

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 FOURTH QUARTER OF 2020 —

FIRST CIRCUIT

United States v. Tirado-Nieves, 982 F.3d 1 (1st Cir. 2020).

The First Circuit affirmed the defendant's sentence, holding, among other things, that the district court did not err by imposing a four-level enhancement under §2K2.1(b)(6)(B) for possession of firearms "in connection with another felony offense." The circuit court affirmed the enhancement based on the district court's determination that the defendant "unlawfully possessed drug paraphernalia in a quantity that was indicative of drug trafficking," and consequently, the commission of a felony offense under Puerto Rico law.

United States v. Castillo, 981 F.3d 94 (1st Cir. 2020). The First Circuit vacated and remanded the defendant's sentence for abusive sexual contact with a minor, holding, among other things, that the district court erred in its application of the criminal sexual abuse cross-reference provision under subsection (c)(1) of §2A3.4. In its reasoning, the circuit court found that (1) the defendant's offense of conviction was limited to the defendant's "touching of [the victim's] inner thigh," which on its own was not sufficient to demonstrate an intent to commit sexual abuse; and (2) because the offense was a "discrete, standalone act, not a continuing offense," and the "lack of contemporaneity" of the defendant's other admitted acts, those other acts could not constitute "relevant conduct" to support a finding of an intent to commit sexual abuse.

United States v. Chan, 981 F.3d 39 (1st Cir. 2020). The First Circuit affirmed the defendants' convictions and sentences for insider trading, holding, among other things, that the appropriate method for determining an insider's gain for purposes of §2B1.4 is to calculate "the difference between the value of the shares when the insider sold them while in possession of [] material, nonpublic information," and the market value of such shares after public dissemination of the information. In so holding, the circuit court joined the Second and Tenth Circuits, but split with the Eighth Circuit whose approach "understands gains to be

'the total profit actually made from a defendant's illegal securities transactions.'"

United States v. Reyes-Torres, 979 F.3d 1 (1st Cir. 2020).

The First Circuit affirmed the defendant's sentence for illegal possession of a machine gun, holding that the sentence was procedurally and substantively reasonable. In its reasoning, the court concluded that an offense-level enhancement under §2K2.1(b)(6)(B) was justified because the "totality of the evidence confirm[ed] that the machine gun and ammunition [that the defendant possessed] had the potential to facilitate the offense of drug distribution."

United States v. Stinson, 978 F.3d 824 (1st Cir. 2020).

The First Circuit affirmed the defendant's sentence for aiding and abetting the theft of firearms from a licensed dealer and for being a felon in possession of a firearm, holding that the district court appropriately applied an offense-level enhancement under §2K2.1(b)(6)(B) simultaneously with an offense-level enhancement under §2K2.1(b)(5). Among other things, the First Circuit noted the following in its reasoning: (1) nothing in the *Guidelines Manual* prohibits the simultaneous application of enhancements under subsections (b)(5) and (b)(6)(B) of §2K2.1; and (2) Application Note 14 of §2K2.1 addresses the very facts of the defendant's case and clarifies that an enhancement under §2K2.1(b)(6)(B) "applies in the case of a burglary when a defendant 'finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary.'"

SECOND CIRCUIT

Gray v. United States, 980 F.3d 264 (2d Cir. 2020). As a matter of first impression, the Second Circuit denied the defendant's motion for a certificate of appealability under 28 U.S.C. § 2255, holding that an offense under 18 U.S.C. § 111(b) is categorically a "crime of violence" under 18 U.S.C. § 924(c)(3). Joining six other courts of appeals, the court reasoned that a section 111(b) violation requires

a person to use a deadly or dangerous weapon or inflict bodily injury, both of which “independently satisfy the physical force requirement” of subparagraph (A) of section 924(c)(3).

United States v. Ramos, 979 F.3d 994 (2d Cir. 2020). The Second Circuit affirmed the defendant’s revocation sentence, holding, among other things and as a matter of first impression, that, in grading a violation of supervised release under §7B1.1(a), a court may consider a state law recidivism enhancement to determine the maximum potential term of imprisonment for the offense constituting the violation. Joining six other courts of appeals, the Second Circuit reasoned that (1) the language of the *Guidelines Manual* instructs a court to “consider all conduct that affects the maximum penalties for a supervised release violation,” and (2) a supervised release revocation hearing requires the consideration of the defendant’s criminal history to determine the gravity of the defendant’s breach of trust.

THIRD CIRCUIT

United States v. Nasir, 982 F.3d 144 (3d Cir. 2020). The Third Circuit, sitting *en banc*, vacated the defendant’s sentence and remanded for resentencing, holding, among other things, that the definition of “controlled substance offense” under §4B1.2(b) does not include inchoate offenses since they are included only in the commentary of the guideline. Noting Supreme Court precedent determining that commentary in the *Guidelines Manual* is akin to “an agency’s interpretation of its own [] rule,” the Third Circuit followed the Supreme Court’s more recent ruling in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which clarified that deference to an agency’s interpretation of a regulation is only appropriate where the regulation is “genuinely ambiguous,” and concluded that the plain text of the definition in §4B1.2(b) does not include, let alone mention, inchoate offenses. Thus, the Third Circuit overruled circuit precedent and joined the D.C. and Sixth Circuits to hold that the commentary to §4B1.2 cannot “expand” the scope of the guideline to include inchoate offenses.

FOURTH CIRCUIT

United States v. Al-Muwakkil, No. 18-6201 (4th Cir. Dec. 28, 2020). The Fourth Circuit reversed the district court’s denial of the defendant’s second motion under 28 U.S.C. § 2255, challenging the defendant’s enhanced sentence under 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”), and remanded with instructions for the district court to grant the motion and hold a new sentencing hearing. The court found that neither of the defendant’s prior Virginia convictions for burglary and attempted rape qualifies as the requisite third predicate offense under the ACCA, and noted that circuit precedent foreclosed the Government from arguing

that the defendant’s prior Virginia firearm conviction qualifies as an ACCA predicate offense since that conviction had not been designated as such in the presentence report. However, the court also noted that its precedent does not preclude consideration of the firearm conviction for ACCA purposes at the resentencing hearing.

United States v. Ka, 982 F.3d 219 (4th Cir. 2020). The Fourth Circuit affirmed the district court’s denial of the defendant’s motion to suppress self-incriminating statements used in a supervised release revocation hearing held under 18 U.S.C. § 3583(e). Similar to the Second, Fifth, and Eleventh Circuits, the court held that the Supreme Court’s decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019), was limited to 18 U.S.C. § 3583(k), and thus, did not abrogate its precedent finding that “the Self-Incrimination Clause of the Fifth Amendment does not prevent the use of compelled, self-incriminating statements in revocation hearings held [] under 18 U.S.C. § 3583(e).”

United States v. McCoy, 981 F.3d 271 (4th Cir. 2020). On the government’s appeal, the Fourth Circuit affirmed the judgment of the district courts in four consolidated cases, joining the Second, Sixth, and Seventh Circuits in holding that the First Step Act of 2018 rendered the policy statement in §1B1.13 inapplicable in cases where a defendant files a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The court reasoned that, since §1B1.13 is not applicable to defendant-filed motions, section 3582(c)(1)(A), as amended by the Act, authorizes courts to independently assess which reasons are “extraordinary and compelling” to warrant compassionate release with respect to such motions. Additionally, the court found that “the district courts permissibly treated as ‘extraordinary and compelling reasons’ for compassionate release the severity of the defendants’ [‘stacked’] sentences [under 18 U.S.C. § 924(c)] and the extent of the disparity between the defendants’ sentences and those provided for under the First Step Act.”

United States v. Taylor, 979 F.3d 203 (4th Cir. 2020). In a successive federal habeas petition under 28 U.S.C. § 2255, the Fourth Circuit vacated and remanded the defendant’s sentence for conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 and use of a firearm in furtherance of a “crime of violence” in violation of 18 U.S.C. § 924(c). The court applied the categorical approach, citing *Descamps v. United States*, 570 U.S. 254 (2013), and held that attempted Hobbs Act robbery is not categorically a “crime of violence” under the plain text of the force clause in 18 U.S.C. § 924(c)(3)(A). The court reasoned that “unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force.” In the court’s view, in order to obtain a conviction for attempted Hobbs Act robbery, the “substantial step” corroborating the intent to commit robbery by means of a threat to use physical force does not

need to involve violent conduct. The court noted its holding is in disagreement with the holdings of the Seventh, Ninth, and Eleventh Circuits, which did not apply the categorical approach in concluding that attempted Hobbs Act robbery does qualify as a “crime of violence.”

FIFTH CIRCUIT

United States v. Jose Luis Galicia, No. 20-40200 (5th Cir. Dec. 28, 2020). The Fifth Circuit affirmed the defendant’s sentence, holding that the district court appropriately applied an enhancement under §2D1.1(b)(12) for maintaining a premises (in this case, the defendant’s residence) to distribute drugs. The court, relying on Application Note 17 to §2D1.1, found that one of the primary uses of the defendant’s premises was “as a storage site for drug distribution,” and further concluded that the primary uses of a premises “need not be equivalent” in order for the enhancement to apply.

United States v. Frierson, 981 F.3d 314 (5th Cir. 2020). The Fifth Circuit affirmed the district court’s application of the career offender enhancement under §4B1.1(a), holding that the defendant’s prior Louisiana conviction for possession with intent to distribute constitutes a “controlled substance offense” under §4B1.2(b). The court’s holding turned on whether the Louisiana statute is divisible, which the court concluded it is. In reaching this conclusion, the circuit court relied in part on the reasoning in *Mathis v. United States*, 136 S. Ct. 2243 (2016), to find, like the Fourth and Eighth Circuits, that “where [] a controlled substance statute prescribes different punishments depending on the type and quantity of drug, the type of substance is an element,” making the statute divisible.

United States v. Cartagena-Lopez, 979 F.3d 356 (5th Cir. 2020). As a matter of first impression, the Fifth Circuit affirmed the defendant’s revocation sentence for violations of the defendant’s supervised release, holding, among other things, that the fugitive tolling doctrine applies in the context of supervised release. In its reasoning, the court relied in part on the longstanding principle that “defendants should not benefit from their own wrongdoing” and found that “the fugitive tolling doctrine protects the statutory scheme of post-confinement monitoring that Congress established in the Sentencing Reform Act [of 1984]” by ensuring that defendants fulfill their terms of supervised release. In so holding, the Fifth Circuit joined the Second, Third, Fourth, and Ninth Circuits, but split with the First Circuit.

United States v. Ramirez, 979 F.3d 276 (5th Cir. Oct. 27, 2020). The Fifth Circuit affirmed the defendant’s sentence for committing health care fraud. Among other things, the court held that the district court appropriately “added 2 points to [the defendant’s] offense level” under

§2B1.1(b)(2)(A)(i), which applies when an offense involves 10 or more victims. The court relied on circuit precedent dictating “that each Medicare beneficiary whose information [is] used in a fraudulent claim is a ‘victim’ within the meaning of §2B1.1(b)(2)(A)(i).” The court also held that the district court was “well within its discretion” to deny the defendant an evidentiary hearing at sentencing because the defendant had “had the opportunity to review the [Pre-Sentence Report] and submit formal objections to it.”

United States v. Martinez, 979 F.3d 271 (5th Cir. 2020). The Fifth Circuit vacated and remanded, as an abuse of discretion by the district court, a condition of the defendant’s supervised release permitting the defendant’s probation officer to elect between inpatient and outpatient substance-abuse treatment for the defendant. As a matter of first impression, the court joined the Second, Ninth, and Tenth Circuits in holding that a judge “may not delegate to the probation officer the decision to require inpatient, rather than outpatient, treatment because of the significant liberty interests at stake.”

SIXTH CIRCUIT

United States v. Henry, 983 F.3d 214 (6th Cir. 2020). In a case involving the stacking of mandatory minimum penalties for multiple firearms offenses under 18 U.S.C. § 924(c), the Sixth Circuit reversed the district court’s order finding that section 403 of the First Step Act of 2018 did not apply to the defendant’s resentencing with respect to such stacking and remanded the case for resentencing. The court held, among other things, that section 403 applies to defendants whose sentences were vacated and remanded for resentencing prior to the enactment of the Act, even in cases where the appellate court issued a limited remand such as the one issued in the defendant’s case. In so holding, the court agreed with the Seventh Circuit’s interpretation of section 403 in *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc).

United States v. Hill, 982 F.3d 441 (6th Cir. 2020). Affirming the defendant’s sentence and agreeing with nine other circuits, the Sixth Circuit held, among other things, that the only downward adjustment available to career offenders whose offense level is controlled by §4B1.1 is acceptance of responsibility under §3E1.1. In so holding, the court relied on the sequence of the application instructions in §1B1.1 and the text of §4B1.1, reasoning that §4B1.1 “overrides” any applicable downward adjustments in Chapter Three of the *Guidelines Manual* in cases where §4B1.1’s prescribed offense level controls, with the exception of acceptance of responsibility, as provided for in the guideline.

United States v. Jones, 980 F.3d 1098 (6th Cir. 2020). Affirming the denial of the defendant’s motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), the Sixth

Circuit held the following: (1) “compassionate release hearings are sentence-modification proceedings” that require courts to follow a three-step, “*Dillon-style test*” (citing *Dillon v. United States*, 560 U.S. 817 (2010)); and (2) a court may “skip step two” of the inquiry when considering a compassionate release motion filed by a defendant because the First Step Act of 2018 rendered the policy statement in §1B1.13 as applicable only to compassionate release motions filed by the Director of the Bureau of Prisons. The circuit court joined the Second Circuit and “the majority of district courts” with its holding regarding the inapplicability of §1B1.13 to defendant-filed compassionate release motions. The court also held that a district court must explain the reasons underlying its compassionate release decisions.

United States v. Ruffin, 978 F.3d 1000 (6th Cir. 2020). The Sixth Circuit affirmed the denial of the defendant’s motion for “compassionate release” under 18 U.S.C. § 3582(c)(1)(A), holding that the district court did not abuse its discretion in balancing the 18 U.S.C. § 3553(a) factors. While the district court denied the defendant’s motion “under all three statutory requirements” of section 3582(c)(1)(A), the Sixth Circuit affirmed the district court’s denial solely on its analysis of the factors in section 3553(a). In its opinion, the Sixth Circuit detailed the division in the courts regarding the applicability of the §1B1.13 policy statement, and whether a court “may find additional extraordinary and compelling reasons other than those in the commentary,” following the enactment of the First Step Act of 2018, but stated that the court “need not (and do[es] not) pick a side in this debate.” Instead, the court reasoned that, “[e]ven if a district court finds that extraordinary and compelling reasons exist and that a sentence reduction comports with §1B1.13, the court may not grant the reduction before ‘considering the [section 3553(a) factors]’” and may “deny relief if it finds that the ‘applicable’ [section] 3553(a) factors do not justify it.”

United States v. Wilson, 978 F.3d 990 (6th Cir. 2020). On the government’s appeal, the Sixth Circuit vacated and remanded the defendant’s sentence for being a felon in possession of a firearm, holding that, because Ohio Rev. Code § 2911.01(A) (Aggravated robbery) is “twice divisible,” the modified categorical approach must be applied to the statute in order to determine whether a conviction under such statute constitutes a “violent felony” under 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”). The Ohio statute provides that a person is guilty of aggravated robbery if the person commits, or attempts to commit, a theft offense with any of three aggravating factors, which the district court concluded constitute separate elements that make the statute divisible into three parts. The Sixth Circuit accepted the district court’s conclusion that the Ohio statute is divisible, and then held that the statute is “twice divisible” because

the statute’s predicate theft offenses “are not merely alternative means of committing a theft offense.”

SEVENTH CIRCUIT

United States v. Ramirez, No. 20-1006 (7th Cir. Dec. 29, 2020). The Seventh Circuit affirmed the defendant’s sentence for possessing a firearm as a felon, holding, among other things, that the district court did not procedurally err when it rejected the defendant’s argument that he was “aging out of crime” at 44 years old. The court stated that, not only did the defendant’s “conduct show[] that over two decades he has not aged out of specific crimes involving firearms and cars,” but also, the data did not support his argument, citing the Commission’s reports on Recidivism Among Federal Firearms Offenders and Recidivism Among Federal Drug Trafficking Offenders.

United States v. Zamora, 982 F.3d 1080 (7th Cir. 2020). The Seventh Circuit affirmed the defendant’s sentence for bribing a federal official, holding that 1) prison guards are public officials in a “sensitive position” for purposes of applying the enhancement under §2C1.1(b)(3), and 2) the enhancement applies to both cases that involve bribes to influence an official act and those that involve bribes to facilitate the commission of a criminal act. In its decision, the court reasoned that the Commission’s 2004 amendments to §2C1.1 broadened the scope of the enhancement to include all law enforcement officers and to cover all bribery offenses that “involve[] an elected public official or any public official in a high-level decision-making or sensitive position,” not just those involving payment to influence such an official.

United States v. Jett, 982 F.3d 1072 (7th Cir. 2020). The Seventh Circuit affirmed the defendants’ sentences, holding, among other things, that, although the district court erred by using the preponderance-of-the-evidence standard to determine under §1B1.2(d) whether the defendants conspired to commit each “object offense” of their conspiracy convictions, the error was harmless. Joining the Second, Third, Fifth, Ninth, Eleventh, and D.C. Circuits, the court held that §1B1.2(d) “requires a sentencing judge to use the reasonable-doubt standard, and not merely the preponderance-of-the-evidence standard, to decide if a defendant conspired to commit each ‘object offense’ of [a] conspiracy.”

United States v. Hogsett, 982 F.3d 463 (7th Cir. 2020). The Seventh Circuit reversed and remanded the district court’s denial of the defendant’s motion for resentencing pursuant to section 404 of the First Step Act of 2018, holding that all convictions under 21 U.S.C. § 841(b)(1)(C), “regardless of whether they are subject to a different penalty range[,] are ‘covered offenses’” under section 404. In so holding, the court adopted a broader definition of the word “modified,” as used in section 404, by focusing on the changes to the threshold quantities that trigger certain penalty ranges under 21 U.S.C. § 841(b), rather than the lack of changes

to the actual text of 21 U.S.C. § 841(b)(1)(C), thereby agreeing with the broader interpretation of the First and Fourth Circuits and disagreeing with the Third Circuit's narrower approach.

United States v. Smith, 981 F.3d 606 (7th Cir. 2020). The Seventh Circuit affirmed the defendant's sentence, holding that the district court properly determined that the defendant's 2008 aggravated assault conviction under Iowa Code § 708.2(3) constitutes a "crime of violence" for purposes of §2K2.1. In its decision, the court examined Iowa Code § 708.1(2), a part of the simple assault statute on which section 708.2(3) is predicated, and affirmed circuit precedent holding that section 708.1(2) is divisible. The court also noted for future relevance that subsection (2)(c) of section 708.1 is further "internally divisible," in that it prohibits the distinct crimes of (1) "intentionally pointing a firearm" and (2) "displaying a dangerous weapon in a threatening manner," and, without more, only the second crime within subsection (2)(c) is a "crime of violence."

United States v. Gunn, 980 F.3d 1178 (7th Cir. 2020). Joining the Second Circuit, the Seventh Circuit vacated and remanded the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding that the policy statement in §1B1.13 addresses compassionate release motions filed by the Director of the Bureau of Prisons, not those filed by defendants. Although the court stated, "the Sentencing Commission has not yet issued a policy statement 'applicable' to [a defendant's] request," it also noted that "[t]he substantive aspects of the [] analysis in §1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons' [that can still] guide [a judge's] discretion without being conclusive."

United States v. Daoud, 980 F.3d 581 (7th Cir. 2020). On the government's appeal, the Seventh Circuit vacated and remanded the defendant's 16-year sentence for crimes involving attempted use of a weapon of mass destruction, solicitation of murder, and aggravated assault, holding, among other things, that the sentence was substantively unreasonable. The court held that the district court did not properly weigh the 18 U.S.C. § 3553(a) factors in its decision to impose "its well-below-Guidelines sentence" because it gave insufficient weight to the seriousness of the defendant's offenses and the need to protect the public from the defendant's "demonstrably high risk of reoffending" and excessive weight to the length and conditions of the defendant's pretrial confinement and other mitigating factors.

United States v. Glispie, 978 F.3d 502 (7th Cir. 2020). The Seventh Circuit vacated and remanded the defendant's sentence, enhanced under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the

"ACCA"), holding that his prior convictions for Illinois residential burglary could not be used to enhance his sentence under the ACCA. In response to a certified question by the Seventh Circuit, the Supreme Court of Illinois held that the limited-authority doctrine applies to Illinois residential burglary by entry. Consequently, the Seventh Circuit held that a conviction for Illinois residential burglary by entry does not qualify as generic burglary for purposes of the ACCA.

EIGHTH CIRCUIT

United States v. Nelson, 982 F.3d 1141 (8th Cir. 2020). In a consolidated case of two co-defendants' appeals, the Eighth Circuit, among other things, affirmed one defendant's sentence, holding that the district court correctly exercised its discretion under §5G1.3(d) to run the defendant's federal sentence partially concurrent with the undischarged terms of the defendant's state sentences. The court explained that, because the defendant's state sentences were not attributable *solely* to offenses that were relevant conduct to the instant federal offense, the commentary to §5G1.3 afforded discretion to the district court under subsection (d) to impose the defendant's federal sentence concurrent with, partially concurrent with, or consecutive to the undischarged terms of the state sentences.

United States v. Holder, 981 F.3d 647 (8th Cir. 2020). The Eighth Circuit vacated the district court's denial of the defendant's motion for a sentence reduction pursuant to section 404 of the First Step Act of 2018 and remanded for further proceedings, holding that the district court erred in determining the defendant's amended guideline range under the Fair Sentencing Act of 2010 during her proceeding for First Step Act relief. The court explained that, although a district court has discretion on whether to grant First Step Act relief, the district court must first determine the correct amended guideline range, and a mistake in such determination is procedural error, which in the instant proceeding was not harmless.

United States v. Doran, 978 F.3d 1337 (8th Cir. 2020). The Eighth Circuit affirmed the defendant's sentence, holding that his prior California convictions for threatening "to commit a crime which will result in death or great bodily injury to another person" under Cal. Penal Code § 422 and possession of marijuana for sale under Cal. Health & Safety Code § 11359 qualify, respectively, as a "crime of violence" and "controlled substance offense" under §§2K2.1(a)(2) and 4B1.2. The court explained that an offense under section 422 is a "crime of violence" because it necessarily requires the threatened use of physical force "capable of causing physical pain or injury to another person[.]" joining the Ninth Circuit, which had held the same in the context of §2L1.2. The court then held that an offense under section 11359 is a "controlled substance offense,"

even though California reclassified an offense under such section as a misdemeanor after the defendant's conviction under such section but before the defendant's instant federal offense conduct, stating that the court's analysis focuses on "whether 'a prior conviction . . . was punishable as a felony at the time of the conviction.'"

United States v. Howard, 977 F.3d 671 (8th Cir. 2020). Among other things, the Eighth Circuit affirmed the defendant's sentence, enhanced under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"), holding that "his 1992 Wisconsin conviction for robbery and his 2009 North Dakota conviction for conspiracy to deliver ecstasy" are qualifying offenses for purposes of the ACCA. Based on the charging document and judgment for the Wisconsin conviction, the court found "no clear error in the district court's factual determination that [the defendant] was convicted of armed robbery," which is a "violent felony" under 18 U.S.C. § 924(e)(2)(B), rather than simple robbery, which is not. Citing *Shular v. United States*, 140 S. Ct. 779 (2020), the court held that the North Dakota offense "categorically qualifies as a 'serious drug offense'" under 18 U.S.C. § 924(e)(2)(A) because "conspiracy to delivery ecstasy in violation of North Dakota law involves distributing a controlled substance."

United States v. Coleman, 977 F.3d 666 (8th Cir. 2020). The Eighth Circuit affirmed the defendant's sentence, enhanced under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"), holding that his 2003 Tennessee conviction for possession of cocaine for resale is a "serious drug offense" under 18 U.S.C. § 924(e)(2)(A), while his 2004 Missouri conviction for delivery or manufacture of an imitation controlled substance is not. Applying the modified categorical approach to the Tennessee conviction, the court found that the defendant was convicted of possession "with intent to manufacture, deliver or sell" and held that the plain language of the Tennessee statute necessarily entails "possessing with intent to manufacture or distribute" under 18 U.S.C. § 924(e)(2)(A)(ii). With respect to the Missouri offense, the court held that because the offense was punishable by a maximum of four years' imprisonment, the offense could not be a "serious drug offense" since 18 U.S.C. § 924(e)(2)(A) requires, among other things, that an offense be punishable by ten years or more in prison.

NINTH CIRCUIT

United States v. Gainza, 982 F.3d 762 (9th Cir. 2020). The Ninth Circuit vacated the defendants' sentences for fraud-related offenses and remanded for resentencing, holding that the district court clearly erred in applying a 12-level enhancement under §2B1.1(b)(1). The court explained that the district court had held the defendants accountable for the total number of access devices (here, debit or credit

cards) used at the ATMs where the defendants had placed a skimming device. However, the court found that the government had not proven that the defendants had obtained any account numbers beyond those for which fraud was reported, and thus, it was clear error to hold the defendants accountable for all access devices used at those ATMs.

United States v. Bautista, 982 F.3d 563 (9th Cir. 2020). The Ninth Circuit reversed the defendant's sentence and remanded for resentencing, holding that his sentence was improperly enhanced under §2K2.1(a)(4)(A) because his 2017 Arizona conviction for attempted unlawful transportation of marijuana for sale is not a "controlled substance offense," as defined in §4B1.2(b). Applying the categorical approach, the court explained that the Arizona statute does not exclude hemp from its definition of "marijuana," while the Controlled Substances Act was amended (before the defendant's instant conviction) to exclude hemp from its definition of the term. Thus, the court held that the Arizona statute is categorically overbroad and does not qualify as a "controlled substance offense" under §4B1.2(b).

United States v. Alhaggagi, 978 F.3d 693 (9th Cir. 2020). The Ninth Circuit vacated and remanded the defendant's sentence for attempting to provide material support to a designated foreign terrorist organization and committing other offenses, holding that the district court abused its discretion in applying a terrorism adjustment under §3A1.4. The court noted that the adjustment requires "that the offense committed 'involved, or was intended to promote, a federal crime of terrorism,'" which is defined in 18 U.S.C. § 2332b(g)(5) "as 'an offense that[, among other things,] is . . . calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.'" Joining the Second, Fourth, Sixth, and Eighth Circuits, the court held that section 2332b(g)(5) imposes a specific intent requirement, focusing not on a defendant's particular motive for committing an offense, but rather, on the object that the defendant seeks to achieve through the commission of the offense. In the defendant's case, the court concluded that clear and convincing evidence did not establish that the defendant's conduct in opening social media accounts for a terrorist organization was calculated to retaliate against government conduct, and thus, §3A1.4 did not apply.

TENTH CIRCUIT

United States v. Clark, 981 F.3d 1154 (10th Cir. 2020). The Tenth Circuit affirmed the district court's determination that there is no analogous guideline applicable to child neglect in Indian Country but concluded nevertheless that the district court committed plain error by failing to adequately explain the reasons for the defendant's sentence. Thus, the Tenth Circuit remanded the defendant's case to

the district court for resentencing with directions to include an explanation of the reasons for the sentence ultimately imposed.

United States v. Miller, 978 F.3d 746 (10th Cir. 2020). Among other things, the Tenth Circuit affirmed the defendant's drug-testing special condition of supervised release as not plainly erroneous. In its reasoning, the court joined the First, Seventh, and Ninth Circuits and held that the text of 18 U.S.C. § 3583(d) plainly expresses congressional intent that a court "determine the maximum number of drug tests to which a defendant must submit during a term of supervised release," thus prohibiting a court from delegating this authority to a probation officer. While the district court committed statutory error by making this delegation, the court held that the delegation did not amount to constitutional error since the determination of drug tests to which a defendant must submit does not infringe upon a significant liberty interest.

ELEVENTH CIRCUIT

United States v. Taylor, 982 F.3d 1295 (11th Cir. 2020). The Eleventh Circuit vacated the district court's order finding the defendant ineligible for a sentence reduction pursuant to section 404 of the First Step Act of 2018 and remanded for consideration of whether a reduction was warranted. The court held that the defendant's offense of conviction—a multidrug conspiracy offense involving both a crack cocaine element, which triggered a penalty range that was modified by section 2 of the Fair Sentencing Act of 2010, and another controlled substance element, which triggered a penalty range that was not so modified—qualifies as a "covered offense" under section 404.

United States v. Bazantes, 978 F.3d 1227 (11th Cir. 2020). The Eleventh Circuit affirmed the convictions of the defendants, but vacated and remanded their sentences, for making false statements in violation of 18 U.S.C. § 1001(a)(3). The court held, among other things, that the district court erred in applying a loss enhancement under §2B1.1(b)(1). In its reasoning, the court first concluded that the defendants' mischaracterization of employees as independent contractors for payroll tax purposes resulted in no loss to the contracting federal agency because the mischaracterization did not affect the amount the agency paid the defendants' company to provide the contracted-for services. As a matter of first impression, the court then joined the Second and Seventh Circuits in holding that the text of the commentary of §2B1.1 makes clear that, in determining

loss under §2B1.1(b)(1), courts cannot use gain as a measure of loss where there is no loss.

United States v. Muho, 978 F.3d 1212 (11th Cir. 2020). The Eleventh Circuit affirmed the defendant's conviction and sentence for bank fraud, wire fraud, aggravated identity theft, and money laundering, holding, among other things, that the district court appropriately applied "a two-level enhancement [under §2B1.1(b)(17)(A) for deriving] more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense." As a matter of first impression, the court held that for the enhancement to apply—in the context of property held by a financial institution for a depositor—the financial institution (1) must be the source of the property (meaning that it has property rights in the property but not necessarily sole ownership of it), and (2) must have been victimized by the offense conduct.

D.C. CIRCUIT

United States v. White, Nos. 19-3058/19-3059 (D.C. Cir. Dec. 29, 2020). The D.C. Circuit reversed and remanded the denial and partial denial of the defendants' motions for sentence reductions with respect to their crack-cocaine distribution offenses, which were filed pursuant to section 404 of the First Step Act of 2018. The court held, among other things, that 1) whether an offense is a "covered offense" under section 404(a) depends not on the actual drug quantity attributable to a defendant, but instead, on whether the offense is one with a statutory penalty range altered by section 2 or 3 of the Fair Sentencing Act of 2010; 2) the "plain language of section 404(b) does not require [a] court to determine what effect the Fair Sentencing Act 'would have had' on a defendant's sentence at the time it was originally imposed"; and 3) relief is available under section 404(b), "even if the Fair Sentencing Act did not modify the statutory [penalty] range for the specific drug quantity" attributable to a defendant.



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