

CASE LAW QUARTERLY

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

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

FIRST CIRCUIT

United States v. Crocco, No. 19-2140, 2021 WL 4398623 (1st Cir. Sept. 27, 2021). The First Circuit affirmed the defendant's career-offender sentence, holding that the district court did not plainly err when it determined that his prior Virginia conviction for possession of marijuana with intent to distribute qualified as a "controlled substance offense" under §4B1.2(b). The First Circuit rejected the defendant's argument that the conviction is not a "controlled substance offense" because Virginia law regulates marijuana separately from "controlled substances." The court noted a circuit split concerning whether the Controlled Substances Act must provide the definition of "controlled substance" for purposes of §4B1.2(b), and reasoned that a "circuit split regarding the source of the definition of controlled substance (state vs. federal law) thwarts the claim of plain error."

United States v. Garcia-Perez, 9 F.4th 48 (1st Cir. 2021). The First Circuit vacated and remanded the defendant's sentence for possession of a machine gun, finding that the district court committed procedural error by imposing an upward variance, without providing adequate justification, based on the factors set forth in 18 U.S.C. § 3553(a). The court noted that although the district court expressed concern that machine guns are capable of killing many people in mere seconds, possession of that firearm had already been accounted for by application of §2K2.1(a)(4), and stated that courts must "articulate specifically" the reasons a particular offense is different from that covered by a guideline calculation when "a [section] 3553(a) consideration is already accounted for in the guideline range." Further, the court cited *United States v. Carrasquillo-Sanchez*, 9 F.4th 56 (1st Cir. 2021), an unrelated opinion decided the same day also involving the application of §2K2.1(a)(4) and an upward variance, where the court had also vacated and remanded the sentence for procedural error. In that case, the court provided further rationale, explaining it vacated the sentence because the district court had been clear that

"the driving force behind the upward variance" was the defendant's possession of a machine gun and had not provided any explanation for the variance, even though the factors on which it had relied had already been factored into the guideline range.

United States v. Sandoval, 6 F.4th 63 (1st Cir. 2021). Among other things, the First Circuit affirmed one of the defendant's sentences, holding that being an accessory after the fact to attempted murder under Massachusetts law qualifies as a "predicate act of racketeering" under the Racketeer Influenced and Corrupt Organizations Act (RICO), and therefore, counts as relevant conduct when determining a defendant's offense level under §2E1.1. Rejecting the defendant's argument that his conviction did not so qualify because the Massachusetts accessory-after-the-fact statute does not "involve" murder, the court relied on the reasoning of *Shular v. United States*, 140 S. Ct. 779 (2020), which "explained that 'involve' can mean 'to include as a necessary circumstance, condition, or consequence,'" and held that, by its terms, the Massachusetts statute does "include as a necessary circumstance" the commission of the underlying felony.

SECOND CIRCUIT

United States v. Waite, 12 F.4th 204 (2d Cir. 2021). The Second Circuit affirmed the district court's judgment, holding, among other things, that the passage of the First Step Act of 2018, which eliminated "stacking" under 18 U.S.C. § 924(c), did not render the defendant's sentence "cruel and unusual in violation of the Eighth Amendment." The court rejected the defendant's argument that the passage of the Act rendered his sentence unconstitutional because accepting such an argument would result in a situation where "every non-retroactive change in criminal penalties would risk running afoul of the Eighth Amendment merely because those defendants sentenced before the change faced different penalties than those sentenced after the [] change." The court also rejected the defendant's request for a sentencing remand based on the Act, explaining that the

request “effectively ask[ed] [the court] to circumvent [Congress’s choice] not to make [section] 403(a) of the First Step Act fully retroactive.”

United States v. Ceasar, 10 F.4th 66 (2d Cir. 2021). On the government’s appeal, the Second Circuit vacated and remanded as substantively unreasonable the defendant’s 48-month sentence, representing a 312–552-month downward variance from her guideline range, for conspiracy to provide material support to ISIS and obstruction of justice. The court stated that the sentencing court “placed more emphasis on [the defendant’s] need for rehabilitation than that sentencing factor could bear” and failed to properly balance such factor with the other 18 U.S.C. § 3553(a) factors, such as protecting the public, deterring criminal behavior, promoting respect for the law, and avoiding unwarranted sentencing disparities.

United States v. Saladino, 7 F.4th 120 (2d Cir. 2021). Vacating and remanding the district court’s denial of the defendant’s motion under 18 U.S.C. § 3582(c)(1)(A) for failure to exhaust administrative remedies, the Second Circuit held that the exhaustion requirement for such a motion is not jurisdictional. Rather, the court reasoned, the exhaustion requirement in section 3582(c)(1)(A) is a “claim-processing rule that may be waived or forfeited by the government,” as the government did in this case by withdrawing its “defense of exhaustion” on appeal. In so holding, the Second Circuit joined the Fifth, Sixth, Seventh, and Eleventh Circuits.

United States v. Reed, 7 F.4th 105 (2d Cir. 2021). The Second Circuit vacated the order of the district court and remanded for further proceedings. Joining every circuit to have addressed the issue, the Second Circuit held that a multi-object conspiracy that involves a crack cocaine object with a statutory penalty provision under 21 U.S.C. § 841(b)(1)(A)(iii) or 21 U.S.C. § 841(b)(1)(B)(iii) constitutes a “covered offense” under section 404 of the First Step Act of 2018. In so holding, the Second Circuit distinguished the instant case from the facts underlying its decision in *United States v. Echeverry*, 978 F.3d 857 (2d Cir. 2020). While the defendant in *Echeverry* was convicted of a multi-object conspiracy involving a crack cocaine object, the court found him ineligible for relief because his sentence “was already at the statutory mandatory minimum for his non-crack cocaine objects and [] could not be reduced regardless of the Fair Sentencing Act’s modifications to crack cocaine penalties.” Here, the defendant’s sentence for multi-object conspiracy was above the statutory minimum and therefore could be reduced.

United States v. Moyhernandez, 5 F.4th 195 (2d Cir. 2021). The Second Circuit affirmed the district court’s denial of the defendant’s motion for a reduced sentence under section 404 of the First Step Act of 2018, holding, among other things, that a court may, but is not required to, consider

the factors in 18 U.S.C. § 3553(a) when exercising its discretion to reduce a sentence under such section. In so holding, the court joined the First, Eighth, Ninth, Tenth, and Eleventh Circuits, and disagreed with the Third, Fourth, Sixth, and D.C. Circuits, which require consideration of the section 3553(a) factors.

THIRD CIRCUIT

United States v. Scott, No. 20-1514, 2021 WL 4302516 (3d Cir. Sept. 22, 2021). As a matter of first impression for the Third Circuit and under plain error review, the court held that Hobbs Act robbery is not a “crime of violence” under the elements or enumerated offenses clauses in §4B1.2(a), vacating the defendant’s career offender sentence and remanding for resentencing. Regarding the enumerated offenses clause, the court explained that while it may consider a combination of enumerated offenses, neither “generic” robbery nor “generic” extortion reaches force against property, which is included in Hobbs Act robbery. In holding that Hobbs Act robbery is not categorically a crime of violence under the guidelines, the court joined every circuit court to have considered the issue (the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits).

United States v. Denmark, 13 F.4th 315 (3d Cir. 2021). The Third Circuit affirmed the application of a 2-level enhancement for possession of a dangerous weapon under §2D1.1(b)(1), holding that such a weapon does not have to be physically close to drugs or drug paraphernalia for the enhancement to apply. Citing Application Note 11(A) and prior circuit precedent, the court explained that the enhancement will apply when the government proves, by a preponderance of the evidence, that a defendant possessed a dangerous weapon, unless the defendant can show, based on four factors, that it is clearly improbable that the weapon was connected with the defendant’s drug crime. The court also noted that Application Note 11(A) does not require a dangerous weapon to be “present at the crime” in order for the government to prove possession.

United States v. Andrews, 12 F.4th 255 (3d Cir. 2021). The Third Circuit affirmed the district court’s denial of the defendant’s compassionate release motion, rejecting the defendant’s arguments that his sentence length and the non-retroactive changes made by the First Step Act of 2018 to 18 U.S.C. § 924(c)’s mandatory minimums warranted compassionate release. Among other things, the court held that (1) the Commission’s policy statement at §1B1.13, regarding the factors that may be considered in granting compassionate release, is not binding on defendant-filed motions, joining nearly every circuit court to have considered the issue; and (2) the nonretroactive changes to section 924(c)’s mandatory minimums do not constitute extraordinary and compelling reasons for compassionate release, joining the Sixth and Seventh Circuits.

United States v. Perez, 5 F.4th 390 (3d Cir. 2021). The Third Circuit vacated the judgment and sentence for the defendant’s firearms and drug trafficking offenses and remanded for the district court to reconsider the application of a §2K2.1(b)(6)(B) enhancement for possessing a firearm “in connection with” a drug trafficking offense. Citing the Supreme Court’s recent body of administrative law cases, the court held that the commentary to §2K2.1(b)(6)(B) is a reasonable interpretation of an ambiguous guideline and is thus entitled to deference. However, the court held that the commentary only creates a rebuttable presumption—not a bright-line rule—that mere physical proximity between drugs and firearms justifies the enhancement. Thus, the court held that a defendant must have the chance to prove that a firearm’s presence was an accident or coincidence.

FOURTH CIRCUIT

No cases identified.

FIFTH CIRCUIT

No cases identified.

SIXTH CIRCUIT

United States v. Rich, et al., No. 18-2268/2269/2323/2324/2342/2364, 2021 WL 4146810 (6th Cir. Sept. 13, 2021). In an issue of first impression, the Sixth Circuit, among other things, upheld the application of a 2-level enhancement for maintaining a drug premises under §2D1.1(b)(12), through the principles of relevant conduct set forth in §1B1.3(a)(1)(B), relating to a “jointly undertaken criminal activity.” The court rejected the defendant’s argument that the introductory “unless otherwise specified” language in §1B1.3(a) precluded the application of the enhancement because §2D1.1(b)(12) “otherwise specific[s]” that the enhancement applies only if a defendant himself maintained a drug premises. The court found that, to the contrary, “nothing in [§2D1.1(b)(12)] ‘otherwise specific[s]’ that it cannot be applied based on jointly undertaken criminal activity under §1B1.3(a)(1)(B).”

United States v. Cartwright, 12 F.4th 572 (6th Cir. 2021). The Sixth Circuit reversed the defendant’s sentence and remanded for resentencing, holding that the defendant’s two prior Tennessee convictions for first and second-degree burglary are not predicate offenses for purposes of 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”). Using the categorical approach, the court found that the Tennessee burglary statute is broader than “generic” burglary, thus precluding convictions under that statute from qualifying as predicate offenses under the ACCA’s enumerated-crimes clause. In so finding, the court declined to follow conflicting circuit

precedent, which held that Tennessee second-degree burglary is a “generic” burglary. The court explained it was not bound by the prior decision for two reasons: (1) the previous panel had merely assumed, without addressing the merits, that Tennessee defined the element of breaking and entering in conformance with “generic” burglary; and (2) the prior decision conflicts with *Descamps v. United States*, 570 U.S. 254 (2013).

United States v. Hunter, 12 F.4th 555 (6th Cir. 2021). On the government’s appeal, the Sixth Circuit reversed the district court’s grant of the defendant’s motion for compassionate release. The court first noted that, although a district court currently has discretion to define “extraordinary and compelling” reasons under 18 U.S.C. § 3582(c)(1)(A) for purposes of defendant-filed motions, the text of the section limits that discretion. The court then held that because non-retroactive changes in the law do not amount to “extraordinary and compelling” reasons under section 3582(c)(1)(A), the district court erred in considering the non-retroactive change in sentencing law made by *United States v. Booker*, 543 U.S. 220 (2005), to support the defendant’s release. The court further held that facts known at the time of sentencing are not permissible factual considerations in identifying “extraordinary and compelling” reasons under section 3582(c)(1)(A) because the structure and text of the statute show that the identification of such reasons focuses on post-sentencing factual developments.

United States v. Clark, 11 F.4th 491 (6th Cir. 2021). The Sixth Circuit vacated and remanded the defendant’s sentence, holding that the district court had engaged in impermissible “triple counting” in calculating the applicable guideline range. The defendant had pled guilty to two counts of bank robbery, but the presentence report added an additional “pseudo count” for a third bank robbery based on the plea agreement. The district court applied enhancements to each count to account for conduct that occurred while the defendant fled from the third bank robbery. Although the Sixth Circuit noted that double counting may be permissible where the guidelines expressly mandate it through “the cumulative application of sentencing adjustments,” or where Congress or the Commission “intend[] to attach multiple penalties to the same conduct,” the court found that, because the counts were not grouped under the applicable Chapter Three rules, application of the enhancements to the three counts impermissibly resulted in the same conduct factoring into the defendant’s sentence in multiple ways.

SEVENTH CIRCUIT

United States v. Hible, 13 F.4th 647 (7th Cir. 2021). The Seventh Circuit held, as a matter of first impression, that a motion to reconsider a decision pursuant to section 404(b)

of the First Step Act of 2018 extends the time for appeal but affirmed the denial of the defendants' motions for sentence reductions on the merits. The court explained that, while the "Federal Rules of Criminal Procedure lack any parallel to the omnibus motions to reconsider authorized by" the Federal Rules of Civil Procedure, "the Supreme Court has held repeatedly that motions to reconsider in criminal cases [generally] extend the time for appeal." However, the court noted that motions under Criminal Rule 35, which essentially "provides the only means to review a sentencing decision," do not extend the time for appeal. Nevertheless, the court found that motions under the First Step Act are "external to Rule 35" because the Act authorizes courts to reduce a sentence "long after the time allowed by Rule 35." The court thus concluded that such motions extend the time for appeal.

United States v. Hopper, 11 F.4th 561 (7th Cir. 2021). The Seventh Circuit affirmed the district court's decision to reimpose a 235-month sentence for conspiracy to distribute methamphetamine after a previous remand to address an error in the drug quantity calculation. Among other things, the court held that the district court did not plainly err in adding a point for a 2018 conviction—the proceedings for which had been pending at the time of the defendant's original sentencing—to the defendant's criminal history score at resentencing. The court acknowledged a circuit split on the issue, explaining that while the First Circuit interprets the term "prior sentence" to include only sentences imposed before a defendant's original sentencing, the Eighth, Ninth, and Eleventh Circuits have reached the opposite conclusion. Given this landscape, the Seventh Circuit held that any error was not plain, adding that it viewed the district court's approach as "consistent[] with the language of the [g]uidelines, with Congress's statutory requirements for sentencing, and with the Supreme Court's guidance."

United States v. Beltran-Leon, 9 F.4th 485 (7th Cir. 2021). The Seventh Circuit affirmed the defendant's 28-year sentence (below the guideline range of life imprisonment) for conspiracy to possess with intent to distribute controlled substances as a "high level lieutenant" in the Sinaloa Cartel. Among other things, the Seventh Circuit held that, in the context of the entire proceeding, the district judge's remarks about his "personal hurt" as an individual of Mexican descent did not impact the defendant's sentence and therefore did not violate his due process rights. Observing that the district court "significantly discounted" the defendant's sentence due to his alleged torture while in custody in Mexico, the Seventh Circuit also held that the defendant's sentence was not impacted by the district court's comments about the defendant's decision not to testify at sentencing about the torture or by the district court's references to an extra-record article regarding torture by the Mexican military.

United States v. Teague, 8 F.4th 611 (7th Cir. 2021). The Seventh Circuit vacated the defendants' terms of supervised release and remanded for reconsideration. Explaining that 18 U.S.C. § 3583(h) provides that the "court *may* include" a new term of supervised release upon revocation of a previous term of supervision, the court held that the district court plainly erred in believing that it was obliged to apply the statutory minimum terms that were applicable at the original sentencings.

United States v. Robl, 8 F.4th 515 (7th Cir. 2021). The Seventh Circuit affirmed a restitution order against a defendant who defrauded customers by falsely holding himself out to be an asbestos abatement contractor. First, the court held that the district court properly deferred ordering restitution under 18 U.S.C. § 3663A (commonly referred to as the "Mandatory Victims Restitution Act"), because the restitution amount was not ascertainable 10 days prior to sentencing and the district court retained the authority to order restitution outside the 90-day window prescribed by the statute. The court explained that (1) the defendant's objection to the restitution amount demonstrated that the amount was not ascertainable prior to sentencing, and (2) the statutory deadline was designed to ensure timely relief for victims, not to provide a windfall to defendants. Second, the court held that the district court did not violate the defendant's due process rights by declining to hold a restitution hearing, explaining that the defendant had failed to explain what evidence or cross-examination he would have offered at the hearing. Third, the court held that, in the absence of a specific objection to the presentence report, the district court did not err in declining to undertake a "complete accounting of the losses to each victim." Finally, the court held that the district court did not plainly err in not subtracting the value of any services the defendant performed from the restitution amount, noting that the defendant failed to offer any evidence that his services provided any value.

United States v. Love, 7 F.4th 674 (7th Cir. 2021). On the parties' cross-appeals, the Seventh Circuit reversed the defendant's sentence and remanded for resentencing under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"), finding that the defendant had three qualifying predicate offenses. The parties had disputed two of the offenses. First, the court rejected the defendant's argument that his conviction for Illinois armed robbery was not a predicate offense, explaining that the district court did not clearly err in finding that the defendant never received a "restoration of rights" letter, as required to trigger the "anti-mousetrapping" provision in 18 U.S.C. § 921(a)(20). Second, the Seventh Circuit agreed with the government that the defendant's conviction for Indiana Class D battery resulting in bodily injury qualified as an ACCA predicate offense. Specifically, the court held

that Indiana’s requirement of “bodily injury,” defined as “any impairment of physical condition, including physical pain,” satisfies the “physical force” requirement of the ACCA’s elements clause.

United States v. Rollerson, 7 F.4th 565 (7th Cir. 2021). The Seventh Circuit affirmed the defendant’s sentence. First, the court held that the government provided sufficiently reliable evidence to hold the defendant accountable for certain acquitted and uncharged drug quantities, consistent with the presentence report. Among other things, the defendant did not offer evidence to contradict the presentence report, which described the uncharged drug buys in detail, summarized a search warrant affidavit, and was further corroborated by an affidavit attached to the criminal complaint. Second, the Seventh Circuit held that the district court did not clearly err in finding that the uncharged and acquitted drug buys, involving the same stash house and types of drugs as the offense of conviction, were relevant conduct.

United States v. Broadfield, 5 F.4th 801 (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)(i). Even though the district court erroneously applied the dangerousness proviso in §1B1.13 to the defendant’s motion, the Seventh Circuit concluded that remand was not appropriate because reconsideration could not produce a decision in the defendant’s favor. Because the risk of COVID-19 was the defendant’s sole reason for seeking compassionate release and the defendant had declined vaccination against COVID-19, the court found that the defendant’s risk was self-incurred, and thus, could not serve as an “extraordinary and compelling” reason for release. In so ruling, however, the court did not foreclose the availability of relief for defendants who can show that they are “unable to receive or benefit” from a COVID-19 vaccine.

United States v. Ugbah, 4 F.4th 595 (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)(i). Although the district court had erroneously “bypassed the question of whether [the defendant had] established an extraordinary and compelling reason” for compassionate release, the Seventh Circuit held that remand was unnecessary because none of the defendant’s reasons for seeking release were “extraordinary and compelling.” In so holding, the court relied, in part, on its recent decision in *United States v. Broadfield*, 5 F.4th 801 (7th Cir. 2021), which held that defendants who have access to a COVID-19 vaccine generally cannot use the risk of COVID-19 to obtain compassionate release.

United States v. Thacker, 4 F.4th 569 (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)(i), holding, among other things, that section 403 of the First Step Act of 2018, which ended the “stacking” of penalties for violations of 18 U.S.C. § 924(c), cannot serve as an “extraordinary and compelling” reason for release. Consistent with the Eighth Circuit and the most recent decision of the Sixth Circuit, the Seventh Circuit reasoned that compassionate release cannot serve as an “end-run around Congress’s decision in the First Step Act to give only prospective effect to its amendment of [section] 924(c)’s sentencing scheme.” Thus, the court rejected the Fourth Circuit’s view that the sentencing disparity resulting from the section 924(c) amendment may independently serve as an “extraordinary and compelling” reason for compassionate release, as well as the Tenth Circuit’s “middle ground” view that “the sentencing disparity resulting from a nonretroactive change to sentencing law in the First Step Act may serve in combination with other rationales as an extraordinary and compelling reason for early release,” which was echoed by an earlier panel of the Sixth Circuit.

United States v. Gonzalez, 3 F.4th 963 (7th Cir. 2021). The Seventh Circuit affirmed the defendant’s 72-month sentence, rejecting the defendant’s arguments that the sentence was substantively unreasonable. The court held that the district judge adequately justified imposing a sentence above the 33- to 41-month guideline range based on the nature of the offense, the defendant’s history of recidivism, his misrepresentations to the probation officer, and the need to deter similar offenses.

EIGHTH CIRCUIT

United States v. Michael, 12 F.4th 858 (8th Cir. 2021). On the defendant’s second appeal of his 96-month sentence, the Eighth Circuit affirmed his sentence as substantively reasonable. The district court originally had sentenced the defendant to five years’ probation in “a significant downward variance from his applicable [guideline] range of 97 to 120 months” for possession of child pornography. After the defendant was arrested for a probation violation, a different district judge revoked probation and sentenced the defendant to 96 months’ imprisonment. That judge reimposed the same sentence after remand on the defendant’s first appeal. In reviewing for substantive reasonableness, the Eighth Circuit noted that where a court, on revocation of probation, imposes a sentence that falls below the original guideline range, “it is nearly inconceivable that the court abused its discretion in not varying downward still further.” It further noted that a revoking court may “begin the sentencing process anew.” In light of the evidence before the district court and the explanation for the sentence, the Eighth Circuit concluded that the sentence was not substantively unreasonable.

United States v. Miller, 11 F.4th 944 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s judgment, holding, among other things, that the district court did not err in finding that the defendant’s offense involved “a firearm that is described in 26 U.S.C. § 5845(a)” —namely, “a shotgun having a barrel or barrels of less than 18 inches in length”—yielding a base offense level of 22 under §2K2.1(a)(3). Although the defendant conceded that the barrel was less than 18 inches in length, he argued that he did not know that it was less than 18 inches. As a matter of first impression, the Eighth Circuit held that “the [g]uidelines do not require ‘knowledge’ for [the] enhancement to apply,” noting that the Commission “specifically includes a scienter element within a guideline when it intends mens rea to be considered.”

United States v. Henderson, 11 F.4th 713 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s judgment, holding, among other things, that the district court did not err in increasing the defendant’s base offense level under §2K2.1(a)(2) because he had two prior state convictions that qualified as “controlled substance offenses,” as defined in §4B1.2(b). The defendant had argued, *inter alia*, that his prior Illinois conviction did not so qualify because Illinois defines “controlled substances” to include “substances not found in Controlled Substances Act schedules that list controlled substances that are included in the federal *statutory* enhancement for committing a ‘serious felony offense.’” The defendant maintained that the federal schedules govern the issue, citing the presumption outlined in *Jerome v. United States*, 318 U.S. 101 (1943), that, absent plain indication to the contrary, Congress does not make the application of federal statutes dependent on state law. The court rejected this argument, noting that §2K2.1(a)(2) is not a statutory enhancement but rather a guideline enhancement and that §4B1.2(b)’s definition expressly covers both federal and state offenses. The court agreed with the Fourth, Sixth, and Seventh Circuits that the “particular substance underlying [a] state offense also [need not be] controlled under a distinct federal law.” The court further deemed the “*Jerome* presumption” inapplicable because, *inter alia*, “the intent of Congress to depart from pure nationwide sentencing uniformity is clearly evidenced in 28 U.S.C. § 994(i)(1),” which directs the Commission to set guidelines that enhance sentences for defendants with “two or more prior . . . State . . . felony convictions.”

United States v. Hoxworth, 11 F.4th 693 (8th Cir. 2021). Among other things, the Eighth Circuit reversed and remanded for resentencing, holding that the defendant’s prior Texas aggravated assault conviction did not count as a third prior “violent felony,” triggering a mandatory minimum sentence under 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”). The ACCA defines “violent felony,” in part, as a crime that “has as an element the use, attempted use, or

threatened use of physical force against the person of another.” Noting that the Supreme Court recently held in *Borden v. United States*, 141 S. Ct. 1817 (2021), that this definition “categorically excludes crimes that can be committed recklessly,” the Eighth Circuit held that the aggravated assault conviction did not count because, under Texas law, the offense can be “committed under *any* of three mental states—intentionally, knowingly, or recklessly.”

United States v. Robinson, 9 F.4th 954 (8th Cir. 2021). The Eighth 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. The sentencing court had determined that the defendant, who was convicted of conspiracy to distribute and possession with intent to distribute crack cocaine, was responsible for 2.35 kilograms of crack cocaine and should be sentenced under 21 U.S.C. § 841(b)(1)(A)(iii), which then applied to offenses involving 50 grams or more of crack cocaine. After finding that the defendant had two prior convictions for felony drug offenses, the sentencing court imposed a mandatory life sentence. The Fair Sentencing Act of 2010 later increased the threshold quantity for section 841(b)(1)(A)(iii) to 280 grams. However, the district court found that it could not reduce the defendant’s sentence on the view that he remained subject to a mandatory life sentence because the drug amount attributed to him at his original sentencing continued to exceed the threshold. Noting that “[t]he First Step Act applies to offenses, not conduct,” the Eighth Circuit held that the district court erred in relying on the drug quantity finding of 2.35 kilograms and that the defendant’s offense of conviction—namely, an offense involving 50 grams or more—instead determined the statutory sentencing range. Pursuant to the changes made by the Fair Sentencing Act, the applicable sentencing range for the defendant’s offense was between 10 years and life imprisonment. Accordingly, the Eighth Circuit remanded for reconsideration of whether to reduce the sentence as a matter of discretion.

United States v. Mink, 9 F.4th 590 (8th Cir. 2021). Among other things, after vacating the defendant’s conviction on one of fifteen counts, the Eighth Circuit vacated his entire sentence under the discretionary “sentencing package doctrine.” The Eighth Circuit applied the doctrine because *vacatur* of the sentence on the vacated count would result in a significantly lower overall sentence than originally contemplated (reduced from 600 to 240 months). By vacating the entire sentence, the district court could “reconfigure the sentencing plan” to ensure it remained adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a).

United States v. Haynie, 8 F.4th 801 (8th Cir. 2021). Among other things, the Eighth Circuit remanded for resentencing because the district court erred in calculating the guideline range for the defendant’s RICO conviction. Specifically, the

district court mistakenly treated aggravated assault with a firearm as an “underlying racketeering activity” under §2E1.1(a)(2), resulting in a higher offense level than otherwise would have applied. Because the record was insufficient to show that the error was harmless, resentencing was required.

United States v. Corrigan, 6 F.4th 819 (8th Cir. 2021). The Eighth Circuit dismissed as moot the defendant’s appeal of an enhancement that yielded a guideline range of 60 to 71 months, where the sentence the defendant received—60 months—also was the mandatory minimum for his drug trafficking offense. The Eighth Circuit found that it could not provide any effectual relief, explaining that “any live controversy over the enhancement ended the moment the district court gave [the defendant] a 60-month prison sentence,” because at that point, “a decreased offense level could not drive his sentence any lower.”

United States v. Brown, 5 F.4th 913 (8th Cir. 2021). The Eighth Circuit held that the government had breached the parties’ plea agreement by advocating in its sentencing memorandum and at two sentencing hearings “for a different applicable guidelines section and higher base offense level than it had agreed to” in the plea agreement. Moreover, the court found that, “even assuming that the [g]overnment could cure its breach, its halfhearted and begrudging statement that the district court should follow the agreement was not enough—especially taking a holistic view of the [g]overnment’s plea-related conduct.” Accordingly, the Eighth Circuit vacated the defendant’s sentence and remanded for resentencing before a different district court judge, noting that the “reassignment in no way questions the fairness of the sentencing judge.”

United States v. Sarchett, 3 F.4th 1115 (8th Cir. 2021). The Eighth Circuit reversed and remanded for resentencing, holding that the district court miscalculated the guideline range for the defendant’s drug trafficking offense and that it erred in ordering him to pay restitution for environmental damages caused by drug manufacturing. Specifically, the court found that the district court clearly erred by relying on stipulations in the plea agreement regarding two separate incidents to make factual findings about the defendant’s responsibility for additional drug quantities that increased his base offense level and for drug manufacturing items. The court noted that the defendant had objected to the factual recitals when they were repeated in his presentence investigation report and concluded, among other things, that the plea agreement was insufficient to connect the defendant to the two incidents by a preponderance of the evidence.

United States v. Boll, 3 F.4th 1099 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s application of a 2-level enhancement under §3A1.1(b)(2)(B), holding that

when a hospice nurse steals opioids and other pain medications from 14 patients, such 14 patients constitute “a large number of vulnerable victims.” To reach its holding, the court interpreted §3A1.1(b)(2)(B) to apply “when, taking into account [a] defendant’s ‘offense of conviction and all relevant conduct,’ the number of vulnerable victims exceeds the typical number involved in offenses of like kind.”

NINTH CIRCUIT

United States v. Lizarraras-Chacon, No. 20-30001, 2021 WL 4314793 (9th Cir. Sept. 23, 2021). The Ninth Circuit reversed and remanded the district court’s denial of the defendant’s 18 U.S.C. § 3582(c)(2) motion because the district court failed to consider intervening legislative and judicial developments affecting the defendant’s 20-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) when it performed the 18 U.S.C. § 3553(a) factors analysis at step two of the section 3582(c)(2) procedure. The court held that the district court erroneously concluded it lacked discretion to consider (1) recent circuit case law overruling circuit precedent that formed the basis for the defendant’s 20-year mandatory minimum penalty, and (2) Congress’s amendments in the First Step Act of 2018, which changed the trigger for the 20-year mandatory minimum from a “felony drug offense” to a “serious drug felony” and reduced the mandatory minimum from 20 years to 15 years.

United States v. Green, 12 F.4th 970 (9th Cir. 2021). The Ninth Circuit affirmed the district court’s revocation of the defendant’s term of supervised release after he visited a free pornography website, thus violating a condition of supervised release prohibiting the defendant from “patroniz[ing] any place” where sexually explicit “materials or entertainment are the primary material or entertainment available.” The court held that purchasing explicit material was not required because an individual can “patronize” a business merely by visiting it, or in the case of media, by viewing it.

United States v. Prigan, 8 F.4th 1115 (9th Cir. 2021). The Ninth Circuit vacated, reversed, and remanded the defendant’s sentence for illegal possession of a firearm because the district court erred in determining that the defendant’s prior conviction for Hobbs Act robbery was a “crime of violence” under §4B1.2(a). The court held that Hobbs Act robbery is not a “crime of violence” under either the “force clause” in §4B1.2(a)(1) or the “enumerated-offenses clause” in §4B1.2(a)(2) because “[w]hile Hobbs Act robbery covers force or threats of force against a person *or property*, [§4B1.2(a)’s] force clause and the relevant enumerated offenses—robbery and extortion—cover force or threats of force only against persons.” The court also rejected the government’s argument that Hobbs Act robbery is a “crime of

violence” under 18 U.S.C. § 924(c)(3)(A) because section 924(c)(3)(A) is broader than §4B1.2(a) and expressly includes force or threats of force against property.

United States v. Valdez-Lopez, 4 F.4th 886 (9th Cir. 2021). The Ninth Circuit affirmed the district court’s imposition of a 300-month sentence, a term of imprisonment longer than the original 240-month term imposed by a different, now retired, district judge, rejecting the defendant’s argument that the sentence was a product of judicial vindictiveness in response to his successful collateral attack on his 18 U.S.C. § 924(c) conviction. The court held that (1) no presumption of vindictiveness applies; (2) the defendant failed to demonstrate vindictiveness; and (3) the 300-month sentence was both procedurally and substantively reasonable.

United States v. Keller, 2 F.4th 1278 (9th Cir. 2021). The Ninth Circuit affirmed the district court’s denial of the defendant’s two successive motions for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A), holding, among other things, that section 3582(c)(1)(A)’s “administrative exhaustion requirement imposes a mandatory claim-processing rule that must be enforced when properly invoked.” In so holding, the Ninth Circuit joined the unanimous consensus of the other circuit courts that have ruled on the issue.

TENTH CIRCUIT

United States v. Jones, No. 20-6159, 2021 WL 4451967 (10th Cir. Sept. 29, 2021). The Tenth Circuit affirmed the defendant’s sentence for his felon in possession of a firearm conviction. The defendant had argued that the district court improperly included his prior Oklahoma drug trafficking conviction as a “controlled substance offense,” as defined by §4B1.2(b), when calculating his base offense level under §2K2.1(a)(2) because the Oklahoma law controlled more than federally controlled substances. While recognizing a circuit split “about whether a state offense is a ‘controlled substance offense’ . . . when the state law controlled substances that were not controlled under federal law,” the Tenth Circuit did not reach the question, holding that any presumed error was harmless because factors other than the guideline range drove the sentence.

United States v. Egli, No. 19-4140, 2021 WL 4314242 (10th Cir. Sept. 23, 2021). The Tenth Circuit affirmed, on plain error review, the district court’s imposition of a special condition of supervised release that absolutely prohibited the defendant from using computers and the internet. Although the Tenth Circuit “has been hesitant to approve absolute bans” on internet access, its precedent has “always acknowledged the possibility that such a ban might be warranted in an extreme case.” In light of the defendant’s “glaring history of repeated violations of lesser restrictions” on internet access, the court concluded that the

district court did not plainly err in imposing an absolute ban because the defendant may well present such an “extreme case.”

United States v. Sanchez, No. 19-2092, 2021 WL 4168217 (10th Cir. Sept. 14, 2021). Among other things, the Tenth Circuit remanded for resentencing. The defendant had received an enhanced sentence pursuant to 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”) based on the district court’s finding that he had three previous “violent felony” convictions, including two convictions for aggravated assault with a deadly weapon under New Mexico law. Subsequently, in *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court held that, for the purposes of the ACCA’s “elements clause,” a prior offense is not a “violent felony” if it can be committed through “conduct, like recklessness, that is not directed or targeted at another.” Accordingly, the Tenth Circuit remanded for the district court to determine whether New Mexico aggravated assault with a deadly weapon “requires the type of targeted conduct that *Borden* requires of violent felonies.”

United States v. Henson, 9 F.4th 1258 (10th Cir. 2021). Among other things, the Tenth Circuit affirmed the defendant’s sentence, concluding, *inter alia*, that the district court did not err if its sentencing calculus was affected by its observations about the defendant’s “purported smugness and indifferent demeanor” and his role in exacerbating the global drug-addiction problem. Contrary to the defendant’s suggestion that “such commentary amounted to impermissible consideration of extraneous, arbitrary matters beyond the [18 U.S.C.] § 3553(a) factors,” the Tenth Circuit deemed these observations to fall within the ambit of several statutory sentencing factors.

United States v. Hald, 8 F.4th 932 (10th Cir. 2021). Among other things, the Tenth Circuit affirmed the district courts’ denials of the defendants’ motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding that “district courts are free to deny relief on the basis of any one of [section] 3582(c)(1)(A)’s requirements without considering the others.” In so holding, the court reaffirmed the view of the panel opinions in *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021) and *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), which the court conceded was dicta.

United States v. Mjones, 4 F.4th 967 (10th Cir. 2021). The Tenth Circuit affirmed the district court’s denial of the defendant’s motion to dismiss his 18 U.S.C. § 924(c) count, but on alternate grounds to those relied on by the district court. At issue was whether the defendant’s conviction under 18 U.S.C. § 875(c) for “making interstate threats to injure” constitutes a crime of violence and therefore a predicate offense under section 924(c). After determining that section 875(c) is a divisible statute that sets forth elements, not means, by providing two alternatives for violating the

statute (*i.e.*, threat to injure and threat to kidnap), the court applied the modified categorical approach and held that the defendant's conviction is a crime of violence and therefore a proper predicate offense under section 924(c).

United States v. Rico, 3 F.4th 1236 (10th Cir. 2021). In an appeal involving a conviction for possession of a firearm as a prohibited person under 18 U.S.C. § 922(g), the Tenth Circuit affirmed the district court's application of §2K2.1(c)(1)(A) and §2X1.1 "to cross-reference the substantive offense committed with the firearm—attempted murder," as well as the district court's rejection of the defendant's claim of self-defense.

ELEVENTH CIRCUIT

United States v. Brown, No. 20-14574, 2021 WL 4470227 (11th Cir. Sept. 30, 2021). Among other things, the Eleventh Circuit affirmed the application of the sentencing enhancement in §2K2.1(b)(4)(A) for possession of a stolen firearm, rejecting the defendant's argument that the enhancement applies only when the possession itself would be a felony. First, the court explained that "[n]othing in the text of §2K2.1(b)(4)(A) even hints at a requirement that the possession of the stolen firearm must be felonious in order for the enhancement to apply." Second, the court observed that "if the Sentencing Commission intended to link the §2K2.1(b)(4)(A) enhancement to 'another felony offense,' §2K2.1(b)(6)(B) demonstrates that the Commission knew how to do so."

United States v. Pittman, No. 20-13664, 2021 WL 4452341 (11th Cir. Sept. 29, 2021). The Eleventh Circuit affirmed the application of the sentencing enhancement in §2K2.1(b)(6)(B) because the defendant, convicted of felon in possession of a firearm, possessed firearms in connection with another felony offense—drug trafficking. First, though the government did not discover drugs at the residence where the firearms were found, the court held that other evidence (including the defendant's temporary refusal to allow police to enter, the presence of drug paraphernalia, the emptiness of the residence, and the defendant's girlfriend's statement that the defendant had possessed drugs) sufficiently supported the district court's finding that the defendant had been trafficking drugs at the residence. Second, the court found that the firearms were connected to the defendant's drug trafficking, citing the defendant's statement to his girlfriend that he kept the firearms for protection and the physical proximity of the firearms to the drug paraphernalia.

United States v. Tinker, No. 20-14474, 2021 WL 4434621 (11th Cir. Sept. 28, 2021). The Eleventh Circuit affirmed the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). First, the court held that a district court is permitted to assume

the existence of "extraordinary and compelling reasons" supporting release when denying a motion based on the 18 U.S.C. § 3553(a) factors or §1B1.13 policy statement. Second, the court held that the district court provided a sufficient discussion of the salient section 3553(a) factors, the defendant's criminal history, and the need to protect the public and was not required to specifically discuss all of the defendant's mitigating evidence or every section 3553(a) factor.

United States v. Gonzalez, 9 F.4th 1327 (11th Cir. 2021). The Eleventh Circuit affirmed the denial of the defendant's motion for a sentence reduction pursuant to section 404(b) of the First Step Act of 2018. First, joining the Fourth and Sixth Circuits, the court held that the defendant was eligible for a reduction of his sentence, which was imposed upon revocation of his supervised release, because his underlying offense was a "covered offense" under the First Step Act. Second, rejecting the contrary suggestions of the Fourth, Sixth, and Seventh Circuits, the court held that while section 404(c) forecloses successive requests for a reduction if a motion was previously "denied after a complete review of the motion on its merits," it does not require district courts to undertake a "complete review" and calculate the new guideline range in every case. The court held that the district court's reasons for denying the defendant's motion on its merits were clear and supported by the record, and therefore, the district court did not abuse its discretion.

United States v. Coats, 8 F.4th 1228 (11th Cir. 2021). Among other things, the Eleventh Circuit affirmed the defendant's sentence under 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or the "ACCA"). The court rejected the defendant's argument that Georgia's "party to a crime" statute, providing that a defendant may be convicted as a principal to a crime even where he aids or abets its commission, disqualified his burglary conviction from serving as an ACCA predicate offense. The court explained that generic accomplice liability attaches under the ACCA where a defendant "take[s] an affirmative act . . . with the intent to facilitate" a qualifying predicate offense. Because accessory to burglary under Georgia law requires such an affirmative act, the district court properly concluded that the defendant's burglary conviction qualified as an ACCA predicate. Finally, the court held that the district court did not clearly err in denying the defendant a reduction for acceptance of responsibility despite his guilty plea, noting that the defendant had obstructed justice by assaulting a witness while in custody on related state charges.

United States v. Matthews, 3 F.4th 1286 (11th Cir. 2021). The Eleventh Circuit affirmed the defendant's sentence, holding, among other things, that the district court did not commit clear error when it enhanced the defendant's base

offense level under §2K2.1(a)(3) based, in part, on its determination that the defendant’s offense of conviction—making false statements to a firearms dealer—involved a “semiautomatic firearm that is capable of accepting a large capacity magazine.” Relying on circuit precedent interpreting such phrase and the definition of such phrase in the commentary of §2K2.1, the court determined that because the defendant “attempted to purchase a semiautomatic rifle that comes standard with a 30-round magazine” and committed his offense while inside a gun shop that sells both firearms and magazines, “it was reasonable for the district court to infer that a magazine capable of accepting more than 15 rounds of ammunition—that comes ‘standard’ with the rifle—was in close proximity to the rifle [the defendant] sought to purchase.” The court also noted the history of §2K2.1, which evidences that the enhancements in the guideline “are intended to punish firearms crimes involving particularly dangerous *types* of weapons.”

nial of the defendant’s 28 U.S.C. § 2255 petition as untimely. The defendant’s petition challenged his sentencing enhancement under §2K2.1(a)(2), arguing that the Supreme Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015), which struck down the “residual clause” in 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”) as unconstitutionally vague, “invalidate[d] his sentence because his sentencing judge arrived at it in reliance on an identical ‘residual clause’” that used to be in §4B1.2(a). Disagreeing with the majority of its sister circuits, the D.C. Circuit held that the “right asserted” by the defendant in his petition was “initially recognized by the Supreme Court” in *Johnson*, thus rendering the defendant’s petition timely under section 2255(f)(3). In so holding, the court explained that (1) the general principle of *Johnson* is that the ACCA’s residual clause “requires judges to engage in an inquiry so standardless as to be unconstitutional” and that such an inquiry is unconstitutional even if it “appears outside the ACCA or in modified form”; and (2) this general principle is supported by the language in section 2255(f)(3).

D.C. CIRCUIT

United States v. Arrington, 4 F.4th 162 (D.C. Cir. 2021). The D.C. Circuit reversed and remanded the district court’s de-



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