

CASE LAW QUARTERLY

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

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

FIRST CIRCUIT

United States v. Capelton, 966 F.3d 1 (1st Cir. 2020). On the defendant's appeal from a First Step Act resentencing, the First Circuit affirmed the reduction of his sentence from 360 months to 252 months, which included re-imposition of a career offender enhancement. The court held that the defendant's two prior drug convictions in Massachusetts, possession with intent to distribute and distribution of a class B substance, qualified as predicate "controlled substance offenses" under the career offender guideline. The court disagreed with the defendant's argument that the state statute was overbroad, concluding that he had not shown "a realistic probability" that Massachusetts would have applied its statute to conduct that fell outside the generic definition of "aiding and abetting."

SECOND CIRCUIT

United States v. Brooker, No. 19-3218 (2d Cir. Sept. 25, 2020). The Second Circuit vacated and remanded the district court's denial of the defendant's motion for compassionate release from his 15-year sentence for drug trafficking and firearm offenses, holding that the policy statement under §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)) regarding compassionate release is not applicable with respect to compassionate release motions brought by defendants. In its opinion, the Second Circuit discussed amendments made by the First Step Act to 18 U.S.C. § 3582(c)(1)(A), which expanded compassionate release to allow a defendant to bring a compassionate release motion before a court, "even if the [Bureau of Prisons] opposes the [motion]." The Second Circuit reasoned that since compassionate release is no longer contingent upon a motion by the Bureau of Prisons, §1B1.13, which begins with "[u]pon motion of the Director of the Bureau of Prisons," is "clearly outdated" and "cannot be fully applicable" to 18 U.S.C. § 3582(c)(1)(A). Instead, the Second Circuit concluded that §1B1.13 now only applies with respect to those motions brought by the Bureau of Prisons, and, in the

case of a compassionate release motion brought by a defendant, a court may independently determine what reasons are "extraordinary and compelling" to warrant compassionate release.

United States v. Moore, No. 19-1390-cr (2d Cir. Sept. 15, 2020). The Second Circuit affirmed the denial of the defendant's motion for a sentence reduction under the First Step Act, leaving in place his 188-month sentence for drug and firearm offenses. The court held, among other things, that when a sentencing court is determining whether to grant a sentence reduction under the First Step Act, it is not obligated to recalculate the sentencing guidelines, except to reflect guideline changes that flow from sections 2 and 3 of the Fair Sentencing Act of 2010. It held, as a matter of first impression for the circuit, that the text of the First Step Act does not entitle a defendant to a plenary resentencing or operate as a surrogate for collateral review.

United States v. Martin, 974 F.3d 124 (2d Cir. 2020). In a case involving conspiracy to distribute crack cocaine and using a firearm during a drug trafficking offense, the Second Circuit affirmed dismissal of the defendant's First Step Act motion as moot. The court held, among other things, that the First Step Act does not authorize relief for sentences already served. The district court denied the defendant's First Step Act motion as moot, after initially granting it and reducing his sentence, after it learned that the defendant had completed his original sentence and was serving a sentence for additional offenses that were committed while incarcerated. Stating that the First Step Act does not permit the modification of sentences already served, the court held that the administrative aggregation of sentences does not create authority to modify a sentence where it is not otherwise authorized by statute.

THIRD CIRCUIT

United States v. Easter, No. 19-2587 (3d Cir. Sept. 15, 2020). The Third Circuit vacated and remanded the denial of the defendant's motion for a reduction of his sentence for

firearm and drug offenses, holding that a sentencing court considering a motion for sentence reduction under the First Step Act must consider all statutory sentencing factors, to the extent applicable, including post-sentencing rehabilitation. In doing so, the court disagreed with several courts of appeals that have held that consideration of 18 U.S.C. § 3553(a) factors at resentencing is permissive. Although the sentencing court must consider section 3553(a) factors, the court held this does not entitle the defendant to a plenary resentencing under the First Step Act.

United States v. Bullock, 970 F.3d 210 (3d Cir. 2020). The Third Circuit affirmed the defendant's 84-month career offender sentence. Among other things, it held, as a matter of first impression, that the defendant's instant conviction under 18 U.S.C. § 111(a) and (b) for assaulting, resisting, or impeding a federal correctional officer qualifies as a crime of violence for purposes of §4B1.1. Applying the modified categorical approach, the court held that the defendant violated subsection (b) of section 111, which carries an enhanced penalty for offenders who use a deadly or dangerous weapon, or who inflict bodily injury. Agreeing with six other circuits, the court concluded that the defendant's conviction is a crime of violence because subsection (b) requires the use of physical force.

United States v. Birt, 966 F.3d 257 (3d Cir. 2020). In a case involving possession with intent to distribute crack cocaine, the Third Circuit affirmed the denial of the defendant's motion for resentencing under the First Step Act. The court held that the defendant was not eligible for a reduction because his conviction under 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C) is not a "covered offense" within the meaning of the First Step Act, which defines a "covered offense" as a violation of a federal criminal statute that had its penalty provisions modified by the Fair Sentencing Act of 2010. Disagreeing with the First Circuit, the court found that the defendant's conviction for possession with intent to distribute crack cocaine under a combination of 21 U.S.C. § 841(a)(1) and the penalty provision under 21 U.S.C. § 841(b)(1)(C) is not a "covered offense" because the text of those sections were not modified by the Fair Sentencing Act.

United States v. Seighman, 966 F.3d 237 (3d Cir. 2020). The Third Circuit affirmed the defendant's 24-month sentence, imposed upon revocation of his supervised release for drug possession, holding that 18 U.S.C. § 3583(g) does not violate the Sixth Amendment by requiring mandatory imprisonment without the right to jury trial. The court distinguished *United States v. Haymond*, 139 S. Ct. 2369 (2019), which held that subsection (k) of section 3583 was unconstitutional. Noting that subsection (k) carries a mandatory minimum sentence of five years in prison while subsection (g) carries a mandatory minimum sentence of one day in prison, the court concluded that subsection (g) is

more akin to ordinary revocation and less like punishment for a new offense.

United States v. Jackson, 964 F.3d 197 (3d Cir. 2020). The Third Circuit reversed denial of the defendants' motions for sentence reductions under the First Step Act, holding that they were eligible for discretionary reductions under the Act and remanding their sentences of 210 months and 300 months. The court held that the determination of whether they were sentenced for a "covered offense" under section 404 of the Act turns on the defendant's statute of conviction, rather than his actual conduct. Although the defendants possessed more than 28 grams of crack cocaine, which is the upper threshold under 18 U.S.C. § 841(b)(1)(B)(iii), as amended by the Act, they were only convicted of possessing five grams or more of crack, and thus, were eligible for reductions under the Act. The court highlighted several textual indicia, among them the last antecedent rule and the "anti-surplusage" canon, that supported its conclusion that Congress intended for the determining factor to be statutory, rather than conduct-based.

FOURTH CIRCUIT

United States v. Ward, 972 F.3d 364 (4th Cir. 2020). The Fourth Circuit affirmed the defendant's 120-month career offender sentence for distribution of cocaine, holding that his prior state convictions in Virginia for possession with intent to distribute heroin categorically qualify as predicate "controlled substance offenses" for purposes of the career offender enhancement. Although Virginia state law defines controlled substance offenses to include a broader set of substances than federal law, because §4B1.2(b) provides that a "controlled substance offense" means an offense under federal or state law, the court held that the state statutory definitions that include substances not regulated by federal law qualify as controlled substance offenses under the guideline.

United States v. Bolden, 964 F.3d 283 (4th Cir. 2020). The Fourth Circuit vacated and remanded the defendant's 102-month sentence for being a felon in possession of a firearm, holding that the court erred when it applied the §2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with another felony offense, specifically, felony cocaine possession. The court stated that the district court made no findings linking the defendant's possession of the firearm to his possession of cocaine and gave no indication of its reasoning. It explained that the sentencing court had based the enhancement on the cocaine possession offense as an alternative felon offense after finding insufficient intent for a kidnapping alleged in the presentence report, without explaining whether the firearm had the potential to facilitate that cocaine possession.

FIFTH CIRCUIT

United States v. Izaguirre, 973 F.3d 377 (5th Cir. 2020). The Fifth Circuit affirmed in part, vacated in part, and remanded the imposition of two separate consecutive 108-month sentences for the defendant's drug conspiracy and failure-to-appear offenses. The court held that the district court plainly erred in calculating and applying a separate guideline range to the defendant's conviction for failure to appear at sentencing for the underlying drug offense. Although the district court did not err by grouping the failure-to-appear offense with the underlying drug offense, the court stated that the district court plainly erred by calculating and applying a second consecutive sentencing range to the conviction for failure to appear.

United States v. Redmond, 965 F.3d 416 (5th Cir. 2020). In a bank robbery case, the Fifth Circuit affirmed the defendant's 180-month sentence, an upward variance from his guideline range of 78-97 months. The court held, among other things, that the district court committed harmless error by imposing a 4-level enhancement for abduction under §2B3.1(b)(4)(A) because the defendant did not force a victim to "accompany" him to a different location, as required by the enhancement, when he directed bank tellers to "walk to an adjacent room, close the door, and count to 100 before coming out." The error was harmless, the court concluded, because the district court expressly stated it would have imposed the same sentence for the same reasons absent the enhancement.

United States v. Stewart, 964 F.3d 433 (5th Cir. 2020). On the defendant's appeal in a crack cocaine case, the Fifth Circuit vacated the denial of the defendant's motion for a sentence reduction under the First Step Act and remanded for reconsideration. The court held that the district court erred by denying the defendant the benefit of Amendment 750's retroactive changes to the crack cocaine equivalency calculation when resentencing him under the First Step Act. Noting that section 404(b) of the First Step Act does not permit plenary resentencing, the court held that the district court erred by constraining itself to the guidelines in effect at the time of his original sentence.

SIXTH CIRCUIT

United States v. Alston, No. 19-3884 (6th Cir. Sept. 28, 2020). Accepting the government's concession, the Sixth Circuit reversed and remanded the defendant's 169-month sentence for controlled substance offenses, holding that the defendant's prior drug trafficking convictions under Ohio Revised Code § 2925.03(A)(1), which "prohibits persons from '[s]ell[ing] or offer[ing] to sell a controlled substance or a controlled substance analog,'" did not qualify for enhancement under §4B1.1 (Career Offender). In its holding, the court cited circuit precedent that states, "statutes that

criminalize offers to sell controlled substances are too broad to categorically qualify as predicate 'controlled substance offenses'" under §4B1.2 (Definitions of Terms Used in Section 4B1.1).

United States v. Lee, 974 F.3d 670 (6th Cir. 2020). The Sixth Circuit vacated and remanded the defendant's 60-month sentence for possession of a stolen firearm, holding that the district court's upward variance rendered his sentence substantively unreasonable. Stating that some meaningful relationship between the offense of conviction and a defendant's alleged likelihood of reoffending is necessary, the court held that the defendant's criminal history did not justify the district court's 2-year upward variance because it "had little bearing" on the instant offense.

United States v. Cordero, 973 F.3d 603 (6th Cir. 2020). In a multi-defendant case involving conspiracy to commit murder-for-hire and drug distribution, the Sixth Circuit, among other things, reversed and remanded one defendant's 262-month career offender sentence. The court held that neither of the defendant's instant offenses of conviction qualify as crimes of violence or controlled substance offenses. Citing circuit precedent, it explained that the federal murder-for-hire statute did not qualify because it could be violated when the defendant "simply 'traveled in interstate commerce with the intent that a contract murder be committed,'" and that the drug conspiracy offense did not qualify because the guideline definition of "controlled substance offense" does not include inchoate crimes not listed in the text of §4B1.2(b).

United States v. Bailey, 973 F.3d 548 (6th Cir. 2020). In a multi-defendant health care fraud case, the Sixth Circuit affirmed the convictions but vacated and remanded two of the defendants' sentences, holding, among other things, that the mass-marketing enhancement in §2B1.1(b)(2)(A)(ii) does not apply to word-of-mouth solicitation. The court agreed with the approaches taken by the Seventh, Tenth, and Eleventh Circuits that the mass-marketing enhancement focuses on "sophistication and scope" and is therefore targeted to punish the type of marketing designed to defraud a number of people, and disagreed with the Fifth Circuit's broad interpretation of the phrase "other means" within the definition to include word-of-mouth solicitation.

United States v. Fleischer, 971 F.3d 559 (6th Cir. 2020). The Sixth Circuit affirmed the defendant's 447-month sentence for sexual exploitation of a minor and receipt and distribution of child pornography. The court held, among other things, that the district court did not err by applying both a multiple count adjustment under §2G2.1(d)(1) and a pattern of activity enhancement under §2G2.2(B)(5). It explained that application of both provisions did not constitute impermissible double-counting because they are not premised on the "same type of harm," stating that the

guidelines “separately punish defendants who sexually exploit multiple victims, and child pornography offenders who have a history of more than one instance of sexually abusing or exploiting a child.”

United States v. Kozerski, 969 F.3d 310 (6th Cir. 2020). On the government’s appeal in a wire fraud case, the Sixth Circuit affirmed the defendant’s sentence of one year and one day, upholding the district court’s loss calculation where the defendant had obtained six government construction contracts by impersonating a disabled veteran. The court agreed with the district court’s §2B1.1 loss calculation as the aggregate difference between the defendant’s bids and the next-lowest bids, about \$250,000, and disagreed with the government’s assertion that loss should be the total value of the contracts without deducting the value of the services provided, about \$12 million. The court held, among other things, that the “government benefit rule” in Application Note 3(F)(ii) of §2B1.1 does not apply to set-aside procurement contract fraud cases. It noted that its decision aligns with opinions from the Third, Fifth, and Ninth Circuits, and differs from opinions in the Fourth, Seventh, and Eleventh Circuits.

United States v. Paauwe, 968 F.3d 614 (6th Cir. 2020). The Sixth Circuit affirmed the defendant’s 420-month sentence for coercion and enticement of a minor, holding that the district court did not err in applying the §4B1.5(b)(1) enhancement for a pattern of ongoing sexual misconduct because it applies even if the prohibited sexual conduct involved only one victim. The court rejected as inapplicable the defendant’s argument under *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), that the administrative commentary expands the guideline’s scope, even though the title of §4B1.5, “Repeat and Dangerous Sex Offender Against Minors,” refers to “minors” in the plural. The court held that the guideline text fully supported the pattern-of-activity enhancement in this case, and that the enhancement focuses on “multiple acts” rather than multiple victims.

United States v. Snow, 967 F.3d 563 (6th Cir. 2020). The Sixth Circuit affirmed denial of the defendant’s motion to reduce his life sentence pursuant to the First Step Act, holding that he was not eligible for resentencing because his conviction under 21 U.S.C. § 848(e)(1)(A) for conspiracy to murder while engaged in a conspiracy to distribute at least 50 grams of cocaine base is not a “covered offense” under section 404(a) of the Act. The court reasoned that the Fair Sentencing Act, which raised the threshold quantity to 280 grams for a murder conviction under section 848(e)(1)(A), did not “modify” the statutory penalties for that offense but instead eliminated them altogether. The court concluded that the First Step Act “presupposes that the district court may still impose *some* sentence even after applying the Fair Sentencing Act retroactively; it simply does not contemplate the *elimination* of a sentence, as would be required here.”

United States v. Bourquin, 966 F.3d 428 (6th Cir. 2020). The Sixth Circuit vacated and remanded for resentencing the defendant’s 40-month sentence for conveying false information concerning an attempt to kill, injure, or intimidate another. The court held that the district court erred in applying the enhancement at §2A6.1(b)(4)(B) because the government did not meet its burden of proving a substantial expenditure of funds to respond to the offense. The court held that, in order for the district court to assess the expenditure and whether it was substantial enough to warrant the enhancement, the government must introduce either a full accounting of the expenditure or some accounting coupled with facts. The court also noted that the government was precluded from presenting additional evidence on remand to meet its burden in support of the enhancement.

United States v. Garth, 965 F.3d 493 (6th Cir. 2020). The Sixth Circuit affirmed the defendant’s career offender sentence for possession of crack cocaine with intent to distribute, holding that his prior state conviction in Tennessee for possession of marijuana with intent to deliver constitutes a “controlled substance offense.” After applying the categorical approach, the court held that Tennessee possession with intent to deliver and federal possession with intent to distribute, as listed in the guidelines, criminalize the same conduct. Therefore, the court held that Tennessee possession with intent to deliver is categorically a controlled substance offense under §4B1.2(b).

United States v. Fugate, 964 F.3d 580 (6th Cir. 2020). In a case involving a conviction for being a felon in possession of a firearm in connection with a firearms-trafficking operation, the Sixth Circuit reversed and remanded the defendant’s 97-month sentence, holding that the district court erred in applying the §2K2.1(b)(6)(B) enhancement for knowingly trafficking stolen firearms and for selling the firearms to drug traffickers and gang members when it had already applied the §2K2.1(b)(5) enhancement for firearms trafficking. As an issue of first impression, the court held that it was impermissible double-counting in a firearms trafficking offense to apply both enhancements in subsections (b)(5) and (b)(6)(B) because each was based on the defendant’s trafficking of firearms. Following an analysis of Application Notes 13 and 14 and noting that its conclusion aligns with similar conclusions made by the Seventh and Second Circuits, the court stated: “Whatever the elements of the firearms possession or trafficking offense might be, courts cannot, without something more, count the defendant’s firearms possession or trafficking conduct twice via both §2K2.1(b)(5) and §2K2.1(b)(6)(B) at sentencing.”

United States v. Igboba, 964 F.3d 501 (6th Cir. 2020). The Sixth Circuit affirmed the defendant’s 162-month sentence for identity theft and conspiracy to defraud the United States by filing false federal income tax returns using others’ identities. Among other things, it held that the district

court did not err in attributing \$4.1 million in losses to the defendant, even though some losses were linked to the defendant by a single piece of evidence. It also upheld the district court's application of the sophisticated means enhancement based upon the defendant's acquisition of taxpayer personally identifiable information and his use of a virtual private network, the Tor browser, the dark web, multiple bank accounts and email aliases, and corporate shell companies.

SEVENTH CIRCUIT

United States v. Uriarte, No. 19-2092 (7th Cir. Sept. 15, 2020) (en banc). On the government's appeal, the Seventh Circuit affirmed the resentencing of the defendant to 20 years for drug, firearm, and racketeering offenses, agreeing with the district court that the defendant was entitled to be sentenced under section 403 of the First Step Act. Prior to the enactment of the First Step Act, the Seventh Circuit had vacated and remanded the defendant's 50-year sentence so that he could be resentenced without the brandishing enhancement for one of his firearms offenses. Because the vacatur caused the defendant to be "unsentenced" at the time of the Act's passage, the court held that the Act applied to his resentencing. It stated: "Pre-Act offenders whose sentences have been vacated are similarly situated to individuals who have never been sentenced." The court left open the question of whether a defendant who was under a sentence at the time of enactment but subsequently has his sentence vacated could also obtain relief.

United States v. Carnell, 972 F.3d 932 (7th Cir. 2020). The Seventh Circuit affirmed in part, reversed in part, and remanded the defendant's 192-month sentence for conspiracy to distribute a mixture containing methamphetamine, holding, among other things, that the government did not meet its burden of proving that the defendant sold a mixture or substance containing d-methamphetamine of at least 80 percent purity for purposes of §2D1.1, Note C. Disagreeing with the Eighth Circuit, the court held that circumstantial evidence by users, dealers, and law enforcement that a drug is "ice" based on the "look, smell, effect, nomenclature or the like" is insufficient to meet the government's burden that a particular drug is 80 percent pure methamphetamine. The court held that the government must prove that the substance was in fact methamphetamine of at least 80 percent purity for purposes of the guidelines.

United States v. Hudson, 967 F.3d 605 (7th Cir. 2020). The Seventh Circuit reversed and remanded the district courts' denials of three defendants' motions for sentence reduction under the First Step Act, holding that the respective district courts were authorized to reduce each defendant's sentence. The court held that the First Step Act authorizes

a reduction if the aggregate sentence imposed includes non-covered offenses grouped with covered offenses. The court further held that, once the court finds that a "covered offense" is eligible, a sentencing court may reduce a defendant's sentence even if the guideline range for a covered offense is not altered by the Fair Sentencing Act.

United States v. Ruth, 966 F.3d 642 (7th Cir. 2020). The Seventh Circuit vacated and remanded the defendant's 108-month career offender sentence, holding that the defendant's prior Illinois conviction for possession with intent to deliver cocaine did not constitute a predicate "felony drug offense" for purposes of increasing his statutory maximum sentence pursuant to an information filed under 21 U.S.C. § 851, but it did constitute a predicate "controlled substance offense" under the career offender guidelines. First, the court held that the district court erred in applying the statutory enhancement because the indivisible Illinois drug statute at issue includes positional isomers, which makes it categorically broader than the federal definition of "felony drug offense." The court then upheld the career offender enhancement, holding that the prior Illinois conviction was a predicate "controlled substance offense" for purposes of §4B1.2 and stating that it saw "no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline."

EIGHTH CIRCUIT

United States v. Jefferson, No. 19-3159 (8th Cir. Sept. 17, 2020). The Eighth Circuit, among other things, affirmed the defendant's career offender sentence for drug offenses, holding that his prior state conviction in Wisconsin for possessing with intent to distribute cocaine and his prior federal conviction for attempting to possess with intent to distribute marijuana are predicate "controlled substance offenses." The court held that the word "deliver" in the Wisconsin statute is synonymous with distribution and, regarding his prior federal offense, en banc circuit precedent had held that Application Note 1 to §4B1.2, which includes attempt crimes, is enforceable.

United States v. Witherspoon, 974 F.3d 876 (8th Cir. 2020). The Eighth Circuit affirmed the defendant's Armed Career Criminal Act enhancement for his possession of a firearm by a convicted felon offense based, in part, on his prior state conviction in Missouri for first degree robbery. Even though the charging document in the Missouri offense was unavailable, the court held that the government had proven the conviction by a preponderance of evidence, citing the defendant's lack of objection to the presentence report and statement at sentencing that there was not a lack of proof as to the conviction. Noting prior circuit precedent, the court held that the conviction categorically qualifies as a "violent felony."

United States v. Bennett, 972 F.3d 966 (8th Cir. 2020). Among other things, the Eighth Circuit affirmed the Armed Career Criminal Act enhancement to the defendant's sentence, holding that his prior state offense in Iowa of going armed with intent is not a "violent felony" for purposes of the enhancement. The court explained that the Iowa offense requires specific intent to use a dangerous weapon against an individual and movement from one place to another but does not require the movement to be in furtherance of the intent. Thus, the court held that the offense does not categorically require the attempted use of physical force.

United States v. El Herman, 971 F.3d 784 (8th Cir. 2020). The Eighth Circuit affirmed the district court's dismissal of the defendant's motion for a sentence reduction under the First Step Act, agreeing with the district court that it lacked jurisdiction over the defendant's motion. Because the sentencing court had transferred the case to a different district where the defendant was on supervised release, the court held that the transferee court, rather than the sentencing court, had jurisdiction to consider the defendant's First Step Act motion.

United States v. Ross, 969 F.3d 829 (8th Cir. 2020). The Eighth Circuit, among other things, affirmed the defendants' convictions for using a firearm in furtherance of kidnapping resulting in death and carjacking resulting in felony murder under 18 U.S.C. § 924(j), holding that both offenses are crimes of violence under 18 U.S.C. § 924(c). The court explained that section 924(j) requires that a defendant caused a victim's death while violating section 924(c), which encompasses using or carrying a firearm in relation to a crime of violence. The court then held that kidnapping under 18 U.S.C. § 1201 is divisible and that the more serious crime of kidnapping resulting in death is a crime of violence under the force clause of section 924(c). It also held that carjacking resulting in death under 18 U.S.C. § 2119(3) meets section 924(c)'s force clause, citing circuit precedent which had held the same for carjacking without a death.

United States v. Luna, 968 F.3d 922 (8th Cir. 2020). In a consolidated appeal of several defendants' health insurance fraud cases, the Eighth Circuit, among other things, vacated two defendants' restitution orders and remanded for resentencing on the defendant who remained incarcerated. The court held that the district court's loss calculations under §2B1.1 did not make an allowance for the legitimate, compensable services provided by the defendants, noting that Application Note 3(E)(i) provides an offset for the fair market value of service rendered to the victim. Because the district court's findings did not account for possible offsets, the court held that it created a risk that the restitution awards were too high.

United States v. Caudle, 968 F.3d 916 (8th Cir. 2020). The Eighth Circuit affirmed the defendant's 55-month sentence for being a felon in possession of a firearm, holding, among other things, that the district court did not err when it applied a §2K2.1(b)(1)(A) enhancement for possessing three firearms. The court held that the defendant constructively possessed the firearm at issue, which was owned by his wife, because he had unrestricted access to it and, on the day of his arrest, he had used the vehicle in which it was found and he had assaulted his wife with the two other guns on the premises. Distinguishing the facts of this case from others, the court noted the couple's joint occupancy of the home and joint possession of the firearms at issue.

United States v. Mays, 967 F.3d 748 (8th Cir. 2020). The Eighth Circuit affirmed the defendant's sentence for Hobbs Act robbery and discharging a firearm during the commission of the robbery, affirming, among other things, the application of a 3-level enhancement under §2B3.1(b)(3)(D) for inflicting a degree of injury between "bodily injury" and "serious bodily injury" during the robbery. The court noted that the presentence report showed that the victim had been grazed by a bullet that caused a burning sensation, bleeding, and continued soreness after treatment. The court upheld the enhancement because the victim's injury was greater than "bodily injury" that was temporarily painful but lesser than "serious bodily injury" requiring surgery or hospitalization. The court also held that Application Note 4 to §2K2.4, which precludes firearm enhancements for an underlying offense (here, the robbery) imposed in conjunction with a firearm offense, did not preclude the §2B3.1(b)(3) enhancement, because §2B3.1(b)(3) is "an injured victim enhancement" that can apply regardless of whether a firearm is used.

NINTH CIRCUIT

United States v. Herrera, 974 F.3d 1040 (9th Cir. 2020). The Ninth Circuit affirmed the defendant's 84-month sentence for mail fraud, holding, among other things, that a 2-level enhancement for having ten or more victims under §2B1.1(b)(2)(A)(i) was properly applied. Addressing a matter of first impression in the circuit, the court held that state government agencies who suffer losses that are included in the actual loss calculation under §2B1.1(b)(1) are properly counted as victims for purposes of the number-of-victims enhancement. Thus, upholding the enhancement, the court held that the California Employment Development Department was properly counted as a victim because it suffered losses.

United States v. Asuncion, 974 F.3d 929 (9th Cir. 2020). The Ninth Circuit affirmed the defendant's mandatory minimum drug sentence for having prior "felony drug offenses" under 21 U.S.C. § 802(44), holding that his prior offenses satisfied the requirement of being "punishable by

imprisonment for more than one year.” The court held that the mandatory minimum under section 802(44) can be triggered even where the prior state conviction’s guideline range is no greater than a year if the sentencing judge had broad discretion to impose a sentence above the range. The court also held that section 401 of the First Step Act does not apply to defendants sentenced before the First Step Act’s enactment.

United States v. Tuan Ngoc Luong, 965 F.3d 973 (9th Cir. 2020). Among other things, the Ninth Circuit vacated and remanded for resentencing, in part, the defendant’s 144-month sentence for robbery and firearm offenses, holding that the district court’s denial of an acceptance-of-responsibility adjustment under §3E1.1(a) was error insofar as it was predicated on the defendant’s jurisdictional challenges at trial. The court held that the defendant, who admitted factual guilt, was not precluded from receiving the adjustment based on his challenges to the government’s evidence on the interstate-commerce element of his conviction. Accordingly, it remanded for the district court to make a factual finding in the first instance regarding whether the defendant showed the “contrition” necessary for the adjustment.

United States v. Voris, 964 F.3d 864 (9th Cir. 2020). On appeal from the defendant’s convictions and sentence, the Ninth Circuit held, among other things, that the defendant was not entitled to resentencing under the First Step Act because it was enacted after his sentencing for multiple 18 U.S.C. § 924(c)(1)(C) convictions, which arose in the same proceeding and carried several consecutive 25-year sentences. The court held that the Act, which amended section 924(c)(1)(C) so that a mandatory 25-year consecutive sentence for having a prior section 924(c) conviction applies only after the prior conviction has become final, does not apply to cases pending on appeal when it was enacted.

TENTH CIRCUIT

United States v. Ansberry, No. 19-1048 (10th Cir. Sep. 23, 2020). The Tenth Circuit vacated and remanded the defendant’s 324-month sentence for the use or attempted use of a weapon of mass destruction against a person or property in the United States, in violation of 18 U.S.C. § 2332a(a)(2), on two bases. First, the court held that the district court erred in its application of an adjustment under §3A1.2(a) (Official Victim) by impermissibly relying on relevant conduct, “rather than on the facts immediately related to [the defendant’s] offense of conviction,” as §3A1.2(a) specifically refers to the “offense of conviction.” Second, in a matter of first impression for the Tenth Circuit, the court held that the district court erred in its application of an adjustment under §3A1.4 (Terrorism), which applies when an offense is a felony involving “a federal crime of terrorism,” defined in 18 U.S.C. § 2332b(g)(5) as

an offense “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” In the Tenth Circuit’s view, 18 U.S.C. § 2332b(g)(5) requires the offense to be “committed with the specific intent[] to retaliate against government conduct, objectively defined.” Consequently, the Tenth Circuit concluded that the district court erred when sentencing the defendant by failing to determine whether the conduct the defendant retaliated against was objectively government conduct.

United States v. Begay, 974 F.3d 1172 (10th Cir. 2020). The Tenth Circuit affirmed as reasonable the district court’s 46-month sentence for two counts of assault with a dangerous weapon and one count of aggravated assault resulting in serious bodily injury. It held that circuit precedent foreclosed consideration of defendant’s disparity argument under 18 U.S.C. § 3553(a)(6) that Native Americans are typically subject to higher sentences for aggravated assault in federal court than those in state court, noting such arguments could be relevant to other section 3553(a) factors.

United States v. Brown, 974 F.3d 1137 (10th Cir. 2020). On the defendant’s appeal, the Tenth Circuit remanded the district court’s sentence reduction under the First Step Act, stating that the district court must consider the defendant’s challenge to his career offender status. After the defendant’s initial sentencing, the court had held that the Oklahoma offense of feloniously pointing a firearm, one of his prior offenses, was not a violent felony under the elements clause of the Armed Career Criminal Act (ACCA). Although the Act does not authorize plenary resentencing, the court stated, a correct guideline range calculation is “paramount” and “the district court is not required to ignore all decisional law subsequent to the initial sentencing.” Accordingly, it remanded for the district court to consider whether the career offender designation was premised solely on the guideline’s elements clause.

United States v. Mannie, 971 F.3d 1145 (10th Cir. 2020). In this consolidated appeal of a crack cocaine sentence, the Tenth Circuit affirmed denial of the defendant’s motion for reduction of his 262-month sentence under the First Step Act, holding, among other things, that the district court did not abuse its discretion. First, the court held that a circuit court’s standard for reviewing a district court’s action on a First Step Act motion is abuse of discretion, reviewing the propriety of the grant or denial of the motion to reduce, not the propriety of the sentence itself. The court also held that a district court is not required, but has discretion, to hold a hearing on a First Step Act motion. The court noted that both issues were matters of first impression for the circuit, and that it agreed with the other circuits that had ruled on those issues.

ELEVENTH CIRCUIT

United States v. Conage, No. 17-13975 (11th Cir. Sept. 30, 2020). The defendant appealed his sentence, enhanced under the Armed Career Criminal Act (ACCA), arguing that, because Florida Statutes § 893.135(1) prohibits the “purchase” of a trafficking quantity of cocaine, his conviction under such statute for trafficking cocaine did not qualify as a predicate “serious drug offense,” as defined under the ACCA. The Eleventh Circuit was “unable to answer the pivotal question” raised in the appeal and certified the following question to the Florida Supreme Court: “How does Florida law define the term ‘purchase’ for purposes of the Florida Statutes § 893.135(1)? More specifically, does a completed purchase for purposes of conviction under § 893.135(1) require some form of possession—either actual or constructive—of the drug being purchased?” The Eleventh Circuit explained that “the significance of the answer to this [certified] question is enormous” because, if the defendant is correct, “no Florida drug trafficking conviction under § 893.135(1) can ever qualify as an ACCA predicate offense, notwithstanding that statute’s status as Florida’s most serious criminal drug statute.”

United States v. Green, 969 F.3d 1194 (11th Cir. 2020). In a case involving a RICO conspiracy, the Eleventh Circuit vacated and remanded the defendants’ convictions under 18 U.S.C. § 924(c). Among other things, the court held as a matter of first impression that a RICO conspiracy offense does not qualify as a crime of violence under section 924(c). To establish a RICO conspiracy, the court explained, the government must prove that the defendants manifested an agreement to participate in the enterprise through the commission of two or more predicate crimes but it does not have to prove the commission of an overt act or the agreement to commit any specific predicate offense. Analogizing to the court’s recent holding that Hobbs Act robbery does not qualify as a crime of violence, the court explained that a RICO conspiracy does not qualify as a crime of violence under the elements clause because the elements of a RICO conspiracy focus on the *agreement* to commit a crime, which does not require the threat of or use of force.

United States v. Henry, 968 F.3d 1276 (11th Cir. 2020). The Eleventh Circuit vacated and remanded the defendant’s 108-month sentence for being a felon in possession of a firearm, holding that the district court erred by refusing to adjust his federal sentence under §5G1.3(b)(1) for time served on a related state sentence. The court held that application of §5G1.3(b)(1) is mandatory if its requirements are met.

The court reasoned that, because §5G1.3(b)(1) governs the imposition of a sentence and does not affect the guideline range, *United States v. Booker*, 543 U.S. 220 (2005), provides no basis to disregard the mandatory language of the guideline.

United States v. Smith, 967 F.3d 1196 (11th Cir. 2020). The Eleventh Circuit affirmed the defendant’s convictions and 1,105-month sentence for multiple counts of Hobbs Act robbery, carjacking, and brandishing a firearm in furtherance of a crime of violence. The court held, among other things, that section 403 of the First Step Act, prohibiting “stacking” of multiple 25-year mandatory minimum penalties for “second or subsequent” convictions under 18 U.S.C. § 924(c), does not apply to a sentence imposed before the First Step Act’s enactment, even if it was pending appeal after enactment. The court stated that the defendant’s sentence in this case was imposed three months before the First Step Act’s enactment.

United States v. Martinez, 964 F.3d 1329 (11th Cir. 2020). The Eleventh Circuit affirmed the defendant’s 78-month below-guideline sentence for being a felon in possession of a firearm, holding that the district court properly applied an enhancement under §2K2.2(b)(6)(B) for possession of a firearm in connection with another felony offense. The court stated that the district court had found that the defendant planned to trade the firearm for a pound of drugs before he was apprehended, and the firearm was found in his car in close proximity to paraphernalia for drug distribution. The court held that the enhancement applies where the government proves by a preponderance of the evidence that the defendant knew, intended, or had reason to believe the gun was going to be used to buy drugs, and that the sale would have happened but for the defendant’s arrest or something else impeding the sale.

D.C. CIRCUIT

No cases identified.



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