CASE LAW QUARTERLY

Vol. 5 ‖ Issue 2 (April – June 2021)

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

IN THE SPOTLIGHT THIS QUARTER . . .

Borden v. United States, 141 S. Ct. 1817 (2021). In a case involving a conviction for being a felon in possession of a firearm, the Supreme Court reversed and remanded the defendant's mandatory minimum sentence under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"), holding that an offense that requires a *mens rea* of recklessness cannot qualify as a "violent felony" under the elements clause of the ACCA. Resolving a circuit split on the issue, the Court held that the elements clause, which requires the "use of physical force against the person of another," does not include offenses criminalizing reckless conduct because the phrase "against the person of another," when modifying "use of physical force," requires that a "perpetrator direct his action at, or target, another individual." In contrast, reckless crimes merely require a person to "consciously disregard[] a substantial and unjustifiable risk" of injury, which does not satisfy the standard of the elements clause.

Terry v. United States, 141 S. Ct. 1858 (2021). In a case involving the First Step Act of 2018, the Supreme Court affirmed the denial of the defendant's motion for a sentence reduction under section 404 of such Act, holding that a crack offender whose offense did not trigger a mandatory-minimum penalty does not have a "covered offense" for purposes of section 404. In so holding, the Court concluded that section 2(a) of the Fair Sentencing Act of 2010 only modified the mandatory-minimum penalties under 21 U.S.C. § 841(b)(1)(A) and (B), and thus, did not modify the statutory penalties under 21 U.S.C. § 841(b)(1)(C).

SUMMARY OF SELECT APPELLATE CASES FOR THE SECOND QUARTER OF 2021—

FIRST CIRCUIT

United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021). The First Circuit vacated and remanded the defendant's sentence, holding that his prior Massachusetts conviction for possession with intent to distribute marihuana is not a "controlled substance offense" for purposes of §2K2.1(a)(2). The court explained that, because Massachusetts defined "marihuana" to include hemp at the time of the defendant's prior conviction, his prior conviction "must be understood to be a conviction for possession with the intent to distribute hemp" for purposes of applying the categorical approach and determining whether such conviction is a "controlled substance offense" within the meaning of §2K2.1(a)(2). Accordingly, the court found that the prior conviction is not a "controlled substance offense" because the definition of that term incorporates the drug schedules in the Controlled Substances Act, which were amended prior to the defendant's sentencing for the instant offense to exclude hemp.

SECOND CIRCUIT

United States v. Brown, 2 F.4th 109 (2d Cir. 2021). On the parties' cross-appeals, the Second Circuit affirmed the defendant's conviction but remanded the defendant's sentence, holding that New York second-degree assault is a "crime of violence" under §4B1.2(a)(1). To reach its holding,

the court relied on recent circuit precedent holding that (1) an offense is categorically a crime of violence under the force clause of §4B1.2(a) if conviction requires "intentionally caus[ing] at least serious physical injury . . . *whether committed by acts of omission or by acts of commission*," and (2) New York second-degree assault requires "the intentional causation of serious physical injury."

United States v. Eldridge, 2 F.4th 27 (2d Cir. 2021). The Second Circuit affirmed the defendants' convictions and sentences, holding, among other things, that, for purposes of section 403 of the First Step Act of 2018, a sentence is "imposed" when orally pronounced in district court. In so holding, the court joined the unanimous conclusions of the other circuit courts that have considered the issue. As a result, the court held that the defendant could not qualify for relief under section 403 because his sentence was imposed before the Act's passage. In its decision, the court also noted, but found no occasion to resolve, circuit splits on (1) whether section 403 applies where a defendant has his original sentence vacated *before* the Act's passage but is resentenced *after* the Act's passage; and (2) whether it matters if a defendant's original sentence was vacated, regardless of when the *vacatur* occurred.

United States v. Carlineo, 998 F.3d 533 (2d Cir. 2021). In a case involving threats to a Muslim federal official, the Second Circuit vacated a special condition of supervised release requiring the defendant to participate in a certain restorative justice program that "could include a sentencing circle . . . [and] listening circle [and would involve listening] to stories about Muslim refugees or people who suffered from violence [for] being Muslim." Acknowledging that the district court was sensitive in its efforts to craft a sentence that appropriately responded to the defendant's offense, the court nevertheless held that the special condition was impermissibly vague and delegated too much authority to the Probation Office.

United States v. Young, 998 F.3d 43 (2d Cir. 2021). The Second Circuit affirmed in part, vacated in part, and remanded the district court's order on the defendant's motion for a sentence reduction pursuant to section 404 of the First Step Act of 2018, holding, among other things, that distribution of, and possession with intent to distribute, an unspecified quantity of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(C) is not a "covered offense" for purposes of the Act. Agreeing with the Third, Sixth, Tenth, and Eleventh Circuits holding the same, the court reasoned that, unlike sections 841(b)(1)(A)(iii) and (B)(iii), the text of section 841(b)(1)(C) was not modified in any respect by section 2 or 3 of the Fair Sentencing Act of 2010. Therefore, because the statutory penalties for section 841(b)(1)(C) were unmodified by such section 2 or 3, a violation of section 841(b)(1)(C) is not a "covered offense" under the First Step Act.

United States v. Fletcher, 997 F.3d 95 (2d Cir. 2021). The Second Circuit affirmed the denial of the defendant's motion to reduce his sentence pursuant to section 404(b) of the First Step Act of 2018, holding that drug-related murder, in violation of 21 U.S.C. § 848(e)(1)(A), is not a "covered offense" for purposes of section 404(b). In so holding, the court reasoned that (1) even though section 848(e)(1)(A) requires that a defendant be "engaged" in a predicate drug offense under 21 U.S.C. § 841(b)(1)(A) at the time of the intentional murder, a violation of section 848(e)(1)(A) is a distinct substantive offense from the underlying drug crime, and (2) sections 2 and 3 of the Fair Sentencing Act of 2010 did not alter the statutory penalty range for a violation of section 848(e)(1)(A).

United States v. McCoy, 995 F.3d 32 (2d Cir. 2021). In cases involving convictions for conspiracy to commit Hobbs Act robbery, Hobbs Act attempted robbery, substantive Hobbs Act robbery, and violations of 18 U.S.C. § 924(c), the Second Circuit affirmed in part and reversed in part the defendants' convictions and remanded for resentencing and for consideration of "what relief, if any, may be appropriate under the First Step Act [of 2018]." Among other things, the court detailed its precedent holding that substantive Hobbs Act robbery is a crime of violence under the force clause of section 924(c) and held that Hobbs Act attempted robbery is also a crime of violence under such force clause. The court reasoned that attempts to commit a substantive crime of violence "necessarily require (a) an intent to complete the substantive crime (including an intent to use physical force) and (b) a substantial step towards completing the crime." In remanding for consideration of the First Step Act, the court noted other circuits' various treatments of the "temporal applicability" of the First Step Act's provisions limiting "stacking" under section 924(c) and decided to "leave it to the district court in the first instance to consider the applicability of [such provisions to the defendants]."

THIRD CIRCUIT

United States v. Murphy, 998 F.3d 549 (3d Cir. 2021). The final circuit to join a three-way split, the Third Circuit vacated the defendant's sentence, which was reduced under the First Step Act of 2018 and remanded for reconsideration of his career offender status. First, joining the Eleventh Circuit, the court held that the district court correctly refused to reconsider the defendant's attributable drug quantity amount because a district court is bound by a previous drug quantity finding depended upon at a defendant's original sentencing. However, the court cautioned that it was not holding that the attributable drug quantity may never be revisited. Second, the court held that the district court erred in failing to recalculate the defendant's guideline range anew based on current law (which the parties agreed would mean that the defendant would not be a

career offender if sentenced *de novo* today). In so holding, the court noted that it was joining three circuits that hold that a guideline range must be recalculated based on current law, while three circuits hold that it cannot be recalculated from scratch and five circuits hold that a district court can, but need not, consider a fully updated guideline range. Finally, the court held that the error was not harmless even though the district court ultimately reduced the defendant's sentence to an amount at the top of the guideline range without the career offender enhancement.

United States v. Kirschner, 995 F.3d 327 (3d Cir. 2021). Among other things, the Third Circuit vacated the defendant's sentence for his offenses involving impersonating a federal officer and importing counterfeit coins and remanded for resentencing, holding that the district court clearly erred in applying a 22-level enhancement for intended loss under §2B1.1(b)(1) and its commentary. The court stated that to estimate the losses a defendant intended to cause his victims, the district court "must conduct a 'deeper analysis' to make sure the defendant purposely sought to inflict each component of the losses" claimed by the government. The court explained that this inquiry may include, among other things, examining the defendant's knowledge of the fair market values claimed by the government and past sales made by the defendant, rather than simply accepting the government's slightly discounted fair market values. Additionally, the court affirmed, under clear error review, enhancements for abuse of a position of trust and use of sophisticated means.

United States v. Raia, 993 F.3d 185 (3d Cir. 2021). On the government's appeal, the Third Circuit vacated the defendant's below-guidelines sentence for conspiracy to bribe voters, holding that the district court erred in its interpretation of the aggravating role enhancement under §3B1.1 and obstruction of justice enhancement under §3C1.1. First, given the uncontested fact that the offense involved at least five participants, the court stated that the district court incorrectly applied a 2-level enhancement under §3B1.1(c), which only applies to offenses with fewer than five participants. Thus, the court explained that the defendant could only qualify for a 3- or 4-level enhancement under §3B1.1 (for offenses with five or more participants) or no enhancement at all. Second, the court stated that, in denying the government's request for a §3C1.1 enhancement based on perjured testimony, the district court erroneously failed to explain which elements of perjury the government did not prove. The court remanded for resentencing to allow the district court to make additional factual findings to determine whether either enhancement applies, rejecting the government's request for remand to include instructions to apply a 4-level §3B1.1 enhancement and the §3C1.1 enhancement.

FOURTH CIRCUIT

United States v. Simmons, 999 F.3d 199 (4th Cir. 2021). On the government's appeal, the Fourth Circuit affirmed the district court's ruling that "a RICO conspiracy, 'aggravated' or not, is not categorically a crime of violence" under 18 U.S.C. § 924(c). The Fourth Circuit noted that every circuit to address the question has held that a RICO conspiracy is not a "crime of violence" under the categorical approach because "any conspiracy to violate the RICO statute is complete once the *agreement* is reached." The court rejected the government's argument that because an "aggravated" RICO conspiracy, which is subject to a term of life imprisonment under 18 U.S.C. § 1963(a), requires the government to prove the underlying conduct that triggered the enhanced term, the court should consider whether the specific completed racketeering acts require the use of force. Finding merit in some of the conviction-related issues that the defendants raised on cross-appeal, the court reversed certain convictions, vacated the defendants' sentences, and remanded for further proceedings.

United States v. Williams, 997 F.3d 519 (4th Cir. 2021). The Fourth Circuit affirmed the judgment of the district court, upholding the application of an increased base offense level under §2K2.1(a)(1) based on the defendant's two prior convictions for controlled substance offenses. The court held that the defendant's South Carolina conviction for possession with intent to distribute crack cocaine qualified as a "controlled substance offense" under the guidelines' definition of the term. The defendant argued that because the South Carolina statute includes a "permissive inference" that possession of one or more grams of crack cocaine is *prima facie* evidence of intent to distribute, it permits a finding of intent to distribute based on mere possession and, therefore, prohibits a broader range of conduct than the guidelines' definition. Citing South Carolina appellate decisions, the court rejected this argument, explaining that the government still bears the burden of proving that "the suggested conclusion should be inferred based on the predicate facts proved."

United States v. Green, 996 F.3d 176 (4th Cir. 2021). The Fourth Circuit vacated and remanded the defendant's sentence, joining the Third, Sixth, Seventh, Tenth, and Eleventh Circuits in holding that Hobbs Act robbery does not qualify as a "crime of violence," as defined in §4B1.2, for purposes of the career offender enhancement under §4B1.1. The court explained that, because it can be committed through the use or threat of force against *property*, Hobbs Act robbery extends to a broader range of conduct than that covered by §4B1.2(a)(1)'s force clause and the offenses of robbery and extortion under §4B1.2(a)(2)'s enumerated offense clause.

United States v. Collington, 995 F.3d 347 (4th Cir. 2021). The Fourth Circuit reversed 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 with instructions to impose a sentence no greater than the applicable statutory maximum penalty. The Fourth Circuit held that section 404 requires a court to reduce a defendant's sentence for a covered offense to one that is not greater than the statutory maximum penalty established by the Fair Sentencing Act of 2010. As an issue of first impression, the court also held that a sentence imposed under section 404 is subject to review for procedural and substantive reasonableness. The court acknowledged a split of authority on this issue, rejecting the view of the First, Second, Fifth, Ninth, and Tenth Circuits, which review reduced sentences for abuse of discretion, in favor of the reasonableness approach adopted by the Sixth and D.C. Circuits.

United States v. Kobito, 994 F.3d 696 (4th Cir. 2021). The Fourth Circuit affirmed the district court's judgment, joining the Second, Fifth, Sixth, Seventh, and Eleventh Circuits in holding, among other things, that the terrorism adjustment under §3A1.4 "applies whenever a defendant's offense of conviction or relevant conduct was 'intended to promote' a federal crime of terrorism, even if it didn't 'involve' such a crime." The court explained that the disjunctive phrase in §3A1.4 "makes clear that the predicate offense must either (1) 'involve' a federal crime of terrorism or (2) be 'intended to promote' a federal crime of terrorism, and that each clause has a separate meaning."

United States v. Miltier, 993 F.3d 267 (4th Cir. 2021). The Fourth Circuit affirmed the district court's judgment, holding that the defendant's use of a peer-to-peer file-sharing network to unintentionally distribute child pornography rendered him ineligible for a 2-level reduction under §2G2.2(b)(1). Section 2G2.2(b)(1) provides for a reduction if the defendant's "conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor" and "the defendant did not intend to traffic in, or distribute, such material." The Fourth Circuit joined the Second, Sixth, Eighth, and Tenth Circuits in concluding that the plain text of §2G2.2(b)(1) "forecloses eligibility where a defendant engages in distribution at all, irrespective of his mental state."

United States v. Kibble, 992 F.3d 326 (4th Cir. 2021). The Fourth Circuit joined the Third, Fifth, Sixth, and Eighth Circuits in holding that an abuse of discretion standard governs review of a district court's grant or denial of compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). Applying this standard, the Fourth Circuit affirmed the district court's order, which concluded that the defendant's medical conditions, in conjunction with the high Covid-19 infection rate at his facility, presented "extraordinary and compelling reasons" for relief but denied the defendant's motion based on a finding that he posed a danger to the safety of others and that the 18 U.S.C. § 3553(a) factors counseled against early release.

FIFTH CIRCUIT

United States v. Abrego, 997 F.3d 309 (5th Cir. 2021). The Fifth Circuit vacated and remanded the defendant's sentence, holding that the district court erred when it applied an increased base offense level under §2K2.1(a)(4)(B) for an offense that involved a firearm "capable of accepting a large capacity magazine," without considering the accompanying commentary defining what it means for a firearm to be so capable. The court agreed with the defendant that there was no evidence in the presentence report (PSR) that, at the time of the offense, the rifle involved had "a magazine or similar device attached to or in close proximity to it that could accept more than fifteen rounds of ammunition," as required under Application Note 2. The court stated: "[The] commentary is admittedly ambiguous, and one might reasonably wonder what 'close proximity' means . . . . But neither the PSR nor the Government even acknowledged the language of the commentary—let alone gave the district court a basis for applying it."

United States v. Khan, 997 F.3d 242 (5th Cir. 2021). On the government's second appeal, the court reversed and remanded as substantively unreasonable the defendant's below-guidelines 18-month sentence for providing material support to a designated foreign terrorist organization. Among other things, the court agreed with the government, which had twice requested a 180-month sentence, that the district court, which had twice imposed the same 18-month sentence, failed to give significant weight to the seriousness of the defendant's offense. After concluding that the sentence was substantively unreasonable, the court also concluded *sua sponte* that reassignment to a different judge upon remand was warranted.

United States v. Huerta, 994 F.3d 711 (5th Cir. 2021). The Fifth Circuit held, among other things, that the district court did not clearly err when it required the defendant to participate in a substance abuse treatment program as a special condition of supervised release, but delegated supervision of the "modality, duration, and intensity" of the treatment to the probation officer. Discussing two recent Fifth Circuit decisions regarding the delegation of the decision to require "inpatient or outpatient" treatment to a probation officer, the court explained that the district court here did not improperly delegate judicial authority because (1) it retained "final say over the imposition of the condition[] upon release"; and (2) the delegation of supervision to the probation officer did not involve "a significant deprivation of liberty."

United States v. Deckert, 993 F.3d 399 (5th Cir. 2021). The Fifth Circuit upheld the district court's imposition of the §3C1.2 reckless endangerment enhancement, holding that

the district court correctly applied the relevant conduct definition in §1B1.3(a)(2). The court stated: "When it comes to certain groupable offenses such as the drug trafficking offense at issue in this case, we apply the reckless endangerment enhancement even when the defendant is *not* convicted for the specific crime from which he recklessly flees—so long as the crime for which he *is* convicted is part of the 'same . . . common scheme or plan.' "

United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021). The Fifth Circuit reversed and remanded the district court's dismissal of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) based on Covid-19. The court held, among other things, that §1B1.13 and its commentary apply only to compassionate release motions filed by the Director of the Bureau of Prisons and do not apply to such motions filed by inmates. In so holding, the Fifth Circuit noted that five other circuits had reached the same conclusion.

United States v. Horton, 993 F.3d 370 (5th Cir. 2021). On remand from the Supreme Court for further consideration in light of *Davis v. United States*, 140 S. Ct. 1060 (2020), "which requires that unpreserved claims of factual error be reviewed under the full plain error test," the Fifth Circuit again affirmed the defendant's sentence, holding that the district court did not commit a clear or obvious error. The Fifth Circuit held, among other things, that there was no plain error in the district court's findings regarding relevant conduct, its consideration of the sentencing factors described in 18 U.S.C. § 3583(c), or its explanation of the sentence imposed.

United States v. Mims, 992 F.3d 406 (5th Cir. 2021). The Fifth Circuit affirmed the defendant's 21-month sentence for violating her conditions of supervised release, even though the sentence was based on a wrongly calculated guideline range of 15 to 21 months (for a Grade A violation), rather than the correct range of 6 to 12 months (for a Grade B violation). Reviewing for plain error, the court decided that, even though the guideline range calculation "was [a] clear error that [the defendant] did not intentionally waive" and that possibly affected her substantial rights, it would decline to exercise its discretion to remand for resentencing. In so doing, the court held that, despite the wrongly calculated guideline range, the defendant's sentence "[did] not undermine the fairness, integrity, or public reputation of judicial proceedings."

SIXTH CIRCUIT

United States v. Jarvis, 999 F.3d 442 (6th Cir. 2021). The Sixth Circuit affirmed the district court's denial of the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), holding that the non-retroactive amendments made by section 403 of the First Step Act of 2018 (FSA) to 18 U.S.C. § 924(c) cannot serve as "extraordinary and compelling" reasons for a sentence reduction. The court stated that its reasoning in *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021) (holding that similar, non-retroactive statutory changes made by section 401 of the FSA could not serve as "extraordinary and compelling" reasons under section 3582(c)(1)(A)(i)), applies with equal force to section 403 and, despite a recent circuit court decision to the contrary, is binding precedent. Further, the court held that, although non-retroactive amendments in the FSA cannot constitute "extraordinary and compelling reasons" for a sentence reduction, a district court "may consider the non-retroactive [] amendments in applying the [section] 3553(a) factors" to determine what kind of reduction to grant once a defendant has met the threshold requirements for relief under section 3582(c)(1)(A)(i). In so holding, the Sixth Circuit acknowledged its disagreement with the Fourth Circuit and partial disagreement with the Tenth Circuit.

United States v. Tate, 999 F.3d 374 (6th Cir. 2021). The Sixth Circuit affirmed the defendant's sentence for bank robbery under 18 U.S.C. § 2113(a), finding that a hand concealed in a bag can amount to a "dangerous weapon" for purposes of applying the dangerous-weapon enhancement under §2B3.1(b)(2)(E). Among other things, the court rejected the defendant's argument that a "dangerous weapon" must be something that can or is likely to cause injury when used in its ordinary course, explaining that a "dangerous weapon" can also include objects that, "by their objective appearance, create the possibility of danger." The court noted that the Supreme Court adopted the same reading in *McLaughlin v. United States*, 476 U.S. 16 (1986), when it found that the term "dangerous weapon" in section 2113 extends to the use of an unloaded gun during a robbery. The court further expressed that the commentary to §2B3.1 "simply echo[es]" the guideline, which adopted the *McLaughlin* approach, and stated that, because it does not add to or contradict the text of the guideline, it "poses no problem" under the court's precedent in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019). Finally, the court emphasized that its holding is "specific to the federal dangerous weapons sentencing enhancement as applied to robbery offenses."

United States v. Owens, 996 F.3d 755 (6th Cir. 2021). The Sixth Circuit reversed the district court's order denying the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) and remanded the matter for reconsideration. The court first noted that the disparity between the actual sentence that a defendant received and the sentence that such defendant would receive if section 403 of the First Step Act of 2018 applied was not sufficient by itself to constitute an "extraordinary and compelling reason" for compassionate release. The court held, however, that when making "an individualized determination about whether extraordinary and compelling reasons

merit compassionate release," a court may consider such disparity in combination with other unique factors, including whether a lengthy sentence resulted from exercising one's right to a trial and any evidence of rehabilitation.

United States v. Jackson, 995 F.3d 522 (6th Cir. 2021). The Sixth Circuit vacated the defendant's sentence for the second time and remanded for resentencing, finding that the district court should not have applied 18 U.S.C. § 924(c), as amended by section 403 of the First Step Act of 2018, at the defendant's first resentencing. The court held that the applicability provision of section 403(b) does not include a sentence imposed as of the date of enactment of such Act that was later vacated. Rather, the court explained that, under the plain text of section 403(b), all that matters is what a defendant's status is as of such date of enactment. Thus, although the defendant had an appeal pending on such date of enactment and the court later vacated his sentence, leaving him "without a sentence for three months in 2019," the court held that the defendant could not benefit from the changes made by section 403 because a sentence had been imposed on the defendant as of such date of enactment.

United States v. Jackson, 995 F.3d 476 (6th Cir. 2021). In an appeal involving two defendants, the Sixth Circuit reversed one defendant's sentence and remanded for resentencing, holding that, even though the defendant's prior Kentucky drug trafficking conviction qualified as a "controlled substance offense" under §4B1.2(b), the defendant did not qualify for a career offender enhancement under §4B1.1. In finding that the defendant's prior Kentucky conviction qualified as a controlled substance offense, the court acknowledged that Kentucky law explicitly prohibits the "transfer" of controlled substances while §4B1.2(b) does not, but noted that the Controlled Substances Act, from which §4B1.2(b) draws its definition, defines "distribute" to mean "deliver," which further includes actual, constructive, or attempted "transfers." Nevertheless, the court found that the defendant did not qualify as a career offender because his other prior offense, conspiracy to distribute a controlled substance, did not qualify as a controlled substance offense pursuant to circuit precedent.

United States v. Booker, 994 F.3d 591 (6th Cir. 2021). Among other things, the Sixth Circuit affirmed the defendant's status as a career offender, holding that the defendant's prior Michigan conviction for delivery or manufacture of a controlled substance and instant conviction under 21 U.S.C. § 841(a)(1) for distribution of a controlled substance both qualify as "controlled substance offenses" for purposes of §4B1.1. In so holding, the court rejected the defendant's argument that *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (holding that the definition of "controlled substance offense" under §4B1.2 does not include attempt crimes), precluded both convictions from qualifying under §4B1.2. In its reasoning, the court noted that (1) Michigan law defines "delivery" to include attempted transfers and the Controlled Substances Act defines "distribute" to mean "deliver," which further includes attempted transfers; and (2) both federal law and Michigan law "codify attempted distribution or delivery separately from the completed offenses." Thus, under the Michigan statute of conviction, "an 'attempted transfer' constitutes a *completed delivery* rather than an attempt crime," and similarly, under section 841(a)(1), an attempted transfer constitutes a *completed distribution* rather than an attempt crime.

SEVENTH CIRCUIT

United States v. Alvarez-Carvajal, 2 F.4th 688 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's sentence for conspiracy to distribute controlled substances, rejecting the defendant's arguments that the district court erred in applying the drug-premises enhancement in §2D1.1(b)(12) and obstruction-of-justice enhancement in §3C1.1. Even though "the district court did not make separate and distinct findings regarding the enhancements," the court held that any error was harmless because the district court thoroughly considered the 18 U.S.C. § 3553(a) factors and provided a "detailed explanation" of why the district court "would have imposed the same sentence regardless of its [g]uidelines calculation."

United States v. Fowowe, 1 F.4th 522 (7th Cir. 2021). The Seventh Circuit affirmed the district court's decision, holding that a district court is permitted, but not required, to apply an intervening judicial decision when calculating a defendant's new sentencing range under section 404(b) of the First Step Act of 2018. The court began its discussion by noting that, even though the First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits agree that a district court is not required to apply an intervening judicial decision when calculating a defendant's new sentencing range, "those courts disagree over whether [section] 404(b) authorizes a district court to apply such a decision." After analyzing the plain language of section 404(b) and the purposes of the First Step Act, the court joined the Sixth Circuit's view that section 404(b) *does* authorize a district court to apply such a decision, thus rejecting the contrary views of the Fifth, Ninth, and Eleventh Circuits. The Seventh Circuit also noted the First Circuit's holding that section 404(b) authorizes "district courts 'to consider guideline changes, whether or not made retroactive by the [] Commission,' " which the Seventh Circuit interpreted to include intervening judicial decisions.

United States v. Esposito, 1 F.4th 484 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's 200-year total sentence for 20 counts of sexual exploitation of his adopted son and a single count of possession of child pornography. The defendant argued that the district court violated

§5G1.2 by imposing a sentence for each count and then adding them up, rather than first determining an appropriate total sentence and then conforming the sentence for each count to achieve that total. The court first rejected the defendant's characterization of the district court's actions, explaining that the district court determined that the defendant should receive an effective life sentence prior to pronouncing the sentence for each count. Second, the court rejected the defendant's premise that §5G1.2 requires such "a rigid, two-step sequence" where the court uses a combination of consecutive and concurrent sentences to impose an effective life sentence.

United States v. Black, 999 F.3d 1071 (7th Cir. 2021). The Seventh Circuit vacated the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) and remanded for further proceedings. First, the court held, based on circuit precedent decided after the district court's denial, that the district court improperly relied upon §1B1.13 to conclude that the defendant did not demonstrate "extraordinary and compelling" reasons for release. Second, the court rejected the district court's alternative rationale under the 18 U.S.C. § 3553(a) sentencing factors. Specifically, the court found that, in weighing the section 3553(a) sentencing factors, the district court relied heavily on the fact that the defendant had served only a small portion of his sentence and erroneously failed to consider the disparity between the sentence he received and the sentence he could have received had he been sentenced after the enactment of section 403 of the First Step Act of 2018.

United States v. Newton, 996 F.3d 485 (7th Cir. 2021). The Seventh Circuit vacated the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) and remanded for further proceedings, finding that the district court failed to adequately address the defendant's arguments. Specifically, the court found that the district court abused its discretion by minimizing the defendant's risk of Covid-19 based on the uncertainty reflected in the guidance of the Centers for Disease Control and Prevention, failing to consider the cumulative effect of the defendant's medical conditions, failing to explain the import of the defendant's prior Covid-19 infection, and minimizing the comparative risk of Covid-19 in prison against the defendant's proposal to be released to live with his family.

United States v. Gibson, 996 F.3d 451 (7th Cir. 2021). Among other things, the Seventh Circuit affirmed one of the defendants' sentences for conspiring to distribute heroin. First, the court held that the district court did not clearly err in using a formula, supported by evidence from trial, to estimate the total drug quantity based upon (1) the total number of calls made to two drug phones, (2) the average number of calls required to complete each drug transaction, and (3) a conservative estimate of the quantity of drugs sold per transaction. Second, the court held that the district court did not abuse its discretion in sentencing the defendant to a longer term than his codefendant, even though the codefendant received a greater enhancement under §3B1.1 for his role in the drug-trafficking scheme. Specifically, the court found that the district court reasonably considered the 18 U.S.C. § 3553(a) factors, including the codefendant's older age and lengthy consecutive sentence from another jurisdiction, in distinguishing the two codefendants and imposing the defendant's sentence.

United States v. Bridgewater, 995 F.3d 591 (7th Cir. 2021). The Seventh Circuit dismissed the defendant's appeal of the denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), enforcing the defendant's knowing and voluntary waiver of "the right to seek modification of or contest any aspect of the conviction or sentence in any type of proceeding." First, the court held that motions under section 3582(c)(1)(A)(i) fell within the scope of the defendant's waiver, explaining that such motions were "known and available" to the defendant because he agreed to the waiver after the First Step Act of 2018 was enacted. Second, the court held that the statutory right to seek compassionate release is waivable. Finally, disagreeing with authority to the contrary where the court had rejected as unconscionable a plea agreement containing a compassionate release waiver, *see United States v. Osorto*, 445 F. Supp. 3d 103 (N.D. Cal. 2020), the court held that the defendant's waiver did not contravene public policy and was therefore enforceable.

EIGHTH CIRCUIT

United States v. Houck, No. 20-2216, 2021 WL 2655056 (8th Cir. June 29, 2021). On appeal from the denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), the Eighth Circuit held, among other things, that it had no ability to make an equitable exception to the exhaustion requirement in section 3582(c)(1)(A). While the Supreme Court "has expressly reserved deciding whether mandatory claim-processing rules, such as the one in [section] 3582(c)(1)(A), may ever be subject to equitable exceptions," the Eighth Circuit observed that such rules typically are followed unless statutory exceptions apply. It further noted that unlike judicially created exhaustion rules, "congressionally mandated claim-processing rules" are not amenable to exceptions. As a result, the court determined that the district court correctly denied the motion for failure to exhaust administrative remedies.

United States v. Burnell, 2 F.4th 790 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding, among other things, that the district court did not misunderstand its authority under section 404 of the First

Step Act of 2018 and "tether" itself to the guidelines. Contrary to the defendant's argument, the Eighth Circuit noted that the district court never said it was unable to reduce the defendant's sentence under section 404. Instead, the district court had stated that the defendant's "term of imprisonment *will not* be reduced" since his guideline range did not change under such section. The Eighth Circuit found this to be a "plain statement" reflecting the district court's decision not to exercise its "substantial discretion" to reduce the defendant's sentence, rather than "a legal statement that the district court saw itself as bound by or 'tethered' to the [g]uidelines."

United States v. Brown, 1 F.4th 617 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding, among other things, that the district court properly concluded that the defendant is a career offender under §4B1.1. The defendant had argued that his prior Iowa attempted murder and drug trafficking convictions did not qualify as a "crime of violence" and a "controlled substance offense," as defined in §4B1.2, because, *inter alia,* the relevant Iowa statutes could be violated by aiding and abetting. He contended that the definitions of those terms in §4B1.2 must include such inchoate offenses "explicitly, not through commentary," in order for the Iowa convictions to count as predicate offenses. The Eighth Circuit rejected this argument, citing circuit precedent holding that the inclusion of aiding and abetting offenses in the commentary to §4B1.2 is a "reasonable interpretation of the career offender guidelines."

United States v. Spencer, 998 F.3d 843 (8th Cir. 2021). The Eighth Circuit reversed the district court's judgments in two cases where the defendants had been deemed ineligible for sentence reductions under section 404 of the First Step Act of 2018. The Eighth Circuit held to the contrary, finding that the defendants' multidrug conspiracy with the objects to distribute both crack and powder cocaine was a "covered offense" under section 404—namely, "a violation of a [f]ederal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act [of 2010]." The court reasoned that the "statutory penalties for" one object of the conspiracy—crack cocaine—had been "modified" by section 2 of the Fair Sentencing Act, and that this fact would remain true even if the defendants " 'ultimately would be subject to the same statutory sentencing range as a consequence of' the powder cocaine." Focusing on the word "modified," the court also held that relief under section 404 is not limited "to defendants whose penalties would decrease after the Fair Sentencing Act." Thus, the Eighth Circuit found the defendants eligible for resentencing and remanded for further proceedings.

United States v. Cooper, 998 F.3d 806 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding that the district court did not err in denying the defendant a reduction for acceptance of responsibility under §3E1.1 based on his pre-plea criminal conduct. Although the defendant contended that the starting point for the acceptance of responsibility inquiry is the date of a defendant's guilty plea, the Eighth Circuit found nothing in §3E1.1 that suggests such a temporal limit. In addition, based on "the non-exclusivity" of the factors that courts can consider when deciding whether to grant a reduction, "all relevant data" may be assessed. As a result, and consistent with circuit precedent, the Eighth Circuit affirmed the denial of the reduction.

United States v. Sholley-Gonzalez, 996 F.3d 887 (8th Cir. 2021). Among other things, the Eighth Circuit held that the district court committed plain error when it analyzed the applicability of the sporting-use reduction in §2K2.1(b)(2) to the defendant's firearms offense. The Eighth Circuit noted that §2K2.1(b)(2)'s text and commentary only consider "the firearms or ammunition [a] defendant actually 'possessed,' not those [a] defendant 'attempted' or 'intended' to possess." As a result, the district court plainly erred by including in its analysis the firearm that the defendant attempted to purchase, in addition to the ammunition he possessed. Had only the ammunition been considered, there was a "reasonable probability" that the sporting-use reduction would have applied and lowered the defendant's guideline range to one "well below the sentence imposed." In light of "the erroneous guidelines range [that] set the wrong framework for the sentencing proceedings," the court remanded for resentencing.

United States v. Trent, 995 F.3d 1029 (8th Cir. 2021). The Eighth Circuit reversed the district court's judgment and remanded for resentencing, holding that the district court erred in concluding under §7B1.1 that the defendant committed grade A, rather than grade B, violations of his supervised release as a result of his possession of a controlled substance. Looking to §7B1.1's reference to the definition of "controlled substance offense" in §4B1.2(b), the court found that " 'mere possession of a controlled substance does not constitute a controlled substance offense' for [] purposes of classifying a violation as grade A." Because the district court had used the guideline range applicable to grade A violations instead of the "significantly lower" range for grade B violations and there was "no indication that [it] would have imposed the same sentence regardless," the court held that the error was not harmless and the defendant was entitled to resentencing.

United States v. Wright, 993 F.3d 1054 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding, among other things, that the district court did not engage in impermissible double counting by applying both the base offense level under §2B3.1 and the carjacking enhancement under §2B3.1(b)(5) for the defendant's carjacking conviction. The court reasoned that the base offense level did not fully account for the defendant's conduct be-

cause it applies to "the crime of robbery generally—not carjacking"; carjacking "is a specific type of robbery for which the [g]uidelines add two levels[.]" The Eighth Circuit agreed with the Eleventh and Fourth Circuits that adding these two levels under §2B3.1(b)(5) does not constitute impermissible double counting because the Commission provided the increase to reflect the "heightened seriousness" of a robbery involving carjacking.

United States v. Langford, 993 F.3d 633 (8th Cir. 2021). The Eighth Circuit affirmed the district court's judgment, holding that the district court properly refused to vacate the defendant's mandatory life sentence under 18 U.S.C. § 3559(c)(1). The defendant contended that the sentencing court had issued the mandatory life sentence based on a finding that his prior Iowa robbery convictions qualified as "serious violent felonies" under section 3559's residual clause, a clause that he and the government agreed is unconstitutional. The Eighth Circuit held that the defendant had not met his burden of showing that the sentencing court "necessarily relied" on the residual clause, rather than the enumerated-offense or force clauses, of section 3559. Because the record was inconclusive as to which clause was used, the court considered the controlling law at the time of the defendant's sentencing in 2005. Finding that the Eighth Circuit used the categorical approach in 2005 "to determine whether a conviction fell within the enumerated-offense clause [of section 3559]," the court applied the categorical approach to determine whether the defendant's prior convictions qualified under such enumerated-offense cause and found that they did.

United States v. Parker, 993 F.3d 595 (8th Cir. 2021). The Eighth Circuit affirmed the defendant's convictions on two counts and his concurrent life sentences. Among other things, because the defendant's convictions and his life sentence for Count I were valid, the court declined to review his life sentence for Count II under the concurrent sentence doctrine. The doctrine applied because (1) the defendant received concurrent life sentences on both counts; (2) the conviction and sentence for Count I were valid; and (3) a ruling in the defendant's favor on Count II would not have reduced the time he would serve under the life sentence for Count I. While a $100 assessment also was imposed under Count II, the Eighth Circuit held that the defendant was not prejudiced by its application of the doctrine because the defendant was properly convicted on that count and was subject to the assessment regardless of his sentence.

NINTH CIRCUIT

United States v. Parlor, 2 F.4th 807 (9th Cir. 2021). The Ninth Circuit affirmed the defendant's sentence, holding, among other things, that the district court did not err when it concluded that the defendant unlawfully possessed five firearms for purposes of applying a 2-level enhancement under §2K2.1(b)(1)(A). In so holding, the court explained that, "[w]hen a person prohibited from possessing firearms under federal law possesses other firearms in addition to the ones for which he was charged, [the uncharged] firearms can be 'relevant conduct' " under the "same course of conduct or common scheme or plan" prong of §1B1.3. The court also held that the interval between the defendant's possession of the different firearms did not undermine their relatedness under the §1B1.3 prong because that prong does not require the unlawful possession of firearms to occur simultaneously.

United States v. Henderson, 998 F.3d 1071 (9th Cir. 2021). The Ninth Circuit affirmed the defendant's 15-month sentence for violating his supervised release which, combined with the 117-month sentence for his underlying 18 U.S.C. § 922(g)(1) conviction, extended the defendant's total term of incarceration beyond section 922(g)(1)'s 120-month statutory maximum. In so affirming, the court rejected the defendant's argument that the Supreme Court's plurality opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019), overruled the Ninth Circuit's holding in *United States v. Purvis*, 940 F.2d 1276 (9th Cir. 1991), that "a term of supervised release may extend beyond the statutory maximum for the underlying substantive offense," explaining that the controlling concurring opinion in *Haymond* did not adopt the plurality's position. Additionally, the Ninth Circuit held that *Haymond* did not extend the right to jury findings proved beyond a reasonable doubt, recognized by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to revocation of supervised release hearings.

United States v. Lopez, 998 F.3d 431 (9th Cir. 2021). On the government's appeal, the Ninth Circuit affirmed the district court's sentence, holding that the district court appropriately found the defendant eligible for safety valve relief under 18 U.S.C. § 3553(f)(1). In a matter of first impression, the court held that the "and" joining subparagraphs (A), (B), and (C) of section 3553(f)(1) is unambiguously conjunctive. Accordingly, a defendant "must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively," to be barred from safety valve relief under section 3553(f).

United States v. Figueroa-Beltran, 995 F.3d 724 (9th Cir. 2021). Among other things, the Ninth Circuit affirmed the district court's application of a 16-level enhancement under §2L1.2(b)(1)(A)(i), holding that the defendant's prior Nevada conviction for possession of cocaine with intent to sell qualified as a drug trafficking offense for purposes of the enhancement. To reach its holding, the court first applied the categorical approach and found that the Nevada statute, which criminalizes possession of controlled substances that are not listed in the Controlled Substances Act, is a divisible statute because possession of a specific controlled

substance is an element of the possession-for-sale offense, and not merely a means of committing such offense. After finding the Nevada statute divisible, the court applied the modified categorical approach and concluded that the defendant's prior conviction qualified as a drug trafficking offense.

United States v. Aruda, 993 F.3d 797 (9th Cir. 2021). In a matter of first impression, the Ninth Circuit vacated and remanded the district court's denial of the defendant's 18 U.S.C. § 3582(c)(1)(A) compassionate release motion. The court held that the First Step Act of 2018 rendered §1B1.13 "inapplicable" to cases where a prisoner files a compassionate release motion because §1B1.13 only addresses motions brought by the Director of the Bureau of Prisons. In so holding, the Ninth Circuit joined the Second, Fourth, Sixth, Seventh, and Tenth Circuits.

TENTH CIRCUIT

United States v. Lowell, No. 20-2014, 2021 WL 2640548 (10th Cir. June 28, 2021). The Tenth Circuit affirmed the defendant's conviction and sentence for carjacking resulting in death, rejecting the defendant's arguments that his conviction was invalid "because he lacked the specific intent to cause [a] motorcyclist's death while in the act of carjacking" and that the district court erred by applying the first-degree murder cross-reference in §2B3.1(c) to his offense. The circuit court held that a defendant is subject to the penalties of 18 U.S.C. § 2119(3) if his carjacking is the but-for cause of a death, irrespective of his intent in causing such death. The circuit court further held that the application of the cross-reference in §2B3.1(c) was appropriate because (1) carjacking is "a species of robbery" that can be "an underlying felony to support felony murder" under 18 U.S.C. § 1111; and (2) "the motorcyclist's death was 'in perpetration of' the carjacking."

United States v. Broadway, 1 F.4th 1206 (10th Cir. 2021). The Tenth Circuit reversed and remanded the district court's denial of the defendant's motion for a sentence reduction under section 404 of the First Step Act of 2018, holding that before exercising its discretion under section 404, a district court "should look to the minimum drug quantity associated with an eligible defendant's offense of conviction, rather than his underlying conduct, to determine whether the Fair Sentencing Act [of 2010] would have affected his sentence had it been in effect at the time of the defendant's crime." The circuit court further noted that this "offense of conviction approach" does not foreclose a court's consideration of the underlying conduct and the actual quantity of drugs involved in an offense during its analysis of the 18 U.S.C. § 3553(a) factors, or in exercising its discretion to decide whether to reduce a sentence.

United States v. Crooks, 997 F.3d 1273 (10th Cir. 2021). The Tenth Circuit reversed and remanded the district court's denial of the defendant's motion for a sentence reduction under section 404(b) of the First Step Act of 2018, holding that the district court "legally erred by finding [the defendant] ineligible for relief and [] his designation as a career offender [] unreviewable." In analyzing the definition of "covered offense" in section 404(a), the court determined that the phrase "the statutory penalties for which" modifies the phrase "a violation of a [f]ederal criminal statute." Accordingly, the court held that eligibility for relief under section 404(b) depends on a defendant's offense of conviction, not his underlying conduct. The court also reaffirmed that a defendant may challenge the legality of his career offender status in a motion under section 404(b).

United States v. Platero, 996 F.3d 1060 (10th Cir. 2021). In an appeal of a sentence for abusive sexual contact with a child under 12 years of age, in violation of 18 U.S.C. § 2244, the Tenth Circuit affirmed the district court's application of an increased base offense level under §2A3.4(a)(1) on the ground that "the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." In so doing, the court rejected the defendant's argument that §2A3.4(a)(1) requires a violation of section 2241(a) or (b), joining the Seventh and Eleventh Circuits, the only other circuit courts to have considered the issue.

United States v. Craine, 995 F.3d 1139 (10th Cir. 2021). The Tenth Circuit affirmed the defendant's statutory maximum sentence for possession of a firearm, rejecting, among other things, his procedural challenge to the application of a cross-reference to first-degree murder under §2A1.1 pursuant to §2K2.1(c)(1)(B). The circuit affirmed the district court's application of the first-degree murder cross-reference, holding that "the district court did not clearly err in finding that, when [the defendant] fatally shot his father," the defendant possessed malice aforethought, and thus, "used his firearm in connection with the commission of first-degree murder as defined under Oklahoma state law." Therefore, the circuit found that §2A1.1, the first-degree murder guideline, was the most analogous cross-reference to apply pursuant to §2K2.1(c)(1)(B).

United States v. Perrault, 995 F.3d 748 (10th Cir. 2021). The Tenth Circuit affirmed all elements of the defendant's trial and sentence for aggravated sexual abuse, including an obstruction of justice enhancement under §3C1.1. While the court found that the district court erred in applying the enhancement based on the defendant's flight to Morocco prior to indictment, the court nevertheless affirmed the enhancement because of the defendant's efforts to avoid removal to the United States after he was detained in Morocco. In so doing, the Tenth Circuit joined the Second and Seventh Circuits in holding that "putting the government to the expense and hassle of retrieving a defendant from a foreign country constitutes obstruction of justice."

United States v. Maumau, 993 F.3d 821 (10th Cir. 2021). On the government's appeal, the Tenth Circuit affirmed the district court's order granting the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), finding that extraordinary and compelling reasons based on an individualized review of all the circumstances of the defendant's case, including the First Step Act of 2018's elimination of 18 U.S.C. § 924(c)'s "stacking" provision, justified a reduction. In its reasoning, the court, just as it did in *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021), adopted the same three-step test that the Sixth Circuit adopted for courts considering compassionate release motions under section 3582(c)(1)(A) and held that the Commission's policy statement in §1B1.13 does not apply to defendant-filed motions for compassionate release.

ELEVENTH CIRCUIT

United States v. Henry, 1 F.4th 1315 (11th Cir. 2021). The Eleventh Circuit affirmed the defendant's sentence, holding that even though a district court is required to consider §5G1.3(b)(1) when determining a defendant's initial guidelines recommendation, the district court is "free to exercise its discretion to impose the sentence [it determines] most appropriate." In so holding, the court rejected the defendant's argument that §5G1.3(b)(1) remains fully binding on courts even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The opinion vacated and replaced an August 7, 2020, opinion of the same panel.

United States v. Stevens, 997 F.3d 1307 (11th Cir. 2021). The Eleventh Circuit vacated and remanded the district court's order denying the defendant's motion for a sentencing reduction under section 404(b) of the First Step Act of 2018, holding that (1) the district court erred in finding the defendant ineligible for relief based on his actual conduct, rather than the offense of conviction; (2) the First Step Act is a "permissive statute" that does not mandate consideration of the 18 U.S.C. § 3553(a) sentencing factors by a district court when exercising its discretion to reduce a sentence under section 404(b); and (3) the district court abused its discretion by failing to adequately explain its discretionary determination denying relief, thus precluding meaningful appellate review.

United States v. Garcon, 997 F.3d 1301 (11th Cir. 2021). On the government's appeal, the Eleventh Circuit vacated and remanded the defendant's sentence, holding that, based on the statutory text and structure of 18 U.S.C. § 3553(f)(1), the "and" connecting the subparagraphs of such section should be read as disjunctive, rather than conjunctive, meaning that an individual is disqualified from safety valve relief if the individual meets any of the three criteria listed in such section regarding prior convictions. Consequently, the court held that the district court incorrectly determined that the defendant was eligible for safety valve relief.

United States v. Edwards, 997 F.3d 1115 (11th Cir. 2021). The Eleventh Circuit affirmed the district court's conclusion that the First Step Act of 2018 required it to impose an eight-year term of supervised release, disagreeing with the defendant's argument that the Act "only empowers a court to *subtract* from a sentence, not *add* to one." The court held "(1) that the First Step Act is self-contained and self-executing, and that a motion brought under that Act needn't be paired with a request for relief under [18 U.S.C.] § 3582(c)(1)(B), and (2) that a district court has the authority under the First Step Act to impose a new term of supervised release on a First Step Act movant, provided that it 'reduce[s]' the movant's overall sentence."

United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021). In an issue of first impression regarding the applicability of §1B1.13 after the First Step Act of 2018 (FSA), the Eleventh Circuit affirmed the denial of the defendant's motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). First, the court held that §1B1.13 is still an "applicable policy statement" when a sentence-reduction motion is filed by a defendant pursuant to section 3582(c)(1)(A). In so holding, the court acknowledged that its holding is contrary to that of several other circuits that have concluded that §1B1.13 is *not* an "applicable policy statement" for defendant-filed motions. Second, the court held that the FSA did not shift authority from the Commission to the courts to define "extraordinary and compelling reasons," for a sentence reduction, nor did it change or remove the ability of the Director of the Bureau of Prisons to determine what other reasons may be extraordinary and compelling for a sentence reduction under Application Note 1(D) to §1B1.13.

United States v. Osorto, 995 F.3d 801 (11th Cir. 2021). The Eleventh Circuit affirmed the defendant's sentence, rejecting the defendant's procedural due process and equal protection challenges to §2L1.2(b)(2) and (3). The court held, among other things, that: (1) the defendant's challenge to §2L1.2(b)(2) is foreclosed by circuit precedent; (2) his argument "consider[s] the wrong universe of individuals" for an equal protection challenge, as §2L1.2(b)(2) and (3) "do not apply to *all* noncitizens convicted of any crime" but rather to "noncitizens who both have illegally reentered the United States and have been convicted of other crimes"; (3) through [8 U.S.C.] § 1326(b), Congress has determined that illegally reentering the United States after being deported following conviction on another crime is a more serious offense than simply illegally reentering the United States, and that conduct should be deterred"; (4) Congress vested the Commission with "responsibility for fostering and protecting the interests of, among other things, sentencing policy that promotes deterrence and appropriately

punishes culpability and risk of recidivism"; and (5) "[sections] 2L1.2(b)(2) and (3) are rationally related to the Commission's stated interests in issuing them."

United States v. Russell, 994 F.3d 1230 (11th Cir. 2021). The Eleventh Circuit vacated and remanded 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, holding that (1) the defendant was eligible for a reduction because he had a conviction for a "covered offense"; and (2) the record was ambiguous as to whether the district court understood that it had the authority to reduce his sentence. The court stated that there was not enough explanation "to permit meaningful appellate review of the district court's initial order."

D.C. CIRCUIT

United States v. Lawrence, 1 F.4th 40 (D.C. Cir. 2021). The D.C. Circuit affirmed the district court's judgment, holding that a defendant is "not categorically entitled to an opportunity for allocution" before a district court rules on the defendant's motion for a sentence reduction under section 404 of the First Step Act of 2018. Rejecting the defendant's argument that common law and Federal Rule of Criminal Procedure 32 affords him such right to allocate, the court explained that such right to allocate only applies with respect to an original sentencing, *i.e.*, before a sentence is imposed. A sentence reduction proceeding conducted after a sentence has been imposed, such as a section 404 proceeding, is instead governed by Federal Rule of Criminal Procedure 43, which explicitly makes clear that the right to allocate does not apply to sentence reduction proceedings. Further, the court found that neither section 404 nor 18 U.S.C. § 3582(c)(1)(B), the vehicle by which the defendant was able to file his section 404 motion, provides a categorical right to allocution.

United States v. Long, 997 F.3d 342 (D.C. Cir. 2021). The D.C. Circuit joined seven other circuits in holding that the policy statement at §1B1.13 does not apply to defendant-filed motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). The court expressed that the inapplicability of §1B1.13 is "plain on its face," explaining that the policy statement and accompanying commentary refer only to motions filed by the Director of the Bureau of Prisons. The court also noted that the phrase "[u]pon motion of the Director of the Bureau of Prisons" in the guideline is "not mere prologue," but instead implements what had been an essential statutory precondition for compassionate release, since superseded by the First Step Act of 2018. Consequently, the court determined that the district court plainly erred when it treated the second prong under §1B1.13, regarding whether the defendant is a danger to the community, as a categorical bar to relief and remanded the matter for reconsideration.

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov
@theusscgov