

Federal Sentencing

by Roger W. Haines, Jr. and J. Douglas Wilson

GUIDE

**Federal Sentencing Guidelines
Cases From All Circuits**

**Vol. 34, No. 17
August 28, 2023**

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Guidelines Sentencing, Generally

11th Circuit says *Apprendi* does not apply to claim that district court misread jury verdicts. (120)(750) In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that any fact that increases the maximum penalty for a crime must be admitted by the defendant or found by the jury, not by the judge at sentencing. In this case, RICO defendants argued that the district court misread the verdict form when it concluded that the jury's findings supported their enhanced sentences. The Eleventh Circuit found that *Apprendi* does not apply to the question of whether the district court properly interpreted the jury verdicts. *U.S. v. Caldwell*, __ F.4th __ (11th Cir. Aug. 16, 2023) No. 19-15024.

6th Circuit finds court did not double count tax loss to both HUD and IRS. (125)(370) Defendant was convicted of tax offenses, among others. He argued that the district court at sentencing had double counted his tax loss to both HUD and the IRS. The Sixth Circuit found that defendant had harmed two different victims, and no double counting occurred. In any event, the court found any error was harmless because defendant's sentence was based on a higher guideline offense level. *U.S. v. Johnson*, __ F.4th __ (6th Cir. Aug. 18, 2023) No. 21-3979.

Application Principles, Generally (Ch. 1)

4th Circuit says First Step Act's change in "stacking" gun counts required compassionate reduction. (150)(330) Defendant was serving a sentence for drug trafficking and two counts of possessing a gun in relation to a crime of violence under 18 U.S.C. § 924(c) when he filed a compassionate release motion under 18 U.S.C. § 3582(c)(1). He pointed out that if he were sentenced today, his mandatory minimum sentence under § 924(c) would be only ten years, not the 30 years he received before the First Step Act. The district court denied the motion. In a 2-1 opinion, the Fourth Circuit reversed, holding that the twenty-year difference in the mandatory minimum created a disparity that constituted an "extraordinary and compelling reason" to reduce his sentence.

The case was remanded with instructions to reduce defendant's 57-year sentence by 20 years. Judge Quattlebaum dissented. *U.S. v. Brown*, __ F.4th __ (4th Cir. Aug. 16, 2023) No. 21-7752.

5th Circuit reverses summary denial of compassionate release motion for failure to state reasons. (150) Defendant was serving a sentence for fraud when he filed a motion for compassionate release. The district court summarily denied the motion without waiting for a response from the government. The Fifth Circuit reversed even though it found "strong" reasons for denying the motion, and noted that the same district judge had presided over defendant's trial. But the district court's summary denial provided insufficient information for appellate review. *U.S. v. Stanford*, __ F.4th __ (5th Cir. Aug. 17, 2023) No. 22-20388.

6th Circuit affirms applying new enhancement on remand. (197) On remand for resentencing, the district court applied an enhancement that had not been applied at the original sentencing. Defendants argued that this was beyond the scope of the limited remand from the Sixth Circuit. On appeal, the Sixth Circuit found that its remand was not limited, and neither the law of the case nor forfeiture doctrine required a limited remand. *U.S. v. Pembroke*, __ F.4th __ (6th Cir. Aug. 21, 2023) No. 21-1503.

8th Circuit reverses gun count based on attempted Hobbs Act robbery and remands for full resentencing. (197)(330) Defendant was convicted under 18 U.S.C. § 924(c) of possessing a firearm in relation to a crime of violence—attempted Hobbs Act robbery. In *U.S. v. Taylor*, 142 S.Ct. 2015 (2022), the Supreme Court held that attempted Hobbs Act robbery is *not* a crime of violence. Accordingly, the Eighth Circuit vacated defendant's firearms conviction. Relying on the "sentence package" doctrine, the panel advised that on remand the district court was free to resentence on the Hobbs Act count to account for the reversed firearms conviction. *U.S. v. Dennis*, __ F.4th __ (8th Cir. Aug. 24, 2023) No. 22-1759.

Offense Conduct, Generally (Ch. 2)

6th Circuit finds any error in calculating fraud loss was harmless. (219)(850) Defendant was convicted of fraud. At sentencing, the district court calculated actual loss. Defendant challenged the court's finding, but his calculation would not have moved him to the next lowest loss category, so any error was harmless. *U.S. v. Johnson*, __ F.4th __ (6th Cir. Aug. 18, 2023) No. 21-3979.

6th Circuit finds sufficient evidence of fraud loss. (219) Defendant was convicted of fraud. At sentencing, the district court included in loss, money that defendant had received from a federal source that he used to pay employee costs and two checks that he used for his own purposes. The Sixth Circuit found that the district court had sufficient evidence to support these two additions and affirmed. *U.S. v. Johnson*, __ F.4th __ (6th Cir. Aug. 18, 2023) No. 21-3979.

6th Circuit finds charitable gift was actually a loan. (219) Defendant was convicted of fraud. At sentencing, the district court included in loss, an amount that defendant said he had given as a charitable donation to an entity. Defendant argued that he should receive an offset for that amount. The Sixth Circuit rejected the argument, affirming the district court's finding that the money was actually a loan. *U.S. v. Johnson*, __ F.4th __ (6th Cir. Aug. 18, 2023) No. 21-3979.

6th Circuit affirms bank fraud losses caused by all conspirators. (219) Defendants and others participated in a bank fraud scheme. At sentencing, the district court calculated loss using the amount obtained by all the conspirators. The Sixth Circuit upheld the loss amount, finding that even though other conspirators had defrauded

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Editors:

- Roger W. Haines, Jr.
- J. Douglas Wilson
Publication Manager
- Nancy Russell

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Customer-service@jamespublishing.com
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other banks, the coconspirators knew each other, and used the same scheme and modus operandi. *U.S. v. Smith*, __ F.4th __ (6th Cir. Aug. 23, 2023) No. 22-1506.

6th Circuit includes intended loss in bank fraud scheme. (219) Defendant participated in a bank fraud scheme. At sentencing, the district court used intended loss as the measure of the loss defendant caused. The Sixth Circuit noted some ambiguity in § 2B1.1 but concluded that the guideline includes intended loss. *U.S. v. Smith*, __ F.4th __ (6th Cir. Aug. 23, 2023) No. 22-1506.

8th Circuit rejects reduction for incomplete attempted Hobbs Act robbery. (224) Defendant was convicted of attempted Hobbs Act robbery, after the crime was interrupted by law enforcement. Defendant sought a three-level reduction under § 2X1.1(b)(1) for an incomplete crime. The Eighth Circuit rejected the reduction because defendant had repeatedly surveilled the house he was planning to rob, had a disguise, and scripted his false entry. *U.S. v. Dennis*, __ F.4th __ (8th Cir. Aug. 24, 2023) No. 22-1759.

1st Circuit affirms within-guidelines drug sentence despite claims of cooperation and disparity. (240)(742) Defendant pleaded guilty to drug trafficking and was sentenced to 262 months—the low end of the guidelines range. Defendant argued that the district court failed to consider his cooperation with the government and that his sentence was disparate compared to two codefendants who went to trial. The First Circuit found that the district court was aware of defendant’s cooperation because the parties argued it extensively, and defendant was the leader of the conspiracy while his codefendants were “mere participants.” *U.S. v. Coplin-Benjamin*, __ F.4th __ (1st Cir. Aug. 21, 2023) No. 21-1737.

3d Circuit reverses unreasonable estimate of illegally prescribed drugs. (240) Defendant, a doctor, was convicted of unlawfully dispensing drugs. At sentencing, the district court found that some of the prescriptions were lawful, but relied on trial evidence and the government’s medical expert to extrapolate the number of illegal prescriptions. The Third Circuit reversed, ruling that the district court’s extrapolation was not supported by the evidence. *U.S. v. Titus*, __ F.4th __ (3d Cir. Aug. 22, 2023) No. 22-1516.

8th Circuit reverses increases for intimidation and threats in drug case for insufficient evidence. (240) Defendant was convicted of drug trafficking. At sentencing,

the district court added two levels for witness intimidation under § 2D1.1(b)(16)(D) plus two levels for making a credible threat of violence under § 2D1.1(b)(2). The Eighth Circuit found that once defendant objected to these increases, the government was required to prove them, and the government had failed to call any witnesses at sentencing. *U.S. v. Campos*, __ F.4th __ (8th Cir. Aug. 15, 2023) No. 21-3524.

6th Circuit reverses where court ceded its authority over crack sentencing to Congress. (250) Defendant was convicted of crack cocaine offenses. At sentencing, the district court stated that it had discretion over defendant’s sentence and that it had no dispute with the sentencing ratio of crack to powder cocaine. However, it also repeatedly said that Congress, not the courts, should determine sentencing for crack and powder cocaine. The Sixth Circuit reversed, ruling that the district court impermissibly ceded its discretion to Congress to determine the proper sentence. Moreover, the district court only tersely mentioned the 18 U.S.C. § 3553(a) factors, and did not discuss defendant’s personal history or characteristics. *U.S. v. Thomas-Mathews*, __ F.4th __ (6th Cir. Aug. 25, 2023) No. 21-1824.

11th Circuit affirms sentence that was based primarily on protection of public. (290) Defendant was an Atlanta gang member convicted of RICO. He argued that his sentence of life plus ten years was substantively unreasonable because it was based on only one factor, the protection of the public, and because it was longer than any other codefendant. The Eleventh Circuit found no error in assigning one factor predominant weight, and defendant was the only person in the gang who committed murder. *U.S. v. Caldwell*, __ F.4th __ (11th Cir. Aug. 16, 2023) No. 19-15024.

6th Circuit reverses cross-reference from witness tampering to guideline for human trafficking. (310) Defendant pleaded guilty to witness tampering, in violation of 18 U.S.C. § 1512(b). At sentencing, the court relied on the cross-reference in §2J1.2(c) to sentence defendant under the human trafficking guideline, § 2G1.1(a), because he had originally been charged with that offense. The Sixth Circuit reversed, finding that § 2G1.1(a) requires a conviction under 18 U.S.C. § 1591, and the factual basis for defendant’s guilty plea did not support the cross-reference. *U.S. v. Pennington*, __ F.4th __ (6th Cir. Aug. 21, 2023) No. 22-5181.

1st Circuit reverses increase for “trafficking” in firearms. (330) Defendant was convicted of dealing in fire-

arms without a license. At sentencing, the district court added four levels under § 2K2.1(b)(5) for engaging in the “trafficking” of firearms. On appeal, the First Circuit reversed, ruling that the commentary to the guideline indicates that the enhancement is aimed at defendants who engage in bulk gun transfers, i.e., providing multiple firearms to at least one buyer. Defendant did not do that here. *U.S. v. Daniells*, __ F.4th __ (1st Cir. Aug. 22, 2023) No. 19-2188.

1st Circuit affirms upward variance despite claim that court weighed factors inappropriately. (330)(741) At defendant’s sentencing for firearms offenses, the guidelines range was 33-41 months but the district court varied upward to 72 months. Defendant argued that the district court failed to base the sentence on the factors in 18 U.S.C. § 3553(a). The First Circuit found that the district court *did* rely on the § 3553(a) factors in explaining its variance. Defendant simply wanted the factors weighed differently. *U.S. v. Sylvestre*, __ F.4th __ (1st Cir. Aug. 15, 2023) No. 22-1057.

1st Circuit says Massachusetts assault with a dangerous weapon remains a “crime of violence.” (330) Defendant was convicted of firearms offenses. Guideline § 2K2.1, sets a higher offense level if defendant has two prior convictions for a “crime of violence.” Defendant had a prior conviction for assault with a dangerous weapon under Massachusetts Gen. Laws ch. 265 § 15B(b). The First Circuit held that neither *Borden v. U.S.*, 141 S.Ct. 1817 (2021), nor *U.S. v. Taylor*, 142 S.Ct. 2015 (2022), undermined prior First Circuit precedent holding that Massachusetts assault with a dangerous weapon is a “crime of violence.” *U.S. v. Williams*, __ F.4th __ (1st Cir. Aug. 22, 2023) No. 21-1493.

1st Circuit finds Maine robbery with a dangerous weapon is a “crime of violence.” (330) Defendant was convicted of being a felon in possession of a firearm. The guideline for that offense, § 2K2.1, sets a higher offense level if defendant has a prior conviction for a “crime of violence.” Defendant had a prior conviction for robbery with a dangerous weapon under Maine Rev. Stat. Ann. tit. 17-A, §§ 651(1)(B) and 1254(4). The First Circuit found that the Maine offense is a “crime of violence.” *U.S. v. Williams*, __ F.4th __ (1st Cir. Aug. 22, 2023) No. 21-1493.

3d Circuit says Pennsylvania robbery is “crime of violence.” (330) Defendant pleaded guilty to being a felon in possession of a firearm. The guideline for that offense, § 2K1.1(a)(4), enhances defendant’s offense level if de-

fendant has a prior conviction for a “crime of violence.” Defendant had a prior conviction for robbery under Pennsylvania Cons. Stat. § 3701(a)(1)(ii). The Third Circuit found that the Pennsylvania robbery statute defined a “crime of violence.” *U.S. v. Henderson*, __ F.4th __ (3d Cir. Aug. 15, 2023) No. 22-2613.

4th Circuit reverses increase for possessing gun in connection with cocaine found on defendant. (330) Defendant pled guilty to being a felon in possession of a firearm. At sentencing, the district court added four levels under § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony offense, i.e., possession of cocaine that was found on defendant’s person when he was stopped. The Fourth Circuit reversed because the district court made no findings about how the firearm facilitated the possession of cocaine. The gun’s facilitation of the felony offense was not obvious from the record. *U.S. v. Mitchell*, __ F.4th __ (4th Cir. Aug. 17, 2023) No. 22-4284.

6th Circuit finds VICAR conspiracy is not a “crime of violence,” but aiding VICAR assault is. (330) Defendants were convicted of conspiracy under the Violent Crimes in Aid of Racketeering Act, 18 U.S.C. § 1959 (VICAR), as well as VICAR aiding and abetting an assault, and carrying a firearm in relation to a “crime of violence.” A “crime of violence” includes an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. The Sixth Circuit found that VICAR conspiracy is *not* a “crime of violence,” but VICAR aiding and abetting an assault *is* a “crime of violence.” *Nicholson v. U.S.*, __ F.4th __ (6th Cir. Aug. 16, 2023) No. 21-1768.

8th Circuit rejects claim that firearms were possessed for a sporting purpose. (330) Defendant was convicted of being a felon in possession of a firearm. The guideline for that offense, § 2K2.1(b)(2), contains a sporting purposes exception. Ten firearms were recovered from defendant’s vehicle, including one that fit the definition of a semiautomatic firearm capable of accepting a large-capacity magazine. The Eighth Circuit affirmed the district courts finding that defendant was not eligible for the sporting purposes exemption. *U.S. v. Triana*, __ F.4th __ (8th Cir. Aug. 15, 2023) No. 22-1453.

8th Circuit finds that defendant possessed firearms in connection with child abuse. (330) Defendant pleaded guilty to being a felon in possession of a firearm. At sentencing, the district court added four levels under § 2K2.1(b)(6)(B) for possessing the firearm in connection

with another felony offense—felony child abuse under state law. The Eighth Circuit affirmed, ruling that although defendant had not been convicted of child abuse under state law, his actions constituted child abuse: the children were four and seven years old, were found without shoes or car seats in a vehicle, and had access to marijuana and firearms. *U.S. v. Triana*, __ F.4th __ (8th Cir. Aug. 15, 2023) No. 22-1453.

9th Circuit says aiding and abetting and completed Hobbs Act robbery are “crimes of violence.” (330) (520) Defendant pleaded guilty to Hobbs Act robbery and to aiding and abetting Hobbs Act robbery, as well as carrying a firearm in relation to a “crime of violence,” in violation of 18 U.S.C. § 924(c). Defendant argued that his convictions were not crimes of violence, citing *U.S. v. Taylor*, 142 S.Ct. 2015 (2022), which held that attempted Hobbs Act robbery was *not* a “crime of violence.” The Ninth Circuit reaffirmed earlier precedent distinguishing *Taylor*, and ruling that both aiding and abetting and completed Hobbs Act robbery still qualify as “crimes of violence” for purposes of 18 U.S.C. § 924(c). *U.S. v. Eckford*, __ F.4th __ (9th Cir. Aug. 15, 2023) No. 17-50167.

11th Circuit affirms increase for using gun to commit other felony offense. (330) Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court added four levels for possessing a firearm in connection with another felony offense, i.e. shooting a man who came to his house. Defendant argued that the shooting was justified because he was defending his girlfriend. The district court found that the jury had rejected that defense, and the Eleventh Circuit affirmed the enhancement. *U.S. v. Moore*, __ F.4th __ (11th Cir. Aug. 11, 2023) No. 21-12291.

6th Circuit affirms sophisticated means enhancement for tax offenses. (370) Defendant was convicted of tax offenses. At sentencing, the district court found that he used “sophisticated means” under § 2T1.1(b)(2), based on “serial name changing” and “pyramiding” of real estate companies. The Sixth Circuit affirmed, rejecting defendant’s argument that he never hid his ownership interest in the relevant companies. *U.S. v. Chappelle*, __ F.4th __ (6th Cir. Aug. 15, 2023) No. 22-1969.

Adjustments, Generally (Ch. 3)

4th Circuit affirms increase for knowingly assaulting police officer. (410) Defendant pleaded guilty to being a felon in possession of a firearm. Police officers encountered defendant at a stop sign, passed out. When they

woke him, he punched an officer in the face twice. At sentencing, the district court added six levels under § 3A1.2(c)(1) for knowingly assaulting a police officer and creating a substantial risk of injury. The Fourth Circuit affirmed, finding that defendant knowingly assaulted the officer. *U.S. v. Mitchell*, __ F.4th __ (4th Cir. Aug. 17, 2023) No. 22-4284.

1st Circuit upholds four level “leader” increase even though there was another drug leader. (431) Defendant pleaded guilty to drug trafficking. At sentencing, the district court added four levels under § 3B1.1(a) for being the leader or organizer of criminal activity that involved five or more people. Defendant argued that the increase should have been only three levels, because he was only a supervisor of criminal activity and there was another leader of the criminal activity. The First Circuit found that the presence of another leader did not detract from defendant’s leadership role, and affirmed. *U.S. v. Coplin-Benjamin*, __ F.4th __ (1st Cir. Aug. 21, 2023) No. 21-1737.

6th Circuit finds defendant was leader of fraud and tax conspiracy involving five participants. (431) Defendant was convicted of fraud and tax offenses. At sentencing, the court added four levels under § 3B1.1(a) for being the leader of a criminal conspiracy that involved five people. Defendant argued that only four people were involved. The Sixth Circuit found “considerable evidence” that the fifth person was involved in signing of false time sheets for hours that he did not work. *U.S. v. Johnson*, __ F.4th __ (6th Cir. Aug. 18, 2023) No. 21-3979.

1st Circuit denies minor role for defendant who claimed she was only a “smokescreen” for drug conspiracy. (443) Defendant was convicted of drug trafficking. At sentencing, the district court denied her a reduction for minor role under § 3B1.2, despite her claim that she was only a “smokescreen” for the drug conspiracy. The court found that she met with the leader of the drug conspiracy, packaged some of the drugs, and received payment for participating in the conspiracy. The First Circuit affirmed the denial of the minor role reduction, finding that defendant was in the middle of the range of culpability for the offense. *U.S. v. Andino-Rodríguez*, __ F.4th __ (1st Cir. Aug. 21, 2023) No. 20-2129.

6th Circuit finds City Councilman’s executive assistant abused position of trust. (450) Defendant was convicted of fraud. He was the executive assistant to a City Councilman, and at sentencing, the district court added

two levels under § 3B1.3 for abuse of a position of trust. The Sixth Circuit affirmed, noting that defendant had a “high degree of trust,” with broad discretion to authorize payments to family members and friends and discretion to make loans to a fraudulent entity. *U.S. v. Johnson*, ___ F.4th ___ (6th Cir. Aug. 18, 2023) No. 21-3979.

6th Circuit upholds increase for use of a minor even if minors are not complicit. (455) Defendant was convicted of fraud. Defendant insisted that his minor children be kept on the payroll of the entity that he used to defraud the government. At sentencing, the district court enhanced his offense level under § 3B1.4 for use of a minor in committing the offense. The Sixth Circuit affirmed, holding that the enhancement applies regardless of whether the minors are complicit in the crime. *U.S. v. Johnson*, ___ F.4th ___ (6th Cir. Aug. 18, 2023) No. 21-3979.

8th Circuit denies acceptance credit where defendant pled guilty right before trial. (488) Defendant pleaded guilty to being a felon in possession of a firearm the day before trial, and later tried to withdraw his plea. At sentencing, the district court denied a reduction for acceptance of responsibility under § 3E1.1, citing these factors and that defendant showed no remorse. The Eighth Circuit affirmed, finding no error. *U.S. v. Triana*, ___ F.4th ___ (8th Cir. Aug. 15, 2023) No. 22-1453.

11th Circuit rejects acceptance adjustment where defendant only admitted gun after trial. (488) Defendant went to trial on charges of being a felon in possession of a firearm and was convicted. He argued that he was entitled to a reduction for acceptance of responsibility under § 3E1.1 because he admitted that he had the gun. The Eleventh Circuit noted that defendant did not admit that he had the gun until after trial, and affirmed the district court’s finding that he had not accepted responsibility. *U.S. v. Moore*, ___ F.4th ___ (11th Cir. Aug. 11, 2023) No. 21-12291.

Criminal History, Generally (§4A1.1)

9th Circuit says defendant cannot collaterally attack prior convictions counted in criminal history. (504) Defendant pleaded guilty to being a felon in possession of a firearm. He argued that the district court should not have counted his prior federal convictions in calculating his criminal history because neither he nor the district court understood the convictions. The Ninth Circuit found no error, ruling that the guidelines do not give a defendant the right to collaterally attack his prior convictions

during sentencing. *U.S. v. Sadler*, ___ F.4th ___ (9th Cir. Aug. 15, 2023) No. 21-30277.

8th Circuit says Texas offering to sell drugs is *not* a “controlled substance offense.” (520) Defendant pleaded guilty to drug trafficking. At sentencing, the district court found that defendant was a career offender under § 4B1.2 because he had a prior conviction for a “controlled substance offense,” i.e., manufacturing or delivering a controlled substance in violation of Texas Health & Safety Code § 481.112(a). On appeal, the Eighth Circuit reversed, holding that the Texas statute is *not* categorically a “controlled substance offense” because it includes offering to sell, which can be committed without having the intent to distribute or dispense drugs. *U.S. v. Campos*, ___ F.4th ___ (8th Cir. Aug. 15, 2023) No. 21-3524.

5th Circuit reverses finding that prior offenses were committed on occasions different from one another. (540) Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a defendant convicted of being a felon in possession of a firearm is subject to a 15-year minimum mandatory sentence if he has prior convictions for “violent felonies” committed on occasions different from one another. Here, defendant had multiple prior burglary convictions, and he argued that under *Wooden v. U.S.*, 142 S.Ct. 1063 (2022), the district court erred in finding that they were committed on different occasions. The Fifth Circuit reversed, finding plain error because the documents on which the district court relied did not show that defendant’s prior offenses occurred on different days. The district court erred in relying on the presentence report. *U.S. v. Alkheqani*, ___ F.4th ___ (5th Cir. Aug. 17, 2023) No. 21-10966.

5th Circuit finds Texas robbery by threat remains a “violent felony.” (540) Defendant pleaded guilty to being a felon in possession of a firearm. The Armed Career Criminal Act requires a 15-year minimum mandatory sentence if the defendant has three prior convictions for a “violent felony.” Defendant had a prior conviction for robbery by threat under Texas Penal Code § 29.02(a), which prior precedent held was a “violent felony. Defendant argued that this was undermined by *U.S. v. Taylor*, 142 S.Ct. 2015 (2022) which held that attempted Hobbs Act robbery was not a “crime of violence” because it could be committed without the threat of force. The Fifth Circuit distinguished *Taylor* and held that the Texas statute remains a “violent felony.” *U.S. v. Powell*, ___ F.4th ___ (5th Cir. Aug. 15, 2023) No. 22-10544.

6th Circuit says Michigan delivery of cocaine is a “serious drug offense.” (540) Defendant was convicted of being a felon in possession of a firearm. Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a defendant convicted of that offense who has three prior convictions for a “serious drug offense” must receive a 15-year minimum mandatory sentence. Defendant had a prior conviction for possession with intent to deliver cocaine, in violation of Michigan Compiled Laws § 333.7401. The Sixth Circuit found that this was a “serious drug offense” because it matched federal law. The panel rejected defendant’s argument that the Michigan statute included more isomers of cocaine than federal law. *U.S. v. Wilkes*, __ F.4th __ (6th Cir. Aug. 11, 2023) No. 22-1436.

Determining the Sentence (Ch. 5)

D.C. Circuit says probation and incarceration cannot be imposed for the same petty offense. (560) Defendant committed a petty offense. The district court sentenced him to incarceration followed by probation. The D.C. Circuit reversed, holding that 18 U.S.C. § 3561(a) does not allow for probation and imprisonment for the same petty offense. *U.S. v. Little*, __ F.4th __ (D.C. Cir. Aug. 18, 2023) No. 22-3018.

9th Circuit says condition requiring substance abuse treatment was not undue delegation. (580) At sentencing after revocation of supervised release, the district court imposed a new condition requiring defendant to participate in an in-patient program for substance abuse for up to 365 days, under the “supervision” of Probation. Defendant argued that this improperly delegated judicial authority to Probation. The Ninth Circuit rejected the argument on the ground that the district court had directed defendant to participate in the program and limited it to no more than a year. *U.S. v. Taylor*, __ F.4th __ (9th Cir. Aug. 25, 2023) No. 22-10203.

9th Circuit says imposing special condition of release is not an upward departure. (580) After revoking defendant’s supervised release, the district court imposed a within-guidelines sentence, but added a special condition requiring defendant to participate in an in-patient drug treatment program. Defendant argued that this constituted an upward departure from the guidelines. The Ninth Circuit found that the guidelines do not limit special conditions of supervised release, so the imposition of a special condition is not an upward departure from the guidelines. *U.S. v. Taylor*, __ F.4th __ (9th Cir. Aug. 25, 2023) No. 22-10203.

5th Circuit upholds restitution for all child porn images, not just images in guilty plea. (610) Defendant’s cell phone contained images of child pornography, and he pleaded guilty to one count that contained four images. He was ordered to pay restitution to all victims, including victims for which he was not convicted. The Fifth Circuit found that the indictment included all the images that defendant possessed, and that restitution was not limited to the four images to which defendant pleaded guilty. *U.S. v. Bopp*, __ F.4th __ (5th Cir. Aug. 23, 2023) No. 22-10267.

6th Circuit upholds ordering defendant to pay restitution for all losses caused by conspiracy. (610) Defendant and others participated in a bank fraud. Defendant was ordered to pay restitution for all the losses caused by the conspiracy, not just the losses caused by defendant. The Sixth Circuit affirmed, holding that defendant could be ordered to pay restitution for all the losses caused by the conspiracy of which he was a member. *U.S. v. Smith*, __ F.4th __ (6th Cir. Aug. 23, 2023) No. 22-1506.

8th Circuit affirms restitution from “runner” for chiropractic companies that defrauded government. (610) Defendant was a solicitor for chiropractic companies in an insurance fraud scheme that defrauded the government. The district court ordered him to pay restitution and the Eighth Circuit affirmed. Defendant’s role as a “runner” for the chiropractic companies meant that he did not qualify for exceptions for voluntary contact by a patient with a chiropractor or contact resulting from a social encounter. *U.S. v. Hussein*, __ F.4th __ (8th Cir. Aug. 23, 2023) No. 22-1275.

11th Circuit affirms restitution for medically-unnecessary prescriptions. (610) Defendant was convicted of health care fraud for providing medically unnecessary prescriptions, and the district court ordered him to pay restitution. The Eleventh Circuit upheld the order, finding that the district court did not include any medically authorized prescriptions in the restitution order. *U.S. v. Gladden*, __ F.4th __ (11th Cir. Aug. 17, 2023) No. 21-11621.

5th Circuit affirms denial of credit for time served on related state offense. (650) Defendant was convicted of drug trafficking and being a felon in possession of a firearm. He argued that he should have received credit under § 5G1.3(b) for 13 months he spent in state prison for a related offense. The Fifth Circuit found that defendant had raised the issue in district court and

counsel did not have to raise it on appeal because there was no binding caselaw that supported it. *U.S. v. Massey*, __ F.4th __ (5th Cir. Aug. 16, 2023) No. 20-10478.

8th Circuit reverses for failure to explain denial of credit for time in state prison on related offense. (650)

At his sentencing for failing to register as a sex offender, defendant argued that the district court did not take into account under § 5G1.3(b) a term that he had served in another state for failure to register as a sex offender. The district court found the conduct in the other state was relevant conduct, but left it to the Bureau of Prisons to calculate any credit. The court reversed and remanded to allow the district court to clarify the sentence defendant received under § 5G1.3. *U.S. v. McKenzie*, __ F.4th __ (8th Cir. Aug. 17, 2023) No. 22-1954.

Sentencing Hearing (§6A)

7th Circuit says reference to defendant’s “participation in prison industries” did not violate *Tapia*. (750)

At sentencing, the district court said the sentence was intended to promote respect for the law and provide just punishment, but also to allow defendant to participate in prison industries. Defendant argued that the reference to prison industries showed that the court lengthened his sentence rehabilitate him, in violation of *Tapia v. U.S.*, 564 U.S. 319 (2011). The Seventh Circuit found no error, ruling that defendant must show that the district court focused exclusively or disproportionately on rehabilitation in deciding on the length of the sentence. There was no improper focus here. *U.S. v. Long*, __ F.4th __ (7th Cir. Aug. 22, 2023) No. 22-2275.

6th Circuit finds any proffer-protected information in the PSR was not plain error. (770)(850)

Defendant objected to the presentence report, claiming that it included proffer-protected information. The district court denied the objection and gave defendant the minimum mandatory sentence. On appeal, the Sixth Circuit found any error was harmless, because defendant made “little effort” to show that the information affected the sentence. *U.S. v. Wilkes*, __ F.4th __ (6th Cir. Aug. 11, 2023) No. 22-1436.

11th Circuit upholds district court’s finding that defendant was responsible for gang’s mayhem. (770)

Defendant was convicted of RICO, and other offenses. He argued that the district court erred in finding that he was the person most responsible for the murder and mayhem that his gang engaged in and that he was responsible for one murder. The Eleventh Circuit found that the district court had not erred because defendant

was “uniquely responsible” for the gang’s mayhem. *U.S. v. Caldwell*, __ F.4th __ (11th Cir. Aug. 16, 2023) No. 19-15024.

Violations of Probation and Supervised Release (Ch. 7)

9th Circuit bars collateral attack on underlying supervised release sentence at revocation hearing. (800)

Defendant repeatedly violated his supervised release conditions, and just as repeatedly was sentenced to incarceration and more supervised release. At defendant’s third revocation hearing, the district court denied defendant’s argument that his second term of supervised release was too long. On appeal, the Ninth Circuit held that a defendant is barred from collaterally attacking the underlying supervised release sentence at a hearing to revoke supervised release. *U.S. v. Estrada*, __ F.4th __ (9th Cir. Aug. 24, 2023) No. 23-50012.

Habeas Corpus/28 U.S.C. 2255 Motions

7th Circuit reverses because motion to amend “related back” to original § 2255 motion. (880)

Defendant filed a 28 U.S.C. § 2255 motion challenging his sentence, and later filed a motion to amend the § 2255 motion. The district court held that the motion to amend did not “relate back” to the § 2255 motion. The Seventh Circuit reversed, ruling that the government had adequate notice that the amendment challenged defendant’s sentence. *Coleman v. U.S.*, __ F.4th __ (7th Cir. Aug. 15, 2023) No. 22-1678.

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