Case Law Update

Johnson v. U.S., 135 S. Ct. 2551 (2015)

- The Armed Career Criminal Act's "residual clause" is unconstitutionally vague.

Impact of *Johnson* on Other "Residual Clauses"

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

EXAMPLE: ACCA
Definition for "Violent Felony"
18 USC § 924(e)(2)(B)

- ***....has as an element*** the use, attempted use, or threatened use of physical force against the person of another, or
- ***is*** burglary, arson, or extortion, involves use of explosives, or
- ***otherwise involves conduct*** that presents a serious potential risk of physical injury to another....

XXXXX

Johnson's Potential Impact

- **18 U.S.C. § 924(c)**
  - Crime of violence that is a felony and
    - (a) element of force… or
    - (b) that by its nature, involves a substantial risk that physical force against the person or property of anothermay be used in the course of committing the offense

§ 924(c) Is Not impacted by *Johnson*

- *U.S. v. Hill,* --F.3d--, 2016 WL 4191179 (2d Cir. 2016)
- *U.S. v. Taylor,* 814 F.3d 340 (6th Cir. 2016)
- *U.S. v. Prickett*, --F.3d--, 2016 WL 4010515 (8th Cir. 2016)

Johnson's Potential Impact

- **18 U.S.C. § 16(b)**
  - … any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§ 16(b) Is Unconstitutionally Vague

- *Shuti v. Lynch,* --F.3d--, 2016 WL 3632539 (6th Cir. 2016)
- *U.S. v. Vivas-Ceja,* 808 F.3d 719 (7th Cir. 2015)
- *Dimaya v. Lynch,* 803 F.3d 1110 (9th Cir. 2015)

§ 16(b) Is Not Impacted by *Johnson*

- *United States v. Gonzalez-Longoria,* --F.3d--, 2016 WL 4169127 (5th Cir. 2016)

Johnson Is Retroactive for ACCA Cases

Welch v. U.S., 136 S. Ct. 1257
(April 18, 2016)

- *Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review

- *Johnson* was decided on June 26, 2015

Career Offender Residual Clause

- Unconstitutionally vague in light of *Johnson*
  - *U.S. v. Hurlburt*, --F.3d--, 2016 WL 4506717 (7th Cir. 2016)
  - *U.S. v. Calabretta*, --F.3d--, 2016 WL 3997215 (3d Cir. 2016)
  - *U.S. v. Sheffield*, --F.3d--, 2016 WL 4254995 (D.C. Cir. 2016)
  - *U.S. v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)
  - *U.S. v. Pawlak*, 822 F.3d 902 (6th Cir. 2016)

- Not unconstitutionally vague in light of *Johnson*
  - *U.S. v. Matchett*, 802 F.3d 1185 (11th Cir. 2015)

Career Offender *Cert Granted*

- *U.S. v. Beckles v. U.S.*, 616 F. App'x 415 (11th Cir. 2015), *cert granted,* 136 S. Ct. 2510 (2016)
  - (1) Whether *Johnson v. United States* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(a)(2) (defining "crime of violence");
  - (2) whether *Johnson's* constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review; and
  - (3) whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*.

Mathis v. U.S, 136 S. Ct. 2243 (2016)

- "A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element."

Mathis v. U.S, 136 S. Ct. 2243 (2016)

- "Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction."

- "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, *see Richardson v. United States*, 526 U.S. 813 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty"

Mathis v. U.S, 136 S. Ct. 2243 (2016)

- "Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements. Richardson, 526 U.S., at 817) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. And ACCA, as we have always understood it, cares not a whit about them."

- This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question:

Mathis v. U.S., 136 S. Ct. 2243 (2016)

- "The elements/means distinction that the Court draws should not matter for sentencing purposes. I fear that the majority's contrary view will unnecessarily complicate federal sentencing law, often preventing courts from properly applying the sentencing statute that Congress enacted."
  - Justice Breyer and Ginsburg Dissent
- "Now the Court tells them they must decide whether entering or remaining in a building is an "element" of committing a crime or merely a "means" of doing so. I wish them good luck."
  - Justice Alito Dissent

Selected Violent Felony and Crime of Violence Cases and Categorical/Modified Approach Cases

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

Supreme Court Cases Discussing Categorical and Violent Force

- *Mathis v. U.S.*, 136 S. Ct. 2243 (2016)
- *Descamps v. U.S.*, 133 S. Ct. 2276 (2013)
- *Johnson v. U.S.*, 559 U.S. 133 (2010)
- *Nijhawan v. Holder*, 557 U.S. 29 (2009)
- *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007)

Violent Felony

- "The notion that robbery is not a "violent felony," as that term is defined in the Armed Career Criminal Act (ACCA), strikes me as counterintuitive to say the least. Holding that armed robbery doesn't qualify as a violent felony seems even more absurd. But, as the court's opinion persuasively explains, that conclusion is compelled by two oddities of Massachusetts law."

  - *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016)(concurrence by Judge Watford)

Robbery

- *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016)
  - MA Armed Robbery is not a VF
  - "We agree with Parnell that the force required by the actual force prong of robbery under Massachusetts law does not satisfy the requirement of physical force under § 924(e)(2)(B)(i)—"force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140 Because the "degree of force is immaterial," *Jones*, 283 N.E.2d at 843 accord *Commonwealth v. Joyner*, 467 Mass. 176, 4 N.E.3d 282, 293 (2014), any force, however slight, will satisfy this prong so long as the victim is aware of it. Such force is insufficient under *Johnson*."

Robbery Offense Remands

- *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016)
  - MA armed bank robbery not a VF

- *U.S. v. Gardner,* 823 F.3d 793 (4th Cir. 2016)
  - NC common law robbery not a VF

- *U.S. v. Jones,* --F.3d--, 2016 WL 3923838
  - NY first degree robbery is not categorically a COV at §4B1.2

Robbery Offense Remands

- *U.S. v. Eason,* --F.3d--, 2016 WL 3769477 (8th Cir. 2016)
  - AR robbery is not a VF ("degree of physical force required to commit robbery in Arkansas did not rise to level of physical force required to establish a crime of violence for Armed Career Criminal Act (ACCA) purposes.")

- *U.S. v. Dixon*, 805 F.3d 1193 (9th Cir. 2015)
  - CA robbery is not a VF and is not divisible

Robbery Offense Remand

- *U.S. v. Sheffield,* --F.3d--, 2016 WL 4254995 (D.C. Cir. 2016)
  - DC attempted robbery statute is not divisible and does not qualify as a crime of violence as a categorical matter

  - D.C. law requires a jury to find beyond a reasonable doubt only that the defendant committed an act in furtherance of and with the specific intent to commit generic robbery, not any specific type of robbery (whether violent or stealthy)

Robbery is a Violent Felony

- *U.S. v. Duncan,* --F.3d--, 2016 WL 4254936 (D.C. Cir. 2016)
  - IN robbery is a violent felony under the elements section at ACCA

  - "A person can commit robbery under Indiana Code § 35-42-5-1 by taking property by "putting any person in fear." The statute itself does not tell us what the person must fear. Indiana case law teaches that the answer is fear of bodily injury."

Robbery is a Crime of Violence

- *U.S. v. McBride,* --F.3d--, 2016 WL 3209496 (6th Cir. 2016)
  - In this case, 18 U.S.C. § 2113(a) was a crime of violence at §4B1.2 as even robbery by intimidation involves a threat to do immediate bodily harm.

  - "Section 2113(a) seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it (e.g., such as mortgage fraud) on the other."

Hobbs Act Robbery and § 3559

- *U.S. v. House*, --F.3d--, 2016 WL 3144735 (8th Cir. 2016)
  - "Robbery is defined in the Hobbs Act as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). The district court thus did not err by ruling that House's robbery conviction was a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F)(ii).

Robbery and 924(c)

- *U.S. v. Hill,* --F.3d--, 2016 WL 4120667 (2d Cir. 2016)
  - Hobbs Act robbery is a crime of violence for purposes of 924(c)
  - These hypotheticals are insufficient because a defendant is required to "point to his own case or other cases in which the ... courts in fact did apply the statute" in such a manner to show that there is a "realistic probability" that the Hobbs Act would reach the conduct Hill describes.

Second Degree Murder

- *U.S. v. Hernandez-Montes,* --F.3d--, 2016 WL 3996698 (5th Cir. 2016)
  - FL attempted second-degree murder was not a crime of violence at §2L1.2 as the offense does not require proof of the specific intent to commit the underlying act

Involuntary Murder

- *U.S. v. Benally*, --F.3d--, 2016 WL 4073316 (9th Cir. 2016)
  - Involuntary Manslaughter (18 U.S.C. § 1112) is not a COV under § 924(c) as § 1112 requires a mental state of gross negligence
  - "After *Leocal*, a crime of violence requires a mental state higher than recklessness—it requires intentional conduct."

Kidnapping

- *U.S. v. Martinez-Romero,* 817 F.3d 917 (5th Cir. 2016)
  - FL kidnapping does not meet the generic definition of kidnapping because it does not meet the statute only contains two of the four requirements of the generic definition of kidnapping (offense could be committed secretly abducting the victim)
  - FL kidnapping is not a crime of violence under force section because it can be violated without use of force

Assault and Battery

- *U.S. v. Jordan,* 812 F.3d 1183 (8th Cir. 2016)
  - AR aggravated assault (a)(1) not a VF
- *U.S. v. Werle*, 815 F.3d 614 (9th Cir. 2016)
  - WA riot statute not a VF
- *U.S. v. Braun*, 801 F.3d 1301 (11th Cir. 2015)
  - FL aggravated battery of a pregnant woman not VF
  - FL battery on law enforcement officer not VF
- *U.S. v. Garcia-Longoria,* 819 F.3d 1063 (8th Cir. 2016)
  - NE assaulting police officer a crime of violence at §2K2.1

Assault and Battery

- *U.S. v. Rafidi,* --F.3d--, 2016 WL 3670273 (6th Cir. 2016)
  - A violation of 18 U.S.C. § 111(b)(uses a deadly weapon or inflicts bodily injury) is a crime of violence under § 924(c)

- *U.S. v. Lee,* 821 F.3d 1124 (9th Cir. 2016)
  - CA battery against a custodial officer not a COV at §4B1.2
  - CA resisting an executive officer not a COV at §4B1.2

- *U.S. v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015)
  - NJ aggravated assault not a COV at §2L1.2

Assault and Battery

- *U.S. v. Fields,* 823 F.3d 20 (1st Cir. 2016)
  - Massachusetts assault with a deadly weapon is a crime of violence under §4B1.2. The offense has an element of force capable of causing physical pain (See also, U.S. v. Hudson, 823 F.3d 11 (1st Cir. 2016) (same offense is violent felony under ACCA)).
- *U.S. v. Scott,* 818 F.3d 424 (8th Cir. 2016)
  - Missouri 2nd degree assault (MO 565.073.1(1)) is a crime of violence under force section of

Sexual Abuse of A Minor

- *U.S. v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)
  - TX aggr. sexual assault under 14 not a COV at §4B1.2

- *U.S. v. Puga-Yanez,* --F.3d--, 2016 WL 3708243 (5th Cir. 2016)
  - Georgia child molestation qualified as enumerated offense of "sexual abuse of a minor" and, thus, was "crime of violence" under §2L1.2

Drug Trafficking Offenses

- *U.S. v. Hinkle,* --F.3d--, 2016 WL 4254936 (5th Cir. 2016)
  - TX delivery of heroin did not qualify as a controlled substance offense under §4B1.2 as the statute contains means and not elements.

  - "Though our court had held, prior to Descamps and Mathis, that sentencing courts could reference record documents to determine the method of delivery under section 481.002(8) on which a defendant's conviction was based, Mathis makes clear that sentencing courts may no longer do so."

Drug Trafficking Offenses

- *U.S. v. Hinkle,* --F.3d--, 2016 WL 4254936 (5th Cir. 2016)
  - The "delivery" element of Hinkle's crime of conviction criminalizes a "greater swath of conduct than the elements of the relevant [Guidelines] offense." This "mismatch of elements" means that Hinkle's conviction for the knowing delivery of heroin is not a controlled substance offense under the Guidelines. That prior conviction cannot serve as a predicate offense under the Career Offender Guideline provision, which is § 4B1.1.

Drug Trafficking Offenses

- *U.S. v. Villanueva,* 821 F.3d 1226 (10th Cir. 2016)
  - OK distribution of marijuana is a serious drug offense at ACCA as it carries a maximum term of imprisonment of ten years or more
  - Court rejected the defendant's argument that because marijuana is legal in Colorado and Washington for recreational and personal use, and legal for medicinal purpose in 20 states and D.C. it should not be a serious drug offense under the ACCA

Drug Trafficking Offense

- *U.S. v. Dominguez-Rodriguez,* 817 F.3d 1190 (10th Cir. 2016)
  - 21 U.S.C. § 841 is categorically a drug trafficking offense for purposes of §2L1.2.

Plain Error and Harmless Error

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016)

- Where there is an unpreserved error in calculating a Sentencing Guidelines range, a defendant is not required to provide additional evidence to show the error affected his or her substantial rights, and here, defendant was not required to provide additional evidence.

- "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that "improperly calculat[es]" a defendant's Guidelines range, for example, has committed a "significant procedural error."

Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016)

- "The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range... And that explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines. The Government remains free to "poin[t] to parts of the record"—including relevant statements by the judge—"to counter any ostensible showing of prejudice the defendant may make."

Alternative Sentences

- *U.S. v. Hentges,* 817 F.3d 1067 (8th Cir. 2016)
  - "We find it unnecessary to address whether he qualifies as a career offender, because the district court's alternative decision to vary upward from the advisory guideline range is sufficient to justify the sentence imposed."

- *U.S. v. Davis*, --F.3d--, 2016 WL 3124838 (8th Cir. 2016)
  - "Since the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range is sufficient to show that the error affected Davis' substantial rights."

Alternative Sentences

- *U.S. v. Calabretta*, --F.3d--, 2016 WL 3997215 (3d Cir. 2016)
  - The record in this case does not "show ... that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range

- *U.S. v. Magee,* --F.3d--, 2016 WL 4376421 (1st Cir. 2016)
  - "Because the district court made clear that it would have sentenced Magee to 70 months regardless of Magee's criminal history category I, II, III, any error in the calculation of Magee's criminal history was harmless."

Prior Sex Offense Convictions

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

Lockhart v. U.S., 136 S. Ct. 958 (2016)

- The phrase "involving a minor or ward" in § 2252(b)(2) modifies only "abusive sexual conduct" and not "aggravated sexual abuse" or "sexual abuse."

- Section 2252(b)(2) "applies to prior state convictions for 'sexual abuse' and 'aggravated sexual abuse,' whether or not the convictions involved a minor or ward."
  - *U.S. v. Miller*, 819 F.3d 1314 (11th Cir. 2016) (*Lockhart* applies to 18 U.S.C. § 2251(e) (Production of child pornography

Prior Sex Offense Conviction

- *U.S. v. Bennett,* 823 F.3d 1316 (10th Cir. 2016)
  - Defendant's CO conviction for "sexual exploitation of a child if, for any purpose he knowingly… possesses or controls any sexually exploitative material for any purposes" is categorically qualifies as an offense related to possession of child pornography for purposes of the recidivist enhancement at 18 U.S.C. § 2252.
  - Tenth Circuit joins with the Sixth, Eighth, Ninth, and Eleventh Circuits in determining a broad reading of "relating to"

SORNA

- *U.S. v. Hill,* --F.3d--, 2016 WL 1720353 (8th Cir. 2016)
  - "Three other circuits have considered how courts should determine if a prior offense constitutes "conduct that by its nature is a sex offense against a minor" under SORNA, and all three have reached the same conclusion: Courts should employ a circumstance-specific approach. *See id*. at 708; *United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir.2010) (en banc); *United States v. Mi Kyung* Byun, 539 F.3d 982, 991–92 (9th Cir.2008). We agree because we think that the text and purposes of SORNA compel that conclusion."

  - SC indecent exposure was a sex offense against a minor

SORNA

- *U.S. v. Berry*, 814 F.3d 192 (4th Cir. 2016)
  - "As matter of apparent first impression in the Circuit, court must look to actual age of his victim, but otherwise employ "categorical" approach, when deciding whether sex offender's prior state law offense made him a tier III sex offender under SORNA"
  - Sex offender's prior conviction of New Jersey offense of endangering welfare of child, under statute that did not require as element any sexual contact, or attempted sexual contact, with child, did not make him a tier III offender under SORNA

Supervised Release Conditions

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

Common Reasons for Supervised Release Condition Remands

- Court did not provide notice regarding "special condition"
- Court did not make an INDIVIDUALIZED assessment of the condition
- Court did not make necessary findings for the condition
- Condition was vague
- Oral pronouncement of conditions different than written conditions
- Failure to Register Offenses with predicates and computers

Supervised Release Conditions

- *U.S. v. Martinez-Torres,* 795 F.3d 1233 (10th Cir. 2015)
  - "Court did not make an individualized assessment of whether it was appropriate for supervised release sex offender conditions and did not provide proper notice."
  - "When, however, neither the Sentencing Commission nor Congress has required or recommended a condition, we expect the sentencing court to provide a reasoned basis for applying the condition to the specific defendant before the court."

Special Conditions

- *U.S. v. Gall*, --F.3d--, 2016 WL 3854217 (1st Cir. 2016)
  - Condition prohibiting defendant from possessing adult pornography and from entering any location where such pornography is available was remanded because the court did not provide any explanation for imposing the special condition

Special Conditions

- *U.S. v. Fey*, --F.3d--, 2016 WL 4363131 (1st Cir. 2016)
  - The First Circuit vacated a supervised release condition restricting the defendant's contact with children only upon approval of the probation office. The defendant was convicted of failure to register as a sex offender based on a rape conviction 17 years prior, where the victim was 16 years old. The rape conviction was too broad as it applied to contact with all minor children. There was no evidence the defendant was a danger to young children.

Supervised Release Condition Remand: Minor Prohibition

- *U.S. v. LeCompte,* 800 F.3d 1209 (10th Cir. 2015)
  - Restriction on minor prohibition remanded because court did not explain how applying the minor prohibition condition to the conduct here would achieve the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation

Conditions Affirmed

- *U.S. v. Webster*, 819 F.3d 35 (1st Cir. 2016)
  - Supervised release conditions requiring sex offender treatment and use of a computer were reasonable for this defendant who was convicted of failure to register as a sex offender. While his prior sex offense conviction occurred in 2007, his refusal to accept responsibility for his prior sex offense, his lack of candor towards the court, and continued self-medication illustrate the need for the conditions

Supervised Release Conditions

- *U.S. v. Llantada,* 815 F.3d 679 (10th Cir. 2015)
  - Interpreting various conditions imposed on the defendant, the Court held that many of the terms were common words and were not vague because commonsense would guide probation officers and judges in interpreting them.
  - For instance, the condition to report being questioned by law enforcement would not include if a parking meter attendant asks defendant for the time.

Supervised Release Condition Affirmed: Contact with Minors

- *U.S. v. Woodall*, 782 F.3d 383 (8th Cir. 2015)
  - Condition prohibiting contact with minors without probation officer approval affirmed based on his past sexual offenses (including abusing his 15 year old stepsister) and that he has never completed a sex-offender treatment program

Supervised Release Condition Remand: Sex Offender Treatment

- *U.S. v. Von Behren*, --F.3d--, 2016 WL 2641270 (10th Cir. 2016)
  - Condition of supervised release that required participation in sex offender treatment, which included a mandatory polygraph, violated the defendant's right against self-incrimination because the questions required the defendant to admit to illegal sexual contact with minors and failure to participate in the polygraph would lead to revocation of his supervised release

Supervised Release Condition Remand: Length of Term

- *U.S. v. Duke,* 788 F.3d 392 (5th Cir. 2015)
  - Condition prohibiting accessing computer for rest of his life was unreasonable
  - Lifetime ban on association with minors for life was overbroad

Supervised Release Conditions

- *U.S. v. Winding,* 817 F.3d 910 (5th Cir. 2016)
  - Supervised release for life was reasonable as court found that defendant sexually assaulted women in military and his own daughter at knifepoint. Based on this evidence, court found that defendant was a sexual predator with pedophilic tendencies.
  - "Further, we do not require expert evidence to support a determination that a defendant has a sexual interest in children that justifies a life term of supervised release"

Supervised Release Condition Remand: Software Installation

- *U.S. v. Ferndandez*, 776 F.3d 344 (5th Cir. 2015)
  - Supervised release condition requiring software installation improper because it was not related to defendant's Failure to Register conviction when his only prior sex offense conviction was for sexual assault of 14 year old which did not involve a computer

Supervised Release Condition Remand: Viewing Pornography

- *U.S. v. Medina,* 779 F.3d 55 (1st Cir. 2015)
  - "Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here… fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. There may well be a reason to impose a pornography ban in this case. But if so, the District Court has not yet provided it."

Supervised Release Condition Remand: Computer Monitoring and Computer Activities

- *U.S. v. Dunn*, 777 F.3d 1171 (10th Cir. 2015)
  - Condition requiring a defendant convicted of possessing child pornography to submit to computer monitoring and obtain permission to engage in other computer-related activities was plain error because the district court failed to make necessary findings to impose such a harsh restriction that materially affected the defendant's ability to obtain gainful employment

Supervised Release Condition Remand: Restriction on Alcohol

- *U.S. v. Brown*, 789 F.3d 932 (8th Cir. 2015)
  - Court abused its discretion in imposing condition of defendant's supervised release prohibiting him from consuming alcohol and entering establishments that derived their primary source of income from alcohol sales as the record evidence of defendant's drug use did not support condition.

  - *See also U.S. v. Woodall*, 782 F.3d 383 (8th Cir. 2015) and *U.S. v. Bell*, 770 F.3d 1253 (9th Cir. 2014)

Supervised Release Condition Remand: Computer Ban and Residency Restriction

- *U.S. v. LaCoste*, --F.3d--, 2016 WL 2754736 (9th Cir. 2016)
  - In a securities fraud case, a condition of supervised release that totally bans the defendant from using computer without the permission of the probation officer was too broad and a restriction that prevents the defendant from living in four specific counties was not supported by the facts in the case.

Supervised Release Condition: Pornography

- *U.S. v. Martinez-Torres,* 795 F.3d 1233 (10th Cir. 2015)
  - "We conclude that on this record the district court abused its discretion in imposing the special condition prohibiting Defendant from viewing or possessing materials depicting or describing sexually explicit conduct."

Supervised Release Condition Remand: Computer Restriction

- *U.S. v. West*, --F.3d--, 2016 WL 3947815 (9th Cir. 2016)
  - Ban on computer restrictions, including from creating and maintaining any website and not using computer without written approval appears to deprive West of a greater amount of liberty than necessary to achieve § 3583(d)'s sentencing purposes especially as he was computer technician and his offense was "tax evasion"

Restitution

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

Amount of Restitution

- *U.S. v. Titus*, --F.3d--, 2016 WL 2797735 (7th Cir. 2016)
  - "The district court merely adopted the figure contained in the government's sentencing memorandum and erroneously attributed it to the PSR. Without any factual support for the figure, we cannot evaluate whether $3,760,859 is a reasonable restitution amount."

- *U.S. v. Yihao Pu,* 814 F.3d 818 (7th Cir. 2016)
  - "By awarding a restitution amount without a complete accounting, the district court may have required Pu to pay more restitution than he owed. This error affects Pu's substantial rights. So, we vacate the restitution order."

Including "Unrelated" Losses

- *U.S. v. Zander,* 794 F.3d 1220 (10th Cir. 2015)
  - "Court erred in the restitution amount as the government presented no evidence or argument to support the conclusion that Defendant's crimes of convictions were the proximate cause…."

Including "Unrelated" Losses

- *U.S. v. Thomsen,* --F.3d--, 2016 WL 4039711 (9th Cir. 2016)
  - "The district court clearly erred in holding that the conduct at issue in the second case was sufficiently "related" to the conduct at issue in the first case to warrant inclusion of losses in the second case in the order for restitution pursuant to 18 U.S.C. § 3663A(a)(2)."

Outside the Offense of Conviction

- *U.S. v. Camick,* 796 F.3d 1206 (10th Cir. 2015)
  - The district court erred in the restitution amount in part because some of the losses were based on costs not caused by the conduct underlying the defendant's conviction

- *U.S. v. Foley,* 783 F.3d 7 (1st Cir. 2015)
  - Court incorrectly included losses outside the offense of conviction in the restitution order by including losses not beyond the scheme alleged in the indictment

Restitution and Temporal Scope

- *U.S. v. Udo,* 795 F.3d 24 (D.C. Cir. 2015)
  - Court incorrectly included in restitution award not just the loss resulting from false returns defendant was convicted of helping prepare, but also the losses generated from more than a dozen other returns that defendant was not convicted of helping prepare

Restitution and Conspiracy

- *U.S. v. Fowler*, 819 F.3d 1381907 (6th Cir. 2016)
  - "Thus, the evidence also indicates that Fowler was held responsible for prescriptions written before he became involved in the conspiracy. Based on the record, these two issues alone lead us to conclude that the district court's restitution order was based on clearly erroneous findings…so we conclude that the district court abused its discretion."

- *See also, U.S. v. Rice*, 776 F.3d 1021 (9th Cir. 2015) and *U.S. v. Lozano*, 791 F.3d 535 (5th Cir. 2015)

Restitution and Conspiracy

- *U.S. v. Bengis*, 783 F.3d 407 (2d Cir. 2015)
  - Restitution amount remanded so court can find whether a defendant knew or should have known of the scope and impact of the past activities of the conspiracy prior to joining the conspiracy

Offsets and Restitution

- *U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016)
  - Restitution order remanded in health care fraud offense because under Mandatory Victims Restitution Act (MVRA), restitution had to be offset by value of services that defendant's hospitals rendered to patients;

Attorney Fees and Investigative Costs

- *U.S. v. Nosal*, --F.3d--, 2016 WL 3608752 (9th Cir. 2016)
  - While investigation costs and attorney fees can be awarded to a victim as part of restitution, in this case, the court needed to make additional findings before awarding all the costs sought by the victim. Restitution award vacated for further findings

- *U.S. v. Eyraud*, 809 F.3d 462 (9th Cir. 2015)
  - Court affirmed restitution order that included investigative costs and attorneys' fees incurred by the victim. Those costs were a direct and foreseeable result of the defendant's wrongful conduct.

Restitution

- *U.S. v. Howard,* 784 F.3d 745 (10th Cir. 2015)
  - "Although the impact of sales of mortgage notes to downstream lenders is generally irrelevant to the total-loss calculation under § 2B1.1, it is highly relevant in calculating restitution under the MVRA. *See United States v. James*, 592 F.3d 1109, (10th Cir.2010) ("the calculation of loss for sentencing purposes does not necessarily establish loss for the purpose of awarding restitution under the MVRA")"
  - "We remand with instructions that the district court vacate its restitution order and redetermine the amount of actual loss to identified downstream-noteholder victims."

Restitution in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710 (2014)

"Restitution is proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses. Applying the statute's causation requirements in this case, victims should be compensated and defendants should be held to account for their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others."

Restitution in Child Pornography Cases

- *U.S. v. Galan,* 804 F.3d 1287 (9th Cir. 2015)
  - In calculating the amount of restitution to be imposed upon a defendant who was convicted of distribution or possession of child pornography, the losses, including ongoing losses, caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible. The district court erred when it declined to limit the restitution imposed upon Galan in that manner.

Other Selected Cases

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

ACCA Different Occasions

- *U.S. v. Boman,* 810 F.3d 534 (8th Cir. 2016)
  - "Upon the narrative above, the two criminal episodes committed by Boman in 1992 involved different victims and criminal aggressions. Thus, Boman's 1992 convictions for Counts 3 and 6 involved different victims, times, acts, and locations. For the above reasons, the district court did not err in finding the offenses were, in the district court's words, "discrete criminal episodes." Accordingly, the district court did not plainly err in deciding Boman had three previous convictions and qualified as an Armed Career Criminal under the ACCA."

ACCA Different Occasions

- *U.S. v. Linney*, 819 F.3d 747 (1st Cir. 2016)
  - "That defendant's two prior convictions for burglaries at neighboring houses on same night were committed on different occasions, and thus each could serve as a predicate offense under ACCA."

ACCA Different Occasions

- *U.S. v. Abbott,* 794 F.3d 896 (8th Cir. 2015)
  - "Abbott's drug sales on different days have a sufficient temporal disconnect to be counted as separate ACCA predicates. We also reject Abbott's argument that two counts prosecuted under the same criminal case cannot be counted as separate ACCA predicates."

ACCA Different Occasions

- *U.S. v. Linney*, 819 F.3d 747 (1st Cir. 2016)
  - "We have come to rely on five factors to determine whether predicate ACCA offenses were committed on different occasions: (1) whether the offenses "arose in different geographic locations"; (2) whether "the nature of each offense was substantively different"; (3) whether each offense "involved different victims"; (4) whether each offense "involved different criminal objectives"; and (5) whether "the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense.

2B1.1 Loss

- *U.S. v. Harris,* 821 F.3d 589 (5th Cir. 2016)
  - The mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a "government benefit" akin to a grant or an entitlement program payment. We accordingly hold that procurement frauds involving contracts awarded under the 8(a) set-aside program, like procurement frauds generally, should be treated under the general rule for loss calculation, not the government benefits rule.

§2B1.1 Loss

- *U.S. v. Martin*, 796 F.3d 1101 (9th Cir. 2015)
  - Fraudulently obtaining contracts for disadvantaged businesses falls under the procurement fraud rule
  - "By fully performing all of the contracts, Martin gave the government considerable value. It would be unjust to set the loss resulting from her fraud as the entire value of the contracts, as the district court itself recognized."
  - We also reject Martin's contention that the loss amount is nothing because MarCon performed the contracts."

§2B1.1 Loss

- *U.S. v. Waters,* 799 F.3d 964 (8th Cir. 2015)
  - The district court found that the amount of loss to the government was amount that def. intended to collect through age limit of 62, the age at which Lemons would qualify for retirement—if her fraud was not discovered.
  - "We have recognized that a court may reasonably conclude that a defendant intended continued receipt of illegal benefits until retirement without additional mens rea evidence. In this case, there was additional evidence. Lemons sought to convince the Administration her disability was permanent and to discourage further review."

Reclassification of Offenses

- *U.S. v. Diaz*, 821 F.3d 1051 (9th Cir. 2016)
  - "We thus hold that California's Proposition 47, offering post-conviction relief by reclassifying certain felony convictions as misdemeanors, does not undermine a prior conviction's felony-status for purposes of § 841. Section 841 requires us to look to the status of Vasquez's state conviction when he was convicted of his federal crime—and as of that day, he was "convict[ed] for a felony drug offense" as § 841 requires."

§2D1.1(a)(2)

- *U.S. v. Maxwell,* 823 F.3d 1057 (7th Cir. 2016)
  - "We join the Third, Fifth, and Sixth Circuits in holding that § 2D1.1(a)(2) applies only when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant."

§4B1.5

- *U.S. v. Viren,* --F.3d--, 2016 WL 3609195 (7th Cir. 2016)
  - In order for a prior conviction to apply under §4B1.5(a), the conviction must be against a minor. Thus, the defendant's prior sex conviction against an adult could not qualify under §4B1.5(a).