancement for maintaining a dwelling under §2D1.1(b)(12), and properly applied an obstruction of justice enhancement under §3C1.1 based on the defendant’s failure to report all his assets to the probation officer during the presentence investigation. Additionally, among other issues, the court held that the district court did not err in ordering one of the defendant’s revocation sentences to run consecutive to the sentence imposed for the instant matter, under §5G1.3(b), and that, overall, both defendants’ sentences were substantively reasonable.

**United States v. Canamore, 916 F.3d 718 (8th Cir. Feb. 26, 2019).** The Eighth Circuit affirmed the defendant’s 84-month sentence for possessing a firearm as a convicted felon. The court held that in calculating a guideline range of 100–120 months, the district court properly applied enhancements under §2K2.1(b)(4)(A), for the firearm being stolen, and §2K2.1(b)(6)(B), for possessing the gun in connection with another felony offense. The court further held that the district court did not impermissibly engage in double counting when it applied both of those enhancements because, under Eighth Circuit precedent, the two subsections are “conceptually separate.”

**United States v. Brown, 916 F.3d 706 (8th Cir. Feb. 22, 2019) (per curiam).** The Eighth Circuit affirmed the defendant’s 120-month sentence for bank robbery, holding that the district court properly found the defendant’s prior state conviction for attempted robbery in Illinois qualified as a crime of violence for purposes of the career offender enhancement at §4B1.1. Noting its recent decision that Illinois robbery qualified as a crime of violence, the court held that attempted Illinois robbery also qualifies as a crime of violence.

**United States v. Johnson, 916 F.3d 701 (8th Cir. Feb. 22, 2019).** The Eighth Circuit affirmed the defendant’s 204-month sentence for possession with intent to distribute cocaine base, which was an upward variance from the defendant’s 57–71-month guideline range based on the number of unscored prior convictions. Among other things, the court observed that Supreme Court precedent allows for such a variance in appropriate cases and held that, given this defendant’s “lengthy and sustained criminal history that included a murder, a pattern of drug-related offenses, and a history of incorrigibility while on supervision,” there was no abuse of discretion.

**United States v. Bell, 915 F.3d 574 (8th Cir. Feb. 12, 2019).** The Eighth Circuit reversed and vacated a special condition of supervised release prohibiting the defendant from consuming alcohol and from frequenting establishments where alcohol was the primary item for sale, and a special condition that imposed a curfew. The court held that the sentencing court failed to follow 18 U.S.C. § 3553(a)’s command to make individualized findings regarding the necessity for these conditions and simply relied on its general experience with other offenders.

**United States v. Darden, 915 F.3d 579 (8th Cir. Feb. 12, 2019).** The Eighth Circuit, for the second time, affirmed the defendant’s 200-month sentence for possessing a firearm as a prohibited person and possessing cocaine base with the intent to distribute it. The court held, among other things, that the defendant was properly sentenced as an armed career criminal based on the district court’s conclusion that his prior convictions for Missouri second-degree assault on a law enforcement officer were violent felonies under 18 U.S.C. § 924(e)(2)(B).

**United States v. Newell, 915 F.3d 587 (8th Cir. Feb. 12, 2019).** The Eighth Circuit affirmed the district court’s modifications to the defendant’s 5-year term of supervised release. Among other things, the court held that the district court did not err in imposing a condition of supervised release restricting the defendant’s ability to access the internet without prior written permission from the probation office. Noting the defendant’s recent use of a computer to share images that were of a “sadistic and masochistic nature,” the court held that this special condition did not “involve a greater deprivation of liberty than is reasonably necessary to advance deterrence and protect the public,” as required by 18 U.S.C. § 3583(d).

**United States v. Rodriguez, 915 F.3d 532 (8th Cir. Feb. 7, 2019).** The Eighth Circuit affirmed two defendants’ convictions and 79-month and 120-month sentences for wire fraud, along with a \$298,314.42 restitution order for which

they are jointly and severally liable. With respect to defendant's 79-month sentence, the court held that even if the district court erred in upwardly departing under §5K2.0(a)(3) based on the number of victims, such error was harmless because the district court appropriately explained that it would have given the same sentence pursuant to an upward variance under 18 U.S.C. § 3553(a). With respect to the restitution order, the court held that the district court correctly deemed the defendants jointly and severally liable for the entire amount of loss.

***Dembry v. United States*, 914 F.3d 1185 (8th Cir. Feb. 5, 2019).** The Eighth Circuit affirmed the district court's denial of the defendant's 28 U.S.C. § 2255 motion to vacate his 265-month sentence as an armed career criminal under 18 U.S.C. § 924(e). Aside from the procedural issues regarding section 2255's gatekeeping requirements as affected by the Supreme Court's opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the court held that the defendant would still not be entitled to relief on the merits even without consideration of section 924(e)'s residual clause, which *Johnson* invalidated. The court stated that the defendant's prior Illinois robbery convictions qualify as violent felonies under section 924(e)'s force clause, noting the Supreme Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

***United States v. Hernandez-Loera*, 914 F.3d 621 (8th Cir. Jan. 30, 2019) (per curiam).** The Eighth Circuit affirmed the defendant's conviction and time-served sentence of 111 days and 3 years of supervised release for unlawful use of identification documents. The court held that, even though supervised release is generally deemed unnecessary in cases such as this where the defendant will likely be deported after service of his sentence, the district court did not err in imposing a 3-year term of supervised release under Application Note 5 to §5D1.1 based on its belief that such a term "would provide an added measure of deterrence and protection based on the facts and circumstances of" this case.

***United States v. Sykes*, 914 F.3d 615 (8th Cir. Jan. 30, 2019).** The Eighth Circuit affirmed the defendant's conviction and 46-month sentence for being a felon in possession of a firearm. With respect to sentencing, the court held that the district court properly enhanced the defendant's §2K2.1 base offense level based on his having been previously convicted of a crime of violence. Noting that his prior conviction for Illinois aggravated vehicular hijacking contains an element requiring the actual or threatened use of force, the court held that, under the definition of force adopted by the Supreme Court in *Stokeling v. United States*, 139 S. Ct. 544 (2019), it qualifies as a crime of violence under the guidelines.

***United States v. Mitchell*, 914 F.3d 581 (8th Cir. Jan. 23, 2019).** The Eighth Circuit affirmed the defendant's 41-month sentence for conspiracy, interstate transportation of a stolen vehicle, and access device fraud. The court held that the district court properly applied a §2B1.1(b)(10)(c) sophisticated means enhancement where the conduct of the defendant and his co-conspirators was "repetitive and coordinated" over the course of several months. Additionally, the court held that the district court did not commit procedural error in sentencing the defendant and that the sentence imposed was not substantively unreasonable because, even though the district court cited factors already accounted for by the guidelines as possibly justifying an upward variance, such a variance would have been permissible under Eighth Circuit precedent.

***United States v. Bryant*, 913 F.3d 783 (8th Cir. Jan. 22, 2019).** The Eighth Circuit affirmed the defendant's 360-month sentence for kidnapping, a sentence within the advisory guideline range calculated by the district court at sentencing. In reaching that range, the court held that the district court properly applied a cross-reference to attempted murder after hearing testimony at sentencing showing the defendant intended to kill the victim. The court also held that the district court correctly applied an enhancement for the victim suffering life-threatening bodily injuries, and that applying this enhancement on top of the base offense level for attempted murder did not constitute impermissible double counting. It also rejected the defendant's contention that the sentence imposed was substantively unreasonable.

***United States v. Patino*, 912 F.3d 473 (8th Cir. Jan. 8, 2019).** The Eighth Circuit affirmed the defendant's convictions and 40-month sentence for smuggling human growth hormone into the United States and for conspiring to distribute it for unauthorized purposes. With respect to sentencing, the court affirmed the district court's application of the sophisticated means enhancement at §2T3.1(b)(1) based on the defendant's repetitive and coordinated conduct, his use of specialized medical knowledge to create and sustain the smuggling operation, and his use of mass online marketing and misleading email addresses and packaging materials to try to hide financial transactions from authorities. The court also affirmed the district court's §4A1.3(a)(1) upward departure based on five prior convictions that were not counted in the defendant's criminal history score.

***United States v. Eagle Pipe*, 911 F.3d 1245 (8th Cir. Jan. 7, 2019).** The Eighth Circuit affirmed the defendant's 45-month sentence for domestic assault by a habitual offender. The court held that the district court did not procedurally err in upwardly departing, pursuant to §4A1.3(a)(1), from Criminal History Category I to IV in

sentencing the defendant—based on the fact that he had a significant tribal criminal history that, under §4A1.2(i), was unaccounted for in the calculation of his criminal history score. Additionally, the court held that the sentence imposed was not substantively unreasonable given the district court’s “well-supported, fully explained” basis for an upward departure to address the defendant’s extensive criminal history.

## NINTH CIRCUIT

**United States v. Jauregui, 918 F.3d 1050 (9th Cir. Mar. 22, 2019).** The Ninth Circuit vacated and remanded the defendant’s 71-month sentence for conspiracy to import methamphetamine because it exceeded the statutory maximum sentence for an offense involving marijuana. The court held that, under the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant’s plea colloquy admission that he conspired to import marijuana but that it was “reasonably foreseeable that the controlled substance may be methamphetamine” could not support a sentence exceeding the statutory maximum sentence for a marijuana offense. The court applied the 2-part test from *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003), concluding that because the defendant’s “admissions did not establish the existence of a conspiracy to import methamphetamine, he could not properly be sentenced for conspiracy to import methamphetamine.”

**United States v. Prien-Pinto, 917 F.3d 1155 (9th Cir. Mar. 12, 2019).** The Ninth Circuit affirmed the defendant’s 36-month sentence for being a felon in possession of a firearm, holding that it was proper to apply the stolen firearm enhancement at §2K2.1(b)(4) even though there was no evidence that the defendant knew the relevant firearm was stolen. Joining ten other circuits, the court reaffirmed its holding in *United States v. Goodell*, 990 F.3d 497 (9th Cir. 1993), that the lack of a *mens rea* requirement in §2K2.1(b)(4) does not violate due process.

**United States v. Vederoff, 914 F.3d 1238 (9th Cir. Feb. 1, 2019).** The Ninth Circuit vacated and remanded defendant’s 60-month career offender sentence for being a felon in possession of a firearm, holding that his prior offenses did not qualify as crimes of violence under §4B1.2. The court stated that the Washington state crime of second-degree assault is indivisible and overbroad when compared to the generic definition of aggravated assault, and that the Washington state crime of second-degree murder is indivisible and overbroad when compared to the generic definition of murder, because it includes felony murder.

**United States v. Valencia-Mendoza, 912 F.3d 1215 (9th Cir. Jan. 10, 2019).** The Ninth Circuit vacated and remanded defendant’s sentence, holding that the district court erred by imposing a 4-level increase under §2L1.2 for a prior felony conviction. The court held that the prior Washington state offense did not warrant the increase because it was not punishable by imprisonment for a term exceeding one year. To determine whether a crime is “punishable” by more than one year, according to the court, it must consider both the elements of the offense and the sentencing factors that correspond to the crime of conviction. Where the actual maximum term a defendant could receive under state law is less than the general statutory maximum, it stated, it was error to look only to the general statutory maximum. In its holding, the court overruled its past Ninth Circuit cases to the contrary, stating that they were irreconcilable with more recent Supreme Court precedent in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) and *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

## TENTH CIRCUIT

**United States v. Pullen, 913 F.3d 1270 (10th Cir. Jan. 29, 2019).** The Tenth Circuit affirmed the district court’s dismissal of the defendant’s 28 U.S.C. § 2255(h)(2) motion, agreeing that, for purposes of a second or successive 2255 motion, *Johnson v. United States*, 135 S. Ct. 2551 (2015), did not create a new rule of constitutional law retroactively applicable to the mandatory guidelines. The court explained that *Johnson* did not create a new rule of constitutional law because (1) it is an open question whether the void for vagueness doctrine applies to mandatory guidelines under *Beckles v. United States*, 137 S. Ct. 886 (2017); (2) the guidelines, even in their mandatory form, are not statutes; and (3) even a vague guideline provides “more guidance to defendants and sentencing judges than did the congressionally-enacted statutory minimum and maximum sentences that provided defendants sufficient due process.”

## ELEVENTH CIRCUIT

**United States v. Gandy, 917 F.3d 1333 (11th Cir. Mar. 6, 2019).** The Eleventh Circuit affirmed the defendant’s convictions and 300-month sentence for drug trafficking, possession of a firearm in furtherance of drug trafficking, and possession of a firearm as a convicted felon. The court held that the district court properly determined that the defendant’s prior Florida conviction for battery of a jail detainee qualified as a crime of violence under §4B1.2(a)(1), thus making the defendant a career offender. Specifically, the court held that the state statute was divisible and, under

the modified categorical approach, allowed the district court to consult the arrest report, which had been incorporated into the factual basis for the defendant's plea. Thus, the court found that the district court properly determined, based on the arresting officer's narrative, that the defendant had "necessarily" been convicted under a part of the statute having an element of force.

**United States v. Valois, 915 F.3d 717 (11th Cir. Feb. 12, 2019).** The Eleventh Circuit affirmed three defendants' convictions and sentences for trafficking cocaine in international waters, in violation of the Maritime Drug Law Enforcement Act (MDLEA). The court held, among other things, that defendants convicted of offenses under the MDLEA are not eligible for safety valve relief, rejecting the defendants' claims that the safety valve provisions at 18 U.S.C. § 3553(f) and §5C1.2 violate the Fifth Amendment's due process and self-incrimination clauses. Additionally, the court held that the district court properly denied all three defendants a minor role reduction under §3B1.2(b), where no defendant could show that he was less culpable than any other participant in the relevant conduct for which each was held accountable at sentencing.

## D.C. CIRCUIT

**United States v. Alvaran-Velez, 914 F.3d 665 (D.C. Cir. Feb. 5, 2019).** The D.C. Circuit affirmed the district court's

denial of the defendant's 18 U.S.C. § 3582(c)(2) motion for a reduction of his 2013 sentence based on Amendment 782, the retroactive "drugs-minus-two" amendment. The court held that the district court correctly determined that a policy statement promulgated in 2011 as Amendment 759 prohibited the district court from granting a reduction when the sentence it imposed in 2013 was still substantially lower than the defendant's guideline range as calculated after Amendment 782's effective date. Specifically, the court held that an ex post facto violation did not result from the decision to deny the motion for reduction.

**United States v. Flores, 912 F.3d 613 (D.C. Cir. Jan. 4, 2019).** The D.C. Circuit vacated and remanded the defendant's 144-month sentence imposed for one count of RICO conspiracy and two counts of being an accessory after the fact to murder and attempted murder. The court held that the district court erred in its guideline calculation by considering, as relevant conduct under §1B1.3(a)(1)(A), the defendant's murder of a Mexican national in Mexico to determine his base offense level. Because that murder does not constitute "racketeering activity," the court stated, the district court erred in using that act to establish an increased base offense level under §2E1.1.



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