

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 . . .

Shular v. United States, 140 S.Ct. 779 (Feb. 26, 2020). In a case involving a conviction for being a felon in possession of a firearm, the Supreme Court affirmed the defendant's 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA), holding that his six prior cocaine-related convictions under Florida law qualified as serious drug offenses triggering the ACCA enhancement. Although the parties agreed that a court should look to the state offense's elements to determine if a prior conviction qualifies as a "serious drug offense" under 18 U.S.C. § 924(e)(2)(A)(ii), the government argued that the statute describes conduct against which the court should measure those elements, and the defendant argued that the statute identifies generic offenses against which the court should measure those elements. Affirming the Eleventh Circuit, the Court held that the ACCA's definition of "serious drug offense" requires only that a state offense involve the conduct specified in the federal statute, not that a state offense match the elements of a generic analogue offense. In so holding, the Supreme Court resolved a circuit split on the issue, abrogating the Ninth Circuit's opinion in *United States v. Franklin*, 904 F.3d 793, 800 (9th Cir. 2018).



Davis v. United States, 140 S. Ct. 1060 (Mar. 23, 2020)

The Supreme Court vacated and remanded the district court's imposition of a 57-month sentence for the defendant's drug and firearms offenses, holding that there was no legal basis for the Fifth Circuit's "outlier practice" of declining to review certain unpreserved factual arguments for plain error. On appeal, the defendant argued for the first time that the district court erred by ordering his federal sentence to run consecutively to any state sentences imposed, because his state and federal offenses were part of the "same course of conduct," and thus both sentences should have run concurrently pursuant to §§ 1B1.3(a)(2) and 5G1.3(c). The Fifth Circuit affirmed, refusing to hear the defendant's argument on appeal based on Fifth Circuit precedent that certain unpreserved factual arguments can never constitute plain error. The Court rejected the Fifth Circuit precedent, noting that "almost every other Court of Appeals conducts plain-error review of unpreserved arguments, including unpreserved factual arguments." It stated that "there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error."

Holguin-Hernandez v. United States, 140 S. Ct. 762 (Feb. 26, 2020)

The Supreme Court vacated and remanded the district court's imposition of a 12-month sentence for violation of supervised release, which was imposed along with a sentence for drug trafficking. On appeal, the defendant argued that his 12-month revocation sentence was unreasonably long in that it was "greater than necessary to accomplish the goals of sentencing under 18 U.S.C. § 3553(a)." The Fifth Circuit affirmed the district court's sentence, stating that the defendant forfeited this argument by failing to "object in the district court to the reasonableness of the sentence imposed." The Court disagreed with the Fifth Circuit's "suggestion that defendants are required to refer to the 'reasonableness' of a sentence to preserve such claims for appeal." It held that the defendant, by advocating for a shorter sentence, properly preserved the claim that a longer sentence was unreasonable, and that he did not need to also refer to the standard of review.

SUMMARY OF SELECT APPELLATE CASES FOR THE FIRST QUARTER OF 2020 —

FIRST CIRCUIT

United States v. Garcia-Cartagena, 953 F.3d 14 (1st Cir. Mar. 6, 2020). The First Circuit affirmed the 36-month sentence imposed for the defendant's violation of supervised release, finding no reversible error in the district court's conclusion that the defendant committed a Grade A violation. The court joined the Third and Ninth Circuits in adopting a hybrid approach to classifying the grade of a violation under §7B1.1(a), using the categorical approach initially to determine whether an offense is a "crime of violence" or "controlled substance offense," and then using a conduct-based approach to determine if the defendant committed the offense. It also held that courts in revocation hearings can look beyond *Shepard* documents to any other reliable evidence available.

United States v. Colon-Maldonado, 953 F.3d 1 (1st Cir. Mar. 6, 2020). The First Circuit vacated and remanded for resentencing the defendant's 30-month sentence imposed on revocation of his supervised release, holding that the district court misapplied the guidelines in finding that his supervised release violation, which involved Abuse in violation of Puerto Rico law, was a crime of violence that constituted a Grade A violation under §7B1.1(a)(1)(A)(i). The court held that the district court committed clear error in finding, based only on unsubstantiated allegations in a charging document, that the defendant had used physical force.

United States v. Baez-Martinez, 950 F.3d 119 (1st Cir. Feb. 11, 2020). The First Circuit affirmed the defendant's 15-year armed career criminal sentence for being a felon in possession of a firearm, holding that his prior convictions under Puerto Rico law for second degree murder and attempted murder qualify as predicate violent felonies under the Armed Career Criminal Act (ACCA). The court held, as a matter of first impression, that the Puerto Rico second degree murder statute qualifies as a violent felony under the force clause of the ACCA, finding that it requires malice aforethought rather than ordinary recklessness. The court also held, relying on Supreme Court precedent, that the defendant's prior conviction for attempted murder qualifies as a crime of violence under the force clause of the ACCA, stating that attempted murder categorically involves violent force.

United States v. Hercules, 947 F.3d 3 (1st Cir. Jan. 9, 2020). The First Circuit affirmed the defendant's sentence for conspiracy to distribute and possession with intent to distribute controlled substances, holding that a sentencing court has the discretion, in an appropriate case, to weigh the possibility of future deportation when considering the factors in 18 U.S.C. § 3553(a). The court upheld the district court's finding that the defendant's potential future deportation

did not warrant a downward variance, noting the substantial possibility of "shifting immigration policies and fluctuating enforcement priorities" during his 87-month sentence. Stating that a district court has discretion to either weigh or decline to weigh the possibility of deportation in its section 3553 calculus, the court concluded that the district court did not abuse its discretion when it declined to consider the defendant's potential future deportation because of "an amalgam of appropriate concerns."

SECOND CIRCUIT

United States v. Scott, 954 F.3d 74 (2d Cir. Mar. 31, 2020). On the government's appeal, the Second Circuit affirmed the vacatur of the defendant's 264-month sentence for Hobbs Act robbery and related firearms offenses, holding that his prior New York conviction for first-degree manslaughter under N.Y. Penal Law § 125.20(1) was not a "violent felony" under the Armed Career Criminal Act or a "crime of violence" under the career offender guideline. The court held that the New York statute can be violated by "an omission despite a duty to act," which is different from indirect force and does not qualify as "physical force" under the elements clause. It held that the statute also does not match generic murder, manslaughter, or aggravated assault under the enumerated offenses clause of the career offender guideline.

Nunez v. United States, No. 18-1803-pr (2d Cir. Mar. 30, 2020). The Second Circuit affirmed the denial of the defendant's 28 U.S.C. § 2255 motion challenging his 360-month sentence for substantive and conspiratorial Hobbs Act robbery. The court held that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), did not recognize a retroactive right not to be sentenced based on the residual clause in the career offender guideline of the previously-mandatory sentencing guidelines. Because no such right was recognized, the defendant's section 2255 motion, which was filed 18 years after his federal conviction, was ruled untimely.

United States v. Nikolla, 950 F.3d 51 (2d Cir. Feb. 19, 2020). The Second Circuit affirmed the defendant's 216-month sentence for Hobbs Act extortion conspiracy, threatening physical violence in furtherance of an extortion plan, and brandishing a firearm during and in relation to a crime of violence, holding that threatening physical violence in furtherance of an extortion plan categorically qualifies as a predicate crime of violence under the elements clause of 18 U.S.C. § 924(c)(3). In so holding, the court noted that the elements of the offense of Hobbs Act robbery or extortion mirror almost exactly the definition of a crime of violence in the elements clause of section 924(c).

United States v. Tabb, 949 F.3d 81 (2d Cir. Feb. 6, 2020).

The Second Circuit affirmed the defendant's 120-month career offender sentence for aiding and abetting the distribution of crack cocaine. The court held that the defendant's prior New York conviction for second-degree attempted assault qualified as a crime of violence under the elements clause of §4B1.2, and that his prior federal drug conspiracy conviction qualified as a predicate controlled substance offense under §4B1.2. In holding that the career offender guideline at §4B1.2, as interpreted by Application Note 1, includes narcotics conspiracies, the court relied on earlier Second Circuit precedent in *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995). The court noted that the D.C. Circuit and the Sixth Circuit have held, contrary to the Second Circuit, that Application Note 1 conflicts with the text of §4B1.2 by including inchoate offenses like conspiracy, therefore impermissibly expanding the definitions found in the text of §4B1.2.

United States v. Smith, 949 F.3d 60 (2d Cir. Feb. 3, 2020).

The Second Circuit affirmed as procedurally and substantively reasonable the defendant's 2-year above-guideline sentence for a violation of supervised release (VOSR). The court noted that the Second Circuit has previously held that 18 U.S.C. § 3553(c)(2) requires a written Statement of Reasons (SOR) form for VOSR sentences outside the guideline range. Nonetheless, it held that the district court did not err in failing to issue an SOR here because the Sentencing Commission has not created such an SOR form for VOSR sentences. The court concluded, among other things, that the district court clearly explained in open court its reasons for imposing an above-guideline sentence.

THIRD CIRCUIT**United States v. McCants, 952 F.3d 416 (3d Cir. Mar. 12, 2020).**

The Third Circuit affirmed the defendant's 120-month sentence for possession of a firearm by a felon and possession with intent to distribute heroin, holding that the defendant's prior state convictions for second-degree robbery in New Jersey were properly counted as crimes of violence under §4B1.2 for purposes of the career offender enhancement. After finding that the New Jersey statute was divisible, the court applied the modified categorical approach, and held that the charging documents indicated the defendant had been charged with violent crimes. Because the statutory subsection he was convicted of was a violent crime, the court stated, his prior conviction met the requirements of both the elements and enumerated offenses clauses of the career offender guideline.

United States v. James, 952 F.3d 429 (3d Cir. Mar. 9, 2020).

The Third Circuit affirmed the defendant's 105-month sentence for possession of a firearm by an individual convicted of a crime punishable by more than a year of incarceration. The court held that the defendant's prior state

conviction in Pennsylvania for the misdemeanor offense of maliciously loitering around a dwelling house at nighttime was properly counted in his criminal history score even though loitering is excludable under §4A1.2(c)(2). The court distinguished between two forms of loitering, stating that the guideline excludes loitering simpliciter but not loitering plus, which requires a purpose to engage in some type of unlawful conduct. Explaining that the defendant's prior conviction was more akin to loitering plus, the court held that it was properly counted.

United States v. Hodge, 948 F.3d 160 (3d Cir. Jan. 17, 2020).

The Third Circuit affirmed the defendant's mandatory minimum sentence of 420 months for possessing a firearm during commission of a violent crime under 18 U.S.C. § 924(c), holding that the First Step Act's reduced mandatory minimum sentence for multiple counts of section 924(c) did not apply to the defendant even though he was awaiting resentencing on related territorial charges when it became law. The court held that the First Step Act applied retroactively only if a sentence had not been imposed at the time of its enactment. It relied, in part, on its earlier decision in *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019), which interpreted similar language in another section of the Act to mean that a sentence is "imposed" once "a sentencing order has been entered by a district court." The court also noted that focusing on "initial-sentence imposition" rather than "ultimate-sentence imposition" would unfairly favor defendants whose appeals took longer to resolve.

United States v. Bell, 947 F.3d 49 (3d Cir. Jan. 7, 2020).

The Third Circuit reversed and remanded the defendant's 86-month sentence for being a felon in possession of ammunition and Hobbs Act robbery. Among other things, the court held that the defendant did not "physically restrain" his victim, a store employee, in a manner sufficient to warrant application of the §2B3.1(b)(4)(B) enhancement, even though he grabbed the store clerk by the neck and forced him to the floor. In order to impose the enhancement, the court stated, a district court should determine "if the defendant's actions involved the use of physical force that limited the victim's freedom of movement, with a sustained focus on the victim for some period of time which provided the victim with no alternative but compliance." In this case, the court stated, "we cannot say that the victim was left with no alternative but compliance . . . since the victim twice attempted to thwart the robbery," noting that the entire incident lasted only seconds.

FOURTH CIRCUIT**United States v. Gravatt, 953 F.3d 258 (4th Cir. Mar. 23, 2020).**

In a case involving conspiracy to distribute both powder and crack cocaine, the Fourth Circuit vacated and

remanded the district court's denial of the defendant's motion for a sentence reduction under the First Step Act of 2018. The court held, as a matter of first impression, that the defendant was eligible for relief under the Act, even though his powder cocaine offense was not covered under the Act, and his sentence fell within the statutory base penalty for powder cocaine offenses. The court stated: "[i]f Congress intended for the Act not to apply if a covered offense was combined with an offense that is not covered, it could have included that language. But it did not. We decline to expand the limitations crafted by Congress (footnote omitted)."

United States v. Jordan, 952 F.3d 160 (4th Cir. Mar. 3, 2020). In a case involving two convictions for possessing firearms in furtherance of a drug trafficking crime, the Fourth Circuit affirmed the defendant's convictions and 420-month sentence, which included a 5-year mandatory consecutive sentence for his first 18 U.S.C. § 924(c) conviction and a 25-year mandatory consecutive sentence for the second. It held, among other things, that section 403 of the First Step Act of 2018 did not apply to the defendant, whose case was pending on appeal on the "date of enactment." Noting that the defendant was sentenced more than a year before the Act was enacted, the court held that a sentence is "imposed" when the district court enters a sentence, not when the appeals are exhausted.

United States v. Arbaugh, 951 F.3d 167 (4th Cir. Feb. 20, 2020). The Fourth Circuit affirmed the defendant's 276-month sentence for knowingly traveling in foreign commerce to engage in illicit sexual conduct with a minor but vacated and remanded several conditions of his lifetime term of supervised release. Among other things, the court held that the district court erred by failing to explain why it imposed four special conditions of supervised release related to the defendant's use of computers, even though his offense did not involve computers and despite the possibility that those conditions may limit his future job prospects.

United States v. Bryant, 949 F.3d 168 (4th Cir. Jan. 24, 2020). On appeal from the denial of the defendant's motion to vacate, the Fourth Circuit affirmed his conviction and enhanced sentence for brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The court held that his underlying conviction for assault with intent to rob, steal, or purloin a postal employee and place their life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. § 2114(a), categorically qualifies as a crime of violence under the force clause of section 924(c)(3)(A). The court explained that the aggravated offense in section 2114(a), which requires that the defendant wound or put the victim's life in jeopardy by use of a dangerous weapon during the commission of the offense, is categorically a crime of violence.

FIFTH CIRCUIT

United States v. Rodriguez-Leos, 953 F.3d 320 (5th Cir. March 16, 2020). The Fifth Circuit vacated and remanded the defendant's 50-month sentence for unlawful possession of ammunition by a person admitted to the United States under a nonimmigrant visa. The court held, among other things, that the district court committed clear error in failing to apply a 3-level reduction under §2X1.1 for not substantially completing or being on the verge of completing the offense of exporting ammunition. It reasoned that, at the time of the defendant's arrest, he had only bought the ammunition and did not have possession of it, and there was no showing that completion of the offense was inevitable or imminent.

United States v. Moton, 951 F.3d 639 (5th Cir. Mar. 2, 2020). The Fifth Circuit affirmed the defendant's conviction and 186-month sentence for possession with intent to distribute a synthetic cannabinoid. Among other things, the court held that any error in calculating the defendant's offense level was harmless, stating that the district court properly relied on information in the presentence report to determine the drug quantity used to calculate the base offense level. In addition, the court found no error in application of the §2D1.1(b)(12) enhancement for maintaining a premises for manufacturing or distributing a controlled substance, where the facts established the defendant's access, dominion, and control of the premises.

United States v. James, 950 F.3d 289 (5th Cir. Feb. 18, 2020). The Fifth Circuit affirmed the defendant's 188-month armed career criminal sentence for being a felon in possession of a firearm, holding that his three prior convictions under Louisiana law for armed robbery qualify as predicate violent felonies under the Armed Career Criminal Act (ACCA). Among other things, the court discussed and relied on its earlier decision in *United States v. Brown*, 437 F.3d 450, 452 (5th Cir. 2006), which held that Louisiana simple robbery is a violent felony under the ACCA's force clause.

United States v. Mecham, 950 F.3d 257 (5th Cir. Feb. 13, 2020), petition of cert. filed, No. 19-7865 (Mar. 4, 2020). The Fifth Circuit, affirming the defendant's conviction for possession of child pornography, vacated and remanded his 97-month sentence, holding that the district court erred in applying a 4-level enhancement under §2G2.2(b)(4)(A) for sadistic material. The court held that the production of videos that superimposed the minor victim's faces on pornographic photos of adults to make it appear they were engaged in sexual activity was not "sadistic" for purposes of the enhancement because a reasonable viewer would not have concluded that the images depicted the contemporaneous infliction of pain.

United States v. Butler, 949 F.3d 230 (5th Cir. Feb. 4, 2020). The Fifth Circuit affirmed the defendant's sentence for being a felon in possession of a firearm, finding that his prior federal robbery convictions were predicate "violent felonies" under the elements clause of the Armed Career Criminal Act (ACCA). The court stated that the federal bank robbery statute, 18 U.S.C. § 2113, is a divisible statute describing two separate offenses. Accordingly, the court held, the district court properly applied the modified categorical approach and used the bank robbery indictments to narrow the defendant's prior convictions to the violent felonies of taking bank property through intimidation.

United States v. Chambliss, 948 F.3d 691 (5th Cir. Jan. 28, 2020). The Fifth Circuit affirmed denial of the defendant's motion for reduction of his career offender drug trafficking sentence under the compassionate release provision of the First Step Act of 2018, 18 U.S.C. § 3582(c)(1)(A)(1), despite his eligibility for that relief. Holding that the district court did not abuse its discretion, the court stated that compassionate release was discretionary and, even though the defendant was terminally ill and his release did not present a danger to the community, the district court found that his conduct was severe, he trafficked in drugs while on parole, and he was receiving effective medical care in prison. It concluded that the district court sufficiently articulated its reasons for denying compassionate release under 18 U.S.C. § 3553(a).

SIXTH CIRCUIT

United States v. Armes, 953 F.3d 875 (6th Cir. Mar. 26, 2020). The Sixth Circuit affirmed the defendant's 50-year sentence for multiple counts of child pornography, upholding imposition of an enhancement under 18 U.S.C. §§ 2251(e) and 2252A(b)(1)-(2) for a repeat sex offender. The court held, among other things, that the district court properly relied on the undisputed presentence investigation report (PSR), which described the defendant's prior sexual abuse indictment involving Kentucky third degree rape, to determine whether his prior convictions qualified as predicate sexual abuse offenses for purposes of the enhancement. Among other things, the court stated that, in determining the elements of a prior conviction, sentencing courts may consider the relevant part of an undisputed PSR that characterizes the contents of an underlying *Shepard*-approved state court record, such as an indictment or plea agreement.

United States v. Alexander, 951 F.3d 706 (6th Cir. Oct. 18, 2019) (designated for publication Mar. 4, 2020). Following the defendant's pro se appeal from a resentencing that reduced his sentence for possession with intent to distribute cocaine base from 360 months to 262 months, the Sixth Circuit affirmed the sentence reduction under the First

Step Act and 18 U.S.C. § 3582(c)(1)(B). In this panel decision recently designated for publication, the court held that the limited authority granted to courts by the First Step Act to reduce an otherwise final sentence does not entitle defendants to a plenary resentencing. In so holding, the court relied on caselaw as well as Fed. R. Crim. P. 43, which does not require the defendant's presence for sentence reductions under 18 U.S.C. § 3582(c).

United States v. Cavazos, 950 F.3d 329 (6th Cir. Feb. 12, 2020). In a conspiracy to distribute cocaine case, the Sixth Circuit reversed and remanded for resentencing the defendant's 262-month career offender sentence, holding that his prior Texas conviction for possession of a controlled substance with intent to deliver did not qualify as a "controlled substance offense" for purposes of §4B1.1 and §4B1.2. The court explained that, based on its prior precedent, "offers to sell" constitute an attempt to commit a controlled substance offense. Inchoate offenses cannot qualify as predicate offenses, it stated, because the guidelines commentary that includes them "impermissibly 'add[s] to' the Guidelines." Therefore, the court held, the district court clearly erred in enhancing the defendant's offense level under §4B1.1 based on his prior conviction.

United States v. Woods, 949 F.3d 934 (6th Cir. Feb. 4, 2020). The Sixth Circuit affirmed the district court's denial of a sentence reduction under the First Step Act of 2018 for the defendant's 37-month sentence for revocation of his supervised release. First, the court held that the defendant was eligible for a reduction of his current revocation sentence because it related to his original drug offense, which was covered by the First Step Act. The court then held that, even though the defendant was eligible for a reduction, the district court did not abuse its discretion in denying it based on the relevant sentencing factors.

United States v. Hollon, 948 F.3d 753 (6th Cir. Jan. 30, 2020). The Sixth Circuit affirmed the defendant's 370-month sentence for engaging in a child exploitation enterprise, holding that the offense of conviction qualified as a "covered sex crime" for purposes of the enhancement in §4B1.5(b) for repeat and dangerous sex offenders. The court stated that, although Application Note 2 to §4B1.2 excludes from the enhancement the trafficking, receipt, or possession of child pornography, it does not exclude the offense of engaging in a child exploitation enterprise. The court also held that the §4B1.5 enhancement can apply to first offenders, explaining that it punishes the pattern of prohibited sexual conduct rather than the offender's criminal history.

United States v. Richardson, 948 F.3d 733 (6th Cir. Jan. 27, 2020). In a case involving aiding and abetting Hobbs Act robbery and firearms offenses, the Sixth Circuit reaffirmed the defendant's convictions and 1,494-month sentence, holding, among other things, that the defendant cannot

benefit from the First Step Act of 2018 because the district court resentenced him before the Act became law. This appeal arose after two remands from the Supreme Court, one in light of its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and one after passage of the First Step Act. First, the Sixth Circuit held that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c), agreeing with the First, Third, Tenth, and Eleventh Circuits. The court also held that section 403 of the First Step Act was not retroactive. It reasoned that the First Step Act created new law rather than clarifying existing law, and that the defendant's sentence was "imposed" when the judgment was first announced, which was more than one year before the First Step Act became law.

United States v. Demma, 948 F.3d 722 (6th Cir. Jan. 24, 2020). On the government's appeal from a downward variance in a child pornography possession case, the Sixth Circuit vacated and remanded as substantively unreasonable the defendant's one-day time-served sentence. The court held that the district court's policy disagreement with §2G2.2 could not justify the extent of the downward variance, noting that the district court failed to discuss the retributive purposes of §2G2.2. The court stated that the district court gave excess weight to the factors in 18 U.S.C. § 3553(a) involving the defendant's individual characteristics, including his military service, a diagnosis of post-traumatic stress disorder, and the need to provide correctional treatment, but gave little to no weight to other factors, including sentences imposed in similar cases, offense seriousness, and deterrence.

United States v. Sands, 948 F.3d 709 (6th Cir. Jan. 24, 2020). The Sixth Circuit vacated and remanded the defendant's 78-month sentence for being a felon in possession of a firearm, holding that the district court erred in applying a 4-level enhancement under §2K2.1(b)(4)(B) for altered serial numbers after finding the numbers were still visible to the naked eye. Agreeing with at least three other circuits, the court adopted the Ninth Circuit's standard in *United States v. Carter* 421 F.3d 909, 910 (9th Cir. 2005), which defined "altered or obliterated" as "materially changed in a way that makes accurate information less accessible." In addition, it clarified that a serial number that has been defaced but is still visible to the naked eye is not "altered or obliterated" for purposes of the enhancement.

United States v. Potts, 947 F.3d 357 (6th Cir. Jan. 8, 2020), petition of cert. filed, No. 19-8187 (April 6, 2020). The Sixth Circuit affirmed the defendant's 108-month sentence for unauthorized access device fraud and aggravated identity theft offenses, which included consecutive prison terms for each count of conviction to run consecutively to an undischarged term of state imprisonment. The court held, among other things, that the district court did not err when it imposed consecutive prison terms without expressly

mentioning the §5G1.2 factors. The court joined the Third, Fourth, Ninth, and Eleventh Circuits in holding that a district court need not expressly reference the §5G1.2 factors in formulating a sentence involving multiple counts of aggravated identity theft, "so long as there is some indication that the district court assessed the relevant factors" in that guideline and its commentary.

SEVENTH CIRCUIT

United States v. Bridgewater, 950 F.3d 928 (7th Cir. Feb. 19, 2020). The Seventh Circuit affirmed as substantively reasonable the defendant's 78-month above-guideline sentence for soliciting an obscene visual depiction of a minor, holding, among other things, that the district court properly considered conduct involved in a dismissed charge of attempted enticement of a minor. The court affirmed the district court's rationale that a within-guideline sentence that did not account for the dismissed charge would not reflect the totality of the circumstances and would differ from others like it. It also held that the district court's reliance on dismissed conduct to increase the sentence did not violate the defendant's right to due process or a jury trial.

United States v. Lee, 950 F.3d 439 (7th Cir. Feb. 18, 2020). The Seventh Circuit affirmed the defendant's 210-month sentence for possession with intent to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime but vacated and remanded a supervised release condition. The supervised release condition at issue prohibited the defendant from knowingly meeting, communicating, or interacting with known felons unless the probation officer granted the defendant permission to do so. The court held, among other things, that the clause requiring permission by the probation officer did not involve the "management or supervision" of a condition but instead involved whether a condition of supervised release should go into effect, a power reserved for Article III judges.

United States v. Ballard, 950 F.3d 434 (7th Cir. Feb. 14, 2020). The Seventh Circuit vacated and remanded the defendant's 108-month sentence for possession of a firearm by a felon, holding that the district court did not provide an adequate explanation for the imposition of its 160% upward departure during resentencing. Noting that the district court did not articulate any new factors justifying the difference between the 10% departure in the first sentencing and the 160% departure in the second sentencing, the court stated that the district court's departure was "extreme" and required a "significant justification." In its instructions for the second remand, the Seventh Circuit recommended that the court follow the instructions in §4A1.3(a)(4)(B) and move incrementally down the sentencing table until it finds the appropriate guideline range.

Dotson v. United States, 949 F.3d 317 (7th Cir. Feb. 3, 2020). In a case involving a 188-month Armed Career Criminal Act (ACCA) sentence for possession of a firearm by a convicted felon, the Seventh Circuit affirmed the district court's denial of the defendant's 28 U.S.C. § 2255 motion. The court held that, in very limited circumstances like the instant case, the government may "substitute" an ACCA predicate offense if another predicate was deemed ineligible. In its analysis, the court noted different circuits' holdings on the issue, including the Eleventh Circuit in *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019) (allowing the government to rely on a conviction not determined at sentencing to be a predicate) and the Fourth Circuit in *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (government must specifically identify convictions it intends to use to enhance ACCA sentence). The court allowed consideration of the predicate offense in the instant case, it stated, because there were no notice concerns.

United States v. Holding, 948 F.3d 864 (7th Cir. Jan. 28, 2020). In this case involving drug and firearms offense, the Seventh Circuit reversed and remanded the defendant's 216-month sentence, holding that a district court may not credit a drug quantity finding over a defendant's objection where that quantity was based solely on the confidential informants' out-of-court statements, without some further indicia of reliability. Holding that the defendant's due process rights were violated, the court noted that the district court relied solely on the informant statements recounted in the presentence investigation report to account for more than 96% of the defendant's drug quantity, a quantity that substantially increased the guideline range.

EIGHTH CIRCUIT

United States v. Clayborn, 951 F.3d 937 (8th Cir. Mar. 4, 2020). The Eighth Circuit affirmed the defendant's 144-month career offender sentence for possession with intent to distribute a controlled substance. The court held that the defendant's prior Iowa and Illinois convictions for delivery of a controlled substance qualified as controlled substance offenses under §4B1.2. The court explained that the guideline's definition of "distribution" includes delivery and is not limited to commercial drug trafficking crimes. Regarding the Iowa offense, the court cited its prior precedent holding that the statute categorically qualifies as a controlled substance offense and noted that distribution includes the constructive transfer of a controlled substance. The court also held that the Illinois conviction imposed in 2000 was not too old to qualify because his relevant conduct began in 2014.

United States v. Harris, 950 F.3d 1015 (8th Cir. Feb. 21, 2020). The Eighth Circuit reversed and remanded the defendant's 240-month career offender sentence for distributing methamphetamine, holding, among other things,

that his prior Arkansas conviction for committing a terroristic act was not a crime of violence for purposes of the career offender enhancement. The court explained that the Arkansas statute's *mens rea* requirement is indivisible and can be committed with intent to injure property, rather than a person, which does not satisfy the elements clause.

United States v. Hamilton, 950 F.3d 567 (8th Cir. Feb. 19, 2020). Following a remand and resentencing for reconsideration of whether a prior conviction was properly included in the defendant's criminal history score, the Eighth Circuit reversed the defendant's 81-month sentence for possession of heroin with intent to distribute and again remanded for resentencing. The court held that while the criminal history score was properly supported by the *Shepard* documents, the district court erred in believing it was limited on remand to consideration of only the criminal history score issue. The court explained that a district court can hear any relevant evidence on remand that it could have heard at the original sentencing hearing, with the exception of issues decided by the appellate court.

United States v. Jesse, 950 F.3d 552 (8th Cir. Feb. 14, 2020). The Eighth Circuit affirmed the defendant's 175-month sentence for conspiring to distribute methamphetamine, holding that the district court correctly assigned criminal history points to a prior Iowa conviction. For the Iowa conviction, the defendant had received an indeterminate sentence not to exceed two years' imprisonment, but because she had already spent more than 332 days in custodial settings, she received a subsequent order discharging her sentence as having been served. The Eighth Circuit held that her Iowa sentence was properly counted as a sentence for "more than one year and one month," yielding three criminal history points, because the subsequent order did not vacate the original sentence.

United States v. Brown, 947 F.3d 503 (8th Cir. Jan. 16, 2020). The Eighth Circuit affirmed the defendant's 36-month sentence for violating supervised release, upholding the district court's finding that he committed a grade A violation by assaulting a law enforcement officer. The court held the district court correctly determined that the defendant had committed the Missouri offense of second-degree assault, a grade A supervised release violation under §7B1.1(a)(1)(A)(i), rather than simple assault. When the defendant lunged at the deputy and placed his hands on the deputy's weapon with intent to remove it, the court explained, he took a substantial step toward committing assault with at least the threat of violence. The court stated that the Missouri assault offense could be completed by an attempt, and that the defendant did not have to subjectively intend to harm the officer with the gun to be convicted.

United States v. Watters, 947 F.3d 493 (8th Cir. Jan. 10, 2020). The Eighth Circuit affirmed the defendant's 262-

month sentence for distributing child pornography, which was ordered to run consecutive to a 60-month sentence that was previously imposed for violating supervised release in an earlier child pornography case. The court held, among other things, that the district court did not violate the Double Jeopardy Clause when it imposed the instant sentence based on the same conduct that had given rise to the sentence previously imposed for a probation violation under 18 U.S.C. § 3583(k). The court noted that the instant offense was supported by evidence known during the revocation proceedings and later-discovered evidence. Acknowledging the Supreme Court’s invalidation of § 3583(k) in *United States v. Haymond*, 139 S. Ct. 2369 (2019), the court stated that *Haymond’s* reasoning did not necessarily displace longstanding double jeopardy jurisprudence. The court also noted that, even assuming error, it did not seriously affect the proceedings because the combination of his revocation sentence and instant sentence was still within the guideline range for the instant offense.

NINTH CIRCUIT

United States v. Walker, 953 F.3d 577 (9th Cir. Mar. 20, 2020). The Ninth Circuit affirmed the defendant’s 15-year sentence under the Armed Career Criminal Act (ACCA) for being a felon in possession of a firearm. The court held that his prior state convictions in California for “willfully inflict[ing] corporal injury” on a spouse or cohabitant are violent felonies under the ACCA, citing circuit precedent that the offense is a crime of violence under §2L1.2 and 18 U.S.C. § 16(a). The court also held that the Sixth Amendment does not preclude a sentencing court from determining whether prior convictions occurred on separate occasions, citing circuit precedent that sentencing courts may determine the dates on which prior offenses occurred in deciding whether a defendant has three or more predicate offenses under the ACCA.

United States v. Jones, 951 F. 3d 1138 (9th Cir. Mar. 4, 2020). The Ninth Circuit affirmed denial of the defendant’s 28 U.S.C. § 2255 motion, upholding his sentence for unlawful possession of a firearm under the Armed Career Criminal Act (ACCA). The court held that the defendant’s prior Colorado conviction for second-degree burglary is a “violent felony” under the ACCA. Citing *United States v. Stitt*, 139 S. Ct. 399 (2018), the court stated that the Colorado statute’s definition of “dwelling” satisfies the federal generic offense of burglary. It explained that vehicles included in the definition must be both adapted for overnight accommodations or for business *and* used, intended to be used, or usually used for habitation.

United States v. George, 949 F.3d 1181 (9th Cir. Feb. 4, 2020). The Ninth Circuit affirmed the defendant’s 240-month sentence for mail fraud, wire fraud, and conspiracy, upholding a 6-level enhancement under §2B1.1(b)(2)(C) for

offenses that “resulted in substantial financial hardship to 25 or more victims.” Among other things, the court held, as a matter of first impression, that the enhancement required the district court to determine whether the victims suffered losses that were significant in light of their individual financial circumstances. The court stated, however, that to apply the enhancement, the district court was not required to identify each specific victim in order to make a reasonable estimate of the number of victims based on the available information.

TENTH CIRCUIT

NO NOTABLE CASES IDENTIFIED

ELEVENTH CIRCUIT

NO NOTABLE CASES IDENTIFIED

D.C. CIRCUIT

United States v. Miller, 953 F.3d 804 (D.C. Cir. Mar. 27, 2020). Affirming the defendant’s convictions for travel and wire fraud, the D.C. Circuit reversed and remanded the defendant’s 204-month sentence, holding, among other things, that the district court erroneously rejected the defendant’s sentencing-based ineffective assistance of counsel claim. The district court held that trial counsel’s failure to inform the court that the defendant’s detention on a federal writ while awaiting trial deprived him of the opportunity to earn state confinement credits, fell below an objective standard of reasonable performance, but did not prejudice the defendant. However, the D.C. Circuit found prejudice and, citing §5G1.3(c), explained that “in order to determine whether a consecutive sentence is ‘reasonable,’ a sentencing court must know what the [state] sentence is and consider whether the federal sentence, when combined with the state sentence, is necessary to achieve a reasonable punishment.”

United States v. Browne, 953 F.3d 794 (D.C. Cir. Mar. 27, 2020). In a case involving kidnapping and marijuana possession with intent to distribute, the D.C. Circuit, among other things, affirmed the defendant’s concurrent 176-month and 60-month sentences. The court held that it was reasonable for the sentencing court to infer that the defendant’s kidnapping of a ride-sharing driver was in furtherance of his drug trafficking. In doing so, the court relied on circuit precedent holding that a district court may base its sentence on acquitted or uncharged conduct if it finds by a preponderance of the evidence that the conduct occurred.

United States v. Mason, 951 F.3d 567 (D.C. Cir. Mar. 6, 2020). The D.C. Circuit affirmed the defendant’s 5-year

sentence for drug conspiracy, holding, among other things, that he was ineligible for a sentence reduction under the safety valve at §5C1.2(a)(5) because he refused to provide the names of his customers. The court stated that the names of customers, who were also alleged dealers, constituted “information” concerning “the offense of conviction and all relevant conduct” that he was obligated to provide to qualify for a safety valve reduction.

United States v. Carr, 946 F.3d 598 (D.C. Cir. Jan. 7, 2020). The D.C. Circuit affirmed the dismissal of the defendant’s second 28 U.S.C. § 2255 motion, upholding the district

court’s determination that he qualified as a career offender based on his prior federal bank robbery convictions under 18 U.S.C. § 2113(a). Agreeing with nine other circuits, the court held that bank robbery under section 2113(a) is categorically a crime of violence under the elements clause of §4B1.2(a)(1). The court stated that, based on this finding, it did not have to reach the defendant’s constitutional objection to the guideline’s residual clause.



UNITED STATES SENTENCING COMMISSION

One Columbus Circle, N.E.

Suite 2-500, South Lobby

Washington, DC 20002-8002

T: (202) 502-4500

F: (202) 502-4699

www.ussc.gov

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