

CASE LAW QUARTERLY

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

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

FIRST CIRCUIT

No cases identified.

SECOND CIRCUIT

United States v. Keitt, 21 F.4th 67 (2d Cir. 2021). The Second Circuit affirmed the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding, among other things, that when a district court denies a motion for compassionate release on the sole ground that the 18 U.S.C. § 3553(a) factors weigh against a sentence reduction, it does not need to determine whether extraordinary and compelling reasons exist that might otherwise justify a sentence reduction.

United States v. Capers, 20 F.4th 105 (2d Cir. 2021). Among other things, the Second Circuit vacated the defendant's conviction for "murder through the use of a firearm during and in relation to a crime of violence or a narcotics offense," in violation of 18 U.S.C. § 924(j). The court found that the district court had erroneously instructed the jury that the defendant's RICO conspiracy count was a crime of violence on which a section 924(j) violation could be predicated, explaining that RICO conspiracy does not constitute such a crime of violence because it does not categorically have as an element the use, attempted use, or threatened use of physical force.

United States v. Solis, 18 F.4th 395 (2d Cir. 2021). The Second Circuit affirmed the sentences imposed on two co-defendants for conspiring to manufacture, distribute, or possess a controlled substance on a vessel. Among other things, the Second Circuit affirmed the district court's application of a 2-level enhancement pursuant to §2D1.1(b)(3) for acting "as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance." Rejecting the defendants' argument to the contrary, the Second Circuit found

that the ordinary meanings of the terms "pilot" and "navigator" do not require the possession of any special skill, authority, or training, and therefore, the enhancement may apply to an individual who simply steers or navigates a boat.

Chery v. Garland, 16 F.4th 980 (2d Cir. 2021). The Second Circuit, among other things, recognized the abrogation of its 2008 decision concluding that Connecticut's drug trafficking statute does not categorically qualify as a "controlled substance offense" under §4B1.2. The court had reached that conclusion based on its determination that the statute criminalizes a "mere offer to sell, absent possession," which falls outside the definition of "controlled substance offense." However, the Connecticut Supreme Court held in 2013 that the statute requires "actual, constructive or attempted transfer" and "the presentation of a controlled substance for acceptance or rejection." Accordingly, the Second Circuit agreed with the government that its 2008 decision had been superseded by the Connecticut Supreme Court's 2013 decision.

THIRD CIRCUIT

United States v. Nasir, 17 F.4th 459 (3d Cir. 2021). Following remand from the Supreme Court after a grant of the government's writ of certiorari on a *Rehaif v. United States*, 139 S. Ct. 2191 (2019) issue, the Third Circuit affirmed the defendant's convictions but reiterated that the career offender enhancement was improperly applied because it was based in part on a prior conviction for an inchoate offense. Five judges joined the concurring opinion authored by Judge Bibas in the original case, which asserted the importance of the rule of lenity in statutory construction and criticized the deference given to the commentary in the *Guidelines Manual*.

United States v. Sheppard, 17 F.4th 449 (3d Cir. 2021). The Third Circuit affirmed the district court's denial of the defendant's motion under 18 U.S.C. § 3583(e)(1) seeking early termination of supervised release based on the pro-

bation officer's alleged communications with the defendant's then-girlfriend. The court acknowledged that the alleged communications were "entirely inappropriate and unprofessional" and held that the district court "should not have considered the possible effects of the probation officer's misconduct on [the defendant's] rehabilitation." Notwithstanding this "improper" inference, the court affirmed the district court's conclusion that the defendant should continue supervised release under a different probation officer.

United States v. Claude, 16 F.4th 422 (3d Cir. 2021). The Third 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 that the defendant's purported substantial assistance to the government could not serve as an independent "extraordinary and compelling reason" for relief. The court explained that the defendant had effectively sought a sentence reduction based on substantial assistance without complying with Federal Rule of Criminal Procedure 35, which permits courts to grant such reductions only upon motion by the government, and that such rule was left unaltered by the First Step Act of 2018. However, the court clarified that, even though substantial assistance cannot independently justify compassionate release, it can be a "relevant factor" for such relief.

United States v. Quinones, 16 F.4th 414 (3d Cir. 2021). The Third Circuit vacated the defendant's sentence under the career offender guideline, §4B1.1, and remanded for resentencing. Applying the categorical approach, the court held that assault by a prisoner under a provision of a Pennsylvania statute that criminalizes "'caus[ing] another to come into contact with [bodily] fluid' when the prisoner knew or should have known the fluid came from someone with a communicable disease" is not a "crime of violence." The court explained that a defendant could violate this provision by "spitting or expelling fluid," an action that, in its least culpable form, does not involve the use of force because it is not capable of causing physical pain or injury. Further, the court held that the assault provision lacks the *mens rea* element required to constitute a "crime of violence" because a defendant could violate the provision with only a negligent state of mind as to whether the fluid came from an infected person.

FOURTH CIRCUIT

United States v. McKinnie, No. 19-4888, 2021 WL 6110290 (4th Cir. Dec. 27, 2021). The Fourth Circuit affirmed the defendant's above-guidelines sentence for distribution of fentanyl, holding, as a matter of first impression and among other things, that an upward variance under 18 U.S.C. § 3553(a) for a fentanyl buyer's death does not require a finding that the defendant's drugs were the but-

for cause of the death. Noting that the text of section 3553(a) has no but-for causation requirement, the court rejected the defendant's attempts to read in such a requirement based on the text of a Chapter Two enhancement and a separate statute.

United States v. Williams, 19 F.4th 374 (4th Cir. 2021). Among other things, the Fourth Circuit affirmed the use of the Ice methamphetamine guideline in sentencing four co-defendants in a methamphetamine distribution conspiracy case. The court held that the district court did not abuse its discretion in rejecting the defendants' policy argument against relying on the offense level for Ice methamphetamine, which is treated as 10 times the quantity of methamphetamine mixture in the §2D1.1(c) drug quantity table. As a matter of first impression, the court also held that establishing reasonable foreseeability for a defendant that a conspiracy involved Ice merely requires sufficiently reliable and specific evidence that the methamphetamine has 80 percent purity or above. Thus, the court concluded that the district court did not clearly err in determining that the conspiracy involved Ice based on the test results of some of the drugs and circumstantial and direct evidence as a whole. The court noted that the Seventh and Eighth Circuits use different approaches to this issue, with the Seventh Circuit requiring more specific evidence and the Eighth Circuit allowing for indirect evidence.

United States v. Lewis, 18 F.4th 743 (4th Cir. 2021). The Fourth Circuit vacated the defendant's sentence and remanded for resentencing, holding that the district court erroneously applied a "bodily injury" sentencing enhancement under §2B3.1(b)(3)(A). Noting the guidelines' definition of "bodily injury" as "any significant injury" and the court's precedent, the court explained that a "significant injury" requires showing that a victim's injuries lasted for a meaningful period and were more than trivial. The court held that the district court, which stated that merely getting an injury examined at a hospital satisfied the enhancement, applied the incorrect legal standard and that this error was not harmless.

United States v. Muhammad, 16 F.4th 126 (4th Cir. 2021). The Fourth Circuit vacated the district court's dismissal of the defendant's motion seeking compassionate release under 18 U.S.C. § 3582(c)(1)(A), making two holdings. First, the court held that section 3582(c)(1)(A)'s threshold requirement for defendant-filed motions is non-jurisdictional and thus subject to waiver or forfeiture, joining the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Second, the court joined the Third, Fifth, and Sixth Circuits and held that the threshold requirement "outlines two routes [for satisfaction]—one of which does not require exhaustion of administrative remedies."

FIFTH CIRCUIT

United States v. Okulaja, No. 20-20101, 2021 WL 6111712 (5th Cir. Dec. 27, 2021). Among other things, the Fifth Circuit vacated and remanded the defendant's sentence, finding that the district court clearly erred by using §1B1.3(a)(2)'s "broad definition of relevant conduct." The court explained that §1B1.3(a)(2) is inapplicable to offenses that are not groupable under §3D1.2(d); thus, if an offense is not groupable, the only acts and omissions that may constitute relevant conduct are those described in §1B1.3(a)(1), which limits relevant conduct to certain acts and omissions committed during, in preparation of, or in the course of attempting to avoid detection or responsibility for the offense of conviction.

United States v. Sinclair, 16 F.4th 471 (5th Cir. 2021). The Fifth Circuit vacated the defendant's sentence and remanded for resentencing because the district court failed to explain the basis for its application of the 2-level firearm enhancement under §2D1.1(b)(1). The court explained that its precedent requires a district court to make "appropriate findings and state plainly the basis for its decision" to apply §2D1.1(b)(1).

SIXTH CIRCUIT

United States v. McCall, 20 F.4th 1108 (6th Cir. 2021). The Sixth Circuit reversed and remanded the district court's judgment, holding that its circuit precedent mandated that a court may consider a nonretroactive change in law as one of multiple factors forming extraordinary and compelling reasons justifying a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The court explained that other Sixth Circuit cases to the contrary conflicted with its earliest holding on the matter and thus were not binding precedent. However, the court also clarified that, under its precedent, nonretroactive changes in law alone cannot serve as extraordinary and compelling reasons for a sentence reduction.

United States v. Hymes, 19 F.4th 928 (6th Cir. 2021). On appeal from a limited remand in light of its precedent in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), the Sixth Circuit determined, in part, that the defendant's within-range sentence was not unreasonable even though the district court failed to consider national sentencing data collected by the Commission. Although the court recognized its precedent indicates such data can be helpful as a "starting point" in attempting to avoid unwarranted disparities and further suggests courts "should" look to Commission data when considering significant variances, it "expressly rejected" imposing a requirement on district courts to consider national sentencing statistics, either for within-range sentences or sentences out-

side the guideline range. The court noted that such an approach would "elevate the Commission's statistical data over the text of the [g]uidelines themselves." The court further reasoned that similar to its decision in *Havis*, where it held courts cannot rely on guideline commentary to add to the plain text of the guidelines, courts also cannot "substitute unvarnished Commission data in place of a properly calculated [guideline] range."

United States v. Harris, 19 F.4th 863 (6th Cir. 2021). On appeal from a second or successive motion under 28 U.S.C. § 2255, the Sixth Circuit held that the offense of aiding and abetting attempted robbery at 18 U.S.C. § 2111 "necessarily constitutes" a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A). The court rejected the defendant's argument that the district court's silence on whether his sentence was based on the elements clause or on the residual clause at section 924(c)(3)(B), which the Supreme Court had held unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319 (2019), rendered the sentence unconstitutional. Instead, the court held that because the least of the acts criminalized by section 2111 involves the threat to use physical force, the statute is a "crime of violence" under the elements clause.

United States v. Nicolescu, 17 F.4th 706 (6th Cir. 2021). The Sixth Circuit affirmed the defendants' convictions but vacated their sentences and remanded for resentencing. Among other things and agreeing with almost every other circuit to address the issue, the Sixth Circuit held that the district court erred in applying the enhancement under §2B1.1(b)(4) because the enhancement is "limited in its application to professional fences," not to those who "merely sell goods they stole." However, the Sixth Circuit affirmed the application of the enhancement under §2B1.1(b)(11)(B)(i), which applies in part to offenses that involve "trafficking in unauthorized access devices." The defendants, who were also convicted of aggravated identity theft under 18 U.S.C. § 1028A for the knowing and unlawful transfer, possession, or use of a means of identification, had argued that the trafficking enhancement could not apply because: (1) Application Note 2 to §2B1.6 instructs that if a sentence for aggravated identity theft is "imposed in conjunction with a sentence for an underlying offense," an enhancement for the transfer, possession, or use of a means of identification may not be applied to the sentence for the underlying offense, and (2) trafficking in unauthorized access devices is synonymous with transferring a means of identification. Rejecting the defendants' argument and disagreeing with other circuits that have held that the trafficking enhancement cannot apply to convictions for aggravated identity theft, the court reasoned that the ordinary meaning of the term "traffic" includes a commercial aspect while the ordinary meaning of the term "transfer" does not. This opinion amended and superseded the opinion in *United States v. Nicolescu*, 15 F.4th 689 (6th Cir. 2021).

United States v. Bass, 17 F.4th 629 (6th Cir. 2021). The Sixth Circuit reversed and remanded the grant of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The court found in part that the district court's judgment constituted an abuse of discretion because its reasoning resulted from errors of law. First, the court held the district court invoked the incorrect legal standard when it evaluated the sentencing factor in 18 U.S.C. § 3553(a)(6) because the district court improperly compared the defendant's federal sentence to his co-defendant's state sentence. The court explained that the factor concerns national disparities between similarly situated defendants, rather than disparities between co-defendants. Second, the court found the district court committed legal error in analyzing section 3582(c)(1)(A) by analogizing its role to that of a parole board.

United States v. Augustin, 16 F.4th 227 (6th Cir. 2021). On appeal from a second or successive motion under 28 U.S.C. § 2255, the Sixth Circuit held, in part, that the district court was reasonable in engaging in a more limited remedy of correcting the defendant's sentence, instead of resentencing the defendant, when it vacated his conviction under 18 U.S.C. § 924(c) pursuant to *United States v. Davis*, 139 S. Ct. 2319 (2019). The court found that vacating the defendant's conviction did not impact the sentence he received on his other counts or his guideline range. Additionally, the court found a resentencing was not required because the district court did not exercise "any new or significant discretion." Instead, the district court "simply imposed a corrected sentence that was 'largely consistent with the rationale' for the originally imposed sentence.

SEVENTH CIRCUIT

United States v. Mansfield, No. 20-2981, 2021 WL 6124747 (7th Cir. Dec. 28, 2021). The Seventh Circuit affirmed the defendant's sentence, holding, among other things, that a district court may consider a defendant's arrest history during sentencing if the information is reliable. The court explained that it analyzes a court's determination of reliability deferentially, and such reliability "can be shown by 'the number of prior arrests' or 'the similarity of prior charges to the offense of conviction.'"

United States v. Martin, No. 21-1527, 2021 WL 6124746 (7th Cir. Dec. 28, 2021). The Seventh Circuit affirmed the district court's denial of the defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), holding, among other things, that "a claim of errors in [a defendant's] original sentencing" does not alone constitute an extraordinary and compelling reason warranting a reduction in sentence. However, the court provided that a court may reconsider its evaluation of a defendant's mitigating arguments at original sentencing once the defendant presents

extraordinary and compelling reasons for a sentence reduction in a motion for compassionate release.

United States v. Issa, No. 20-2949, 2021 WL 6112439 (7th Cir. Dec. 27, 2021). Among other things, the Seventh Circuit affirmed the district court's application of the vulnerable victim adjustment at §3A1.1, finding that the defendant had waived his challenge to the adjustment by stipulating to it in the written plea agreement. The court concluded that the district court was entitled to rely on such stipulation in applying the adjustment.

United States v. Kurzynowski, 17 F.4th 756 (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). First, the court held that the district court did not err in considering §1B1.13 as "instructive," but not binding, in evaluating the defendant's motion. Second, the court held that the district court adequately considered the factors in 18 U.S.C. § 3553(a). Finally, the court held that any error would have been harmless because the defendant had been vaccinated against COVID-19 and therefore would have been "ineligible for relief on remand."

United States v. Price, 16 F.4th 1263 (7th Cir. 2021). The Seventh Circuit vacated and remanded the defendant's sentence, concluding that the district court failed to make the findings required to impose the enhancement in §2K2.1(b)(6)(B) for using or possessing a firearm in connection with another felony offense. The district court inaccurately paraphrased the provision as applying where the "defendant possessed the firearm while committing another felony offense." Because of this error, the Seventh Circuit remanded the case for the district court to determine whether "the firearm was involved in, or contributed to, the other felony," as required to impose the enhancement.

United States v. Lovies, 16 F.4th 493 (7th Cir. 2021). Among other things, the Seventh Circuit affirmed the defendant's sentence for carjacking and kidnapping and the application of two enhancements. First, the court affirmed the application of §3B1.4 for using a minor to commit an offense. The court held that the district court did not clearly err in finding that the defendant partnered with a minor to commit his offenses and that the enhancement applies regardless of whether the minor was a voluntary participant. Second, the court affirmed the application of the 2-level enhancement in §3B1.1(c) for having an aggravating role in an offense. Among other things, the court explained that the enhancement may apply even in the absence of a formal criminal organization or ongoing conspiracy and held that the district court did not clearly err in finding that the defendant organized and led others in the commission of his offenses.

United States v. Wilks, 15 F.4th 842 (7th Cir. 2021). The Seventh Circuit reversed the district court’s order revoking the defendant’s pretrial release and remanded for further proceedings. The court, acknowledging a division of authority among the circuits, held as a matter of first impression that the revocation order was subject to “independent review” on appeal, with “due deference to the judge’s factual findings.” Applying this standard, the court first held that the district court erred in failing to find by clear and convincing evidence that the defendant violated a condition of release, as required by 18 U.S.C. § 3148(b)(1)(B). Second, the court held that the district court erred in failing to explain why detention was necessary under the statutory criteria set forth in section 3148(b)(2) and the factors listed in 18 U.S.C. § 3142(g). However, the court declined to order the defendant’s immediate release and instead remanded the matter for prompt consideration under the appropriate standard.

EIGHTH CIRCUIT

United States v. Tinlin, 20 F.4th 426 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s treatment of the defendant as a career offender under the guidelines, holding that his prior conviction for Iowa domestic abuse assault with intent to commit serious injury was appropriately counted as a “crime of violence” under the “force clause” of §4B1.2(a) because it “requires at least a threatened use of physical force.”

United States v. Raiburn, 20 F.4th 416 (8th Cir. 2021). Among other things, the Eighth Circuit affirmed the district court’s application of the 2-level enhancement at §2G2.1(b)(2)(A), which applies if a defendant’s offense involved “the commission of a sexual act or sexual contact.” The court held that, for purposes of the enhancement, the act of masturbating qualifies as “sexual contact.”

United States v. Davis, 19 F.4th 1083 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s modification of the defendant’s sentence, holding that the district court did not abuse its discretion by imposing a reduced sentence (based on the likely sentence the defendant would receive for the same offense conduct under the current version of 18 U.S.C. § 924(c)(1)), rather than reducing the sentence to time served. The panel noted, however, that it took “no position” on the current circuit split about whether the changes to section 924(c) “can constitute an extraordinary and compelling reason for compassionate release.”

United States v. Levy, 18 F.4th 1019 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s judgment, holding, among other things, that the district court did not err by including the cost of a “lookback” in the defendant’s loss amount calculation under §2B1.1(b)(1). The defendant’s employer had conducted the lookback to review pathology

cases completed by the defendant, a former Chief of Pathology, in light of his repeated intoxication at work. While Application Note 3(D)(ii) to §2B1.1 provides that loss shall not include the costs of a criminal investigation, the Eighth Circuit agreed with the district court that the lookback was conducted for the benefit of the business—to ensure patients had a correct diagnosis—rather than for the benefit of the criminal investigation, and thus there was no error.

United States v. Nilsen, 18 F.4th 587 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s judgment, which increased the defendant’s offense level under §2K2.1(b)(6)(B) for possessing a firearm in connection with another felony offense (here, the North Dakota felony offense of preventing arrest). Among other things, the court rejected the defendant’s contention that the enhancement did not apply because the “gun did not facilitate nor did it have the potential to facilitate preventing arrest,” given that he “was handcuffed, with no access to the gun, and he did not reach for it.” The Eighth Circuit held that the district court did not clearly err in finding that the presence of an unsecured, loaded gun somewhere on the defendant’s person led him to engage in the felonious conduct, which posed “a substantial risk of misfire and potential injury” to the arresting officers.

United States v. Martin, 15 F.4th 878 (8th Cir. 2021). Among other things, the Eighth Circuit re-affirmed the district court’s application of the career offender enhancement in §4B1.1(a) based in part on the defendant’s prior Illinois armed robbery conviction. The Eighth Circuit previously held that the conviction qualified as a predicate “crime of violence” under the force clause of the definition of that term in §4B1.2(a). On panel rehearing, the Eighth Circuit reconsidered the enhancement in light of the Supreme Court’s holding in *Borden v. United States*, 141 S. Ct. 1817 (2021), that reckless offenses cannot qualify as a “violent felony” under the elements clause of 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”). The court noted that it “generally consider[s] cases interpreting [the terms “crime of violence” and “violent felony”] interchangeably.” The Eighth Circuit concluded that the conviction still qualifies as a “crime of violence,” though under the enumerated offenses clause in §4B1.2(a)(2) because the Illinois armed robbery statute categorically matches the “generic” definition of robbery.

United States v. Marcussen, 15 F.4th 855 (8th Cir. 2021). The Eighth Circuit affirmed the district court’s order denying the defendant’s motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). In reaching this result, the Eighth Circuit noted, *inter alia*, that it could ignore “what is, in substance, no more than an academic debate” about whether a court’s discretion is limited by the factors in §1B1.13 and its commentary, “[s]o long as a district court does not explicitly limit its discretion to th[ose] factors.” The court observed that section 3582(c)(1)(A)(i) specifically

requires the consideration of Commission policy statements, and therefore, “§1B1.13 and its commentary may not be ignored.” However, it further observed that the relevant commentary was “advisory not prohibitive.” Accordingly, the Eighth Circuit held that the district court properly looked to the commentary to §1B1.13 as “relevant but not binding” in finding that the defendant’s health conditions were not “extraordinary and compelling reasons” warranting a sentence reduction.

NINTH CIRCUIT

No cases identified.

TENTH CIRCUIT

United States v. Benally, 19 F.4th 1250 (10th Cir. 2021). On plain error review, the Tenth Circuit affirmed the district court’s imposition of restitution under 18 U.S.C. § 3663A (commonly referred to as the “Mandatory Victims Restitution Act” or “MVRA”). Although the court found, in light of *Borden v. United States*, 141 S. Ct. 1817 (2021), that the district court had plainly erred in concluding that the defendant’s charge of assault resulting in bodily injury was a “crime of violence” on which restitution under the MVRA could be predicated, the court concluded that the error did not affect the defendant’s substantial rights. Instead, taking into account the defendant’s concession that the district court had discretionary authority to impose restitution under 18 U.S.C. § 3663 (commonly referred to as the “Victim and Witness Protection Act” or the “VWPA”), the court determined that the district court would have employed the same analysis that it did under the MVRA to impose restitution under the VWPA. The court further explained that, under both statutes, restitution is authorized not only for victims whose “injuries or death [] are essential elements of [a defendant’s] offense of conviction,” but also for those with loss caused by the underlying conduct.

United States v. Benvie, 18 F.4th 665 (10th Cir. 2021). Among other things, the Tenth Circuit remanded for reconsideration of the defendant’s special conditions of supervised release. On plain error review, the Tenth Circuit found that the district court’s justification for the special conditions—“that the total combined sanction, without a fine, is sufficiently punitive”—constituted clear error in that it did not “sufficiently explain, even in generalized terms, how the special conditions further the requirements of [18 U.S.C.] § 3583(d), and [may have justified] the conditions using an impermissible rationale.” The Tenth Circuit found that all four elements of plain error were met because “if the district court had explained its reasoning for the conditions and ensured that its reasoning was supported by the record, then the court may have refrained from imposing some, if not all, of the conditions.”

United States v. Wilson, 17 F.4th 994 (10th Cir. 2021). The Tenth Circuit vacated the defendant’s sentence for distribution of methamphetamine and remanded for resentencing. As a matter of first impression, the Tenth Circuit concluded that whether a quantity of drugs for personal use counts as relevant conduct under §1B1.3(a) for a defendant convicted of “simple” distribution (*i.e.*, not a conspiracy charge) is a “case-by-case factual determination” that requires “an assessment of any evidence of a nexus between the drugs possessed for personal use and drugs possessed for distribution.” Among other things, the court explained that personal use quantities would not count under §1B1.3(a)(1)(A) if—as in the defendant’s case—they were not “‘part of or connected to the commission of, preparation for, or concealment of’” the distribution offense and “not possessed with the intent to distribute.” However, the Tenth Circuit also held that a defendant “bears the burden of production regarding any excludable personal-use quantity,” and because the defendant had not met that burden, the court remanded to allow both sides to present (or rebut) evidence as to personal use of the drugs.

United States v. Jones, 15 F.4th 1288 (10th Cir. 2021). The Tenth Circuit affirmed the district court’s judgment, which had found the defendant’s prior Oklahoma drug trafficking conviction to be a “controlled substance offense” within the meaning of §4B1.2(b) and had calculated the defendant’s base offense level under §2K2.1(a)(4)(A) accordingly. Rejecting the contrary position of the Second, Fifth, and Ninth Circuits, the Tenth Circuit joined the Fourth, Seventh, and Eighth Circuits in holding that the definition of “controlled substance offense” in §4B1.2(b) includes state convictions involving controlled substances that are not identified in the Controlled Substances Act. Among other things, the court explained that the “plain language” of §4B1.2(b) “references ‘state law,’” and thus the definition “necessarily applies to and includes state-law controlled-substance offenses.”

United States v. Hemmelgarn, 15 F.4th 1027 (10th Cir. 2021). Among other things, the Tenth Circuit affirmed the district court’s denial of the defendant’s motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). As a threshold matter, the Tenth Circuit held that the defendant’s failure to exhaust his administrative remedies did not preclude its consideration of the motion on the merits. In its first published opinion on the question, the court concluded that section 3582(c)(1)(A)’s exhaustion requirement is a mandatory claim-processing rule, rather than a jurisdictional rule. In so holding, the court noted that “[a]ll the other circuits that have addressed this issue have reached the same conclusion.” Accordingly, the court found that even though the defendant did not show that he exhausted his administrative remedies, the argument was waived because the government did not argue exhaustion on appeal.

ELEVENTH CIRCUIT

United States v. Sharp, No. 20-12574, 2021 WL 6123326 (11th Cir. Dec. 28, 2021). On the government’s appeal, the Eleventh Circuit vacated the defendant’s sentence and remanded for resentencing. The court held that the government did not waive its argument that the defendant’s prior Georgia conviction for terroristic threats qualified as a “violent felony” under 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or the “ACCA”) because “the argument was foreclosed by binding precedent at the time of sentencing and the change in law occurred within the time to file a notice of appeal.”

Telcy v. United States, 20 F.4th 735 (11th Cir. 2021). The Eleventh Circuit affirmed the dismissal of the defendant’s successive habeas petition under 28 U.S.C. § 2255, holding that a sentence reduction under the First Step Act of 2018 does not constitute a “new judgment” that would allow a defendant to file a successive habeas petition without prior approval from the court. In its decision, the court reasoned, among other things, that the statute does not allow for plenary resentencing hearings but instead is “an act of legislative grace left to the discretion of the district court.”

United States v. Arcila Ramirez, 16 F.4th 844 (11th Cir. 2021). The Eleventh Circuit vacated and remanded the defendant’s sentence, concluding that the district court failed to make the findings required to impose the terrorism enhancement in §3A1.4. The court explained that, for the enhancement to apply, a defendant’s conduct must be “‘calculated’ to influence, affect, or retaliate” against government conduct. Since the district court failed to find whether the defendant had this requisite specific intent, the Eleventh Circuit remanded the case for additional fact-finding and resentencing.

United States v. Giron, 15 F.4th 1343 (11th Cir. 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), holding that circuit precedent foreclosed the defendant’s arguments on appeal. First, the court explained that the district court was bound by §1B1.13 and was therefore prohibited from independently considering whether the defendant’s medical and COVID-19 concerns qualified as “extraordinary and compelling reasons” for release. Second, the court held that, in light of the district court’s finding that extraordinary and compelling reasons did not support release, the district court was not required to analyze the factors set forth in 18 U.S.C. § 3553(a).

D.C. CIRCUIT

United States v. Brevard, 18 F.4th 722 (D.C. Cir. 2021). The D.C. Circuit affirmed the defendant’s sentence on the alternative basis that it was a variance, but held that the sentence was not proper as a departure under §5K2.21 for conduct underlying a potential charge not pursued in the case of conviction. The defendant escaped custody, in violation of 18 U.S.C. § 751(a), and before being apprehended, committed offenses under the District of Columbia Criminal Code. The court reasoned that the District Court for the District of Columbia only has jurisdiction over violations of the District of Columbia Criminal Code where those violations may be properly joined under Federal Rule of Criminal Procedure 8. Because the only relation between the offenses was temporal, the D.C. Circuit held the D.C. offenses could not be properly joined with the escape offense and so could not have been pursued in the defendant’s federal case, as required for §5K2.21. However, the D.C. Circuit affirmed the district court’s alternative basis that an upward variance was appropriate in light of the defendant’s criminal history.



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