

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 SECOND QUARTER OF 2020 —

FIRST CIRCUIT

United States v. Lewis, No. 18-1916 (1st Cir. June 16, 2020). The First Circuit affirmed the defendant's 108-month career offender sentence for conspiracy to distribute powder cocaine, holding that his conspiracy offense qualifies as a "controlled substance offense" under the career offender guideline. Noting a circuit split, the court relied on prior circuit precedent in holding that, under Application Note 1, §4B1.2 includes inchoate offenses such as conspiracy. The court also held that the district court did not err by declining to vary downward based on a policy disagreement with the application note. In addition, the court concluded that it did not have to decide whether the defendant's conspiracy conviction under 21 U.S.C. § 846 is a "categorical mismatch" with the generic definition of conspiracy, noting that other circuits are divided on that issue.

United States v. Lopez, 957 F.3d 302 (1st Cir. April 30, 2020). In a racketeering conspiracy case, the First Circuit affirmed the defendant's 240-month sentence, holding that the district court's increase for managerial or supervisory role was warranted. In an issue of first impression for the circuit, the court held that the 3-level managerial role adjustment at §3B1.1(b) depends on the defendant's role in the racketeering enterprise as a whole, not on his role in the discrete predicate acts that underpin the conspiracy.

United States v. Smith, 954 F.3d 446 (1st Cir. April 8, 2020). The First Circuit reversed and remanded the district court's denial of a sentence reduction under the First Step Act, holding that the defendant's 2007 conviction for distributing less than two grams of crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(C), was a "covered offense" under section 404 of the Act. In so holding, the court rejected the government's argument that the "[f]ederal criminal statute" referred to in section 404 refers to a specific subsection of section 841(b)(1), leaving the district court to decide the remedy on remand.

United States v. Cruz-Rivera, 954 F.3d 410 (1st Cir. Apr. 1, 2020). In a case involving multiple counts of carjacking and firearms offenses, the First Circuit denied the defendant's motion to recall the court's mandate and remand for resentencing, leaving the defendant's 872-month sentence in place. The court held that section 403 of the First Step Act, which prohibits "stacking" of multiple 25-year mandatory minimum penalties for convictions under 18 U.S.C. § 924(c), does not apply where the defendant was sentenced before its enactment date. The court rejected the defendant's argument that section 403 should apply to cases that were pending on direct appeal at the time of enactment, joining the Third, Fourth, and Sixth Circuits in so holding.

SECOND CIRCUIT

United State v. Vargas, 961 F.3d 566 (2d Cir. June 9, 2020). In a drug conspiracy case, the Second Circuit remanded for resentencing the defendant's 90-month sentence, holding, among other things, that the district court erred in denying the government's motion to grant a third-level reduction for timely acceptance of responsibility under §3E1.1(b). The sentencing court had denied the government's motion because the defendant pled guilty only after a lengthy suppression hearing. The Second Circuit stated that the sentencing court made no factual findings about whether the plea, which came four weeks before the trial, was sufficiently timely to allow it to allocate its resources efficiently, and there was nothing in the record to support its rejection of the government's own assessment that the plea had saved government resources.

United States v. Thompson, 961 F.3d 545 (2d Cir. June 8, 2020). The Second Circuit vacated and remanded for resentencing the defendant's mandatory minimum 10-year sentence for conspiracy and possession with intent to distribute a controlled substance, holding that the defendant's prior New York conviction for fifth degree attempted sale of a controlled substance does not categorically qualify as a predicate felony drug offense for purposes of 21 U.S.C.

§ 841(b)(1)(B). Disagreeing with the district court's conclusion that the categorical approach does not apply to define a "felony drug offense," the court held that the New York statute criminalizes conduct beyond the scope of the federal analog because it regulates a substance that is not regulated by the analogous felony statute.

United States v. Johnson, 961 F.3d 181 (2d Cir. June 5, 2020). On the government's appeal in a drug conspiracy case, the Second Circuit affirmed the district court's reduction of the defendant's sentence under the First Step Act, which included reducing his prison sentence from 20 years to time served. The court held that the statute under which the defendant was convicted, and not the defendant's actual conduct, determines whether a defendant was sentenced for a "covered offense" under section 404 of the First Step Act. The defendant pled guilty to a conspiracy involving 50 grams or more of crack cocaine, it stated, even though he admitted in his plea agreement that his relevant conduct included at least 1.5 kilograms (1,500 grams) of crack cocaine.

United States v. Zapatero, 961 F.3d 123 (2d Cir. June 3, 2020). In a case involving conspiracy to distribute cocaine, the Second Circuit affirmed the denial of the defendant's motion to reduce his 168-month sentence under 18 U.S.C. § 3582(c)(2) based on Amendment 782. Holding that the defendant was not eligible for a reduction, the court stated that the policy statement at §1B1.10(b) precluded the district court from reducing the defendant's sentence below the amended guideline range to reflect an adjustment under §5G1.3(b) for time served on a related, undischarged term of imprisonment for the same conduct that was part of his original sentence.

United States v. Holloway, 956 F.3d 660 (2d Cir. Apr. 24, 2020). In a case involving crack distribution, the Second Circuit vacated the denial of the defendant's motion to reduce his sentence under the First Step Act, and remanded for consideration of a reduction. The court first held that the defendant's release from prison did not moot his appeal because his undischarged term of supervised release could still be reduced. It then held that the defendant was eligible for a reduction because he was sentenced "for a covered offense," even though his guideline range was unchanged due to his career offender status. It stated that his eligibility for a reduction is governed by 18 U.S.C. § 3582(c)(1)(B), which does not require that the reduction comport with the guideline policy statements, rather than section 3582(c)(2).

THIRD CIRCUIT

United States v. Sims, 957 F.3d 362 (3d Cir. Apr. 24, 2020). The Third Circuit affirmed the defendant's 151-month sentence for conspiracy to commit sex trafficking by force,

fraud, or coercion in violation of 18 U.S.C. § 1594(c), holding that the base offense level under §2G1.1(a)(1) is a level 34. In doing so, the court disagreed with a Ninth Circuit case that applied a base offense level of 14 under §2G1.1(a)(2). The court explained that §2G1.1 must be read in conjunction with §2X1.1, which instructs courts to apply the base offense level for the underlying substantive offense rather than the guideline section in general.

FOURTH CIRCUIT

United States v. Chambers, 956 F.3d 667 (4th Cir. Apr. 23, 2020). On the defendant's appeal from a First Step Act resentencing, the Fourth Circuit vacated the defendant's 262-month sentence, which included re-imposition of a career offender enhancement, and remanded for a new resentencing without the enhancement. The defendant's career offender designation had been deemed erroneous by intervening, retroactively-applicable circuit case law, which the district court declined to apply at resentencing. The Fourth Circuit held that, in resentencing the defendant under the First Step Act, any guideline error deemed retroactive must be corrected. It also held that the statutory sentencing factors apply at resentencing, and the sentencing court has the discretion to vary from the guidelines and consider post-sentencing conduct.

FIFTH CIRCUIT

United States v. Guidry, 960 F.3d 676 (5th Cir. June 4, 2020). The Fifth Circuit affirmed the concurrent sentences of 60 and 115 months imposed on the defendant for two drug convictions, upholding the district court's criminal history calculation as well as its adjustments for obstruction of justice and possession of a dangerous weapon. The court affirmed the §3C1.1 obstruction increase based on jailhouse phone calls the defendant made to third parties asking them to convince a witness to recant statements implicating him and lie to a grand jury. It also affirmed the §2D1.1(b)(1) weapon enhancement, agreeing with the district court's finding that there was a "temporal and spatial relationship among" the defendant, the narcotics, and the firearm because the firearm was within the defendant's reach and he had a bullet in his pocket. In addition, the court upheld the district court's finding that a prior sentence imposed on the defendant in lieu of revocation of probation was part of a "prior sentence" for purposes of calculating his criminal history points under §4A1.2(a).

United States v. Smith, 957 F.3d 590 (5th Cir. Apr. 30, 2020). In a case involving multiple firearm convictions, the Fifth Circuit affirmed denial of the defendant's motion to vacate his 1,320-month sentence. The court held that, although the residual clause in 18 U.S.C. § 924(c)(3)(B) has been struck down, the defendant's prior federal convictions

for aggravated bank robbery and attempted murder qualify as predicate crimes of violence under the elements clause in section 924(c)(3)(A). The Fifth Circuit also joined several other circuits in holding that an attempt to commit a crime of violence is itself a crime of violence under the elements clause.

United States v. Diggles, 957 F.3d 551 (5th Cir. April 29, 2020). On rehearing of a case involving fraud, the en banc Fifth Circuit affirmed, among other things, four conditions of supervised release related to the defendants' financial obligations. In doing so, the court stated that it was resolving inconsistency in its caselaw regarding how the requirement that a court pronounce its sentence in the defendant's presence applies to conditions of supervision. At sentencing, the district court had expressly adopted, without reciting, the recommendations in the presentence report as to conditions of supervision. The court held that "what matters is whether a condition is required or discretionary under the supervised release statute." Specifically, "if a condition is required, making an objection futile, the court need not pronounce it. If a condition is discretionary, the court must pronounce it to allow for an objection." It also stated that oral adoption of the presentence report's proposed conditions complied with the oral pronouncement requirement.

United States v. Rodriguez-Pena, 957 F.3d 514 (5th Cir. April 27, 2020). The Fifth Circuit vacated and remanded the defendant's above-range sentence of 44 months for illegal reentry. The court held that the district court committed plain error when it relied on and mentioned an incorrect guideline range in explaining its sentence, even though it imposed a sentence outside that range. The court remanded for resentencing because, it stated, the record was silent as to what the district court might have done had it considered the correct range.

United States v. Johnson, 956 F.3d 740 (5th Cir. April 21, 2020). The Fifth Circuit vacated and remanded the defendant's above-guideline sentence of 72 months for possessing a firearm after being convicted of domestic violence. The court held that it was plain error for the sentencing court to rely on factual allegations about witness intimidation in connection with dismissed armed robbery charges that were not disclosed to the defendant in the presentence report or otherwise. It stated that the district court "expressly relied on the failure of witnesses to appear and testify at a trial on an armed robbery charge and 'evidence of intimidation of witnesses' in imposing its above-guidelines sentence."

United States v. Prentice, 956 F.3d 295 (5th Cir. April 13, 2020). On appeal from resentencing for possession of a firearm by a felon, the Fifth Circuit, among other things, va-

cated the district court's sentence of 55 months and remanded for reinstatement of the defendant's original armed career criminal sentence of 188 months. The court held, in the wake of the Supreme Court's recent decision in *Shular v. United States*, 140 S. Ct. 779 (2020), that the defendant's prior Texas conviction for possessing with intent to deliver a controlled substance constitutes a predicate "serious drug offense" under the Armed Career Criminal Act (ACCA). The court stated that *Shular* broadens the understanding of "a serious drug offense" by focusing on the underlying conduct and thus "dictates that the Texas offense of possessing with intent to deliver is conduct involving 'distribution' of controlled substances under the ACCA."

SIXTH CIRCUIT

United States v. Hill, No. 19-1003 (6th Cir. June 25, 2020). In a case involving Hobbs Act robbery, the Sixth Circuit reversed and remanded the defendant's 130-month sentence with instructions for the district court to apply the 2-level enhancement at §2B3.1(b)(4) for "physical restraint" rather than the 4-level enhancement that it applied for "abduction." Stating that courts were split on whether the forced movement of victims from one area or room to another area or room within the same building constitutes an "abduction" under the guideline, the court agreed with the Seventh and Eleventh Circuits that the phrase "different location" generally refers to a place other than the store being robbed. Noting that the phrase "different location" could be context-dependent, the court concluded that, in this case, the back room of the store robbed did not qualify as a "different location" from the sales floor of the store.

United States v. Smith, 960 F.3d 883 (6th Cir. June 5, 2020). The Sixth Circuit affirmed the defendant's 150-month career offender sentence for distribution of controlled substances, holding, among other things, that the defendant's prior conviction for Ohio drug distribution under O.R.C. § 29.25.03(A)(2) qualified as a predicate "controlled substance offense" for purposes of §4B1.2(b). The court determined that the Ohio statute, which prohibits a person from, among other things, knowingly preparing for shipment a controlled substance when the offender knows or has reason to believe it is intended for sale, "falls safely within the Guideline's contours." The court, in responding to the defendant's arguments under *United States v. Havis*, 927 F.3d 382, 384 (6th Cir. 2019) (en banc), regarding the word "prepare" in the statute, stated that "the possession of a controlled substance, which is necessary for a conviction for 'preparing' to distribute . . . [is] beyond the substantial step necessary for attempt."

United States v. Woodson, 960 F.3d 852 (6th Cir. June 3, 2020). In a case involving an interstate diamond-theft conspiracy, the Sixth Circuit affirmed the defendant's 24-

month sentence, holding that the district court properly applied the §2B1.1(b)(10)(A) enhancement for relocating to avoid law enforcement. The court declined to adopt a categorical rule that the enhancement is precluded if defendants carry out part of a criminal scheme from a “home base.” Citing circuit precedent, the court instead held that the enhancement applies if travel to other jurisdictions to avoid detection by law enforcement is a “key component” of the scheme. The court also noted that its decision was in accord with a case in the First Circuit and at odds with a case in the Seventh Circuit.

United States v. Alam, 960 F.3d 831 (6th Cir. June 2, 2020).

In a case involving fraud, the Sixth Circuit affirmed the district court’s dismissal without prejudice of the defendant’s motion for compassionate release from his 101-month sentence, based on the Covid-19 pandemic. Noting that the defendant’s failure to exhaust administrative remedies by waiting 30 days before filing his motion in federal court did not affect the court’s subject matter jurisdiction, it held that it did require dismissal without prejudice. The court stated that prisons must have the authority to process 18 U.S.C. § 3582(c)(1)(A) applications, and “thirty days hardly rises to the level of ‘an unreasonable or indefinite timeframe.’” The court agreed with the Third Circuit’s recent decision in *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020), which found that failure to complete the exhaustion requirement “presents a glaring roadblock foreclosing compassionate release.”

United States v. Boulding, 960 F.3d 774 (6th Cir. June 1, 2020).

On cross appeals in a case involving a crack cocaine sentence, the Sixth Circuit affirmed the defendant’s eligibility for resentencing under the First Step Act but vacated and remanded for resentencing the defendant’s reduced sentence of 324 months. The court held that the district court’s failure to provide the defendant with an opportunity to present objections to its calculation of the amended guideline range “fell short of the resentencing review envisioned by the First Step Act.” First, the court held that eligibility for resentencing under the First Step Act is governed by the statute of conviction rather than a defendant’s specific conduct, joining the First, Fourth, Fifth, Seventh, and Eighth Circuits. The court then held that, even though eligible defendants are not entitled to plenary resentencing during First Step Act proceedings, the defendant was entitled to an opportunity to present objections, subject to reasonableness review on appeal.

United States v. Perez-Rodriguez, 960 F.3d 748 (6th Cir. May 27, 2020).

The Sixth Circuit reversed and remanded as substantively unreasonable the defendant’s 24-month sentence for illegal reentry, an upward variance from his guideline range of 8–14-months. The court held, among other things, that the defendant’s guilty plea conviction was a “mine-run case” requiring a closer review, noting

that his guideline range already reflected his prior convictions, and that the district court’s upward variance created unwarranted sentence disparities.

United States v. Smith, 959 F.3d 701 (6th Cir. May 15, 2020). The Sixth Circuit vacated and remanded the district court’s order denying the defendant’s motion to reduce his 240-month sentence for conspiracy to distribute crack cocaine under the First Step Act, holding that the district court abused its discretion in declining to reduce his sentence. The court stated that the district court “failed to provide a sufficiently compelling justification for maintaining the sentence that is now twice the guideline range set by Congress,” and that it should reconsider the defendant’s motion for reduction with reference to the purposes of the First Step Act and the Fair Sentencing Act.

United States v. Foreman, 958 F.3d 506 (6th Cir. May 7, 2020).

On the defendant’s appeal from resentencing, the Sixth Circuit affirmed as reasonable the defendant’s 232-month sentence, which was reduced pursuant to the First Step Act. The court held that the Act did not entitle the defendant to a plenary resentencing, including reconsideration of his career offender status, and that the district court did not err in leaving the term of his supervised release unchanged. The court also held that First Step Act proceedings are subject to appellate reasonableness review, stating that it “decline[d] to add First Step Act proceedings to the list of sentence reduction and modification proceedings shielded from appellate review under § 3742(a)(1).”

United States v. Smith, No. 958 F.3d 494 (6th Cir. May 6, 2020).

On the defendant’s appeal from resentencing, the Sixth Circuit affirmed the defendant’s 360-month sentence, reduced from a life sentence under the First Step Act. The court held that the Act does not require a full resentencing, that the appellate court had jurisdiction to consider procedural unreasonableness, and that the district court provided sufficient explanation of its reasoning. After reaffirming its earlier case holding that plenary resentencing was not required, the Sixth Circuit held that the court satisfied its obligation to explain its reasoning by using a modified version of AO Form 247 (Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)). In so holding, the court cited to the Supreme Court’s decision in *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018), and its approval of the use of a “nearly identical form order” for a sentence modification.

United States v. Brown, 957 F.3d 679 (6th Cir. Apr. 24, 2020).

On the government’s appeal, the Sixth Circuit vacated and remanded the defendant’s 63-month reduced sentence pursuant to 28 U.S.C. § 2255, with instructions for the district court to reinstate the defendant’s original 180-month Armed Career Criminal Act (ACCA) sentence

for being a felon in possession of a firearm. The court held, among other things, that the defendant's three prior Tennessee convictions for burglary constitute violent felonies under the ACCA following the Supreme Court's decision in *United States v. Stitt*, 139 S. Ct. 399 (2018), which reversed the Sixth Circuit's en banc opinion interpreting the Tennessee statute. The defendant had already completed a 2-year term of supervised release prior to this decision reimposing his sentence of imprisonment.

United States v. Allen, 955 F.3d 355 (6th Cir. Apr. 14, 2020). The Sixth Circuit reversed and remanded the district court's order denying, in part, the defendant's motion to reduce his 210-month sentence for possession with intent to distribute cocaine base. The court held that section 404 of the First Step Act of 2018 does not prohibit courts from considering a defendant's post-sentencing conduct when deciding whether to reduce his sentence. Among other things, the court stated that sentencing courts are not precluded from considering the 18 U.S.C. § 3553(a) factors during resentencing proceedings pursuant to 18 U.S.C. § 3582(c)(1)(B), noting that the factors are both familiar and manageable in the sentencing context.

SEVENTH CIRCUIT

United States v. Carter, 961 F.3d 953 (7th Cir. June 8, 2020). The Seventh Circuit affirmed the defendant's 105-month sentence for possession of a firearm by a felon, holding that the defendant's prior Iowa conviction for aggravated assault is a crime of violence for purposes of determining his base offense level under §2K2.1(a)(2). After declining to identify a generic definition of aggravated assault for purposes of the enumerated offenses clause, the court held that the defendant's conviction instead qualifies as a crime of violence under the elements clause because it required the display of a dangerous weapon in a threatening manner. In its decision, the court, referring to the use of the categorical approach to determine predicates under §4B1.2, stated, "we also remind district courts that the classification of prior convictions under the Sentencing Guidelines can produce abstract disputes that bear little connection to the purposes of sentencing," and that it would be appropriate for a court to "signal" it was using its discretion under section 3553(a) to impose a sentence that "does not depend on that categorical classification."

United States v. Draheim, 958 F.3d 651 (7th Cir. May 7, 2020). In a case involving conspiracy and drug crimes, the Seventh Circuit, among other things, affirmed one defendant's 130-month sentence, holding that her role as leader of a conspiracy foreclosed her eligibility for safety valve relief. At issue was 18 U.S.C. § 3553(f)(1)(4), which requires that the defendant (1) not be a leader or organizer and (2) not engage in a continuing criminal enterprise. In a

matter of first impression, the court held that the district court need not have found both statutory conditions in order to deny relief because, among other things, it is the defendant's burden to prove either part, and if one applies, it necessarily forecloses relief. Noting that it was adopting the Sixth Circuit's approach to the issue, the court cited both congressional intent and Application Note 6 of §5C1.2.

United States v. Shaw, 957 F.3d 734 (7th Cir. Apr. 28, 2020). The Seventh Circuit reversed and remanded the district courts' denial of four defendants' motions, in separate actions, for sentence reductions under the First Step Act. The court held, among other things, that the defendants' crack cocaine offenses constitute "covered offenses" under the First Step Act, and thus were eligible for sentence reduction regardless of the quantities involved in their offenses. In its analysis, the court joined the First, Fourth, Fifth, Sixth, and Eighth Circuits in holding that the statute of conviction determines a defendant's eligibility for First Step Act relief. It also stated, as to one defendant, that the district court failed to adequately explain its determination where it gave no indication it had considered the defendant's arguments or accounted for the statutory sentencing factors.

EIGHTH CIRCUIT

United States v. Moore, No. 19-3187 (8th Cir. June 24, 2020). In a case involving conspiracy to distribute 50 or more grams of cocaine base, the Eighth Circuit affirmed denial of the defendant's motion for sentence reduction under the First Step Act. The court held that the district court properly exercised its discretion to deny the reduction without considering the statutory sentencing factors in 18 U.S.C. § 3553(a), noting that Congress did not explicitly mandate consideration of those factors in the text of the Act.

United States v. Hodgkiss, 960 F.3d 1110 (8th Cir. June 8, 2020). The Eighth Circuit vacated the defendant's 120-month mandatory minimum sentence for methamphetamine distribution, which ran consecutive to a 60-month sentence for firearm possession in furtherance of a drug trafficking offense, and remanded for further proceedings. The court disagreed with the district court's holding that the defendant was ineligible for safety valve relief on the drug offense because his relevant conduct for the drug offense included the conduct underlying the firearm offense. The court held that the defendant's firearm offense did not disqualify him from statutory safety valve eligibility on his drug offense because "the offense" in the statute only means the offense of conviction. The commentary to the safety valve guideline at §5C1.2 defines "the offense" to include relevant conduct, the court noted, and where the

commentary conflicts with the plain meaning of a statute, the statute governs.

United States v. Sherman, 960 F.3d 978 (8th Cir. May 28, 2020). The Eighth Circuit affirmed denial of the defendant's motion for a sentence reduction under the First Step Act, upholding the district court's re-imposition of a 240-month sentence for conspiracy to distribute 50 grams or more of cocaine base. The court held that the district court's finding that the defendant was responsible for more than 30 kilograms of cocaine base was not inconsistent with the finding at the original sentencing that the defendant was responsible for more than 1.5 kilograms of cocaine base. It also held that the record supported this finding, and that the district court was not required to explicitly address the defendant's post-sentencing rehabilitation efforts.

McCoy v. United States, 960 F.3d 487 (8th Cir. May 26, 2020). The Eighth Circuit affirmed denial of the defendant's motion to vacate his 120-month mandatory minimum sentence for using a firearm during and in relation to a crime of violence, which was imposed consecutive to a 96-month sentence for voluntary manslaughter. The court held that voluntary manslaughter qualifies as a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A) because it has as an element the use of force against the person of another. Citing prior Supreme Court and circuit precedent, the court explained that the force clause can be satisfied by a recklessness mens rea and that causing injury through indirect means can constitute use of force.

United States v. Sterling, 959 F.3d 855 (8th Cir. May 13, 2020). In a case involving impersonating a foreign diplomat and being a felon in possession of a firearm, the Eighth Circuit affirmed in part and vacated in part the district court's modification of the defendant's sentence to add three special conditions of supervised release. Among other things, the court vacated a special condition requiring the defendant to provide the probation officer access to "any" requested financial information, including unexpected financial gains. The court noted that §5D1.3(d)(3) recommends imposing such a broad financial disclosure condition in specific circumstances which were not present in the defendant's case, where there was no evidence he committed monetary crimes or was at risk of committing them in the future. Accordingly, it held that the condition imposed a greater deprivation of liberty than reasonably necessary under 18 U.S.C. § 3583(d)(2) and was not the minimum necessary to protect the public under §5F1.5(b).

United States v. Roberts, 958 F.3d 675 (8th Cir. May 1, 2020). The Eighth Circuit vacated and remanded the defendant's 96-month sentence for being a felon in possession of a firearm, holding that the §3B1.4 enhancement for "using a minor to commit a crime" should not apply. The court

held that giving marijuana and money to a minor in exchange for a firearm did not amount to "use" of a minor "to commit" the felon-in-possession offense because the enhancement requires a more affirmative act to involve a minor in the crime. In addition, the court affirmed a §2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with another felony, holding that the Iowa offense of carrying a weapon constituted "another felony offense."

United States v. Vanoy, 957 F.3d 865 (8th Cir. Apr. 27, 2020). The Eighth Circuit affirmed the defendant's Armed Career Criminal Act (ACCA) sentence for being a felon in possession of a firearm, holding that his two prior drug convictions under Virginia Code § 18.2-248 constitute predicate "serious drug offenses." Citing to prior precedent regarding a different drug offense, the court held that the Virginia statute is divisible, punishing some substances that qualify under the ACCA and some that do not. Applying the modified categorical approach, the court found that the defendant's offense involved the distribution of cocaine, which qualifies.

United States v. Castellanos Muratella, 956 F.3d 541 (8th Cir. Apr. 15, 2020). The Eighth Circuit affirmed the defendant's 200-month career offender sentence for conspiracy to distribute methamphetamine, holding, among other things, that his two prior felony drug convictions under Iowa Code § 124.401 are predicate "controlled substance offenses" under the career offender guideline. Relying on circuit precedent, the court stated that counterfeit substances under the guidelines include the "simulated controlled substances" mentioned in the Iowa statute.

United States v. Winnick, 954 F.3d 1103 (8th Cir. Apr. 1, 2020). The Eighth Circuit vacated and remanded the defendant's 366-month sentence for producing child pornography, holding, among other things, that clarification was necessary regarding how the district court arrived at the final sentence after applying a §5G1.3 adjustment for time already spent in custody. The court stated that the district court appeared to incorrectly believe that §5G1.3 limits credit for time spent in state custody to time served *after* initiation of the instant federal case, noting that the guideline and its application notes do not provide such a limitation. In remanding for clarification, the court declined to presume that the district court correctly applied §5G1.3 and simply exercised its discretion to vary upwards to reach the final sentence.

NINTH CIRCUIT

United States v. Kelley, 962 F.3d 470 (9th Cir. June 15, 2020). In a First Step Act appeal, the Ninth Circuit affirmed the district court's reduction of the defendant's sen-

tence from 192 months to 180 months for conspiracy to distribute 50 grams of cocaine base, which was based, in part, on its re-imposition of the career offender enhancement. Although the defendant argued he would no longer qualify for career offender status, the court held that the First Step Act does not authorize a plenary resentencing, including reconsideration of his career offender status. In doing so, the court joined with the view of the Fifth and Sixth Circuits instead of the Fourth Circuit, noting that it was deepening a circuit split on the issue.

United States v. Baldon, 956 F.3d 1115 (9th Cir. Apr. 21, 2020). Among other things, the Ninth Circuit vacated, in part, the defendant's 184-month sentence for possession with intent to distribute a controlled substance, holding that his prior conviction for carjacking under California Penal Code § 215 is not a crime of violence under §4A1.1(e). In so holding, the court stated that its prior precedent regarding the California carjacking offense was "clearly irreconcilable" with the Supreme Court's reasoning in *Stokeling v. United States*, 139 S. Ct. 544 (2019). Nevertheless, the court again held that the section 215 is not a crime of violence because it can be committed through fear of injury to property rather than injury to persons. Concluding that the district court incorrectly included two points for the defendant's prior carjacking convictions, the court vacated and remanded for resentencing.

United States v. Dominguez, 954 F.3d 1251 (9th Cir. Apr. 7, 2020). Among other things, the Ninth Circuit affirmed the defendant's convictions for possession of a firearm in furtherance of a crime of violence, holding that his contemporaneous convictions for Hobbs Act robbery and attempted Hobbs Act robbery are crimes of violence under 18 U.S.C. § 924(c). The court relied on recent Supreme Court cases and Ninth Circuit precedent to conclude that Hobbs Act robbery is a crime of violence. It also held, agreeing with two other circuits, that when a substantive offense is a crime of violence under the elements clause in section 924(c), an attempt to commit that offense also is a crime of violence.

TENTH CIRCUIT

United States v. Ramon, 958 F.3d 919 (10th Cir. May 1, 2020). The Tenth Circuit affirmed the district court's order that its 24-month revocation sentence run consecutively to any sentences imposed in the future, holding that, although the district court erred, that error was not plain. Reviewing on appeal for plain error because the defendant failed to object at the revocation hearing, the court stated that the district court exceeded its authority under 18 U.S.C. § 3584(a) by "usurping sentencing authority" belonging exclusively to the second court. The defendant

failed to show plain error, however, because the statutory language was not so obvious as to require reversal.

ELEVENTH CIRCUIT

United States v. Tigua, 19-10177, No. 19-10213 (11th Cir. June 26, 2020). The Eleventh Circuit affirmed the sentences of two defendants, holding that the district court correctly found they were ineligible for safety valve relief under the First Step Act's safety-valve expansion because they pleaded guilty before its enactment. The First Step Act provides that its amendment to the statutory safety-valve provision "shall apply only to a conviction entered on or after the date of enactment." The court held that "conviction entered" refers to the "ordinary meaning" of "conviction," that is, the date the defendant was adjudicated guilty, and rejected the defendants' argument that it instead referred to the date the judgment of conviction and sentence were entered.

United States v. Denson, 19-11696 (11th Cir. June 24, 2020). The Eleventh Circuit affirmed the defendant's 188-month sentence, which was reduced from 262 months under the First Step Act. Rejecting the defendant's argument for a greater reduction, the court held that the district did not err when it ruled on his motion without a hearing in his presence. The court joined the Fifth and Eighth Circuits in concluding that the First Step Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant's motion for a reduced sentence under the First Step Act.

United States v. Oliver, No. 17-15565 (11th Cir. June 18, 2020). The Eleventh Circuit, granting the government's petition for rehearing and vacating its previous opinion, affirmed the defendant's mandatory 15-year minimum sentence under the Armed Career Criminal Act (ACCA). On rehearing, the panel held that the defendant's prior conviction in Georgia for making terroristic threats is divisible and qualifies as a violent felony under the ACCA's elements clause because "a threat to commit 'any crime of violence' under Georgia law always includes an element requiring threatened violent force against another."

United States v. Jones, No. 19-11505, No. 19-10758, No. 19-11955, No. 19-12847 (11th Cir. June 16, 2020). In a consolidated appeal, four drug defendants each appealed denial of their motion for a retroactive Fair Sentencing Act reduction under the First Step Act. The court held, as a matter of first impression, that an offense qualifies as a "covered offense" if the offense triggered the statutory penalties modified by the Fair Sentencing Act, without regard to the actual drug quantity involved in the offense. However, because a court is authorized to reduce a sentence only "as if" the Act were in effect at the time the original

sentence was imposed, the court next held that when determining whether a defendant’s sentence would be lower under the Act, a drug quantity finding that was used to determine the defendant’s original *statutory* penalty is binding, even if it was found by a judge and not a jury. As a result, the court affirmed the denial of two defendants’ requests for a sentence reduction because, based on judge-found drug quantities that determined their original statutory ranges, they would face the same statutory penalties under the Act. The court vacated and remanded the denials as to the other two defendants because their statutory ranges would be lower under the Act. In doing so, the court noted that it was unclear whether the district court understood its authority to reduce those two sentences below the revised guideline range.

United States v. Bates, 960 F.3d 1278 (11th Cir. May 28, 2020). The Eleventh Circuit affirmed the defendant’s convictions and 30-year sentence for assaulting a federal officer with a dangerous weapon, discharging a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c), and other offenses. The court rejected a number of challenges to the defendant’s convictions and sentence. Among those rulings, the court upheld the defendant’s conviction under section 924(c), holding that assaulting a federal officer with a dangerous weapon in violation of

18 U.S.C. § 111 categorically qualifies as a crime of violence under section 924(c)’s elements clause, agreeing with the five other circuits to address the question. The court also upheld enhancements to the defendant’s sentence, stating that his prior Georgia convictions for possession with intent to distribute marijuana qualify as predicate drug offenses for purposes of both the Armed Career Criminal Act and the career offender guideline.

D.C. CIRCUIT

United States v. Abney, 957 F.3d 241 (D.C. Cir. Apr. 24, 2020). The D.C. Circuit vacated the sentence imposed for the defendant’s violation of supervised release and remanded for resentencing, holding that the district court clearly erred in denying his right to presentence allocation. Applying *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020), the court held, as a matter of first impression, that by asking during sentencing if he could “say something,” the defendant preserved for appellate review his claim that the court violated his right to presentence allocation. The court also held, as a matter of first impression, that the right to allocation before sentencing “applies to sentences imposed for revocation of supervised release just as it does to initial sentencing.”



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