

# 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 FIRST QUARTER OF 2021—

### FIRST CIRCUIT

[United States v. Concepcion, 991 F.3d 279 \(1st Cir. 2021\)](#). The First Circuit affirmed the denial of the defendant's motion for a sentence reduction pursuant to section 404 of the First Step Act of 2018, joining the Second, Fifth, Sixth, Ninth, and Eleventh Circuits in holding that eligibility for resentencing pursuant to such section does not entitle a defendant to a plenary resentencing. The court rejected the defendant's argument that the district court, after finding him eligible for resentencing pursuant to section 404, was then required to reevaluate the factors in 18 U.S.C. § 3553(a) as of the date of the motion and commission a new presentence report reflecting changes in the guidelines that would result in the defendant no longer qualifying as a career offender under §4B1.1. Instead, the First Circuit held that, when a court decides whether a defendant should be resentenced pursuant to section 404, it must constrain its inquiry only to the changes made retroactive by such section. It is only after this inquiry, when imposing a reduced sentence, that a court may, in its discretion, consider the section 3553(a) factors, including post-sentencing information, and any other changes in law or the guidelines.

[United States v. Rodríguez-Rivera, 989 F.3d 183 \(1st Cir. 2021\)](#). The First Circuit joined the Second, Fifth, Sixth, and Ninth Circuits in disagreeing with the Fourth and Tenth Circuits by holding that a conviction under 21 U.S.C. § 846 for conspiring to commit a controlled substance offense qualifies as a predicate controlled substance offense under §4B1.2(b), even though section 846 does not require proof of an overt act in furtherance of the conspiracy. Citing *Shular v. United States*, 140 S. Ct. 779 (2020), the court determined that, for purposes of §4B1.2(b), its duty is "not to define or identify any generic offense as the measure of a categorical test, but instead to ask whether the [potential predicate offense] 'prohibits' the [conduct specified in §4B1.2(b)]." More specifically, the court reasoned that Application Note 1 of §4B1.2, which circuit precedent held is authoritative, makes clear that the key test

in a case of conspiring to commit a controlled substance offense is whether the aim of the "conspiring" was the conduct so specified. Consequently, the court found that a violation of section 846 "passes this test."

[United States v. Maldonado, 988 F.3d 103 \(1st Cir. 2021\)](#). On the government's appeal, the First Circuit vacated and remanded the defendant's sentence, holding that a conviction under Massachusetts law for armed assault with intent to murder may qualify as a predicate "crime of violence" under §4B1.2(a), even if "the conviction was or may have been based on a joint venture theory under Massachusetts law as it stood in 2007." In its reasoning, the court first upheld circuit precedent that the definition of "crime of violence" under §4B1.2(a) includes the variants described in Application Note 1 of such section, which include aiding and abetting. The court then reached its holding by relying on a recent circuit court decision finding that, "despite different language employed at different times, Massachusetts joint venture liability" has effectively required since at least 1979 the same *mens rea* showing required of aiding and abetting liability.

### SECOND CIRCUIT

[United States v. Felder, No. 19-897-cr, 2021 WL 1201340 \(2d Cir. Mar. 31, 2021\)](#). Joining every circuit court of appeals to have considered the issue, the Second Circuit held, among other things, that federal carjacking is a "crime of violence" for purposes of the force clause in 18 U.S.C. § 924(c). In so holding, the court reasoned that federal carjacking, even if committed by intimidation, "requires a defendant to act in a way that he knows will create the impression in an ordinary person that resistance to [the] defendant's demands will be met by force."

[United States v. Bryant, 991 F.3d 452 \(2d Cir. 2021\)](#). The Second Circuit affirmed the district court's reduction in the defendant's sentence for conspiracy to distribute cocaine base, holding, among other things, that the defendant was not entitled to a further reduction under section 401(a) of

the First Step Act of 2018, which narrowed the applicability of the sentencing enhancement under 21 U.S.C. § 841(b)(1)(A). The court reasoned that the plain text of section 401(c) of the Act, which describes the applicability of the changes to the enhancement to pending cases, makes clear that the changes only apply to a defendant who committed a qualifying offense before the enactment of the Act if a sentence had not yet been imposed as of the date of such enactment.

[United States v. Scott](#), 990 F.3d 94 (2d Cir. 2021) (*en banc*). On a rehearing *en banc*, the Second Circuit vacated the panel decision, reversed the district court's grant of the defendant's 28 U.S.C. § 2255 motion, vacated his reduced sentence, and remanded with instructions to reinstate the original sentence, holding, among other things, that New York first degree manslaughter categorically qualifies as a "violent felony" and a "crime of violence" under the force clauses of 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA") and §4B1.2, respectively, even though the statute includes manslaughter committed by omission. In its decision, the court joined the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits in applying the Supreme Court's reasoning in *United States v. Castleman*, 572 U.S. 157, 169 (2014) (providing that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force"), to reach its holding.

[United States v. Chestnut](#), 989 F.3d 222 (2d Cir. 2021). The Second Circuit dismissed the defendant's appeal of the denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding that the appeal is moot following the defendant's release from prison. The court reasoned that a "live controversy" did not exist relating to a reduction in the defendant's supervised release term based on the motion, in part because the defendant's motion focused exclusively on release from prison based on Covid-19 risks and care of his children, rather than any reduction in his supervised release term based on the same.

[Collier v. United States](#), 989 F.3d 212 (2d Cir. 2021). The Second Circuit affirmed the district court's denial of the defendant's 28 U.S.C. § 2255 motion to vacate his conviction and sentence, holding that (1) his claim, challenging the residual clause of the pre-*Booker* mandatory career offender guideline as unconstitutionally vague, was untimely, and (2) attempted federal bank robbery is categorically a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3). In reaching its first holding, the court cited a recent circuit court decision, holding that the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), did not recognize the right asserted by the defendant, *i.e.*, the right not to receive a sentence "fixed" by the residual clause of the pre-*Booker* career offender guideline. In its second holding, the court reasoned

that attempted federal bank robbery requires that the defendant have intended to commit the elements of the substantive crime, which requires "force and violence" or "intimidation." Therefore, the court concluded that attempted federal bank robbery is "a categorical match for a crime of violence under the force clause of [section 924(c)(3)]," regardless of whether the "substantial step" towards committing the offense was a violent one or not, noting that its holding comports with those in the Seventh, Ninth, and Eleventh Circuits.

## THIRD CIRCUIT

[United States v. Walker](#), 990 F.3d 316 (3d Cir. 2021). The Third Circuit affirmed the district court's judgment and sentence, holding, among other things, that the defendant's conviction for attempted Hobbs Act robbery under 18 U.S.C. § 1951(a) categorically qualifies as a "crime of violence" under 18 U.S.C. § 924(c). In so holding, the court joined the majority of circuit courts to have considered the issue.

[United States v. Prophet](#), 989 F.3d 231 (3d Cir. 2021). The Third Circuit affirmed the district court's denial of the defendant's motion to vacate his sentence under 28 U.S.C. § 2255 and habeas petition under 28 U.S.C. § 2241, which challenged the application of a two-level enhancement under §2G2.2(b)(3)(F) for distribution of child pornography. Among other things, the court held that Amendment 801, which limited the enhancement to "those who 'knowingly engaged in distribution'" and was adopted by the Sentencing Commission after the defendant was sentenced, is not retroactive. In so holding, the court rejected the defendant's argument that Amendment 801 is a clarifying amendment that can be raised and retroactively applied in a section 2255 motion. The court explained that the addition of a *mens rea* requirement to the main text of the guideline (rather than the commentary), the Commission's explanation of the purpose of the amendment, and the amendment's effect of narrowing the scope of the enhancement all show that the amendment made a substantive, rather than clarifying, change.

[United States v. Aguirre-Miron](#), 988 F.3d 683 (3d Cir. 2021). The Third Circuit vacated the defendant's sentences for child pornography production, receipt, and possession offenses and remanded for resentencing, holding, on plain error review, that the district court erred in failing to group the defendant's three production counts and group the production counts with the receipt and possession counts. The court explained that, because the defendant had received a pattern enhancement under §2G2.2(b)(5) on his receipt and possession counts "based on the conduct embodied in his production counts," all of his counts had to be grouped under §3D1.2(c). Consequently, the court held that the district court's failure to do so was a clear or obvious error that

affected the defendant's substantial rights and chose to exercise its discretion to cure the plain error.

*United States v. Senke*, 986 F.3d 300 (3d Cir. 2021). Among other things, the Third Circuit vacated several special conditions of supervised release for the defendant's conviction for attempted sex offenses involving a minor and remanded for further findings. The court explained that the condition requiring that the defendant abstain from computer and internet use was contradictory to the conditions requiring that he "obtain permission from his probation officer to use the internet, have monitoring software installed on any computer he uses, and submit to searches of his computers." Noting that internet and computer bans are particularly draconian in a modern society, the court stated that the district court must make findings on remand, tailored to the defendant's conduct, to support any restrictions on his internet and computer use. The court also vacated a special assessment fee under 18 U.S.C. § 3014 (enacted under the Justice for Victims of Trafficking Act of 2015 after the defendant committed his offenses) as a plain error violation of the Ex Post Facto Clause.

## FOURTH CIRCUIT

*United States v. Miller*, No. 20-4075, 2021 WL 1201348 (4th Cir. Mar. 31, 2021). The Fourth Circuit affirmed the district court's judgment, holding that the district court did not err in adding one criminal history point under §4A1.1(c) for the defendant's prior North Carolina conviction for possession of marijuana, which had been resolved through a prayer for judgment continued (a "PJC disposition"). Under North Carolina law, a PJC disposition is "a type of deferred disposition . . . under which the court renders an adjudication of guilt but entry of final judgment is not required." Here, no final disposition was ever entered in the defendant's case. The Fourth Circuit explained, though, that the plain language of §4A1.2(f) provides that "diversionary disposition[s] resulting from a finding or admission of guilt, or a plea of nolo contendere," are "counted as a sentence under §4A1.1(c) even if a conviction is not formally entered." The court further reasoned that the state's range of state sentencing options, naming conventions, and treatment of a diversionary disposition are not dispositive to whether a conviction counts for criminal history purposes.

*United States v. Freeman*, No. 91-4104, 2021 WL 1180711 (4th Cir. Mar. 30, 2021). The Fourth Circuit, after directing appointed counsel to brief specific issues in response to counsel's *Anders* brief, vacated and remanded the defendant's 210-month sentence for possession with intent to distribute, holding that the defendant's counsel provided ineffective assistance and that the sentence was substantively unreasonable. First, the court held that defendant's coun-

sel provided ineffective assistance by failing to raise meritorious objections to (1) the Presentence Report's ("PSR") calculated drug weight, which failed to reflect the defendant's proffer; (2) a 2-level upward adjustment for obstruction of justice based on leaving the state while on bond; and (3) the PSR's failure to apply a downward departure for acceptance of responsibility. Second, the court concluded that the defendant's sentence was substantively unreasonable based on (1) the disparity between the defendant's sentence and that of similarly situated defendants, as evidenced by data from the Commission's 2018 *Sourcebook of Federal Sentencing Statistics*; and (2) the overwhelming record evidence of the defendant's addiction to opioids.

*In re Thomas*, 988 F.3d 783 (4th Cir. 2021). The Fourth Circuit joined the First, Fifth, Sixth, Tenth and Eleventh Circuits in holding that *Davis v. United States*, 139 S. Ct. 2319 (2019)—which struck the residual clause of 18 U.S.C. § 924(c)'s "crime of violence" definition as unconstitutionally vague—applies retroactively on collateral review. Thus, after finding that the defendant stated a "plausible claim" that *Davis*'s holding requires a different outcome in his case, the court granted the defendant's motion seeking authorization to file a second or successive motion under 28 U.S.C. § 2255.

*United States v. Croft*, 987 F.3d 93 (4th Cir. 2021). The Fourth Circuit affirmed the district court's denial of the defendant's 28 U.S.C. § 2255 motion, holding that South Carolina carjacking, which prohibits taking or attempting to take a motor vehicle "by force and violence or by intimidation while [a] person is operating the vehicle or while the person is in the vehicle," is categorically a violent felony under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"). The court concluded that, "[a]lthough South Carolina courts have not explicitly interpreted the carjacking statute, the state has given [] every indication that it meant 'intimidation' in its carjacking statute to require the use, attempted use or threat of physical force against the person in the vehicle."

*United States v. Haas*, 986 F.3d 467 (4th Cir. 2021). The Fourth Circuit affirmed the defendant's convictions for attempted sex trafficking of a minor and three child pornography offenses but partially vacated his sentence, holding that the district court erred in applying a 4-level enhancement under §2G2.1 for an offense involving a minor under 12 years of age. The court concluded that "neither subparagraph (A) or (B) of the application note defining 'minor' for §2G2.1 encompass[es] a situation in which a private citizen represents that a fictitious child could be provided to engage in sexual conduct, [and, therefore,] the district court erred in applying [the] enhancement." However, the court affirmed the district court's application of the repeat sex offender enhancement under §4B1.5, explaining that, in the case of a defendant convicted on multiple counts, "as long as one count is a covered sex crime, the 'instant offense

of conviction is a covered sex crime' and the enhancement applies."

*United States v. McDonald*, 986 F.3d 402 (4th Cir. 2021). The Fourth Circuit vacated orders partially granting three defendants' sentence reduction motions pursuant to section 404 of the First Step Act of 2018 and remanded to the district court with instructions to provide an explanation for each resentencing. In its reasoning, the court relied on *United States v. Martin*, 916 F.3d 389 (4th Cir. 2019), which held that when a defendant presents mitigating evidence of post-sentencing conduct sufficient to overcome the "presumption that the district court sufficiently considered relevant factors in deciding [an 18 U.S.C. § 3582(c)(2)] motion," the district court must provide an individualized explanation for its decision. After concluding that *Martin* is also applicable to motions made pursuant to 18 U.S.C. § 3582(c)(1)(B), the court determined that the district court had failed to meet the requirement with respect to each defendant.

*United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021). The Fourth Circuit reversed and vacated and remanded the imposition of two of the defendant's special conditions of supervised release, holding that the "outright ban[s] on internet access and on possessing legal pornography or entering any location where it may be accessed" could not be sustained under 18 U.S.C. § 3583(d)(1) as "reasonably related" to the defendant's conviction for failure to register as a sex offender and were too broad to meet the "reasonably necessary" requirement under 18 U.S.C. § 3583(d)(2). The court found that (1) section 3583(d)(1) requires conditions of supervised release to be supported by individualized evidence; (2) section 3583(d)(2) requires the least restrictive alternative to achieve the purposes described in such section; and (3) "[n]othing in [section] 3583(d), or elsewhere, authorizes a district court to use a condition of release as a 'stick' to encourage desired behavior by a defendant."

## FIFTH CIRCUIT

*United States v. Burney*, No. 20-10529, 2021 WL 1167849 (5th Cir. Mar. 29, 2021). The Fifth Circuit affirmed the defendant's sentence, holding that the district court did not improperly consider the defendant's socioeconomic status by considering, among other factors, the defendant's "good childhood" and upbringing in justifying an upward variance. Finding the sentence substantively reasonable, the court stated: "Though it's certainly more unusual for a defendant's *good* childhood to be considered an aggravating factor, those decisions still suggest that such considerations are part of a defendant's background, not his socioeconomic status."

*United States v. Reyna-Aragon*, No. 20-10071, 2021 WL 1152964 (5th Cir. Mar. 26, 2021). The Fifth Circuit affirmed the defendant's sentence, holding that, although the district court committed *ex post facto* error by applying the more onerous sentencing guidelines in effect at the time of the defendant's sentencing, rather than the more lenient guidelines in effect at the time of his offense, the error was harmless. It found the error harmless because, among other things, the district court relied "on factors independent from the erroneous [guideline] range" and "was not influenced by the erroneous [guideline range] calculation in imposing" the sentence. The court also held that the district court did not commit error under the Fifth Amendment's Due Process clause by adopting the Presentence Report's description of the defendant's arrest for sexual assault under Texas law, which was later "no-billed," stating that it was not a "bare arrest record."

*United States v. Vigil*, 989 F.3d 406 (5th Cir. 2021). The Fifth Circuit upheld a special condition of supervised release that included an alcohol prohibition, even though there was no evidence of alcohol abuse, as part of the defendant's sentence for transportation of illegal aliens. The court stated that "in a case like this, where the defendant has a history of substance abuse and drug-related arrests such that the court reasonably believes he is an 'abuser' of drugs, it is within the district court's discretion to require substance abuse treatment and prohibit the use of intoxicating substances, including alcohol, as special conditions of supervised release—even when there is no evidence in the record of alcohol abuse specifically."

*United States v. Lopez*, 989 F.3d 327 (5th Cir. 2021). In a case involving one count of conspiracy to possess with intent to distribute more than five kilograms of cocaine and one count of conspiracy to possess with intent to distribute more than 50 kilograms of marijuana, the Fifth Circuit vacated and remanded the district court's decision to reduce the defendant's sentence on only the cocaine count but not the marijuana count. At issue was whether the defendant's sentence for his marijuana count was "based on" a sentencing range that had subsequently been lowered by the Sentencing Commission, thus meeting one of the threshold requirements for a sentence reduction under 18 U.S.C. § 3582(c)(2). The court first found that "the base drug offense levels for [both of the defendant's counts had] retroactively been reduced]" by the Commission. The court then held that, even though the defendant's sentence on his marijuana count had been determined by a statutory maximum term of imprisonment that was lower than the minimum of his "initial guideline range," the "guideline range applicable" to the defendant for purposes of section 3582(c)(2) was his "initial guideline range" because that range "played 'a relevant part in the framework the

sentencing judge used’ in imposing” his sentence. Therefore, the defendant’s sentence met the “based on” threshold requirement of section 3582(c)(2).

*United States v. Kim*, 988 F.3d 803 (5th Cir. 2021). In this copyright infringement case, the Fifth Circuit vacated and remanded the order of restitution, holding that it was in excess of the statutory maximum because it exceeded the amount of the victim’s actual loss. First, the court dismissed the defendant’s challenge to the imposition of a 14-level loss enhancement under §2B1.1(b)(1)(H) because it was barred by the appeal waiver in his plea agreement. Next, the court held that, despite the defendant’s appeal waiver, he was not barred from appealing the restitution order because the restitution amount exceeded the maximum authorized by statute. Stating that the government had not proven by a preponderance of the evidence that the victim’s purported loss was proximately caused by the defendant’s offense, the court concluded that the district court erred in ordering restitution based on the speculative loss amount contained in the Presentence Report.

*United States v. Martinez*, 987 F.3d 432 (5th Cir. 2021). Withdrawing its prior opinion in *United States v. Martinez*, 979 F.3d 271 (5th Cir. 2020), and issuing a new one, the Fifth Circuit vacated and remanded 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. Reviewing for an abuse of discretion, the court held that “giving a probation officer the option to require inpatient treatment impermissibly delegates a core judicial function.” In so holding, the court agreed with three other circuits’ holdings that a court may not delegate that decision “because of the significant liberty interests at stake in confinement during inpatient treatment.” It stated that “because of [the defendant’s] short ten-month sentence, the district court should not have delegated the decision to further restrict a defendant’s liberty during the course of treatment while on supervised release,” distinguishing *United States v. Medel-Guadalupe*, 987 F.3d 424 (5th Cir. 2021) (permitting delegation of the inpatient–outpatient decision after a longer, ten-year sentence).

*United States v. Winters*, 986 F.3d 942 (5th Cir. 2021). On the government’s appeal, the Fifth Circuit affirmed the district court’s decision to reduce the defendant’s sentence for a “dual-object conspiracy” from 233 months to 180 months pursuant to section 404 of the First Step Act of 2018. The court held that the defendant’s “dual-object conspiracy” under 21 U.S.C. § 846, involving both crack cocaine and powder cocaine, constituted a “covered offense” under section 404(a), agreeing with cases in the Fourth and Eleventh Circuits and disagreeing with a case in the Second Circuit. It also held that the district court had statutory authority under section 404(b) to reduce the defendant’s

sentence and that neither of section 404(c)’s limitations applied.

*United States v. Warren*, 986 F.3d 557 (5th Cir. 2021). The Fifth Circuit affirmed the defendants’ convictions and sentences in a telemarketing fraud conspiracy, holding, among other things, that the district court did not err in finding that one of the defendants was a “manager or supervisor” for purposes of an offense-level increase under §3B1.1. Even though the defendant did not manage or supervise other participants in the conspiracy, the court held that he controlled the telemarketing operations’ technology. In upholding the increase, the court stated: “Despite Application Note 2’s clear instructions, we have upheld offense-level increases under §3B1.1 based solely on management of property, assets or activities. Though we believe those cases incorrectly applied the [g]uidelines, we are bound by them under our court’s rule of orderliness.” (footnotes omitted).

## SIXTH CIRCUIT

*United States v. Wills*, 991 F.3d 720 (6th Cir. 2021). The Sixth Circuit affirmed the district court’s denial of the defendant’s motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The court held, among other things, that, because the amendments made by section 401 of the First Step Act of 2018 (providing a definition for “serious drug felony” for purposes of 21 U.S.C. § 841) do not apply retroactively, the district court did not abuse its discretion in finding no extraordinary and compelling reasons to warrant a sentence reduction.

*United States v. Maxwell*, 991 F.3d 685 (6th Cir. 2021). The Sixth Circuit affirmed the denial of the defendant’s motion for a sentence reduction pursuant to section 404 of the First Step Act of 2018. The court first noted that a court has discretion in granting a sentence reduction pursuant to section 404 and then joined the Second, Fifth, Ninth, and Eleventh Circuits in concluding that the plain language of section 404 does not entitle a defendant to a plenary resentencing. It further joined the Second, Seventh, Eighth, and Tenth Circuits in finding that courts are permitted to use their discretion under section 404 to consider subsequent legal and factual developments in balancing the factors in 18 U.S.C. § 3553(a) to assess whether, and to what extent, to modify a sentence.

*United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021). The Sixth Circuit affirmed the district court’s denial of the defendant’s motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The court first noted, among other things, that, based on its precedent in *United States v. Elias*, 984 F.3d 516 (6th Cir. 2021) (establishing that §1B1.13 is not an applicable policy statement for defendant-filed motions under section 3582(c)(1)(A)), the district court erred by limiting itself to §1B1.13’s four catego-

ries of “extraordinary and compelling reasons” for compassionate release in its determination. However, the court held that reversal was not required because the district court’s reliance on §1B1.13 was not the sole reason for its denial. The district court also denied the motion based on its alternative weighing of the factors in 18 U.S.C. § 3553(a), thus constituting an independent reason to deny relief under section 3582(c)(1)(A).

*United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021). Among other things, the Sixth Circuit reversed and remanded the defendant’s sentence, extending *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), to find that Application Note 3(F)(i) of §2B1.1 impermissibly expands “loss” in §2B1.1(b)(1) with respect to certain access devices. The court concluded the commentary, which states “loss shall be not less than \$500 per access device,” is invalid, as it is not an “interpretation” of “loss,” but is instead a substantive legislative rule that must be in the guideline itself to have force. The court explained that in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court clarified that courts are not to “reflexively defer to an agency’s interpretation,” but are to evaluate whether a regulation is “genuinely ambiguous,” and, to be upheld, the agency’s interpretation must come “within the zone of ambiguity.” Citing *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (finding *Kisor* applies to the guidelines), the court held that “loss” for access devices in the application note does not fall within the zone of ambiguity.

*United States v. Sherwood*, 986 F.3d 951 (6th Cir. 2021). The Sixth Circuit reversed and remanded the district court’s denial of a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), filed prior to its recent holding that §1B1.13 is no longer an independent basis upon which to deny such a defendant-filed motion. The court stated that, while a district court’s brief order may be sufficient for purposes of a denial of compassionate release, where that order “relies exclusively on an impermissible consideration,” it must be vacated and remanded for further consideration. The court further noted that, because it presumes the initial balancing of the 18 U.S.C. § 3553(a) factors remains accurate, the defendant must make a compelling case demonstrating why the court’s section 3553(a) analysis would be different if conducted today.

*United States v. Quintanilla Navarro*, 986 F.3d 668 (6th Cir. 2021). The Sixth Circuit affirmed the district court’s denial, in the form of a “barebones form order,” of the defendant’s compassionate release motion asserting that the Covid-19 pandemic, and not any changes to personal circumstances, established the necessary extraordinary and compelling circumstances warranting a reduction under 18 U.S.C. § 3582(c)(1)(A). The court explained that, taken in isolation, its recent analysis of the insufficiency of “barebones orders” for motions for compassionate release, considered in the larger context of a court’s obligation to weigh

the 18 U.S.C. § 3553(a) factors in such motions, conflicts with *Chavez-Mesa v. United States*, 138 S. Ct. 1959 (2018) (holding that a district court is not required to render a “full opinion” where the matter is “conceptually simple” and the record is clear that the court considered the evidence and arguments), and “is accordingly not binding on later panels.”

*United States v. Elias*, 984 F.3d 516 (6th Cir. 2021). The Sixth Circuit affirmed the denial of the defendant’s motion for compassionate release, which was filed pursuant to the amendments made by the First Step Act of 2018 to 18 U.S.C. § 3582(c)(1)(A). In its decision, the court reaffirmed its recent holding that §1B1.13 is not an applicable policy statement for compassionate release motions filed by inmates, noting “a newfound consensus among the courts.” The court further clarified that, when denying a compassionate release motion, a district court may “deny [the] motion[] when any of the three prerequisites listed in [section] 3582(c)(1)(A) is lacking and [does] not need to address the others,” but when granting such a motion, a district court “must address all three steps.”

*United States v. Jackson*, 984 F.3d 507 (6th Cir. 2021). The Sixth Circuit affirmed two defendants’ sentences, holding, among other things, that one defendant’s Kentucky conviction for trafficking in a controlled substance, which includes the transfer of such substance, qualifies as a predicate controlled substance offense for purposes of the career offender enhancement under §4B1.1, even though the definition of “controlled substance offense” in §4B1.2 does not explicitly include the act of “transfer.” In its decision, the court stated that “the Guidelines draw their definitions from the Controlled Substances Act,” and reasoned that, because the Act includes the transfer of a controlled substance in its definitions of “delivery” and, in turn, “distribute,” “the generic offense in the Guidelines encompasses the conduct of transfer.”

## SEVENTH CIRCUIT

*United States v. Coe*, No. 20-1990, 2021 WL 1115873 (7th Cir. Mar. 24, 2021). The Seventh Circuit affirmed the defendant’s sentence, rejecting, among other things, the defendant’s argument that the district judge improperly considered his race in declining to treat his father’s incarceration as a significant mitigating factor. Though the district judge remarked that an absent father “is a common thing in our particular community” (both the judge and defendant are Black), in context, the comment was part of a “race-neutral” explanation that, unlike many other defendants, the defendant had a supportive mother and family. Further, the defendant failed to demonstrate that the district court relied on the purportedly impermissible factor in

light of other factors, such as the violent nature of the defendant's crimes and the defendant's criminal history, that weighed heavily in the district court's decision.

*United States v. Wylie*, 991 F.3d 861 (7th Cir. 2021). The Seventh Circuit vacated the defendant's five-year term of supervised release, imposed as part of a sentence for possession with intent to distribute, holding that the district court plainly erred in believing that it was required to impose the statutory minimum, despite the defendant's qualification for safety-valve relief under 18 U.S.C. § 3553(f). The court remanded the matter for the limited purpose of reconsidering the length of the defendant's term of supervised release without regard to the statutory minimum.

*United States v. Jackson*, 991 F.3d 851 (7th Cir. 2021). The Seventh Circuit affirmed the denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), holding that the defendant is ineligible for relief because he committed his crime before the Sentencing Reform Act of 1984 ("SRA") took effect on November 1, 1987. In so holding, the court rejected the defendant's argument that the amendments made by the First Step Act of 2018 to section 3582(c)(1)(A) permitted him to seek early release, notwithstanding a transition rule in the SRA that limits the applicability of the SRA to offenses committed after the SRA's effective date.

*United States v. Wallace*, 991 F.3d 810 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's conviction and sentence for being a felon in possession of a firearm. Among other things, the court held that the district court properly added two criminal history points under §4A1.1 for a prior conviction where the state court judgment stated: "Defendant is to receive credit for 136 days previously served." The court rejected the defendant's argument that no points should have been added because he never actually served any time in custody on the conviction, explaining that the argument was "essentially a misplaced collateral attack on a state-court judgment." Accordingly, the court declined to weigh in on a "potential circuit split" with the Sixth and Eleventh Circuits regarding how to determine when a sentence is "actually served" for purposes of the criminal history point calculation.

*Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021). The Seventh Circuit reversed the district court's denial of the defendant's 28 U.S.C. § 2255 petition and remanded for further proceedings regarding whether his counsel failed to provide effective assistance by stipulating—rather than objecting—to the career offender enhancement under §4B1.1 in the defendant's plea agreement for Hobbs Act robbery. Specifically, the court held that the career offender enhancement should not have been applied because Hobbs Act robbery is not a "crime of violence," as defined in

§4B1.2, and that the defendant is entitled to a prompt evidentiary hearing to prove that his counsel's failure to raise or investigate the issue constituted deficient performance.

*United States v. Lundberg*, 990 F.3d 1087 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's conviction and sentence for wire fraud and held, among other things, that the district court did not clearly err in applying the 2-level sophisticated means enhancement under §2B1.1(b)(10)(C). The court explained that the defendant's "doctoring of another person's tax forms to support a lease application for a home paid for with the victim's money obviously [went] above and beyond the activity inherent in wire fraud," and therefore, supported the enhancement.

*United States v. Slone*, 990 F.3d 568 (7th Cir. 2021). The Seventh Circuit affirmed the district court's judgment, holding that, despite the defendant's acquittal on a charge of drug possession with intent to distribute, the district court did not err in imposing a 4-level enhancement under §2K2.1(b)(6)(B) for possessing firearms "in connection with" drug trafficking. The court explained that "[a] sentencing court[] may consider acquitted conduct[,] provided that its findings are supported by a preponderance of the evidence," and concluded that "[t]here was more than enough evidence to meet that threshold" to support the enhancement in the defendant's case.

*United States v. Smith*, 989 F.3d 575 (7th Cir. 2021). Among other things, the Seventh Circuit held that the district court properly treated the defendant's prior conviction for conspiracy to traffic cocaine under 21 U.S.C. § 846 as a predicate controlled substance offense under §4B1.2 for purposes of the career offender enhancement under §4B1.1. First, the court acknowledged the circuit split and recent decisions of the Third, Sixth, and D.C. Circuits refusing to follow Application Note 1 of §4B1.2 and excluding inchoate offenses from the definition of "controlled substance offense," but declined to revisit Seventh Circuit precedent holding that Application Note 1 does not conflict with the text of §4B1.2. Second, the court noted a circuit split over whether Application Note 1 includes a conspiracy under section 846. The court rejected the views of the Fourth and Tenth Circuits, which held that a section 846 conspiracy does not qualify as a controlled substance offense under §4B1.2, and endorsed the decisions of the Second, Fifth, and Ninth Circuits to the contrary.

*United States v. Sanchez*, 989 F.3d 523 (7th Cir. 2021). The Seventh Circuit substantially affirmed the sentences imposed against seven participants in a drug trafficking organization. Among other things, the court rejected several of the defendants' contention that the district court "failed to adequately address the merits of their unwarranted sentencing disparities argument" under 18 U.S.C. § 3553(a)(6) and held that, by imposing sentences within or below each

of their guideline ranges, the district court sufficiently addressed their argument. The Seventh Circuit also held that the district court did not plainly err in refusing to apply the minor role reduction under §3B1.2(b) to a courier who transported a large quantity of drugs, recruited others into the conspiracy, unloaded narcotics at stash houses, and prevented law enforcement from apprehending a codefendant.

*United States v. Joiner*, 988 F.3d 993 (7th Cir. 2021). The Seventh Circuit affirmed the denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) and held that the district court did not procedurally err by not specifically addressing the defendant's argument that he was at an elevated risk for complications from Covid-19 because of his skin color. Assuming that the defendant's contention of procedural error should be reviewed under the same standard the court uses in reviewing a contention of procedural error in sentencing, the court explained that, under such standard, a court must "address each of the movant's principal arguments, unless they are 'too weak to require discussion' or 'without factual foundation.'" Here, the court found that the district court was not required to address the defendant's argument because he presented only general evidence of race-based disparities in health care outcomes and failed to tie that evidence to his individual situation.

*United States v. Ford*, 988 F.3d 970 (7th Cir. 2021). The Seventh Circuit affirmed the district court's judgment, holding that the district court did not err in applying a 6-level enhancement under §2B3.1(b)(2)(B) to a defendant whose codefendant "otherwise used" a firearm during an attempted robbery of a gas station. The court explained that there was "ample evidence" that the defendant was in on his codefendant's plan to rob the gas station "from the start and that he continued to help after [the codefendant] brandished the firearm." The court concluded that this evidence supported the reasonable inference that the use of the firearm was within the scope of the defendant's "jointly undertaken criminal activity, in furtherance of it, and reasonably foreseeable," as required by §1B1.3(a)(1)(B).

*United States v. Anderson*, 988 F.3d 420 (7th Cir. 2021). Among other things, the Seventh Circuit held that the district court properly imposed a 2-level leadership enhancement under §3B1.1 where the defendant "directed and coordinated the entire delivery" of a single drug transaction. The court noted the defendant prearranged the logistics of the drug pickup, "maintained near-constant contact" with her codefendant who picked up the drugs, provided "step-by-step instructions for obtaining the drugs," and confirmed that the drugs had been delivered.

*United States v. Strobel*, 987 F.3d 743 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's sentence, holding, among other things, that the inclusion of a condition of

supervised release related to paying a fine and restitution in the district court's written judgment that had not been included in the Presentence Report, which the district court adopted by reference during sentencing, did not result in an inconsistency between the district court's oral pronouncement and written judgment that warranted resentencing. While the defendant conceded that "the portion of the condition regarding restitution payment [was] mandatory" under 18 U.S.C. § 3583(d), he argued that the portion of the condition concerning fine payment was not mandatory, despite its inclusion in §5D1.3(a)(6), because section 3583(d) "does not mention fines in the same way that it mentions restitution," and thus, does not provide specific statutory authorization for the condition to be considered mandatory. However, because the defendant's sentence did not include a fine, the court declined to address the defendant's argument, concluding that the condition did not conflict with the oral pronouncement since it was a "nullity."

*United States v. Williams*, 987 F.3d 700 (7th Cir. 2021). The Seventh Circuit affirmed the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding, among other things, that, in order to satisfy the exhaustion requirement for defendant-filed motions under section 3582(c)(1)(A), a defendant "is required to present the same or similar ground for compassionate release in a request to the Bureau [of Prisons] as in a motion to the court." In so holding, the court rejected two district court decisions to the contrary, reasoning that (1) the purpose of the exhaustion requirement is "to provide the Bureau with the information necessary to move for release on a defendant's behalf"; (2) the Bureau's regulation requires inmates to detail the circumstances warranting compassionate release; and (3) the other district court decisions did not involve a situation where the unrelated, properly exhausted ground was frivolous.

*United States v. Collins*, 986 F.3d 1029 (7th Cir. 2021). The Seventh Circuit held that the government's alleged breach of a plea agreement, which had required the government to inform the district court of the extent of the defendant's "cooperation," was not plain error entitling the defendant to withdraw his guilty plea. Specifically, the defendant argued that the government had breached the agreement by failing to inform the district court of the defendant's safety valve proffer at sentencing. However, the court held that any breach was not plain error because (1) the district court had already been aware of the proffer; (2) the defendant's admission of his own guilt during the safety valve proffer could not have satisfied the "cooperation" requirement for a downward departure under 18 U.S.C. § 3553(e) and §5K1.1; (3) the defendant had not contested his failure to cooperate with the prosecution of his codefendants; and (4) the defendant had been sentenced to the statutory minimum and, because he had not satisfied the requirements



for the downward departure, would not be able to receive a lower sentence even if he were resentenced.

*United States v. Stephens*, 986 F.3d 1004 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's sentence, holding that a district court has no obligation to explain its decision to disregard a probation officer's sentencing recommendation, even where the district court elects to disclose the recommendation to the defendant. The court also rejected the defendant's arguments that the district court inadequately addressed his mitigation arguments and the factors set forth in 18 U.S.C. § 3553(a).

*United States v. Sanford*, 986 F.3d 779 (7th Cir. 2021). Joining the Third, Fifth, and Sixth Circuits, the Seventh Circuit affirmed the denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding that the administrative exhaustion requirement for defendant-filed motions under section 3582(c)(1)(A) is a "mandatory claim-processing rule" that "*must* be enforced [by a district court] when properly invoked." While the district court had denied the defendant's motion based on the merits of the defendant's arguments, the Seventh Circuit found it unnecessary to address the district court's ruling on the merits since the defendant had failed to comply with the administrative exhaustion requirement before filing his motion.

*United States v. Blake*, 986 F.3d 756 (7th Cir. 2021). Among other things, the Seventh Circuit granted the defense counsel's motion to withdraw from representing the defendant on appeal from a denial of a motion for a sentence reduction pursuant to section 404(b) of the First Step Act of 2018, holding that section 404(b) neither implies a constitutional entitlement to appointed counsel, nor supplies a statutory entitlement to such counsel. In so holding, defense counsel was entitled to withdraw without first demonstrating that the appeal was frivolous.

*United States v. Wilkinson*, 986 F.3d 740 (7th Cir. 2021). The Seventh Circuit affirmed the application of a 4-level enhancement under §2B1.1(b)(20), holding that the district court appropriately concluded that the defendant was a "commodity pool operator" who had committed a "violation of commodities law." The court explained that the guidelines commentary refers to the Commodity Exchange Act to define "commodity pool operator" and rejected the defendant's argument that this definition excludes those who traded certain "excluded commodities." Rather, "excluded commodity" is a term of art of limited applicability under the Act, and its application does not limit the definition of "commodity pool operator." Finally, the court explained that one need not actually trade futures to qualify as a commodity pool operator; soliciting funds for the purpose of trading commodities suffices.

*United States v. McGee*, 985 F.3d 559 (7th Cir. 2021). The Seventh Circuit vacated and remanded the defendant's

sentence, holding that the district court "erred in imposing a two-point leadership enhancement under §3B1.1(c)" with respect to a drug trafficking operation because no evidence suggested that the defendant exercised control or authority over, or played a superior role to, any other person in the operation. Though the defendant's sentence fell within the guidelines range that would have applied without the enhancement, the court vacated and remanded for resentencing because the record did not indicate what sentence the district court would have imposed had it considered the correct guidelines range.

## EIGHTH CIRCUIT

*United States v. Lyman*, 991 F.3d 994 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding, among other things, that the district court did not commit plain error in ruling that the defendant's three prior Missouri drug trafficking convictions qualified as predicate "serious drug offenses" for purposes of an enhanced sentence under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"). The defendant argued that his convictions did not qualify as predicate offenses because they were based on a mental state of recklessness, rather than of knowledge. While the applicable Missouri law was "murky on the question of what mental state was required" and "did not include an express *mens rea* element," the Eighth Circuit determined that the district court did not plainly err in finding that the convictions so qualified because (1) the ACCA's definition of "serious drug offense" has no express *mens rea* requirement; (2) the Eleventh Circuit has held that no such requirement is implied; and (3) the Supreme Court recently declined to address the issue when it arose in *Shular v. United States*, 140 S. Ct. 779 (2020).

*United States v. Gifford*, 991 F.3d 944 (8th Cir. 2021). The Eighth Circuit affirmed the defendant's sentence, holding, among other things, that the district court did not commit plain error in imposing a life term of supervised release for his conviction under 18 U.S.C. § 2260A in addition to a consecutive life term of supervised release for his conviction under 18 U.S.C. § 2251. In reviewing for plain error, the court found that the district court erred in imposing a life term of supervised release for the section 2260A conviction because it exceeded the statutory maximum of three years. However, the court found no prejudice from the error because, "[e]ven if the term imposed for his violation of [section] 2260A were eliminated, [the defendant] would still be subject to a life term of supervised release for the [section] 2251 conviction."

*United States v. Yackel*, 990 F.3d 1132 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, which applied the career offender enhancement under §4B1.1 based, in part, on the defendant's prior Minnesota

conviction for aiding and abetting second-degree assault. The defendant argued that his Minnesota conviction could not qualify as a “crime of violence” under §4B1.2 because the Minnesota aiding and abetting statute, as applied, criminalizes “passive, unknowing conduct (e.g., mere presence),” while the generic federal definition “requires proof of affirmative conduct” in support of the underlying crime. Applying the categorical approach, the Eighth Circuit found that Minnesota courts’ application of the state statute is no broader than federal courts’ application of the generic definition. In both contexts, mere presence can support liability but only where a defendant intended to aid the primary actor by his presence. Accordingly, the Minnesota conviction qualified as a “crime of violence” under §4B1.2.

*United States v. Mofle*, 989 F.3d 646 (8th Cir. 2021). The Eighth Circuit affirmed the denial of the defendant’s motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), which was filed in response to Amendment 782. Since this was the defendant’s second motion under section 3582(c)(2) based on the same guidelines amendment, the court first considered whether the district court had subject-matter jurisdiction over the motion and concluded that it did, agreeing with every other circuit that has considered the same question. The court held, however, that the motion was untimely, finding that a subsequent section 3582(c)(2) motion is subject to Federal Rule of Appellate Procedure 4(b)’s timeliness requirements if it constitutes a motion for reconsideration by presenting “the same legal question that the court addressed in its previous order.”

*United States v. Wickman*, 988 F.3d 1065 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s sentence for the defendant’s methamphetamine trafficking conviction, holding that the sentence was substantively reasonable. In its reasoning, the Eighth Circuit rejected the defendant’s argument that the district court should have varied downward, as he contended other judges from the District of Minnesota have done, to reflect the contention that provisions in the sentencing guidelines “for *pure* methamphetamine, as compared to those for methamphetamine *mixtures*, create a sentencing disparity between similarly situated defendants.” Instead, the Eighth Circuit found no abuse of discretion and noted that it was not its “‘proper appellate role’ to compel a district court to diverge from the [sentencing guidelines] in accordance with a defendant’s proffered policy reasons.”

*United States v. Ruzicka*, 988 F.3d 997 (8th Cir. 2021). Among other things, the Eighth Circuit affirmed the district court’s loss calculation for certain of the defendant’s mail and wire fraud convictions. Agreeing with the defendant that the guidelines’ net-loss approach offsets a victim’s gross loss by the value of any gains the victim received as part of a fraud, the court nonetheless concluded that the

victim company—the defendant’s employer—gained nothing by receiving the defendant’s unvested ownership shares in an affiliate as part of the fraud scheme. Due to his fraud, the defendant had been fired from the victim company before his shares in the affiliate had vested. As a result, the unvested shares had zero value to the victim company because it would have emerged with full ownership of the affiliate at no additional cost after the defendant’s firing.

*United States v. Oliver*, 987 F.3d 794 (8th Cir. 2021). Among other things, the Eighth Circuit reversed the district court’s 25-year mandatory minimum sentence for the defendant’s drug trafficking convictions and remanded for resentencing. The Eighth Circuit held that the mandatory minimum sentence did not apply because the government failed to prove beyond a reasonable doubt that the defendant’s 2006 Illinois drug conviction was a “serious drug felony” supporting a statutory enhancement under 21 U.S.C. § 841(b)(1)(A). Assuming that all charges underlying the defendant’s 2006 conviction were for violations of the same Illinois criminal drug conspiracy statute, the court applied the categorical approach to such statute and determined that it is broader than the federal definition of a “serious drug felony.” After determining that the statute is also divisible, prescribing different punishments for different drug types and quantities, the court applied the modified categorical approach and concluded that it was “impossible to know [from the defendant’s conviction record] whether [his] conviction involved a controlled substance that is listed on the federal controlled substances schedules.”

*United States v. Warren*, 984 F.3d 1301 (8th Cir. 2021). Among other things, the Eighth Circuit affirmed the district court’s determination that the defendant is a career offender, noting that circuit precedent had already rejected the defendant’s contention that “his three prior Illinois drug convictions [are] not ‘controlled substance offenses’ under [] §4B1.2(b), and his prior Iowa conviction for [d]omestic [a]ssault with strangulation [is] not a ‘crime of violence’ under [] §4B1.2(a)(1).” Consequently, the Eighth Circuit declined to consider the government’s alternative argument that, because the district court had stated it would have reached the same sentence under the 18 U.S.C. § 3553(a) factors, any error in the district court’s career offender analysis was harmless.

## NINTH CIRCUIT

*United States v. Furaha*, No. 20-10063, 2021 WL 1134945 (9th Cir. Mar. 25, 2021). In a matter of first impression for the Ninth Circuit, the court affirmed the defendant’s sentence, holding that his prior conviction under 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a “drug trafficking crime” was a “controlled substance offense” within the meaning of §4B1.2(b) and for purposes of

§2K2.1(a)(4)(A). After acknowledging that section 924(c)'s definition of “drug trafficking crime” encompasses more conduct than §4B1.2(b)'s definition of “controlled substance offense,” the court found that section 924(c) is divisible and applied the modified categorical approach to find that the defendant's conviction qualified as a “controlled substance offense” under §4B1.2(b). In so holding, the Ninth Circuit agreed with the Eighth Circuit's interpretation of section 924(c) in *United States v. Williams*, 926 F.3d 966 (8th Cir. 2019), the only other circuit to have considered the matter.

*United States v. Woodberry*, 987 F.3d 1231 (9th Cir. 2021). Among other things, the Ninth Circuit affirmed the defendants' convictions for Hobbs Act robbery of a licensed marijuana dispensary in Washington State. In so doing, the court clarified that the short-barreled rifle provision in 18 U.S.C. § 924(c)(1)(B)(i), which requires an increase in the applicable statutory mandatory minimum penalty, is not a sentencing enhancement but an essential element that the government must prove to a jury beyond a reasonable doubt. See *Alleyne v. United States*, 570 U.S. 99, 103 (2013). The Ninth Circuit further held that section 924(c)(1)(B)(i) requires no showing of *mens rea* as to the rifle barrel's length to sustain a conviction.

*United States v. Grimaldo*, 984 F.3d 876 (9th Cir. 2021). Among other things, the Ninth Circuit vacated the defendant's 120-month sentence for being a felon in possession of a firearm and remanded for resentencing, holding that the district court plainly erred in applying a 4-level enhancement under §2K2.1(b)(6)(B) without determining whether the defendant used the firearm “in furtherance” of his methamphetamine possession. The court first held that the defendant did not waive his challenge to the enhancement, despite agreeing to its application at sentencing, and then concluded that the defendant's mere possession of the firearm, without findings connecting that possession to the likelihood of owning illegal drugs, did not support the enhancement. The court also exercised its discretion to vacate and remand the defendant's concurrent 36-month sentence for simple possession of methamphetamine because it exceeded the applicable statutory maximum.

## TENTH CIRCUIT

*United States v. McGee*, No. 20-5047, 2021 WL 1168980 (10th Cir. Mar. 29, 2021). The Tenth Circuit reversed the district court's order denying the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) and remanded the matter for further consideration. The Tenth Circuit held that (1) district courts must independently assess whether extraordinary and compelling reasons warrant a reduction before separately determining whether a reduction would be consistent with applicable policy statements of the Commission; (2) nonretroactive

changes in law, like those made to the penalty provisions under 21 U.S.C. § 841, in combination with the defendant's unique circumstances, can support a claim of extraordinary and compelling reasons; and (3) the Commission's policy statement in §1B1.13 does not apply to defendant-filed motions for compassionate release, joining the Second, Fourth, Sixth, and Seventh Circuits.

## ELEVENTH CIRCUIT

*United States v. Rogers*, 989 F.3d 1255 (11th Cir. 2021). The Eleventh Circuit affirmed the defendant's sentence for production and distribution of child pornography, upholding the application of several enhancements, the exclusion of certain evidence at his sentencing hearing, and the substantive reasonableness of his within-guidelines sentence. Upholding an enhancement under §2G2.2(b)(4) for sadism/masochism, the court also held that there was no impermissible double counting when the district court applied both the 5-level enhancement under §2G2.2(b)(5) (which applies if a defendant “engaged in a pattern of activity involving the sexual abuse or exploitation of a minor”) and the 5-level enhancement under §4B1.5(b)(1) (which applies when a “defendant's instant offense of conviction is a covered sex crime . . . and the defendant engaged in a pattern of activity involving prohibited sexual conduct”). In addition, the court held that the district court's denial of the defendant's request to cross-examine a detective regarding two pending statutory rape cases in which his victim also was the identified victim “did not violate his constitutional rights,” stating that “the confrontation clause and right to cross-examination do not extend to non-capital sentencing proceedings.”

*United States v. Harris*, 989 F.3d 908 (11th Cir. 2021). The Eleventh Circuit held that the district court did not abuse its discretion in denying the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) and holding that the defendant's medical conditions—lupus, scleroderma, hypertension, glaucoma, and past cases of bronchitis and sinus infections—were not “extraordinary and compelling reasons” to grant her compassionate release, despite her contention that they placed her at increased risk of contracting Covid-19. After first finding that the exhaustion requirement in section 3582(c)(1)(A)(i) is not jurisdictional, but rather, “a claim-processing rule,” the court stated that the defendant's contention failed because, of the conditions she put forth, only hypertension was recognized by the Centers for Disease Control and Prevention as a condition that “might” increase the Covid-19 risk of an adult with the condition.

*Williams v. United States*, 985 F.3d 813 (11th Cir. 2021). The Eleventh Circuit affirmed the district court's denial of the defendant's motion under 28 U.S.C. § 2255 in which

the defendant argued that case law at the time of his sentencing established that his prior federal kidnapping conviction had been classified as a “violent felony” under the “residual clause” of 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”). Since the Supreme Court had ruled that the residual clause was unconstitutionally vague and had made such ruling retroactive, the parties and court agreed that the defendant was due to be resentenced if the defendant could prove that it was more likely than not that the sentencing court had relied on the residual clause *alone* in classifying his conviction. Ultimately, the majority agreed with the district court that the defendant had not met his burden of proof.

*United States v. Kushmaul*, 984 F.3d 1359 (11th Cir. 2021). The Eleventh Circuit affirmed the defendant’s sentence for

possession and distribution of child pornography, holding that the district court did not plainly err in applying an enhanced statutory minimum penalty under 18 U.S.C. §§ 2252A(b)(1) and (b)(2) based on the defendant’s prior conviction under Fla. Stat. § 827.071(3) for promoting the sexual performance of a child. The court explained that “[t]he plain meanings of Fla. Stat. § 827.071(3) and 18 U.S.C. §§ 2252A(b)(1), (b)(2) strongly suggest that [section] 827.071(3) is a predicate offense under the federal sentencing enhancement statutes.”

## D.C. CIRCUIT

No cases identified.



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