

CASE LAW QUARTERLY

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CASE LAW QUARTERLY provides brief summaries of select appellate court decisions issued each quarter of the year that involve the guidelines and other aspects of federal sentencing. The list of cases and the summaries themselves are not intended to be comprehensive. Instead, this document summarizes only a few of the relevant cases, focusing on selected sentencing topics that may be of current interest. The Commission's legal staff publishes this document to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive.

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

FIRST CIRCUIT

United States v. Nygren, 933 F.3d 76 (1st Cir. Aug. 6, 2019). The First Circuit affirmed the defendant's concurrent 95-month sentences for bank fraud, use of an unauthorized device, and tax evasion, upholding the application of a §3C1.1 enhancement for obstruction of justice. The court held, as a matter of first impression in the First Circuit, that the obstruction of justice enhancement applies to a defendant who deliberately feigns incompetency to avoid responsibility for his crimes. It also affirmed the district court's denial of a §3E1.1 reduction for acceptance of responsibility, explaining that a defendant who received an adjustment for obstruction of justice is typically ineligible for a reduction for acceptance of responsibility.

United States v. Rueda, 933 F.3d 6 (1st Cir. July 31, 2019). The First Circuit affirmed the defendant's 4-month, below-guideline sentence for one count of conspiracy to commit access device fraud, holding that the district court properly calculated loss under §2B1.1 by assessing \$500 for each of the 2,580 credit card numbers associated with a financial institution that were recovered from his co-conspirator's laptop. The court reasoned that Application Note 3(F)(i) necessarily requires that a \$500 minimum loss be attributed to each counterfeit or unauthorized access device, without additional proof that each access device "can be used," and rejected the defendant's contention that only devices actually used to make a charge could be assessed the \$500 minimum.

SECOND CIRCUIT

United States v. Parkins, 935 F.3d 63 (2d Cir. Aug. 19, 2019). In a case involving conspiracy to commit bank fraud and health care fraud, the Second Circuit vacated and remanded a condition of supervised release that required the defendant to perform 300 hours of community service each year during the 3-year term of supervised release. The court noted that, although Application Note 1 at §5F1.3 provides that community service in excess of 400 hours "generally should not be imposed," it was unclear whether

the limitation was intended to apply per year or to the full term of supervised release. Applying the rule of lenity, the court found the limitation applied to the full term of supervised release and, because the sentencing court had provided inadequate justification for more, the condition involved a greater deprivation of liberty than reasonably necessary.

United States v. Brown, 935 F.3d 43 (2d Cir. Aug. 16, 2019). The Second Circuit remanded the defendant's 39-year sentence for robbery and brandishing a firearm in furtherance of crimes of violence, holding that the district court was permitted to consider the severity of mandatory consecutive minimum sentences imposed under 18 U.S.C. § 924(c) in determining his robbery sentences. The court stated that *Dean v. United States*, 137 S. Ct. 1170 (2017), permitting consideration of the severity of mandatory consecutive minimum sentences under section 924(c) when determining the sentence for the underlying predicate offenses, abrogated its decision in *United States v. Chavez*, 549 F.3d 119 (2d Cir. 2008), which precluded consideration of such severity. Stating that it could not determine whether the sentencing court was aware of the discretion permitted by *Dean*, the court remanded for resentencing.

United States v. Sierra, 933 F.3d 95 (2d Cir. Aug. 1, 2019). The Second Circuit affirmed mandatory life sentences for the defendants, who were convicted of substantive and conspiracy counts of murder in aid of racketeering. The court rejected the defendants' argument that their sentences violated the Eighth Amendment because of their ages, which ranged from 18 to 22, explaining that *Miller v. Alabama*, 567 U.S. 460 (2012), drew the line at 18 for age-based challenges. The court also rejected one defendant's argument that his sentence violated the Eighth Amendment because it was mandatory and he did not commit the murder directly, citing to *Harmelin v. Michigan*, 501 U.S. 957 (1991).

United States v. Bleau, 930 F.3d 35 (2d Cir. July 8, 2019). The Second Circuit affirmed a below-guideline 78-month sentence for receipt and possession of child pornography but remanded the case for further consideration of a supervised release condition. The court upheld, among other

things, a §2G2.2(b)(4) enhancement for material portraying “sadistic or masochistic conduct or other depictions of violence,” joining other circuits in holding that “sadism” includes the depiction of *mental* cruelty. Regarding supervised release, the court held that the district court plainly erred in failing to explain why a condition prohibiting the defendant from having direct contact with minors without preapproval from his probation officer was “reasonably necessary” under 18 U.S.C. § 3553(a).

THIRD CIRCUIT

United States v. Aviles, 938 F.3d 503 (3d Cir. Sep. 12, 2019). The Third Circuit affirmed in part, vacated in part, and remanded for resentencing the defendant’s life sentence for 21 counts of drug trafficking and related offenses. Among other things, the court held that the district court erred in imposing a mandatory life sentence under the Controlled Substances Act (CSA), which provides for a mandatory life sentence where a defendant has been convicted of at least two “felony drug offenses.” The court held that two of the defendant’s three prior state convictions did not qualify as predicate felony drug offenses for purposes of the CSA. Finding that neither the defendant’s New Jersey conviction for maintaining or operating a controlled dangerous substance production facility nor his Maryland conviction for possession with intent to distribute a controlled dangerous substance qualified as a felony drug offense, the court vacated his life term and remanded for resentencing.

FOURTH CIRCUIT

United States v. Norman, 935 F.3d 232 (4th Cir. Aug. 15, 2019). In a case involving firearms offenses and possession with intent to distribute drugs, the Fourth Circuit affirmed the defendant’s 156-month sentence, which included a 6-level increase under §2K2.1(a)(4) for a prior drug conspiracy conviction. The court held, among other things, that the defendant’s prior federal conviction for conspiracy to possess with intent to distribute cocaine and cocaine base under 21 U.S.C. § 846 did not constitute a “controlled substance offense” as defined in §4B1.2 because “conspiracy” under section 846 does not require an overt act. Because the generic definition of conspiracy requires an overt act, the court stated, the prior conspiracy conviction could not categorically qualify the defendant for the §2K2.1(a)(4) increase. However, the court concluded that the circuit’s precedent “sufficiently muddied the water such that ‘the district court’s error was not so clear or obvious as to be plain.”

United States v. Walker, 934 F.3d 375 (4th Cir. Aug 9, 2019). In a case involving firearms and kidnapping offenses, the Fourth Circuit vacated and remanded the defendant’s conviction and 84-month sentence for brandishing a firearm during and in relation to a crime of violence

in violation of 18 U.S.C. § 924(c), which was imposed consecutively to a 324-month sentence for kidnapping. The court held that the district court plainly erred in finding the defendant guilty under section 924(c). Because *United States v. Davis*, 139 S. Ct. 2319 (2019) held that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, the court considered whether kidnapping qualified as a crime of violence under the force clause of section 924. Explaining that the defendant’s concomitant offense of kidnapping under 18 U.S.C. § 1201(a) may be committed without violence, the court held that it could not meet the requirements of the force clause.

United States v. Mathis, 932 F.3d 242 (4th Cir. July 31, 2019). In this consolidated case, the Fourth Circuit affirmed in part, vacated in part, and remanded for resentencing the life sentences of four defendants who had been convicted, among other things, of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), violent crimes in aid of racketeering activity (VICAR) by committing kidnapping and murder under Virginia law, Hobbs Act robbery, witness tampering by means of murder, and multiple firearm offenses under 18 U.S.C. § 924(c). Among other things, the defendants challenged their section 924(c) convictions, arguing that the various predicate offenses underlying those convictions do not qualify as crimes of violence under the statute’s force clause. The court held that VICAR by committing murder in violation of Virginia law, witness tampering by means of murder, and Hobbs Act robbery were all crimes of violence that properly serve as predicate offenses for the section 924(c) convictions. However, it vacated the section 924(c) convictions stemming from the commission of VICAR based on kidnapping, stating that they did not qualify as crimes of violence because kidnapping under Virginia law can be committed without the use of force.

United States v. Cornette, 932 F.3d 204 (4th Cir. July 30, 2019). Granting the defendant’s successive 28 U.S.C. § 2255 petition, the Fourth Circuit reversed and remanded his 220-month armed career criminal sentence for being a felon in possession of a firearm. Holding that the appeal waiver in the defendant’s plea agreement did not bar his claim, the court held that two of his prior offenses could no longer qualify as predicates under the Armed Career Criminal Act (ACCA) following *Welch v. United States*, 136 S. Ct. 1257 (2019), which made retroactive the holding of *Johnson v. United States*, 135 S. Ct. 2551 (2105), striking the residual clause. The court held that the defendant’s prior Georgia burglary conviction did not qualify as a violent felony because the Georgia statute was overbroad compared to the generic burglary crime in the ACCA’s enumerated offenses clause. It also held that the North Carolina controlled substance offense did not qualify as a “serious drug offense” under the ACCA because the presumptive

sentence was only three years, and there were no aggravating factors for a higher sentence.

United States v. Dinkins, 928 F.3d 349 (4th Cir. July 1, 2019). The Fourth Circuit affirmed the district court’s dismissal of the defendant’s motion to vacate under 28 U.S.C. § 2255, holding that his prior state conviction for North Carolina common law robbery categorically qualified as a violent felony predicate under the Armed Career Criminal Act (ACCA). In doing so, the court relied on the Supreme Court’s holding regarding “physical force” in *Stokeling v. United States*, 139 S. Ct. 544 (2019), which abrogated the Fourth Circuit’s opinion in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016). The court also held that the defendant’s prior North Carolina state conviction for being an accessory before the fact of armed robbery qualified as a predicate violent felony because that offense incorporates the elements of armed robbery, which is itself a violent felony.

FIFTH CIRCUIT

United States v. Reece, 938 F.3d 630 (5th Cir. Sept. 30, 2019). In a case involving a series of bank robberies, the Fifth Circuit vacated and remanded three convictions and the sentence imposed for using a firearm during a crime of violence, holding that conspiracy to commit bank robbery is not a predicate crime of violence for purposes of 18 U.S.C. § 924(c). After issuing a certificate of appealability following the district court’s denial of the defendant’s 28 U.S.C. § 2255 motion, the Fifth Circuit held that the intervening Supreme Court decision in *United States v. Davis*, 129 S. Ct. 2319 (2019), holding the residual clause of section 924(c)(3) unconstitutional, announced a new rule of constitutional law that applies retroactively on collateral review. The court then held that, based on *Davis*, conspiracy to commit bank robbery was no longer a crime of violence under the residual clause in section 924(c)(3)(B). The court also found that conspiracy to commit bank robbery did not qualify as a crime of violence under the elements clause in section 924(c)(3)(A) because it did not require proof of the use, attempted use, or threatened use of physical force.

United States v. Kalu, 936 F.3d 678 (5th Cir. Aug. 30, 2019). The Fifth Circuit affirmed the defendant’s 70-month sentence for conspiracy to commit healthcare fraud. The court held, among other things, that the court did not err in applying the 2-level enhancement at §2B1.1(b)(11)(C)(i) for using a means of identification to produce or obtain other means of identification, where Medicare administratively generated claim numbers in response to the defendant’s false billing submissions. In its decision, the court reasoned that the defendant’s conduct is similar to the bank loan example in Application Note 10(C)(ii)(I), where an offender

can receive the §2B1.1(b)(11)(C)(i) increase if he or she obtains a bank loan in an individual’s name, considering that the account number generated for the bank loan is the “other means of identification.”

United States v. Pervis, 937 F.3d 546 (5th Cir. Aug. 30, 2019). The Fifth Circuit affirmed two co-defendants’ convictions and sentences for bank robbery, which included additional sentences under 18 U.S.C. § 924(c) for carrying firearms during the robbery. The court held, among other things, that 18 U.S.C. § 2113(a) bank robbery is a crime of violence under the elements clause in section 924(c)(3)(A) because, even though it may be committed by intimidation, intimidation necessarily involves a threatened use of force. In its decision, the court relied on *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017), which held that federal bank robbery qualifies as a crime of violence for purposes of §4B1.2(a)(1), reasoning that section 924(c)(3)(A) is similarly worded.

United States v. London, 937 F.3d 502 (5th Cir. Aug. 29, 2019). The Fifth Circuit affirmed the district court’s denial of the defendant’s 28 U.S.C. § 2255 motion, which challenged the guidelines’ career offender provision, as untimely. Rejecting the defendant’s argument that his pre-Booker career offender sentence violated constitutional due process based on *Johnson v. United States*, 135 S. Ct. 2251 (2015), the court held that *Johnson* did not restart the time to file a habeas motion because the defendant’s claim did not assert the same right recognized by the Supreme Court in *Johnson*. The court explained that *Johnson* decided a challenge to the residual clause in the Armed Career Criminal Act (ACCA), a statute that carries mandatory minimum and maximum sentences, as opposed to the guidelines, which “only cabin[] a judge’s discretion in choosing a sentence within the statutory range.” By holding that the defendant’s motion was untimely, the court agreed with the decisions of the Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits, and declined to follow the Seventh Circuit.

United States v. Aguilar-Alonzo, 936 F.3d 278 (5th Cir. Aug. 27, 2019). The Fifth Circuit vacated and remanded the defendant’s 70-month sentence for aiding and abetting possession with intent to distribute marijuana, holding that the district court clearly erred in applying the §2D1.1 enhancement for using fear or affection to involve another individual in the offense. The court held there was no evidence that the defendant used affection to recruit his girlfriend to participate, even though his girlfriend was pregnant and subjectively believed he would break up with her if she did not help him.

United States v. Jones, 935 F.3d 266 (5th Cir. Aug. 12, 2019) (per curiam). On a second appeal, the Fifth Circuit vacated and remanded the convictions of three defendants for causing death through the use of a firearm, conspiracy

to possess firearms, and use of a firearm during a crime of violence. The court held that the section 924(c) convictions relied on an invalid predicate for a crime of violence, that is, racketeering conspiracy. The court noted that in *United States v. Davis*, 139 S. Ct. 2319 (2019), holding the residual clause in section 924(c)(3)(B) unconstitutionally vague, the Supreme Court left intact its holding in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), that Hobbs Act conspiracy is not a crime of violence for purposes of section 924(c) because such a conspiracy is merely an agreement to commit an offense.

United States v. Hegwood, 934 F.3d 414 (5th Cir. Aug. 8, 2019). On the defendant's appeal from a resentencing for possession with intent to distribute cocaine base, the Fifth Circuit affirmed the defendant's 153-month sentence, which had been reduced pursuant to the First Step Act, Pub. L. No. 115–391, title IV, § 404, 132 Stat. 5194 (2018). The court held that, because Congress expressly “back-dat[ed]” only Sections 2 and 3 of the Fair Sentencing Act, the First Step Act does not allow for plenary resentencing proceedings and instead grants a district judge only limited authority to impose a reduced sentence “by placing itself in the time frame of the original sentencing [and] altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act.” On that basis, the Fifth Circuit held that the district court did not err in continuing to apply the career offender enhancement even though subsequent circuit case law may have cast doubt on the defendant's predicate convictions.

United States v. Escalante, 933 F.3d 395 (5th Cir. Aug. 2, 2019). The Fifth Circuit vacated and remanded the defendant's 48-month above-guideline sentence for failure to register as a sex offender, holding that the district court erred in determining that the defendant's prior Utah conviction for unlawful sexual activity with a minor was a predicate offense for determining a tier II sex offender designation under the Sexual Offense Registration and Notification Act (SORNA). The court found that, under the categorical approach, the Utah statute under which the defendant was convicted swept more broadly than the comparable federal offense. While the categorical approach applies to determine the appropriate SORNA sex offender tier, it stated, the text of SORNA requires a circumstance-specific approach for the limited purpose of determining whether the victim actually was a minor at the time of the relevant offense. However, the court held, as a matter of first impression, that a standard categorical approach applies to the offender-victim age differential required as an element of a cross-referenced federal offense, and that the court erred in considering the circumstance-specific facts of the age differential.

United States v. Fields, 932 F.3d 316 (5th Cir. July 29, 2019). The Fifth Circuit affirmed the defendant's 60-month

sentence for being a felon in possession of a firearm, holding that the district court did not err when it imposed a 14-month upward variance relying, in part, on a factual recitation in the presentence investigation report (PSR) describing two prior child abuse arrests that were “no-billed” by Texas grand juries. Noting that a sentencing court may not rely on a bare arrest record, the court stated that the PSR's factual recitations of the prior arrest conduct had sufficient indicia of reliability for the district court to find the defendant committed the underlying activities and to base his sentence in part upon those activities. While a grand jury could return a no-bill for a myriad of reasons, the court stated, the no-bill alone “cannot transform a factual recitation with sufficient indicia of reliability into one that lacks such indicia.”

United States v. Cortez-Gonzalez, 929 F.3d 200 (5th Cir. July 2, 2019). The Fifth Circuit affirmed the defendant's 37-month sentence for transporting illegal aliens, holding that it was proper to apply the 4-level increase under §2L1.1(b)(3)(B) for two or more prior felony convictions for immigration and naturalization offenses, even though one of the prior convictions was ineligible for criminal history points under §4A1.2(e). The court described the language of §2L1.1 as unambiguous and containing no temporal limit to applicable prior convictions.

SIXTH CIRCUIT

United States v. Bowens, 938 F.3d 790 (6th Cir. Sept. 12, 2019). The Sixth Circuit affirmed the defendants' convictions for possession of firearms while being unlawful users of marijuana but vacated and remanded the sentence of one defendant. The court held, among other things, that the district court erroneously applied the firearms enhancement at §2K2.1(b)(1)(A) for possessing three firearms. The court found that the defendant's possession of a third firearm, which he left under a pillow at his mother's house four months before the offense at issue, should not have been counted as relevant conduct because the circumstances of that possession were unrelated to the offense of conviction. The court concluded that the earlier possession was not relevant conduct for purposes of the enhancement, pointing to the lack of regularity and similarity, and the weak temporal proximity.

Greer v. United States, 938 F.3d 766 (6th Cir. Sept. 12, 2019). On appeal from the district court's denial of the defendant's 28 U.S.C. § 2255 motion, the Sixth Circuit affirmed the defendant's 272-month sentence, enhanced under the Armed Career Criminal Act (ACCA), for being a felon in possession of a firearm, armed bank robbery, and use of a firearm during a crime of violence. Among other things, the court held that the defendant's prior state convictions in Ohio for aggravated burglary categorically qual-

ify as violent felonies under the ACCA's enumerated offenses clause. Relying on the rationale used by the Supreme Court in analyzing the Tennessee and Arkansas statutes in *United States v. Stitt*, 139 S. Ct. 399 (2018), the court noted that the presence requirement in Ohio's burglary statute focused on those type of burglaries that carry a serious risk of violence.

United States v. Boucher, 937 F.3d 702 (6th Cir. Sept. 9, 2019). On the government's appeal, the Sixth Circuit vacated and remanded the defendant's 30-day sentence for assaulting a member of Congress as substantively unreasonable, holding, among other things, that the district court did not give a "sufficiently compelling" reason for the "dramatic downward variance" from the guideline range of 21 to 27 months. It found that the district court gave little weight to the seriousness of the victim's injuries, ignored general deterrence, and placed too much weight on disfavored characteristics, including the defendant's education, professional success, and standing in the community.

Bullard v. United States, 937 F.3d 654 (6th Cir. Sept. 4, 2019). The Sixth Circuit affirmed the denial of the defendant's 28 U.S.C. § 2255 petition, which challenged the district court's determination that he qualified as a career offender based on a prior Arizona conviction for attempting to sell drugs. The court agreed with the defendant that, after its recent decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. June 6, 2019) (en banc), attempt crimes no longer qualify as "controlled substance offenses" for purposes of the §4B1.1 career offender enhancement. However, it held that the defendant could not use section 2255, or the decision in *Havis*, to attack collaterally his career offender designation. The court also found that the defendant was not prejudiced by alleged ineffective assistance of counsel.

Knight v. United States, 936 F.3d 495 (6th Cir. Aug. 27, 2019). On appeal from the denial of the defendant's motion to amend his 28 U.S.C. § 2255 petition to challenge his convictions under 18 U.S.C. § 924(c), the Sixth Circuit vacated his conviction for use of a gun in relation to kidnapping, affirmed his conviction for use of a gun in relation to assault and robbery, and remanded. While the appeal was pending, the Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the residual clause in section 924(c)(3)(B) is unconstitutionally vague. Based on *Davis*, the government conceded that the kidnapping conviction was not a crime of violence, and the Sixth Circuit vacated it. The court concluded, however, that the defendant's conviction for use of a firearm in relation to aggravated assault and robbery is a crime of violence under the elements clause of section 924(c)(3)(A).

United States v. Johnson, 933 F.3d 540 (6th Cir. Aug. 5, 2019). The Sixth Circuit affirmed the defendant's 71-

month sentence, which the district court imposed on resentencing, holding that the district court properly applied an increased base offense level under §2K2.1(a)(2) because two prior state felony convictions qualified as crimes of violence. Specifically, the court held that the defendant's prior Ohio conviction for robbery qualified as a crime of violence under §4B1.2 because the relevant subsection of the state statute, requiring a person to inflict, attempt to inflict, or threaten to inflict physical harm, requires at least the "physical force" contemplated by the guideline. The court also found, among other things, that the defendant's prior Ohio conviction for complicity to commit aggravated robbery qualified as a crime of violence under §4B1.2 because complicity to commit aggravated robbery requires that the elements of aggravated robbery, including physical force, had been proved.

United States v. Bailey, 931 F.3d 558 (6th Cir. July 26, 2019). The Sixth Circuit affirmed the defendant's 78-month sentence for witness retaliation, upholding application of the cross reference at §2J1.2(c)(1) for obstructing the "prosecution of an offense" by threatening to assault a victim who testified. Affirming the increased offense level applied by cross reference to §2X3.1 (Accessory After the Fact), the court held that the cross reference applies to "attempted obstruction of justice," that it applies to statements made in the sentencing stage of a prosecution, and that it does not require involvement in the underlying crime. It also held the sentence procedurally and substantively reasonable.

United States v. Sulik, 929 F.3d 335 (6th Cir. July 3, 2019). The Sixth Circuit affirmed the defendant's 48-month sentence for cyberstalking, upholding application of the 6-level official victim enhancement at §3A1.2 for threats to a Congress member. The court rejected the defendant's argument that he was motivated by the content of the member's statements, not his official status, noting that he learned of the victim's statements because of his official status and he sent threats to the victim's official campaign address, not his personal address.

SEVENTH CIRCUIT

United States v. Gardner, No. 18-1731 (7th Cir. Sept. 30, 2019). The Seventh Circuit affirmed the defendant's 100-month sentence for being a felon in possession of a firearm, an above-guideline sentence based in part on the defendant's use of violence in a prior burglary. The court held, among other things, that the categorical approach does not apply when a judge imposes an above-guideline sentence based on a defendant's aggravating conduct in a prior offense. It stated: "The sentencing judge may consider aggravating circumstances in a defendant's criminal record without the constraints imposed by the categorical ap-

proach that usually applies to statutory sentencing enhancements and the determination of offense-level increases and criminal-history points under the Sentencing Guidelines.” The court emphasized that discretion has replaced formal departure analysis, and that courts do not have to analogize to the guidelines when explaining a variant sentence.

United States v. Barber, 937 F.3d 965 (7th Cir. Aug. 27, 2019). The Seventh Circuit affirmed the defendant’s conviction and 210-month sentence for stealing firearms from a licensed firearms dealer, being a felon in possession of a firearm, and possessing stolen firearms. Among other things, the court upheld imposition of a 2-level adjustment for obstruction of justice under §3C1.1, where, carved into a bench at the courthouse near where the defendant was sitting during trial were these words: “Tell [a co-conspirator] to think b4 h get on there n lie.” The court rejected the defendant’s argument that, with those words, he was encouraging his co-conspirator to tell the truth, reasoning that the more likely scenario is that he wanted to discourage him from testifying against him.

United States v. Adams, 934 F.3d 720 (7th Cir. Aug. 20, 2019). The Seventh Circuit affirmed the defendant’s conviction and 84-month sentence for being a felon in possession of a firearm. Among other things, the court upheld application of an increased base offense level under §2K2.1(a)(4), holding that the defendant’s prior state methamphetamine conspiracy conviction in Illinois met the definition of a controlled substance offense under §4B1.2. The court found that the guidelines do not impermissibly expand the definition of “controlled substance offense” for purposes of §4B1.2 by putting inchoate offenses in Application Note 1 rather than the guideline itself, and instead followed *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012), which held that the inclusion of conspiracy in Application Note 1 did not conflict with the text of §4B1.2(b). The court noted that the Sentencing Commission had published a proposed amendment to §4B1.2 that would add the inchoate offense language to the guideline text.

United States v. Brazier, 933 F.3d 796 (7th Cir. Aug. 12, 2019). In a case involving codefendants convicted of kidnapping, ransom demand, and various firearm offenses, the Seventh Circuit affirmed one defendant’s 444-month sentence but reversed the section 18 U.S.C. § 924(c) convictions for the other defendants, vacating their 528-month and 656-month sentences. Citing circuit precedent, the court held that neither kidnapping nor holding a person for ransom, both of which can be accomplished without threat of force or violence, categorically satisfies the elements clause of section 924(c). In addition to other holdings, the court also held that the defendants’ convictions could not be upheld under the residual clause because of *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the

residual clause in section 924(c)(3)(B) is unconstitutionally vague.

United States v. Herman, 930 F.3d 872 (7th Cir. July 18, 2019). The Seventh Circuit vacated the defendant’s 120-month sentence for possessing a firearm as a felon and remanded for resentencing. The court disagreed with the district court’s imposition of a §2B3.1(b)(4)(B) enhancement for physical restraint of a victim in a robbery where the defendant held his victims at gunpoint and ordered them to stay seated while robbing them. The Seventh Circuit held that psychological coercion, including a threat at gunpoint, does not constitute “physical restraint” within the meaning of the enhancement and, noting a circuit split, disapproved of any earlier cases that allowed application of the enhancement based solely on psychological coercion.

EIGHTH CIRCUIT

United States v. Block, 935 F.3d 655 (8th Cir. Sept. 9, 2019). The Eighth Circuit affirmed the defendant’s armed career criminal sentence for possessing a firearm as a felon, holding that the defendant’s prior Arkansas conviction for second-degree battery qualified as a violent felony for purposes of the Armed Career Criminal Act (ACCA). It also held that his prior Texas convictions for delivery of a controlled substance, which could be committed through offers to sell, qualified as serious drug offenses, noting that the ACCA’s “serious drug offense” definition encompasses offenses “related to or connected with” drug manufacture, distribution, or possession with intent to do either.

United States v. Merritt, 934 F.3d 809 (8th Cir. Aug. 16, 2019). The Eighth Circuit affirmed the defendant’s 46-month sentence for being a felon in possession of a firearm, upholding application of an enhanced offense level under §2K2.1(a)(4)(A). The court held that the defendant’s prior federal drug conspiracy conviction qualifies as a “controlled substance offense” under §4B1.2(b). The court rejected the argument that Application Note 1 improperly adds conspiracy offenses to §4B1.2(b), stating it was bound by Eighth Circuit precedent holding that conspiracy to commit a “controlled substance offense” is itself a “controlled substance offense.” Noting a circuit split regarding whether it is necessary to determine whether a federal conspiracy statute is a categorical match for generic conspiracy, the court held that the defendant could not satisfy the requirements of plain error review.

United States v. Clark, 932 F.3d 1064 (8th Cir. July 31, 2019). The Eighth Circuit affirmed the defendant’s 137-month sentence for being a felon in possession of a firearm, which had been enhanced under the Armed Career Criminal Act (ACCA). In upholding the ACCA enhancement, the court held, among other things, that the district court properly concluded that the defendant’s two prior convictions for distributing cocaine base were “separate predicate

offenses” because they were “punctuated events” within the larger drug conspiracy for which he had also been charged in the same indictment. The court pointed to *United States v. Melbie*, 751 F.3d 586 (8th Cir. 2014), which held that a drug conspiracy conviction and a possession-with-intent-to-deliver conviction that occurred during the period of the charged conspiracy were each separate qualifying predicate offenses because the latter was a “punctuated event” within the conspiracy.

United States v. Berry, 930 F.3d 997 (8th Cir. July 22, 2019).

The Eighth Circuit affirmed the defendant’s 300-month sentence for drug trafficking. Among other things, the court upheld the district court’s §1B1.3(a)(2) relevant conduct determination, holding that the defendant’s 2015 drug activity was part of the same course of conduct as the 2017 charged activity. It also upheld the §2D1.1(b)(15)(E) criminal livelihood enhancement, holding as a matter of first impression for the circuit, that “income,” for purposes of the enhancement, refers to *gross* income as opposed to net income.

United States v. Moody, 930 F.3d 991 (8th Cir. July 19, 2019).

The Eighth Circuit vacated and remanded the defendant’s two consecutive 4-month sentences for two counts of possessing a prohibited object in prison, finding that the district court mistakenly believed the statute required it to impose the two sentences consecutively. Although the statute at issue, 18 U.S.C. § 1791, requires that the sentences run consecutive to the undischarged term being served, the court stated, it does not require that the two new sentences run consecutively rather than concurrently.

Brown v. United States, 929 F.3d 554 (8th Cir. July 3, 2019).

The Eighth Circuit vacated the defendant’s 180-month armed career criminal sentence for being a felon in possession of a firearm, and remanded for resentencing. The court held that the defendant’s prior state conviction for second-degree burglary in Missouri was not a predicate violent felony for purposes of the Armed Career Criminal Act (ACCA), stating that the definition of second-degree burglary under the Missouri statute was not a categorical match to the definition of generic burglary under the enumerated offenses clause of the ACCA.

NINTH CIRCUIT

United States v. Shelby, No. 18-35515 (9th Cir. Sept. 19, 2019).

The Ninth Circuit reversed the denial of a 28 U.S.C. § 2255 motion and remanded for resentencing the defendant’s 15-year mandatory minimum sentence, which was imposed pursuant to the Armed Career Criminal Act (ACCA). The court held the defendant’s prior Oregon convictions for first-degree robbery are not violent felonies under the ACCA’s elements clause. The Ninth Circuit stated that its earlier decision holding that the base Oregon rob-

bery statute is not a violent felony remains good law, noting that it is not “clearly irreconcilable” with *Stokeling v. United States*, 139 S. Ct. 544 (2019).

United States v. Schopp, 938 F.3d 1053 (9th Cir. Sept. 16, 2019).

The Ninth Circuit reversed and remanded the defendant’s life sentence for producing child pornography under 18 U.S.C. § 2251(e), which provides an enhanced sentencing range of 35 years to life in prison if the defendant was previously convicted of two or more state convictions “relating to the sexual exploitation of children.” In a matter of first impression for the circuit, the court defined the generic federal offense of “sexual exploitation of children” as the production of child pornography. The court held, under the categorical approach, that the defendant’s prior Alaska convictions involving sexual assault and sexual abuse of minors did not involve visual depictions of minors and therefore did not “relat[e] to the sexual exploitation of children.” The court noted its holding conflicts with the Fourth and Eighth Circuits, which held the generic definition means “taking advantage of children for selfish and sexual purposes” and “any criminal sexual conduct with a child,” respectively.

United States v. Campbell, 937 F.3d 1254 (9th Cir. Sept. 11, 2019).

In a case involving a violation of supervised release, the Ninth Circuit affirmed the defendant’s sentence, which included five consecutive 6-month prison terms, holding that it was not plain error to impose consecutive prison terms following the revocation of concurrent supervised release terms. Noting that 18 U.S.C. § 3584(a) gives the district court discretion to impose concurrent or consecutive terms for the revocation of concurrent supervised release terms, the court rejected the defendant’s argument that Chapter 7 of the guidelines precludes this discretion. The court joined the Fifth and Eleventh Circuits in holding that the guidelines’ silence on the issue should be read to permit such discretion.

United States v. Fitzgerald, 935 F.3d 814 (9th Cir. Aug. 26, 2019).

On the government’s appeal, the Ninth Circuit vacated and remanded the defendant’s sentence for unlawful possession of a firearm. The court held that the defendant’s prior Nevada conviction for attempted battery with substantial bodily harm qualified as a crime of violence, and that the defendant should have been subject to the increased base offense level provided at §2K2.1(a)(4)(A). Rejecting the defendant’s argument that Nevada precedent allowed for the offense to be committed by a mere touch, the court explained that, for the defendant to prevail, he would have to demonstrate that a defendant could *realistically* be convicted of attempted battery with substantial bodily harm without the attempted use of violent force.

United States v. Cuevas-Lopez, 934 F.3d 1056 (9th Cir. Aug. 19, 2019).

The Ninth Circuit affirmed the defendant’s

37-month sentence for attempted illegal reentry after deportation, holding that the “single sentence rule” at §4A1.2(a)(2) applies to the enhancements in §2L1.2(b)(2) and (b)(3). The court thus upheld application of a 10-level enhancement at §2L1.2(b)(3)(A) based on two prior 3.5-year consecutive sentences imposed on the same day, holding it was proper to aggregate these sentences into a single 7-year sentence for purposes of §2L1.2.

United States v. Begay, 934 F.3d 1033 (9th Cir. Aug. 19, 2019). The Ninth Circuit, among other holdings, reversed the defendant’s conviction for discharging a firearm during a crime of violence, holding that second-degree murder in Indian country was not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). Applying prior Ninth Circuit case law holding that a crime of violence under section 924(c)(3) requires the intentional use of force, the court reasoned that second-degree murder can be committed recklessly.

United States v. Crum, 934 F.3d 963 (9th Cir. Aug. 16, 2019) (per curiam). On the government’s appeal, the Ninth Circuit vacated and remanded the defendant’s 25-month sentence for being a felon in possession of a firearm, holding that his base offense level should have been increased under §2K2.1(a)(4)(A). The court held that the defendant’s prior Oregon conviction for delivery of methamphetamine—which can be committed through soliciting another person to deliver a controlled substance or offering to sell a controlled substance—qualifies as a “controlled substance offense” under §4B1.2(b). Discussing a circuit split regarding whether Application Note 1 to §4B1.2 is consistent with the text of the guideline, the court stated that it was bound by Ninth Circuit precedent holding that delivery of marijuana under Oregon law qualifies as a “controlled substance offense” under §4B1.2.

United States v. Hernandez-Martinez, 933 F.3d 1126 (9th Cir. Aug. 13, 2019). In this consolidated appeal, the Ninth Circuit affirmed the district court’s denial of the defendants’ 18 U.S.C. § 3582(c)(2) motions for sentence reduction based on Amendment 782, finding it remained bound by *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017) (holding policy statements of the Sentencing Commission at §1B1.10 were consistent with both the governing statutes and constitutional requirements). The court stated that *Padilla-Diaz* is not inconsistent with the Supreme Court’s recent decisions in *Hughes v. United States*, 138 S. Ct. 1765 (2018), and *Koons v. United States*, 138 S. Ct. 1783 (2018).

United States v. Sainz, 933 F.3d 1080 (9th Cir. Aug. 12, 2019). The Ninth Circuit reversed and remanded the district court’s denial of the defendant’s 18 U.S.C. § 3582(c)(2) motion for a reduction of his 120-month drug sentence based on a guideline amendment. The court held, in a case of first impression, that it was an abuse of discretion for

the district court to *sua sponte* raise the defendant’s waiver of his right to seek a sentence reduction in the cooperation agreement, and deny the defendant’s motion for a reduction on that basis.

United States v. Perez, 932 F.3d 782 (9th Cir. July 11, 2019). The Ninth Circuit affirmed the defendant’s 61-month career offender sentence for being a felon in possession of a firearm and ammunition, holding that his prior state conviction for battery resulting in serious bodily injury qualified as a crime of violence for purposes of §4B1.2(a)(1). Quoting earlier Ninth Circuit cases examining similar statutes—*United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014) and *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010)—the court explained that the California statute “fits squarely within the term [crime of violence] by requiring the deliberate use of force that injures another.”

TENTH CIRCUIT

United States v. Malone, 937 F.3d 1325 (10th Cir. Sept. 11, 2019). The Tenth Circuit reversed and remanded the defendant’s sentence for drug distribution in order for the district court to strike a special condition of supervised release, which required the defendant to “take prescribed medication as directed.” Declining to narrowly construe the special condition, the court held that “imposing a blanket medication requirement without particularized supportive findings is plain error affecting [the defendant’s] substantial rights and the fairness, integrity, and public reputation of judicial proceedings.” The court stated that district courts must be “precise and discerning” in their imposition of such conditions.

United States v. Sweargin, 935 F.3d 1116 (10th Cir. Aug. 28, 2019). The Tenth Circuit affirmed the defendant’s 30-month sentence for promoting a commercial sex act, upholding application of the 4-level coercion enhancement at §2G1.1(b)(1). The court held that the phrase “occurs as part of the offense” in §2G1.1(b)(1) includes all relevant conduct, and that coercion was established by the defendant’s earlier threat to post a sex video of the victim and by his physical assault of the victim. It concluded that the district court correctly applied the coercion enhancement because the defendant substantially impaired the victim’s ability to choose her own course of conduct.

United States v. Blair, 933 F.3d 1271 (10th Cir. Aug. 13, 2019). In this possession of child pornography case, the Tenth Circuit affirmed the sentence in part but vacated and remanded a special condition of supervised release that prohibited the defendant’s use of computers and internet devices without prior permission from the probation officer. The court held that the special condition was a greater deprivation of liberty than necessary to achieve the

goals of 18 U.S.C. § 3583(d)(2) because it allowed for a complete ban of offline and internet computer use. It stated: “[t]he probation office is limited to imposing only those restrictions that are reasonably calculated to prevent the defendant from using a computer or the Internet to access, store, produce, or send child pornography in any form; to provide necessary restrictions to facilitate a defendant’s correctional treatment so that he may be rehabilitated; and to protect the public from any further crimes. . . .”

United States v. Gonzales, 931 F.3d 1219 (10th Cir. July 29, 2019). The Tenth Circuit vacated and remanded the defendant’s 27-month sentence for being a felon in possession of a firearm, holding that the district court erred in applying a §3A1.2(c)(1) adjustment for assault on a government officer. The court held that assault, for purposes of §3A1.2(c)(1), requires proof that the defendant had specific intent to instill fear of bodily harm. Because the government argued that the defendant pulled a gun to instill fear of bodily harm and the defendant argued that there was a reasonable inference that he was trying to discard the gun, the court remanded for consideration of the defendant’s intent.

ELEVENTH CIRCUIT

United States v. Kirby, 938 F.3d 1254 (11th Cir. Sept 17, 2019). The Eleventh Circuit affirmed the defendant’s 1,440-month sentence for multiple counts of sexual exploitation of children for the purpose of producing child pornography and multiple counts of possession with intent to view material involving minors engaged in sexually explicit conduct. The court held that the district court did not err in imposing consecutive terms of the statutory maximum for each count of conviction in accordance with the defendant’s guideline sentence of “life imprisonment.” It explained that, because life imprisonment lacks a fixed term, the district court correctly combined the statutory maximums for each count to reach the closest available sentence to “indefinite incarceration.” The court further held that the sentence was not substantively unreasonable.

United States v. Baptiste, 935 F.3d 1304 (11th Cir. Aug. 28, 2019). In this case involving money laundering, aggravated identity theft and related offenses, the Eleventh Circuit affirmed, in part, a defendant’s convictions and sentence of 212 months’ imprisonment and \$11 million restitution but remanded for the limited purpose of allowing the defendant to allocute personally, which he was denied at sentencing. Among other things, the court upheld the district court’s §3C1.1 enhancement for obstruction of justice, which it imposed based on a hearsay statement without any explicit findings about its reliability. The court noted that §6A1.3 allows the district court to consider information without regard to its admissibility under the rules of evidence at trial if “the information has sufficient indicia of reliability to

support its probable accuracy.” The court rejected the defendant’s argument that the district court must make explicit findings on the record that the evidence is reliable, holding that the guidelines permit the use of hearsay evidence as long as the record *as a whole* supports its reliability.

United States v. Whyte, 928 F.3d 1317 (11th Cir. July 10, 2019). The Eleventh Circuit affirmed the defendants’ convictions and sentences for sex trafficking of a minor, conspiracy to commit sex trafficking of a minor, and knowingly transporting an individual in interstate commerce for the purpose of engaging in prostitution. Among other things, the court upheld a §2G1.3(b)(3)(B) enhancement for using a computer to solicit prohibited sexual contact with a minor, holding that posting online ads for prostitution of a minor justified the enhancement. The court rejected the argument that, based on Application Note 4 of the guideline, the enhancement could only apply to communications with the minor victim or someone exercising control of the victim.

D.C. CIRCUIT

United States v. McIlwain, 931 F.3d 1176 (D.C. Cir. July 26, 2019). The D.C. Circuit vacated and remanded the defendant’s 8-month sentence for escape, holding that the district court erred by denying his motion for disclosure of the probation officer’s sentence recommendation. The court stated that Federal Rule of Criminal Procedure 32(e)(3) requires disclosure of the recommendation to the parties absent a “local rule” or “order in a case.” Because the court found that the district court in this case denied disclosure pursuant to its own “blanket policy of nondisclosure,” it remanded with instructions for the district court to disclose the recommendation unless it finds that “case-specific reasons justify non-disclosure.”

United States v. Monzel, 930 F.3d 470 (D.C. Cir. July 19, 2019). The D.C. Circuit affirmed a \$7,500 restitution order for possession and distribution of child pornography, upholding the amount as “reasonable and circumscribed” based on the factors set out in *Paroline v. United States*, 572 U.S. 434 (2014). Analyzing the factors and noting that there can be no “precise algorithm” for computing restitution awards, the court held that the district court’s decision “reflects a reasonable exercise of discretion guided by the *Paroline* guideposts and principles of analysis.”



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