

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 . . .



United States v. Haymond, 139 S. Ct. 2369 (June 26, 2019)

The Supreme Court struck down a provision of the federal supervised release statute, 18 U.S.C. § 3583(k), that requires a 5-year mandatory minimum sentence for offenders on supervised release who are found by a judge to have committed certain enumerated offenses while under supervision. The Court held that this statutory provision was contrary to *Alleyne v. United States*, 570 U.S. 99 (2013), which interpreted the Due Process Clause and the Sixth Amendment jury trial right to require that any facts increasing the mandatory minimum sentence be found by a jury beyond a reasonable doubt.

United States v. Davis, 139 S. Ct. 2319 (June 24, 2019)

The Supreme Court struck down as unconstitutionally vague the residual clause in 18 U.S.C. § 924(c)(3)(B), which provides mandatory minimum sentences based on using, carrying, or possessing a firearm in connection with a federal crime of violence. Holding that the residual clause was unconstitutionally vague under due process and separation of powers principles, the Court provided substantially the same reasons it had for earlier invalidating similar clauses in the Armed Career Criminal Act in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and in 18 U.S.C. § 16 in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Court rejected the government's argument that, pursuant to the canon of constitutional avoidance, section 924(c)(3)(B) could and should have been read to permit a conduct-based approach rather than the categorical approach.

Quarles v. United States, 139 S. Ct. 1872 (June 10, 2019)

The Supreme Court affirmed the defendant's sentence for being a felon in possession of a firearm, holding that his prior state conviction in Michigan for third-degree home invasion was a predicate violent felony under the enumerated offenses clause of the Armed Career Criminal Act (ACCA). It held that generic burglary under the ACCA, which encompasses "remaining-in" burglary, occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully present in a building or structure. Stating that its conclusion was supported by the decisions of all state appellate courts to address the issue by the time of the ACCA's enactment, the Court noted that the danger inherent in burglary, which led Congress to include it as a predicate offense, is no less present where the criminal intent forms after the initial unlawful entry or remaining.

Mont v. United States, 139 S. Ct. 1826 (June 6, 2019)

The Supreme Court held that the defendant's term of supervised release was tolled during his pretrial detention for a new crime that was later credited as time served. The Court ruled that such a period of pretrial detention is "a period in which the person is imprisoned in connection with a conviction" within the meaning of 18 U.S.C. § 3624(e). The Court found this construction of the statute most consistent with the breadth of the "in connection with" language and with the statutory purpose of allowing periods of non-imprisonment supervision to run concurrently with each other, but not with periods of imprisonment.

SUMMARY OF SELECT APPELLATE CASES FOR THE SECOND QUARTER OF 2019—

FIRST CIRCUIT

United States v. Flete-Garcia, 925 F.3d 17 (1st Cir. May 23, 2019). In this tax fraud conspiracy case involving access device fraud, money laundering and aggravated identify theft, the First Circuit affirmed the denial of the defendant's motion to withdraw his guilty plea, upholding the district court's 132-month sentence and \$7.7 million restitution order. Among other holdings, the court upheld application of the §2B1.1(b)(2) increase for the number of victims, rejecting the defendant's argument that Application Note 2 to §2B1.6, which prohibits applying "any specific offense characteristic for the transfer, possession, or use of a means of identification," precluded its application. The court stated that the §2B1.1(b)(2) enhancement punished the defendant for the overall breadth of his criminal activity, a factor not captured by the statute of conviction and not foreclosed by the application note. It also upheld the district court's calculations regarding loss and restitution.

United States v. Mohamed, 920 F.3d 94 (1st Cir. Apr. 3, 2019). On the government's appeal, the First Circuit vacated and remanded the defendant's 37-month sentence for being a felon in possession of a firearm, holding that the district court erred in finding that his prior state conviction in Maine for trafficking 5.7 grams of cocaine base did not qualify as a "controlled substance offense" for purposes of assigning the base offense level at §2K2.1. The court held that the intent element was not stripped away by Maine's statutory permissible inference of drug trafficking based on the quantity of drugs involved. It noted that there was no evidence that the defendant's conviction "rested on anything other than his intentional distribution plea."

SECOND CIRCUIT

United States v. Evans, 924 F.3d 21 (2d Cir. May 8, 2019). The Second Circuit affirmed the defendant's 180-month sentence for being a felon in possession of a firearm, holding that two of his prior convictions qualified as violent felonies for purposes of the Armed Career Criminal Act (ACCA). Applying the categorical approach, the court held that the defendant's prior state conviction in North Carolina for second-degree burglary qualified as a violent felony under the ACCA's enumerated offenses clause, and that his conviction for federal bank robbery qualified as a violent felony under the ACCA's elements clause.

United States v. Hendricks, 921 F.3d 320 (2d Cir. April 11, 2019). The Second Circuit affirmed the defendant's conviction and 360-month career offender sentence for credit union robbery and using a firearm during a crime of violence. The court held, among other things, that the district court properly determined that credit union robbery under 18 U.S.C. § 2113(a) is categorically a crime of violence for

conviction purposes. It noted that every circuit to address the issue has held that robbery committed by intimidation under section 2113(a) is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A) or §4B1.2(a). In addition, the court affirmed the district court's finding that the defendant was subject to a career offender sentence because his prior state convictions in New York for third-degree burglary and second-degree burglary are predicate crimes of violence under §4B1.1.

United States v. Thompson, 921 F.3d 82 (2d Cir. April 10, 2019). The Second Circuit remanded for resentencing the defendant's 60-month sentence for cyberstalking and making hoax threats, holding that the district court erred in applying a 2-level enhancement under §2A6.2(b)(1)(A) for violation of a court protection order where the defendant was not properly served with the protection order by a state-level family court. Among other things, the court held that Application Note 1 to §1B1.1 defined "court protection order" in a way that required the court issuing the order to have personal jurisdiction over the defendant, which it did not.

THIRD CIRCUIT

United States v. McCants, 920 F.3d 169 (3d Cir. Apr. 5, 2019). The Third Circuit affirmed the defendant's 120-month career offender sentence for being a felon in possession of a firearm and possession with intent to distribute heroin. The court held that the defendant's two prior state convictions in New Jersey for second-degree robbery qualify as crimes of violence under §4B1.2. It stated that they are predicate offenses under both the elements clause of §4B1.2, because the state definition of "bodily injury" falls within the definition of crime of violence, and under the enumerated offenses clause, because the state statute requires the threat of bodily injury.

FOURTH CIRCUIT

United States v. Furlow, No. 18-4531 (4th Cir. June 27, 2019). The Fourth Circuit affirmed the defendant's 180-month sentence for possession with intent to distribute drugs and possession of a firearm and ammunition by a felon, upholding enhancements under the Armed Career Criminal Act (ACCA) and the career offender guideline. The court held that the defendant's prior state convictions for distribution of crack cocaine in South Carolina and first degree arson in Georgia qualified as predicate offenses for purposes of the ACCA and the career offender guideline. It stated that the South Carolina conviction constituted a "serious drug offense" under the ACCA and a "controlled substance offense" under the career offender guideline, and held that the district court did not plainly err in ruling that

the Georgia arson statute qualified as a violent felony under the ACCA and a crime of violence under the career offender guideline.

United States v. Vanderhorst, 927 F.3d 824 (4th Cir. June 25, 2019). The Fourth Circuit affirmed the denial of the defendant's motion for resentencing under Rule 36 for a clerical error in the presentence report but disagreed with the district court's conclusion that a defendant is categorically barred from relying on Rule 36 to correct a sentence tainted by a clerical error. According to the court, the defendant was sentenced as a career offender with four prior convictions for controlled substance offenses, one of which had been incorrectly recorded in the county court clerk's office and the presentence report. The court held that a defendant may rely on Rule 36 for resentencing when a clerical error likely resulted in the imposition of a longer sentence than would have been imposed absent the error. Nonetheless, the court affirmed the decision to deny resentencing because the defendant's three other controlled substance convictions were sufficient for career offender status.

United States v. Battle, 927 F.3d 160 (4th Cir. June 11, 2019). The Fourth Circuit affirmed the district court's denial of the defendant's motion under 28 U.S.C. § 2255 to vacate his 15-year armed career criminal sentence for being a felon in possession of a firearm. The court held that the defendant's prior state conviction in Maryland for assault with intent to murder categorically qualified as a predicate violent felony for purposes of the Armed Career Criminal Act (ACCA), even after *Johnson v. United States*, 559 U.S. 133 (2015) invalidated the ACCA's residual clause. The court concluded that the Maryland assault statute, which "constitute[d] a statutory aggravated form of assault, coupled with a specific intent to murder," falls within the force clause of the ACCA.

United States v. Drummond, 925 F.3d 681 (4th Cir. June 5, 2019). The Fourth Circuit affirmed the defendant's 247-month sentence for being a felon in possession of a firearm, holding that the defendant's prior state convictions in South Carolina for criminal domestic violence categorically qualified as violent felonies for purposes of the Armed Career Criminal Act (ACCA). The court reasoned that the South Carolina statute met the force clause of the ACCA because it required, at a minimum, a threat to cause physical harm or injury to a person's own household member.

United States v. Dennings, 922 F.3d 232 (4th Cir. April 25, 2019). The Fourth Circuit affirmed the defendant's 110-month sentence for being a felon in possession of a firearm, upholding a 2-level increase under §3C1.2 for reckless endangerment during flight. The court upheld the increase for the defendant's armed flight on foot because he ignored repeated commands from a police officer to stop running, continued to flee while armed with a loaded weapon, and

appeared to be holding or reaching toward his right jacket pocket, where a loaded firearm was later discovered.

FIFTH CIRCUIT

United States v. Jones, 927 F.3d 895 (5th Cir. June 21, 2019). The Fifth Circuit affirmed the defendant's 84-month sentence for being a felon in possession of a firearm, holding that the §2K2.1(b)(4) enhancement for an altered or obliterated serial number was warranted where the metal plate reflecting the serial number had been removed from the firearm's frame but it had a legible serial number on its slide. Joining the First, Eighth, and Eleventh Circuits, the court held that §2K2.1 requires that only one serial number be altered or obliterated even if others are clearly legible, and that a serial number is "altered or obliterated" when it is "materially changed in a way that makes accurate information less accessible."

United States v. Randall, 924 F.3d 790 (5th Cir. May 22, 2019). The Fifth Circuit vacated and remanded the defendant's aggregate sentence of 45 years for possession, transportation, and production of child pornography and for committing a felony offense involving a minor while being required to register as a sex offender. The court held that the district court committed plain procedural error in calculating the offense level for child pornography production involving one victim by including as relevant conduct unadjudicated conduct involving instances of child pornography production involving five other victims, set forth in five "pseudo counts." Citing §1B1.3 and the grouping rules in §3D1.2(d), the court stated that the uncharged production offenses could not qualify as relevant conduct without evidence that the defendant either used an image of the production offense's victim to obtain images from the "pseudo count" victims, or used the images from the "pseudo count" victims to obtain images from the victim of the production conviction.

United States v. Torres, 923 F.3d 420 (5th Cir. May 6, 2019). On remand from the Supreme Court following *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Fifth Circuit affirmed the defendant's 56-month sentence for illegal reentry, holding that his prior Texas conviction for aggravated assault with a knife qualifies as a crime of violence, and accordingly, an aggravated felony for purposes of the increased statutory maximum in 8 U.S.C. § 1326(b)(2). The court concluded that knowingly threatening imminent bodily injury under the Texas provision qualifies as a crime of violence for purposes of 18 U.S.C. § 16(a).

United States v. Vasquez-Puente, 922 F.3d 700 (5th Cir. May 1, 2019). The Fifth Circuit affirmed the defendant's 51-month sentence and 3-year term of supervised release for illegal reentry, upholding two special conditions orally pronounced but not enumerated in the written judgment.

The court held that the conditions—requiring the defendant to surrender to immigration officials and requiring him to remain outside the country unless legally authorized to reenter—did not conflict with the court’s oral pronouncement.

United States v. Flores, 922 F.3d 681 (5th Cir. Apr. 30, 2019) (per curiam). The Fifth Circuit vacated and remanded the defendant’s 180-month armed career criminal sentence for being a felon in possession of a firearm. Among other things, the court held that the defendant’s prior juvenile adjudication in Texas for aggravated assault does not qualify as a predicate violent felony under the Armed Career Criminal Act (ACCA). Stating that the Texas statute does not categorically require the use or carrying of a knife, firearm, or destructive device, the court held that both the “serious bodily injury” and “deadly weapon” prongs of the Texas statute are broader than the relevant ACCA offense relating to juvenile adjudications.

United States v. Rocha Flores, 921 F.3d 1133 (5th Cir. Apr. 30, 2019) (per curiam). The Fifth Circuit affirmed the defendant’s conviction and 36-month sentence for illegal reentry, holding that his prior Texas conviction for assault of a public servant qualifies as a crime of violence, and accordingly, an aggravated felony under 8 U.S.C. § 1326(b)(2). Discussing the court’s recent decision in *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir. 2019), the court stated that the Texas “Assault Family Violence” statute at issue in that case, which qualified as a crime of violence and aggravated felony, has elements identical to the Texas assault of a public servant statute at issue in this case.

United States v. Clay, 921 F.3d 550 (5th Cir. Apr. 18, 2019), revised Apr. 25, 2019. In a challenge to a sentence increased under the Armed Career Criminal Act (ACCA), the Fifth Circuit affirmed the district court’s denial of a successive section 2255 habeas petition, holding that the defendant failed to establish, by a preponderance of the evidence, that the district court relied on the residual clause of the ACCA in imposing his sentence. As a matter of first impression for the Fifth Circuit, the court held that an inmate seeking authorization to file a successive section 2255 petition raising a claim under *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), must show it was more likely than not that he was sentenced under the residual clause. By adopting the preponderance of evidence standard, the court stated that it was joining the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits, and declining to follow the Fourth and Ninth Circuits’ “may have” standard of proof.

United States v. Hathorn, 920 F.3d 982 (5th Cir. Apr. 11, 2019). In a case involving the revocation of a drug defendant’s supervised release, the Fifth Circuit upheld a special

condition of supervised release that allowed probation officers to conduct warrantless searches of his electronic devices on reasonable suspicion. Noting that the defendant had repeatedly violated his supervised release by using drugs, the court found that the condition met the three requirements of 18 U.S.C. § 3583(d). Even though the §5D1.3(d)(4) Substance Abuse guideline recommends a few potential special conditions for defendants with substance abuse issues, the court stated, “it does not cabin a district court’s discretion to only those conditions.”

United States v. Burris, 920 F.3d 942 (5th Cir. Apr. 10, 2019). In a case involving firearms and drugs, the Fifth Circuit affirmed the defendant’s 188-month sentence, holding that the defendant’s prior state robbery conviction in Texas, whether committed by injury or by threat, qualified as a predicate violent felony under the force clause of the Armed Career Criminal Act (ACCA). Applying the holdings in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2019) (en banc), and *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019), the court stated that Texas robbery requires the “use, attempted use, or threatened use of physical force,” and that causing “bodily injury” under the Texas statute requires more force than is necessary to overcome a victim’s resistance.

United States v. Lawrence, 920 F.3d 331 (5th Cir. Apr. 8, 2019). The Fifth Circuit affirmed the defendant’s 151-month sentence for receipt and possession of child pornography, upholding the enhancement imposed under §2G2.2(b)(3)(F) for knowingly engaging in distribution. Although the mere use of a peer-to-peer network is not enough to justify the enhancement, the court held, it was properly applied where the defendant knowingly made the files available to others through the network. Stating that fact-specific determinations about knowledge should be left to district courts, the court held that the district court had “ample evidence” the defendant knew his files were accessible to others online.

United States v. Gracia-Cantu, 920 F.3d 252 (5th Cir. Apr. 2, 2019). The Fifth Circuit withdrew its prior panel opinion, substituting this opinion, and affirmed the defendant’s 41-month sentence for unlawful presence following deportation, holding that his prior state conviction in Texas for “Assault–Family Violence” is a crime of violence under 18 U.S.C. § 16(a). The court stated, consistent with prior Fifth Circuit caselaw, that the Texas statute qualifies as a crime of violence, which is intentional, knowing, or reckless conduct that employs a “force capable of causing physical pain or injury” against another.

SIXTH CIRCUIT

United States v. Mayes, No. 18-5902 (6th Cir. June 27, 2019). The Sixth Circuit affirmed the defendant’s 180-

month armed career criminal sentence for being a felon in possession of a firearm. The court held that the defendant's prior state convictions in Kentucky for trafficking cocaine continued to qualify as serious drug offenses under the Armed Career Criminal Act (ACCA), even though the maximum 10-year sentence for three of his offenses had subsequently been reduced to five years by the Kentucky legislature. The court stated, based on *McNeill v. United States*, 563 U.S. 816 (2011), that the applicable maximum term is the term in effect at the time of the defendant's state conviction for that offense.

Williams v. United States, 927 F.3d 427 (6th Cir. June 11, 2019). On the defendant's successive motion to vacate his sentence under 28 U.S.C. § 2255, the Sixth Circuit vacated and remanded his 180-month armed career criminal sentence for being a felon in possession of a firearm. Among other things, the court cited *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019), holding that the defendant's prior state conviction in Ohio for attempted felonious assault could not qualify as a predicate violent felony under the elements clause of the Armed Career Criminal Act (ACCA). It reasoned that the elements of the Ohio statute were a "categorical mismatch" with the elements clause of the ACCA and the guidelines.

United States v. Lynde, 926 F.3d 275 (6th Cir. June 7, 2019). In a case involving receipt and distribution of child pornography, the Sixth Circuit affirmed the defendant's 97-month below-guideline sentence, which included four enhancements under §2G2.2, holding that it was substantively reasonable. In doing so, the court rejected the defendant's argument that the §2G2.2 enhancements should be disregarded based on the "purported lack of empirical grounding," the frequency of their application, and the Commission's 2012 report to Congress criticizing the guideline.

United States v. Havis, 927 F.3d 382 (6th Cir. June 6, 2019) (en banc). The Sixth Circuit, *en banc*, reversed and remanded the defendant's 46-month sentence for possession of a firearm by a felon, holding that the defendant's prior state conviction in Tennessee for selling or delivering cocaine was not a controlled substance offense for purposes of the increased offense level at §2K2.1(a)(4). Finding that the Tennessee statute includes attempted transfer, the court held that it could not qualify as a prior controlled substance conviction under §4B1.2(b) because the plain language of the guideline does not include attempt crimes. In so holding, the court stated that it abrogated *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), which had held that the definition of controlled substance offense in §4B1.2(b) includes attempt crimes.

United States v. Douff, 926 F.3d 244 (6th Cir. June 4, 2019). The Sixth Circuit vacated and remanded the defendant's

135-month sentence for receipt of child pornography, holding that the district court erred in applying the enhancement for pattern of activity involving the sexual abuse or exploitation of a minor. As a matter of first impression in the circuit, the court held that the district court must use days and months, rather than whole years, to calculate the age difference under the §2G2.2(b)(5) enhancement, which applies if the perpetrator was at least four years older than the minor. Because the district court applied the wrong legal standard, the court stated, the government may introduce additional evidence about the precise age difference on remand.

United States v. Shanklin, 924 F.3d 905 (6th Cir. May 24, 2019). The Sixth Circuit affirmed the defendant's conviction and 63-month sentence for possession of a firearm by a felon, upholding application of the §2K2.1(b)(6)(B) firearms enhancement "in connection with another offense." Among other holdings, the court held that a preponderance of evidence supported application of the enhancement, under the "fortress theory," for possessing a firearm in furtherance of the felony offense of "marijuana cultivation, trafficking activity." Although the firearm was found in a bedroom apart from the growing operation in a different part of the house, the court stated, the location of the loaded weapon in the bedroom, the number and value of the marijuana plants, and the presence of drug paraphernalia throughout the house supported application of the enhancement.

United States v. Davis, 924 F.3d 899 (6th Cir. May 22, 2019). The Sixth Circuit affirmed in part, vacated in part, and remanded the defendant's 360-month sentence for transportation of a minor with intent to engage in prostitution, conspiracy to engage in sex trafficking of a minor, and sex trafficking. Among other things, the court vacated as procedurally unreasonable the district court's enhancement for exercising undue influence over a minor, despite the defendant's 16-year age gap with the defendant. It stated that the district court did not make adequate factual findings, relying almost exclusively on the rebuttable presumption in §2G1.3, Application Note 3(b), that the enhancement applies when the defendant is at least ten years older than the minor. Instead, the court stated, it should have considered record evidence rebutting that presumption.

Lowe v. United States, 920 F.3d 414 (6th Cir. Apr. 4, 2019). On appeal from the district court's denial of the defendant's successive motion to vacate under 28 U.S.C. § 2255, the Sixth Circuit reversed and remanded the defendant's 235-month sentence, enhanced under the Armed Career Criminal Act (ACCA), for possessing ammunition as a convicted felon. The court held, among other things, that the defendant's prior state conviction for rape under Tennessee law does not categorically qualify as a predicate violent felony under the ACCA. The court explained that the statute is

overbroad for ACCA purposes because a rape by “coercion” under the statute could be committed by the use of parental authority, without force.

SEVENTH CIRCUIT

Klikno v. United States, No. 16-2312 (7th Cir. June 21, 2019). In a consolidated case arising from multiple post-conviction petitions, the Seventh Circuit held that Illinois simple robbery is a violent felony under the elements clause of the Armed Career Criminal Act (ACCA). Relying on the Supreme Court’s decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), and analyzing case law from Illinois state appellate courts, the Seventh Circuit concluded that Illinois simple robbery has an element of force functionally identical to the element of “force necessary to overcome a victim’s resistance” established by *Stokeling*, and is thus a violent felony for ACCA purposes.

EIGHTH CIRCUIT

United States v. Smith, No. 17-3760 (8th Cir. June 27, 2019). The Eighth Circuit affirmed the defendant’s 120-month sentence for being a felon in possession of a firearm, holding that his prior state conviction in Arkansas for aggravated robbery qualifies as a crime of violence for purposes of the base offense level at §2K2.1(a)(1). Stating that its prior analysis on the issue of force was abrogated by *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019), the court held that Arkansas robbery, which requires sufficient force to overcome the victim’s resistance, satisfies both the elements clause and the enumerated offenses clause of §4B1.2.

United States v. Perrin, 926 F.3d 1044 (8th Cir. June 19, 2019). The Eighth Circuit affirmed the defendant’s sentence for production of child pornography and commission of a felony offense involving a minor while required to register as a sex offender, upholding a special condition imposed as part of his 20-year term of supervised release. The court held that the special condition, which prohibited the defendant from possessing or using a computer or accessing any online service without the prior approval of the probation office, did not violate the defendant’s rights under the First Amendment. Distinguishing this case from others, the court noted that the defendant had used devices for producing, and not simply possessing, child pornography, and that the condition was not a total ban on internet access.

United States v. Cloud, No. 18-1170 (8th Cir. June 17, 2019). In a case involving the sexual abuse of a minor, the Eighth Circuit affirmed the defendant’s 60-month sentence, a variance of 23 months above the top end of the guidelines. The court found the sentence procedurally reasonable, stating that the district court did not plainly err

by relying on uncontested information in the presentence report documenting the defendant’s prior unscored tribal court convictions to support its upward variance. It also held that the sentence was substantively reasonable, noting that, although the court may have mentioned potential disparities between federal and state sentences under section 3553(a)(6), it “did not afford any such disparities significant weight” in justifying its upward variance.

United States v. Williams, 926 F.3d 966 (8th Cir. June 13, 2019). The Eighth Circuit affirmed the defendants’ sentences for possession of a firearm by a felon, upholding a §2K2.1(a) base offense level enhancement for having a prior conviction for a controlled substance offense, namely, possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1). Among other things, the court held that the prior section 924(c) conviction was a controlled substance offense because the underlying felony, conspiracy to distribute controlled substances, qualified as such an offense.

United States v. Anderson, 926 F.3d 954 (8th Cir. June 12, 2019). The Eighth Circuit affirmed the defendant’s 120-month sentence for making a false statement to a licensed firearms dealer and, in doing so, rejected his claim that the sentence was procedurally and substantively unreasonable. Concerning procedural reasonableness, the court held that the district court’s explanation of its decision to upwardly vary from a guidelines range of 15–21 months to 120 months, “though perhaps testing brevity’s limits,” was sufficient in that it considered all of the defendant’s mitigation arguments but then explained that the extent of the upward variance was due in large part to the defendant’s role in an earlier assault.

Taylor v. United States, 926 F.3d 939 (8th Cir. June 7, 2019). The Eighth Circuit affirmed the district court’s denial of the petitioner’s motion to vacate his 180-month armed career criminal sentence for being a felon in possession of a firearm. In doing so, the court held that the Supreme Court’s decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), reinforced its prior holding that Minnesota simple robbery qualifies as a violent felony under the force clause of the Armed Career Criminal Act (ACCA).

Faulkner v. United States, 926 F.3d 475 (8th Cir. June 7, 2019). Affirming the denial of the petitioner’s motion to vacate his 280-month armed career criminal sentence for being a felon in possession of a firearm and ammunition, the Eighth Circuit held that the district court correctly found that the petitioner’s prior conviction for Indiana burglary qualified as generic burglary under the Armed Career Criminal Act (ACCA). The fact that Indiana burglary may encompass “outdoor, fenced-in” areas, the court stated, does not render it categorically overbroad in comparison to the definition of generic burglary.

United States v. McDaniel, 925 F.3d 381 (8th Cir. May 30, 2019). The Eighth Circuit affirmed the defendant's convictions and 622-month sentence for being a felon in possession of firearms, drug trafficking, and possessing firearms in furtherance of drug trafficking crimes. Among other things, the court held that the district court properly sentenced the defendant under the Armed Career Criminal Act (ACCA) based on three prior Missouri convictions for selling cocaine where, despite being listed in one indictment, other *Shepard* documents made clear that the offenses were "committed on occasions different from one another," as required for the ACCA to apply. In addition, the court held that the Missouri offenses qualify as "serious drug offenses" under the ACCA and, it rejected the defendant's contention that the sentence constituted cruel and unusual punishment under the Eighth Amendment.

United States v. Edger, 924 F.3d 1011 (8th Cir. May 23, 2019). The Eighth Circuit affirmed the defendant's 360-month sentence for being a felon in possession of a firearm and for conspiring to possess a firearm in furtherance of a drug trafficking crime. The court held that the district court properly applied §2K2.1(c)(1)(B) to cross reference the firearm possession offenses to the first degree murder guideline at §2A1.1 because the defendant knew the firearm he transferred to a codefendant would be used to commit violence. The court also held that, even though the indictment did not include any identifying characteristics of the firearm at issue, §2K2.1's "cited in the offense of conviction" requirement does not necessitate such characteristics being specifically included in the charging document and instead "encompasses more broadly the offense conduct giving rise to the conviction." In addition, the court rejected the defendant's claim that the government breached the plea agreement by not moving for a downward departure where the district court found that the defendant had failed to uphold his end of the agreement by fully cooperating.

United States v. Carson, 924 F.3d 467 (8th Cir. May 10, 2019). The Eighth Circuit affirmed the defendant's 20-year sentence and life term of supervised release for receipt, possession, and attempted distribution of child pornography. In rejecting the defendant's argument that the district court procedurally erred in imposing a life term of supervised release without considering the required factors under section 3583(c), the court held that a single consideration of the section 3553(a) factors "can embrace both the incarceration sentence and the supervised release term." The court also affirmed three special conditions of supervised release, including a ban from joining any social media site without prior approval of the probation office, finding that the reasons for each condition were sufficiently evident from the record—despite the district court's failure to provide an individualized explanation for each condition.

Jones v. United States, 922 F.3d 864 (8th Cir. Apr. 29, 2019). The Eighth Circuit affirmed the district court's denial of the defendant's motion to vacate his 193-month armed career criminal sentence for being a felon in possession of ammunition. The court held that, after the Supreme Court rendered unconstitutional the residual clause of the Armed Career Criminal Act (ACCA) in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), the defendant was still properly sentenced under the ACCA because his prior robbery offenses qualified as violent felonies under the ACCA's force clause. Discussing *Stokeling v. United States*, 139 S. Ct. 544 (2019), the court held that Missouri first degree robbery qualifies as a violent felony because, under Eighth Circuit precedent, "putting a victim in fear of immediate injury" satisfies the force clause.

United States v. Stovall, 921 F.3d 758 (8th Cir. Apr. 18, 2019). The Eighth Circuit affirmed the defendant's 120-month sentence and career offender designation for distributing methamphetamine. In doing so, the court held that the defendant's prior conviction for Arkansas robbery qualifies as a crime of violence under §4B1.2(a) because the statutory definition of the offense has the same elements as that of generic robbery—in that it involves "misappropriation of property under circumstances involving danger to another person."

United States v. Edmonds, 920 F.3d 1212 (8th Cir. Apr. 15, 2019). The Eighth Circuit affirmed the defendant's 80-month sentence for trafficking heroin laced with trace amounts of fentanyl and carfentanil, rejecting the defendant's arguments that the district court erred in upwardly departing and upwardly varying from his 41–51-month guideline range. Under plain error review, the court upheld the §4A1.3 departure, which was based on the 35-year-old defendant's total of 40 criminal history points, and the variance, which was based on the seriousness of the offense, including the potency of carfentanil and fentanyl in comparison to heroin.

United States v. Reif, 920 F.3d 1197 (8th Cir. Apr. 11, 2019). In a case involving distribution of heroin to a person under age 21, the Eighth Circuit affirmed the defendant's 96-month sentence, an upward departure and variance of 75 months from his guideline range. Among other things, the court held that the district court properly departed based on §5K2.1, for death resulting from heroin the defendant sold, and under §5K2.21, to account for the seriousness of a dismissed charge carrying a 20-year mandatory minimum.

Lofton v. United States, 920 F.3d 572 (8th Cir. Apr. 5, 2019). The Eighth Circuit reversed and remanded the district court's decision denying the petitioner's 28 U.S.C. § 2255 motion to vacate his 327-month armed career criminal sentence for possession of a firearm by a felon. Among other things, the court held that the defendant's prior conviction

for Illinois aggravated sexual abuse no longer qualified as a violent felony after the Supreme Court rendered unconstitutional the residual clause of the Armed Career Criminal Act (ACCA) in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). It stated that the prior offense was not a predicate offense under either the ACCA's enumerated offenses clause or, because it can be committed by a defendant having a child touch him for sexual gratification, under the force clause.

United States v. Barthman, 919 F.3d 1118 (8th Cir. Apr. 3, 2019). In this child pornography possession case, the Eighth Circuit vacated and remanded the defendant's 151-month sentence, holding that the district court plainly erred when it increased his criminal history category by assigning three additional points based on his Minnesota convictions for sexual misconduct. The court explained that the Minnesota offenses were overbroad and could not qualify as forcible sex offenses under §4B1.2(a)(2) because the Minnesota statutes of conviction applied to victims under 13 while the federal comparator statute applied to victims under 12.

United States v. Beattie, 919 F.3d 1110 (8th Cir. Apr. 1, 2019). The Eighth Circuit affirmed the defendant's 190-month sentence for receiving visual depictions of minors engaging in sexually explicit conduct. The court stated that the government had not breached the provision of the plea agreement in which it had agreed to recommend the defendant receive an acceptance of responsibility reduction under §3E1.1. According to the court, the government did not breach the agreement by stating that the court should ultimately determine whether the defendant's actions constituted grounds for denial of the reduction nor did it breach the agreement when it argued for an obstruction of justice enhancement. The court upheld the denial of a §3E1.1 reduction and the imposition of a §3C1.1 enhancement, noting that the defendant possessed a cell phone in violation of his release conditions and provided an incorrect passcode when the officers requested to search it pursuant to a warrant.

NINTH CIRCUIT

United States v. Graves, 925 F.3d 1036 (9th Cir. May 30, 2019). The Ninth Circuit vacated and remanded the defendant's mandatory life sentence for conspiracy to distribute methamphetamine, conspiracy to distribute marijuana, and possession with intent to distribute methamphetamine, enhanced pursuant to 21 U.S.C. § 841(b)(1)(A) on the basis of two prior felony drug convictions. Holding that the defendant's prior state conviction for inmate drug possession in California did not qualify as a predicate felony drug offense because it is indivisible and overbroad, the court concluded that the offense criminalizes controlled

substances under California law that are not regulated under federal law. It also held that the case should be remanded for resentencing even though the district court determined that it would have imposed a life sentence under the statutory sentencing factors, even if the enhancement did not apply.

United States v. Rodriguez, 921 F.3d 1149 (9th Cir. Apr. 24, 2019). The Ninth Circuit reversed the district court's order granting the defendant's request for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), based on Amendment 782, and remanded for supplemental drug-quantity findings. In reversing, the court clarified that, under *United States v. Mercado-Moreno*, 869 F.3d 942 (9th Cir. 2017), drug quantities in an adopted PSR are not binding in section 3582(c)(2) proceedings without a specific and explicit drug quantity finding. The court further explained that the appropriate course of action is to engage in supplemental fact-finding to determine whether it is "more likely than not" that the defendant is responsible for a drug quantity that meets the threshold and may, in its analysis, consider the "court-adopted PSR, as well as the trial and sentencing transcripts."

Mutee v. United States, 920 F.3d 624 (9th Cir. Apr. 4, 2019). The Ninth Circuit affirmed the defendant's 264-month sentence for being a felon in possession of a firearm, enhanced under the Armed Career Criminal Act (ACCA). The court held that the defendant's prior state conviction in North Carolina for breaking-or-entering qualified as a predicate violent felony under the ACCA following *United States v. Stitt*, 139 S. Ct. 399 (2018). The court relied on *Stitt's* holding that mobile structures are included in generic burglary and, overruling its prior circuit law, held that the North Carolina statute criminalizes conduct that falls within the scope of generic burglary.

TENTH CIRCUIT

United States v. Patton, 927 F.3d 1087 (10th Cir. June 24, 2019). The Tenth Circuit affirmed the defendant's 168-month sentence for aiding and abetting robbery and carrying a firearm during the robbery, holding that the relevant conduct of the defendant, the getaway driver, included his accomplice's shooting of a police officer during their flight and after the defendant had already been arrested. The court upheld the district court's imposition of 6-level increases for infliction of permanent or life-threatening bodily injury under the §2B3.1(b)(3)(C) robbery guideline and for assault on a law enforcement officer under the §3A1.2(c)(1) official victim guideline. It stated that the shooting was within the scope of the defendant's agreement to commit robbery, in furtherance of it, and foreseeable, noting that robbery is understood to include the act of fleeing and the immediate consequences of such flight.

United States v. Cabral, 926 F.3d 687 (10th Cir. Jun. 10, 2019). In a case involving possession of a firearm and ammunition by a felon, the Tenth Circuit vacated and remanded the defendant's sentence, holding that one of the conditions of supervised release imposed on him was an improper delegation of judicial power. The court stated that the condition, which allowed the probation officer to require the defendant to notify third parties if the officer determined he posed a risk to them, granted the probation officer decision-making authority that could infringe on a wide variety of liberty interests.

United States v. Yurek, 925 F.3d 423 (10th Cir. May 21, 2019). The Tenth Circuit affirmed the defendant's convictions for tax evasion and bankruptcy fraud but vacated and remanded her 27-month sentence because the district court applied the wrong legal standard when denying her mitigating role adjustment. Among other things, the court affirmed the amount of intended loss attributable to the defendant under §2B1.1, holding that intended loss from her bankruptcy fraud equaled the monetary harm she wanted to cause her creditors, including the Internal Revenue Service. Accordingly, it stated, the intended loss includes the amount of federal tax debt a defendant tries to discharge in bankruptcy. In addition, it vacated the mitigating role adjustment because the district court found only that the defendant's role had been essential to the crimes, and did not consider whether her culpability was substantially less relative to other participants in the scheme.

ELEVENTH CIRCUIT

United States v. Fox, 926 F.3d 1275 (11th Cir. June 13, 2019). The Eleventh Circuit affirmed the defendant's 360-month sentence for sexually exploiting a minor through the production of child pornography, upholding a pattern enhancement under §4B1.5(b)(1), and finding the sentence substantively reasonable. The court held that the §4B1.5(b)(1) enhancement can be imposed for repeated exploitation of a single victim, and does not require multiple victims; that unrelated incidents of abuse are not required, and; that contact can occur during the course of the underlying offense of conviction. The court also held that the sentence was substantively reasonable given the nature of the defendant's offense, regardless of age-related concerns.

United States v. Babcock, 924 F.3d 1180 (11th Cir. May 24, 2019). The Eleventh Circuit affirmed the defendant's convictions and 324-month sentence for producing a visual depiction of sexually explicit conduct with a minor. Among other things and solely with respect to the procedural reasonableness of the sentence, the court held that the district court correctly applied both a 2-level enhancement under §2G2.1(b)(2) for sexual contact occurring during a visual depiction and a 5-level enhancement under

§4B1.5(b) for a pattern of sexual contact with a minor. According to the court, simultaneous application of these enhancements constituted permissible cumulative-counting, rather than impermissible double-counting.

United States v. Rothenberg, 923 F.3d 1309 (11th Cir. May 8, 2019). In a case involving the amount of restitution owed victims by a defendant convicted of possessing child pornography, the Eleventh Circuit affirmed the district court's restitution award as to eight victims but vacated and remanded its order as to one victim. In doing so, the court rejected the defendant's argument that the district court, in ordering restitution, was required to calculate and "disaggregate" the losses caused by the original abuser-creator or distributor of the pornographic material from those caused by a later defendant possessing the images. Discussing the Supreme Court's opinion in *Paroline v. United States*, 572 U.S. 434 (2014), the court held that the district court had clearly erred in determining there was sufficient evidence to support its award to one of the victims.

United States v. Spence, 923 F.3d 929 (11th Cir. May 2, 2019). The Eleventh Circuit affirmed the defendant's 68-month sentence for possession and transportation of child pornography, holding that the district court properly considered as relevant conduct the defendant's out-of-country conduct to increase his offense level under §2G2.2(b)(3)(f) for distribution. In an issue of first impression in the Eleventh Circuit, the court joined the Seventh, Tenth, and Eighth Circuits, holding that the presumption against extraterritorial application of legislation should not be extended to preclude a district court from considering extraterritorial conduct that is otherwise properly considered relevant conduct.

United States v. Hano, 922 F.3d 1272 (11th Cir. Apr. 30, 2019). The Eleventh Circuit affirmed the defendants' convictions and 121 and 120-month sentences for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. With respect to one defendant's sentence, the court held that the district court properly applied a 4-level enhancement under §2B3.1(b)(2)(D) for his "otherwise use" of a dangerous weapon in the commission of the robbery. Specifically, the court held that even a toy gun can form the basis for an enhancement under this subsection if used to make an explicit or implicit threat against a person. The court also held that the enhancement was correctly applied in this case even though the threat was directed at a co-defendant involved in the crime, because such threat was still intended to "extort action" from another individual.

United States v. Delva, 922 F.3d 1228 (11th Cir. Apr. 29, 2019). In a conspiracy case involving aggravated identity theft and unauthorized access devices, the Eleventh Circuit affirmed the defendants' convictions and 102 and 84-month sentences. Among other things, the court upheld im-

position of a §2B1.1(b)(15)(B) offense level increase for possessing a firearm in connection with the fraud offenses. It noted that the firearm at issue, which was owned by a co-defendant, was stored in the same room at the exact time of their fraudulent operations, and that one of the defendants admitted the firearm was kept there for protection. The court also rejected one defendant's challenge to the substantive reasonableness of his 84-month sentence.

United States v. Gordillo, 920 F.3d 1292 (11th Cir. Apr. 17, 2019). The Eleventh Circuit affirmed the defendant's 24-month sentence for possession of a firearm and ammunition by a prohibited person, upholding the offense level increase imposed under §2K2.1(a)(4)(B) for an offense involving a semiautomatic firearm capable of accepting a large capacity magazine. Specifically, the court considered §2K2.1's Commentary at Application Note 2 and concluded that the district court correctly determined that a high-capacity magazine in a bag is in "close proximity" to a locked firearm in a case ten feet away in the same room.

United States v. Corbett, 921 F.3d 1032 (11th Cir. Apr. 17, 2019). In this identity fraud conspiracy case, the Eleventh Circuit vacated and remanded the defendant's concurrent "year and a day" sentences, holding that the district court committed plain error in applying a 2-level enhancement under §2B1.1(b)(2)(A)(i) for an offense involving 10 or more victims. The court stated that the district court incorrectly counted as "victims," under Application Note 4(e) to §2B1.1, every individual whose information was illegally downloaded, regardless of whether that individual's information was ever fraudulently "used" by the defendants for any purpose to which it was adapted as a means of identification. The court also held that the district court correctly calculated the loss amount under §2B1.1(b)(1)(F) to include costs associated with identifying and notifying patients whose information was compromised as reasonably foreseeable pecuniary harm.

United States v. Vereen, 920 F.3d 1300 (11th Cir. Apr. 5, 2019). The Eleventh Circuit affirmed the defendant's 293-month armed career criminal sentence for possession of a firearm by a felon. Among other things, the court held that the defendant's prior state convictions in Florida for felony battery and aggravated battery qualified as violent felonies under the elements clause of the Armed Career Criminal Act (ACCA).

United States v. Moss, 920 F.3d 752 (11th Cir. Apr. 4, 2019). The Eleventh Circuit vacated and remanded the defendant's 180-month sentence for being a felon in possession of ammunition, holding that his prior state conviction for aggravated assault in Georgia did not qualify as a predicate violent felony for purposes of the Armed Career Criminal Act (ACCA). Because the Georgia offense can be committed

with a *mens rea* of recklessness, the court stated, it was not a predicate felony under the ACCA's elements clause.

D.C. CIRCUIT

United States v. Bikundi, 926 F.3d 761 (D.C. Cir. June 11, 2019). The D.C. Circuit affirmed two defendants' convictions and respective 120 and 84-month sentences for health care fraud, money laundering, and conspiracy. Among other things, the court held that the district court properly calculated the §2B1.1(b)(1) loss amount using the guideline's special rule for determining loss in government health care program cases by using the aggregate dollar amount of fraudulent bills submitted to the government program. Upholding the abuse of trust enhancements, the court held that providers who seek payment from the government for the provision of medical services may occupy positions of trust vis-à-vis the government, joining a majority of circuits to have addressed the issue. The court also affirmed an \$80.6 million restitution award, stating that the district court properly required the defendants to prove which, if any, of the services rendered were legitimate and thus not subject to restitution. Without such proof, the court stated, the district court properly calculated restitution to include the *entire* value of services stemming from the defendants' "pervasive fraud."

United States v. Bagcho, 923 F.3d 1131 (D.C. Cir. May 14, 2019). In this drug conspiracy case, the D.C. Circuit affirmed the defendant's convictions but vacated his concurrent 300-month sentences and remanded for resentencing. The court held, among other things, that the district court incorrectly applied an enhancement under §2D1.1(b)(1) for possession of a firearm during a drug offense. Although the firearm was found on the defendant's compound, the court noted that the defendant was not present when it was found and nothing linked the firearm to the defendant. The court held that, without proof the defendant had knowledge of or exercised dominion over the firearm, there was no evidence he actually or constructively possessed it.



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