

CASE LAW QUARTERLY

Vol. 3 || Issue 4 (October – December 2019)



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 FOURTH QUARTER OF 2019—

FIRST CIRCUIT

United States v. Heindenstrom, 946 F.3d 57 (1st Cir. Dec. 30, 2019). The First Circuit affirmed the defendant's above-guideline sentence of 60 months for distribution of a substance or mixture containing fentanyl, based on the district court's finding that a death resulted from the offense. Although the district court had justified the sentence as both a §5K2.1 upward departure and an upward variance from the guideline range of 8-14 months, the First Circuit held that the sentence was supportable when viewed as an upward variance. Considering the validity of the sentence as an upward departure under §5K2.1, the court called it a "close question" that would require establishing what standard of causation was required to determine whether death "resulted" from the defendant's conduct. However, it went on to uphold the sentence as an upward variance, concluding that the district court, on the record before it, did not abuse its discretion by considering as a relevant factor under 18 U.S.C. § 3553(a) the death of the defendant's narcotics purchaser, despite "the absence of strict but-for causation."

United States v. Jiménez, 946 F.3d 8 (1st Cir. Dec. 20, 2019). The First Circuit affirmed, as procedurally and substantively reasonable, the defendant's 36-month sentence for bank fraud and conspiracy to commit bank fraud. The court held, among other things, that the district court appropriately held the defendant, a real estate broker who induced banks to agree to short sales of under-secured homes, responsible for a loss to the lenders of over \$1,500,000, a calculation that increased her offense level by 16 under §2B1.1(b)(1). The court also upheld imposition of adjustments for role in the offense and sophisticated means, noting the district court's finding that the fraud "went beyond the typical fraud of making misrepresentations on a loan application form," instead involving the recruitment of straw buyers, using aliases, and advising mortgagors whether to continue their payments.

United States v. Coffin, 946 F.3d 1 (1st Cir. Dec. 20, 2019). In a case involving convictions for possessing and accessing

child pornography, the First Circuit affirmed the imposition of a statutory maximum 240-month sentence for each of two counts, finding the sentence procedurally and substantively reasonable. Addressing the defendant's challenge to his Criminal History Category (CHC), the court stated that, while it did not resolve the defendant's specific argument about the allocation of criminal history points, any error in arriving at CHC IV was harmless because the district court expressly stated that it would have upwardly departed to that CHC based on the seriousness of the defendant's criminal history and his risk of recidivism. Among other things, the court also affirmed imposition of the §2G2.2(b)(5) pattern of activity enhancement and the §3C1.1 obstruction adjustment.

United States v. Mantha, 944 F.3d 352 (1st Cir. Dec. 10, 2019). In a case involving sexual exploitation of a child committed in 2001 and child pornography offenses committed in 2015 and 2016, the First Circuit vacated the defendant's 196-month sentence, calculated under the 2016 *Guidelines Manual*, and remanded for resentencing. The court held that the district court incorrectly applied the 2016 *Guidelines Manual*, which resulted in a higher total offense level, to calculate the offense level for the defendant's 2001 ungrouped child sexual exploitation offense. In a case of first impression for the First Circuit, the court held that application of the one-book rule and the multiple offense rule to ungrouped offenses constituted an *ex post facto* violation. Stating that its conclusion was consistent with a majority of other circuits, the court noted that its holding was narrow, distinguishing it from the groupable offenses at issue in *United States v. Pagan-Ferrer*, 736 F.3d 573 (1st Cir. 2013).

SECOND CIRCUIT

United States v. Mumuni, 946 F.3d 97 (2d Cir. Dec. 27, 2019). On appeal by the government, the Second Circuit remanded for resentencing the defendant's 17-year sentence for terrorism-related offenses, holding that the district court's downward departure from the statutorily-restricted guideline sentence of 85 years was substantively

unreasonable. The court held that the district court abused its discretion in light of the defendant's attempted murder of a federal officer and "his exceptionally serious conduct involving a domestic terrorist attack against law enforcement in the name of ISIS." It stated that the district court "had not fully appreciated the heinous nature of this offense—including its terrorist design," did not reflect that the defendant's conduct was more serious than his codefendant, and placed undue weight on mitigating factors. Concluding that the sentence was "shockingly low," it explained that, once a sentencing court has accepted a defendant's guilty plea and his allocution to the elements of the charged offense, it cannot make contrary findings of fact. It also stated that, where a sentencing court opts to compare the relative culpability of codefendants, it cannot selectively rely on a factor when it serves a mitigating function in one case, but ignore the same factor when it serves an aggravating function in the other case.

United States v. Flores, 945 F.3d 687 (2d Cir. Dec. 20, 2019). The Second Circuit affirmed the defendants' 216-month sentence for conspiracy to import cocaine into the United States, holding, among other things, that the district court properly applied the 2-level specific offense characteristic increase for use of a private aircraft for importation under §2D1.1(b)(3)(A). The court held that the increase was appropriate in this conspiracy case despite the fact that the prosecution resulted from a sting operation and no aircraft "was used" to carry cocaine. In doing so, the court disagreed with and distinguished its holding from two older decisions in the Ninth and Eleventh Circuits in *United States v. Joelson*, 7 F.3d 174 (9th Cir. 1993), and *United States v. Chastain*, 198 F.3d 1338 (11th Cir. 1999). The court noted that the guidelines have been amended so that §2D1.1 now expressly covers conspiracies and attempts, and §2X1.1 instructs courts to apply the entire §2D1.1 guideline to drug conspiracy convictions, including all specific offense characteristics.

THIRD CIRCUIT

United States v. Mitchell, 944 F.3d 116 (3rd Cir. Dec. 5, 2019). Affirming the defendant's conviction for multiple drug distribution and firearms offenses, the Third Circuit vacated and remanded the defendant's 1,020-month sentence, holding that the district court plainly erred by relying on the defendant's bare arrest record to determine his sentence. The court noted that the district court, at sentencing, interrupted the prosecutor to highlight the defendant's arrests, recited all 18 of his arrests, explicitly referred to his arrests when describing his "long and serious" criminal record, and identified his "extensive criminal history" as sole justification for his sentence. Reasoning that an arrest record, without more, does not justify an assumption that a defendant has committed other crimes, the court concluded that resentencing was required.

FOURTH CIRCUIT

United States v. Johnson, 945 F.3d 174 (4th Cir. Dec. 18, 2019). The Fourth Circuit, affirming the defendant's conviction, vacated and remanded the defendant's 51-month sentence for possession of a firearm by a felon. Disagreeing with the district court, the court held that the defendant's prior Maryland state conviction for robbery qualified as a predicate violent felony under the Armed Career Criminal Act (ACCA), and that his prior Maryland state conviction for possession with intent to distribute a controlled substance qualified as a "controlled substance offense" for purposes of the increased offense level at §2K2.1(a)(4). Relying on *Johnson v. United States*, 559 U.S. 133 (2010), and *Stokeling v. United States*, 139 S. Ct. 544 (2019), the court held that the defendant's prior conviction in Maryland for robbery satisfied the force clause of the ACCA because the Maryland statute requires either a robbery by force or a threat of force. The court also held that the defendant's prior Maryland conviction for possession with intent to distribute qualifies as a controlled substance offense because the Maryland statute requires proof of possession and intent to sell or distribute drugs, and not a mere offer of distribution.

United States v. Muslim, 944 F.3d 154 (4th Cir. Nov. 25, 2019). The Fourth Circuit affirmed the defendant's conviction and life sentence for kidnapping, sex trafficking and sexual exploitation of a minor, upholding application of adjustments for role in the offense, vulnerable victims, supervisory control, and obstruction of justice. Among other things, the court held that the §3C1.1 adjustment for obstruction of justice was properly applied where a previous state kidnapping charge that related to the same kidnapping had been dismissed after the defendant had the victim submit a false affidavit. Pointing to guideline commentary, the court stated that obstructive conduct before the investigation in the instant offense may be covered if the conduct was "purposefully calculated, and likely, to thwart the investigation" of the offense of conviction.

United States v. Allred, 942 F.3d 641 (4th Cir. Nov. 7, 2019). The Fourth Circuit reversed and remanded the defendant's 120-month sentence for being a felon in possession of a firearm, holding that his prior federal conviction for witness retaliation qualified as a predicate violent felony under the Armed Career Criminal Act (ACCA). The Fourth Circuit disagreed with the district court's decision that the defendant, originally sentenced to a 264-month sentence under the ACCA, was no longer subject to the enhanced ACCA sentence after *Johnson v. United States*, 135 S. Ct. 2551 (2015). It stated that the witness retaliation statute sets forth alternative elements that differ significantly from each other, each "comprising a wholly separate crime." In an issue of first impression for the circuit, the court held

that the modified categorical approach applied to determine which of the alternative crimes formed the basis for the defendant's witness retaliation conviction. Because the indictment charged the defendant only with the element of knowingly engaging in conduct that caused bodily injury and not the element of property damage, the court held that the conviction qualified as a predicate violent felony under the force clause of the ACCA.

FIFTH CIRCUIT

United States v. Sifuentes, 945 F.3d 865 (5th Cir. Dec. 19, 2019). The Fifth Circuit affirmed as procedurally and substantively reasonable a defendant's 160-month below-guideline sentence for conspiracy to commit money laundering of proceeds derived from narcotics trafficking. It held that the district court properly applied the narcotics offense cross-reference under §2S1.1(a)(1) because the defendant had "consistently communicated with and coordinated with senior individuals in the ongoing drug distribution and money laundering conspiracy."

United States v. Aguilar-Alonzo, 944 F.3d 544 (5th Cir. Dec. 10, 2019). In a case involving aiding and abetting possession with intent to distribute marijuana, the Fifth Circuit vacated and remanded the defendant's 70-month sentence, holding that the district court clearly erred in applying a 2-level enhancement under §2D1.1(b)(15)(A) for using affection to involve his girlfriend in the offense. Relying on interpretations of the word "used" in a variety of contexts, the court stated that the proper interpretation under the guidelines "requires active employment of affection in return for involvement in the offense," and not "the mere existence of a romantic, familial, or any other kind of pre-existing relationship." The court concluded that the district court's finding that the defendant used affection to involve his girlfriend in the offense was "implausible in light of the evidence in the record."

United States v. Herrold, 941 F.3d 173 (5th Cir. Oct. 18, 2019). Following the Supreme Court's remand, the Fifth Circuit affirmed the district court's imposition of a 15-year sentence enhancement under the Armed Career Criminal Act (ACCA). It held that the defendant's prior state convictions for burglary in Texas qualified as predicate generic burglary for purposes of the ACCA enhancement, rejecting the defendant's argument that the Texas statute did not require specific intent or the requisite unlawful breaking and entering. The Fifth Circuit noted that it had found the Texas burglary statute non-generic before the Supreme Court decided *Quarles v. United States*, 139 S. Ct. 1872 (2019), and *United States v. Stitt*, 139 S. Ct. 399 (2018). The court also rejected the defendant's argument that the term "burglary" in the ACCA's enumerated offenses clause is unconstitutionally vague.

SIXTH CIRCUIT

United States v. Beamus, 943 F.3d 789 (6th Cir. Nov. 21, 2019) (per curiam). In a case involving crack cocaine conspiracy and firearms offenses, the Sixth Circuit reversed and remanded the district court's denial of the defendant's request for resentencing, under the First Step Act of 2018, of his 420-month career offender sentence. The court disagreed with the district court that the defendant's career offender status made him ineligible for resentencing under the First Step Act. It held that the defendant was eligible for resentencing because, as the First Step Act requires, the defendant was convicted of a covered offense and he had not previously received a reduction under Sections 2 and 3 of the Fair Sentencing Act nor lost such a motion after a complete review on the merits. Stating that the First Step Act contains no exception for career offenders, the court concluded that the defendant was eligible but not entitled to resentencing, leaving that decision to the discretion of the district court on remand.

United States v. Parrish, 942 F.3d 289 (6th Cir. Nov. 1, 2019). The Sixth Circuit affirmed the defendant's 180-month sentence for receipt of child pornography, upholding application of the repeat offender enhancement at 18 U.S.C. § 2252(b)(1) based on his prior state conviction in North Carolina for indecent liberties with children. Applying the categorical approach, the court held that the defendant's prior conviction related to "abusive sexual contact involving a minor," as required under section 2252(b)(1). The court stated that the categorical approach for the child pornography statute does not require as close a match to a crime's generic definition as the Armed Career Criminal Act because the pornography statute requires only that the conviction "relate to" abusive sexual contact. The court held that the North Carolina offense meets the generic definition, specifically, "improper, perverted, or damaging behavior associated with libidinal gratification concerning a minor or ward."

United States v. Barron, 940 F.3d 903 (6th Cir. Oct. 15, 2019). In a case involving drug and firearms offenses, the Sixth Circuit, among other things, vacated and remanded the defendant's mandatory minimum 10-year sentence for conspiracy to distribute cocaine. The court held that the district court properly applied a 2-level increase, pursuant to §2D1.1(b)(1), for possession of a firearm because it was reasonably foreseeable that a coconspirator would possess a firearm, but it clearly erred in denying him safety valve relief under §5C1.2. The court stated that it was joining seven circuits in holding that reasonable foreseeability of firearm possession by a coconspirator does not render an offender ineligible for safety valve relief. It disagreed with the district court's conclusion that the defendant did not meet the requirements of the safety valve, including its findings that the defendant aided and abetted the purchase

of ammunition and failed to truthfully provide all information to the government. The court remanded to the district court with instructions to apply the safety valve provisions and sentence the defendant without regard to the 10-year mandatory minimum sentence.

United States v. Owen, 940 F.3d 308 (6th Cir. Oct. 10, 2019). In a case involving transportation of methamphetamine manufacturing equipment in a vehicle with a 7-year old passenger, the Sixth Circuit affirmed the defendant's 250-month sentence for attempting to manufacture methamphetamine and discharging a firearm in furtherance of a drug offense. The court held, among other things, that the district court properly applied the increase in §2D1.1(b)(14)(D) for creating a "substantial risk of harm to the life of a minor" during an offense that involves methamphetamine manufacturing. Although the court found both the quantity of hazardous chemicals and the probability of combustion low, the court stated: "Even a small chance of combustion can create a 'substantial risk' when the combustible material is transported in a dangerous manner, in a confined space, in the presence of a minor."

SEVENTH CIRCUIT

Portee v. United States, 941 F.3d 263 (7th Cir. Oct. 18, 2019). The Seventh Circuit reversed and remanded the district court's denial of the defendant's motion to vacate his 15-year mandatory minimum sentence for being a felon in possession of a firearm, holding that two of his prior state convictions were not predicate violent felonies under the elements clause of the Armed Career Criminal Act (ACCA). First, the court held that the defendant's prior state conviction in Indiana for pointing a firearm was not a predicate offense, disagreeing with the district court's finding that the elements of that statute necessarily include threats of force. Second, the court held that the defendant's prior Indiana felony intimidation conviction was not a predicate offense because it encompasses situations involving self-harm, conduct which falls outside the ACCA's elements clause.

EIGHTH CIRCUIT

United States v. Garcia, 946 F.3d 413 (8th Cir. Dec. 26, 2019). The Eighth Circuit affirmed the defendant's 188-month sentence for aiding and abetting the distribution of methamphetamine. Among other things, the court held that the defendant was properly sentenced as a career offender based on his prior Arkansas convictions for aiding and abetting distribution of methamphetamine and for being an accomplice to second-degree battery. It explained that the drug conviction qualified as a "controlled substance offense" because the commentary to §4B1.2 includes aiding and abetting offenses, and that the battery conviction qualified as a crime of violence because it included as

an element the use of physical force. The court also stated that the commentary to §4B1.2 encompasses accomplice liability.

United States v. Silva, 944 F.3d 993 (8th Cir. Dec. 13, 2019). The Eighth Circuit affirmed the defendant's 180-month sentence for possession of a firearm as a convicted felon, upholding an enhancement under the Armed Career Criminal Act (ACCA) that was based, in part, on a prior Mississippi burglary conviction. The court held that the district court did not clearly err in deciding under which statute the defendant's prior burglary conviction arose, disagreeing with the defendant's argument that his *Shepard* documents, which did not state the statute of conviction, did not satisfy *Taylor's* "demand for certainty" regarding the modified categorical approach. Distinguishing between the legal inquiry in *Taylor* and the factual inquiry into the statutory basis of a conviction in the instant case, the court held that it may affirm even though records may not establish the statute of conviction "with complete clarity."

United States v. McDonald, 944 F.3d 769 (8th Cir. Dec. 11, 2019). In a case involving a 360-month sentence for distribution of cocaine, the Eighth Circuit reversed and remanded the district court's denial of a motion for a sentence reduction under the First Step Act. The court held that the district court erred in determining the defendant was ineligible for relief because his base offense level under the guidelines was based on powder cocaine instead of cocaine base. The court noted that the First Step Act applies to offenses, not conduct, so the statute of conviction determines his eligibility for relief. Moreover, the court stated that the fact that the defendant had previously received a sentence reduction under Amendment 782 did not affect his eligibility for a reduction under the First Step Act.

United States v. Williams, 943 F.3d 841 (8th Cir. Nov. 26, 2019). The Eighth Circuit affirmed the defendant's 240-month sentence for conspiracy to possess with intent to distribute crack cocaine, upholding denial of his motion to reduce sentence under the First Step Act. Among other things, the court stated that the First Step Act did not require district courts to hold a hearing because the Act gave district courts discretion to reduce sentences and did not mention a hearing. The court also stated that the district court had discretion whether to consider post-sentencing rehabilitation, and not adjust the sentence accordingly.

United States v. Quigley, 943 F.3d 390 (8th Cir. Nov. 15, 2019). The Eighth Circuit affirmed the defendant's 240-month sentence for conspiracy to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. It held that the defendant's prior Iowa conviction for assault with intent to inflict serious injury qualified as a predicate crime of violence under the elements clause of the career offender enhancement. The court stated that the Iowa offense is categorically a crime

of violence because there was not a “realistic probability” that it could be committed without physical force, noting that the defendant had not identified any Iowa cases in which an individual had not at least threatened to use physical force.

United States v. Heim, 941 F.3d 338 (8th Cir. Oct. 18, 2019). The Eighth Circuit affirmed the defendant’s 170-month sentence for conspiracy to distribute methamphetamine, holding that the sentencing court did not commit procedural or substantive error when it denied a downward variance. The court stated that the district court adequately explained its denial, and that it considered the need to avoid unwarranted disparities with variant sentences imposed by other district courts. The court held there was no procedural error because, in correctly calculating and reviewing the guideline range, the district court necessarily considered the need to avoid unwarranted sentencing disparities. It also held that the district court’s refusal to vary from a guideline that other district courts disagree with did not create a sentencing disparity amounting to substantive error.

NINTH CIRCUIT

United States v. Harrington, 946 F.3d 485 (9th Cir. Dec. 24, 2019). The Ninth Circuit affirmed the defendant’s 87-month sentence for assault by strangulation, upholding a 3-level adjustment under §2A2.2(b)(4) for assaults involving strangling a spouse, intimate partner, or dating partner. The court held that application of the enhancement was not impermissible double counting. Although strangulation was an element of the defendant’s crime, it explained, §2A2.2’s base offense level applies to a broad range of behavior, is not specific to the defendant’s strangulation offense, and thus does not necessarily “capture the full extent of the wrongfulness” of his behavior.

United States v. Gobert, 943 F.3d 878 (9th Cir. Nov. 26, 2019). The Ninth Circuit affirmed the defendant’s conviction for discharge of a firearm during a crime of violence. The court held that his underlying conviction for assault with a dangerous weapon under 18 U.S.C. § 113(a)(3) categorically qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). It stated that the “least violent form” of the assault offense is the threat to use violent physical force through the use of a dangerous weapon that reasonably caused a victim to fear immediate bodily injury which, following Ninth Circuit precedent, qualifies as a crime of violence under the elements clause.

United States v. Ped, 943 F.3d 427 (9th Cir. Nov. 15, 2019). Affirming the defendant’s conviction for being a felon in possession of a firearm, the Ninth Circuit vacated several supervised release conditions as unconstitutionally vague and remanded for modification of the conditions. The supervised release conditions at issue required the defendant

to “support his . . . dependents and meet other family responsibilities,” “work regularly at a lawful occupation,” and “notify third parties of risks that may be occasioned by [his] criminal record or personal history or characteristics.” The court held that the plain language of 18 U.S.C. § 3742(f)(1) required remanding rather than rewriting the conditions. It stated that neither exception to the general rule for remand—where sentencing provisions can be saved through a plausible narrowing interpretation or can be stricken altogether—were present here.

United States v. Valle, 940 F.3d 473 (9th Cir. Oct. 9, 2019). The Ninth Circuit vacated and remanded the defendant’s 37-month sentence for illegal reentry, holding that his guideline range was improperly increased under §2L1.2 and §4A1.1 based on prior convictions that were too old to consider. The court stated that the government must meet a heightened standard of proof by clear and convincing evidence where a finding underlying an enhancement has a disproportionate impact on the guideline range—here, increasing the guideline range of 1–7 months to 37–46 months. The court held that the government could not prove the defendant’s continuous presence in the United States for purposes of the sentencing increases without direct evidence of the defendant’s whereabouts during the relevant time period. Moreover, the court held that the government could not submit new evidence on remand.

United States v. Green, 940 F.3d 1038 (9th Cir. Oct. 7, 2019). The Ninth Circuit vacated and remanded the defendant’s 108-month sentence for being a felon in possession of a firearm, holding that the district court plainly erred by concluding that it was required to decide whether the defendant had accepted responsibility before allowing him the opportunity to allocute. The court stated that the district court’s decision was contrary to regular sentencing practice, the guidelines, and the Federal Rules of Criminal Procedure. The court found that the error affected the defendant’s substantial rights and seriously affected the fairness of the judicial proceedings, stating that a defendant “can hardly demonstrate sincere contrition to the court through his allocution if he cannot speak until after the sentencing court has already made up its mind as to whether he has done so.”

TENTH CIRCUIT

United States v. Mendenhall, 945 F.3d 1264 (10th Cir. Dec. 23, 2019). The Tenth Circuit vacated and remanded the district court’s restitution order under the Mandatory Victims Restitution Act (MVRA) based on the defendant’s conviction for possessing and concealing stolen firearms. Relying on the Supreme Court’s opinion in *Hughey v. United States*, 495 U.S. 411, 416 (1990), which held that the MVRA authorizes restitution only for losses caused by the conduct underlying the offense of conviction, the court

noted that, although there was evidence suggesting the defendant stole the firearms from a pawn shop, he was not convicted of burglary. Accordingly, the court held that the district court exceeded its authority under the MVRA when it ordered restitution for losses incurred by the burglarized pawn shop related to, but not arising directly from, the defendant's offense of conviction.

United States v. Rodriguez, 945 F.3d 1245 (10th Cir. Dec. 23, 2019). The Tenth Circuit affirmed the defendant's 21-month sentence for a supervised release violation, holding that the district court properly graded the defendant's conduct, simple possession of cocaine by a prior drug offender, as a Grade B violation under §7B1.1. The court found that the defendant's conduct was correctly classified as Grade B rather than Grade C because, based on his three prior drug convictions, his cocaine possession was punishable under federal law by a term of imprisonment exceeding one year. The court held that a district court may consider a supervisee's prior criminal convictions in determining the grade of a supervised release violation.

United States v. Thomas, 939 F.3d 1121 (10th Cir. Oct. 1, 2019). The Tenth Circuit affirmed the defendant's sentence for possession of a firearm by a convicted felon, upholding the district court's application of an increased base offense level under §2K2.1(a)(2). The court held that the defendant's prior Colorado state conviction for distribution of an "imitation controlled substance" qualified as a "controlled substance offense" for purposes of §2K2.1, relying on the definition in §4B1.2(b). The court noted that at least five other circuits have reached the same conclusion, and there was not a good reason to split from the other circuits on the issue.

ELEVENTH CIRCUIT

United States v. Bankston, 945 F.3d 1316 (11th Cir. Dec. 23, 2019). The Eleventh Circuit vacated and remanded the defendant's 130-month sentence for possessing a firearm as a felon, possessing body armor as a violent felon, and distributing methamphetamine, holding that it was plain error to apply the §3B1.5 adjustment for the use of body armor during a drug trafficking offense where the defendant sold body armor for money. The court explained that the guideline defines "use" as either "active employment in a manner to protect the person from gunfire" or "use as a means of bartering," and that "selling is an activity that under both common usage and dictionary definition falls outside of bartering." The court rejected the government's argument that the adjustment should apply based on its purpose and legislative history, finding the plain language precluded its application. It noted that the Fifth Circuit reached the same conclusion in *United States*

v. Juarez, 866 F.3d 622, 633 (5th Cir. 2017) (reviewing a preserved challenge).

United States v. Perez, 943 F.3d 1329 (11th Cir. Nov. 26, 2016). The Eleventh Circuit vacated and remanded the defendant's 46-month sentence, holding that it was error to apply the §2B3.1(b)(2)(F) threat-of-death enhancement where the defendant, during two bank robberies, handed the teller a note stating that no one would get hurt if the requested money was provided. The court explained that whether the defendant's conduct would instill fear of death in a reasonable person is a "fact-intensive" and "highly contextual" inquiry. Explaining that "§2B3.1 is designed to distinguish between bank robberies involving threats of harm and those relying on threats of death," the court concluded that the facts did not "add the 'something more' required to transform [defendant's] general threat of harm inherent in every bank robbery under [18 U.S.C.] § 2113(a) into a threat of death."

D.C. CIRCUIT

Young v. United States, 943 F.3d 460 (D.C. Cir. Nov. 22, 2019). In a case involving possession of a heroin mixture exceeding two kilograms, the D.C. Circuit affirmed the district court's application of the 20-year mandatory minimum sentence based on the then-applicable 21 U.S.C. § 841(b)(1)(A), rather than the amended 10-year mandatory minimum sentence under the First Step Act. The court held that the 2018 First Step Act, which eliminated the defendant's prior conviction as a mandatory-minimum triggering offense, did not apply where the sentence had already been imposed in the district court at the time the statute was enacted. Agreeing with a number of other circuits, the court reasoned that a sentence is "imposed" when the district court passes sentence on a defendant, and rejected the defendant's argument that a sentence is "imposed" only at the time of final judgment by the highest court authorized to review it.



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