Case Law Update

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Main Topics

- *Johnson/Beckles*
- Recent Supreme Court
- Categorical Approach
- Restitution
- Supervised Release

Johnson/Beckles

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Armed Career Criminal Act ("ACCA")

18 U.S.C. § 924(e)(1)

- In the case of a person who violates section 922(g) of this title and has three previous convictions .... for a **violent felony** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years

EXAMPLE: ACCA
Definition for "Violent Felony"
18 U.S.C. § 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....

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

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

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XXXXX

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

Residual Clauses Potentially Impacted by *Johnson*

- §4B1.2
- 18 U.S.C. § 16(b)
- 18 U.S.C. § 924(c)

2015 Career Offender Guideline Definition for "Crime of Violence"

§4B1.2(a)

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

Vagueness Challenge

- *Beckles v. U.S.*, 137 S. Ct. 886 (2017)
  - "Because the advisory Sentencing Guidelines are not subject to a due process vagueness challenge, §4B1.2(a)'s residual clause is not void for vagueness."

Johnson's Potential Impact

- **18 U.S.C. § 16(b)**
  - 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
- **18 U.S.C. § 924(c)**
  - 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

18 U.S.C. § 924(c)

§ 924(c) is constitutional

- *U.S. v. Jones*, 854 F.3d 737 (5th Cir. 2017)
- *U.S. v. Hill,* 832 F.3d 135 (2d Cir. 2016)
- *U.S. v. Taylor,* 814 F.3d 340 (6th Cir. 2016)
- *U.S. v. Prickett*, 839 F.3d 697 (8th Cir. 2016)
- *Ovalles v. U.S.,* 861 F.3d 1257 (11th Cir. 2017)
- *U.S. v. Eshetu*, --F.3d--, 2017 WL 3138110 (D.C. Cir. 2017)

§ 924(c) is unconstitutional

- *U.S. v. Cardena,* 842 F.3d 959 (7th Cir. 2016)

18 U.S.C. § 16(b)

§ 16(b) is unconstitutional

- *Shuti v. Lynch*, 828 F.3d 440 (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)
- *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016)

§ 16(b) is constitutional

- *U.S. v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016)(en banc)

18 U.S.C. § 16(b) *Cert Granted*

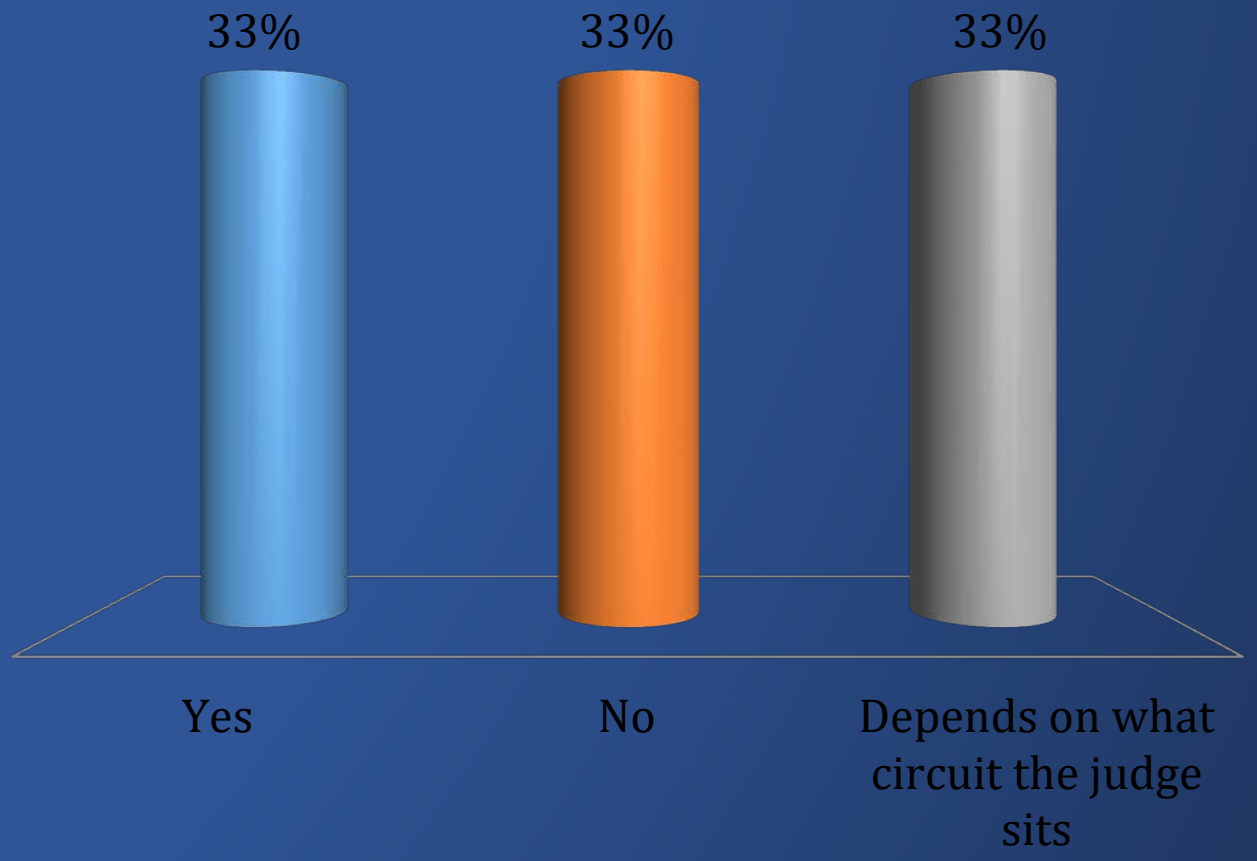
- *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert granted*, 137 S. Ct. 31 (2016)
  - Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

1. Was the court correct that he was prohibited from varying from the guidelines based on the § 924(c) consecutive sentence

A. Yes

B. No

C. Depends on what circuit the judge sits



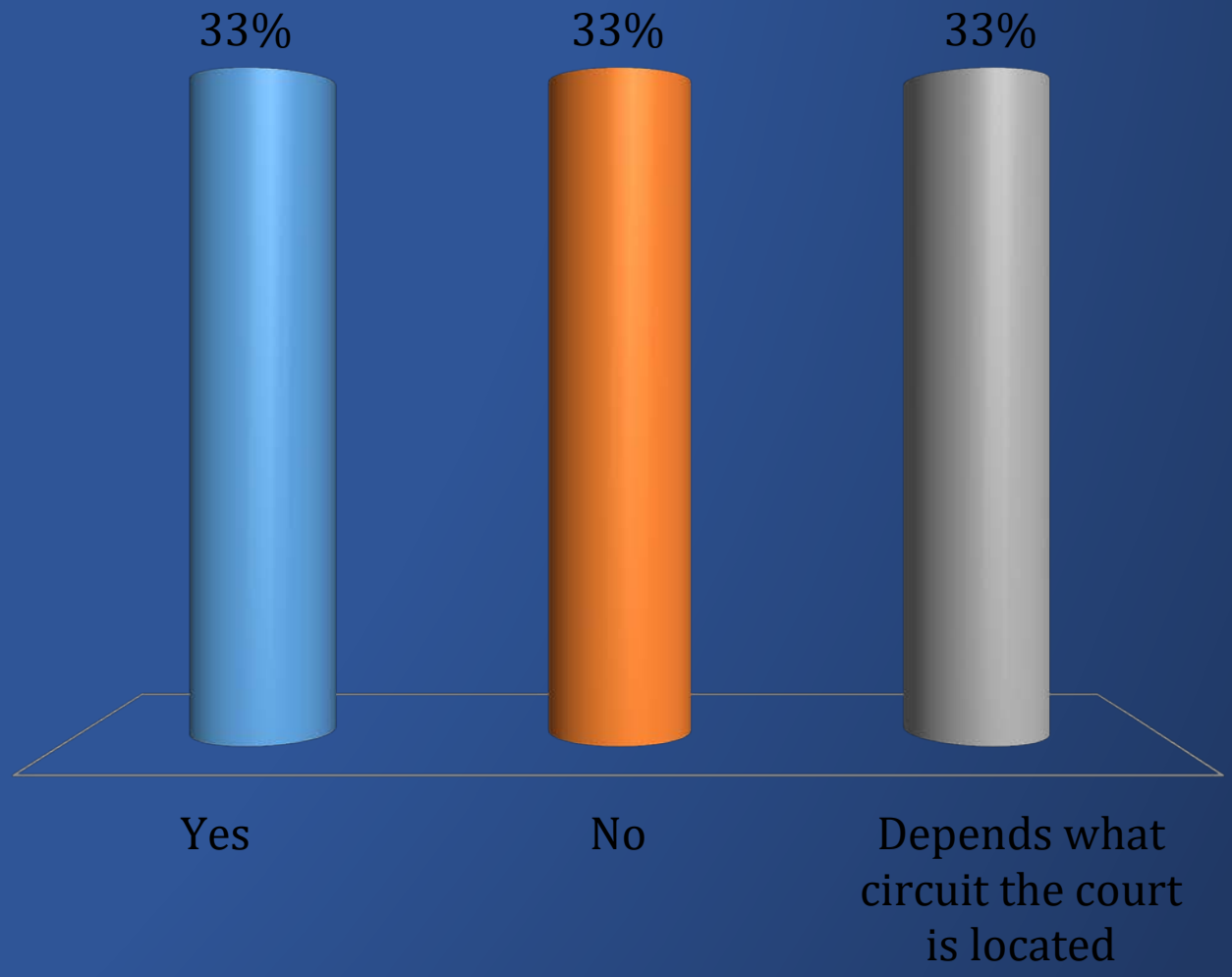
18 U.S.C. § 924(c) Sentences

- *Dean v. U.S.*, 137 S. Ct. 1170 (2017)
  - A court can take into account the mandatory minimum under § 924(c) when calculating an appropriate sentence for the predicate offense

  - *See U.S. v. Edmond*, 815 F.3d 1032 (6th Cir. 2016), *vacated*, 137 S. Ct. 1577 (2017), *U.S. v. Thomas*, 856 F.3d 624 (9th Cir. 2017), *U.S. v. Badoni*, -F. App'x-, 2017 WL 3263754 (9th Cir. 2017)

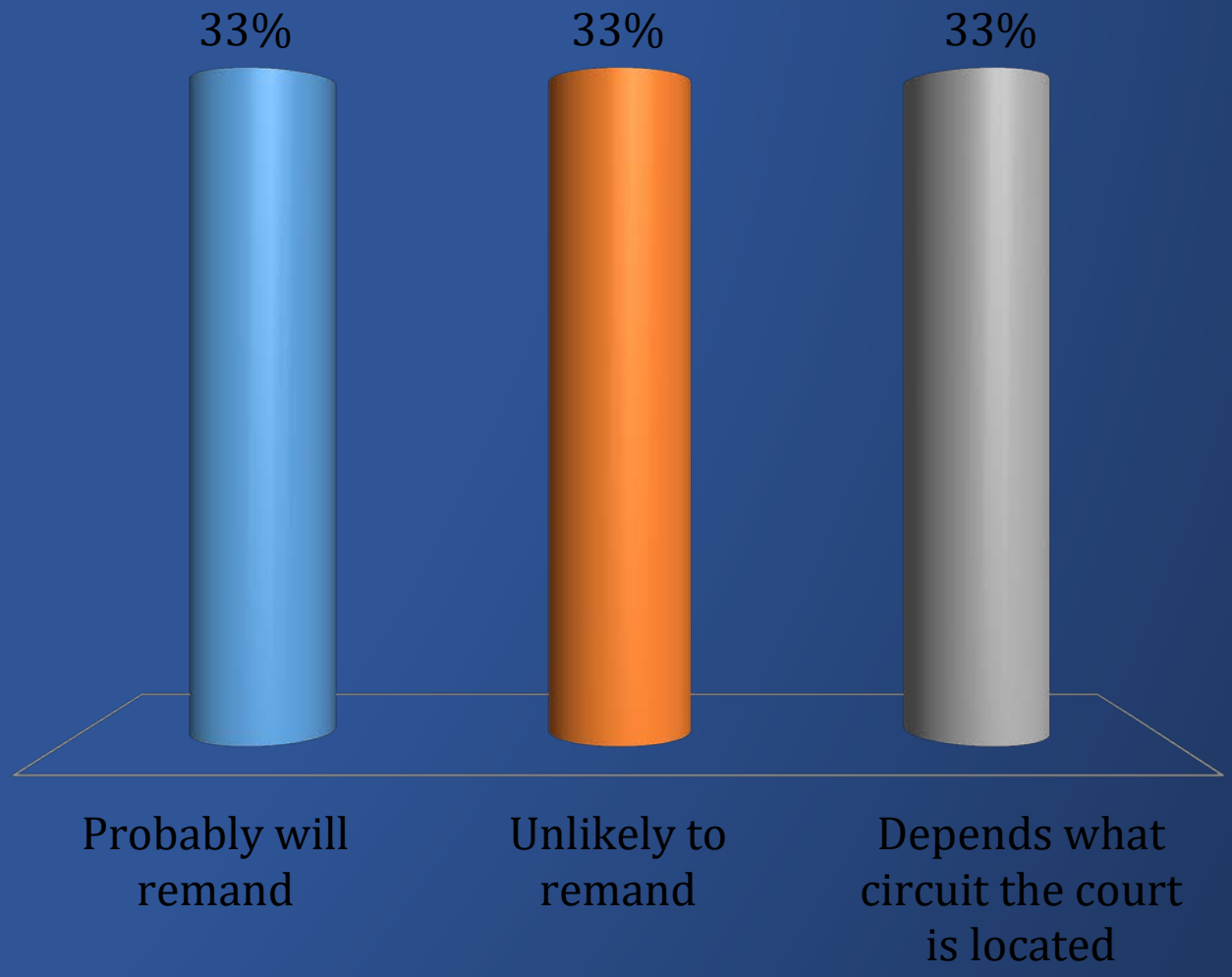
2. Will the appellate court remand the case for resentencing?

A. Yes
B. No
C. Depends what circuit the court is located



3. Will the appellate court likely remand the case for resentencing?

A. Probably will remand
B. Unlikely to remand
C. Depends what circuit the court is located



Harmless Error

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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."

Harmless Error

- *U.S. v. Morrison*, 852 F.3d 488 (6th Cir. 2017)
  - "Here, in fixing Morrison's sentence at 96 months' confinement, the top of Morrison's Guidelines range, the district court emphasized that the offense was "extremely dangerous and egregious" and that "domestic violence is prevalent" throughout Morrison's criminal history. The district court stated that had it determined that aggravated burglary was not a crime of violence, it would have varied upward and ended up with the same Guidelines range.

Harmless Error

- *U.S. v. Morrison*, 852 F.3d 488 (6th Cir. 2017)
  - "Since the district court would have sentenced Morrison to 96 months without regard to whether his conviction for Tennessee aggravated burglary qualifies as a crime of violence, the alleged error in calculating the Guidelines range would not entitle Morrison to resentencing in any event."

Harmless Error

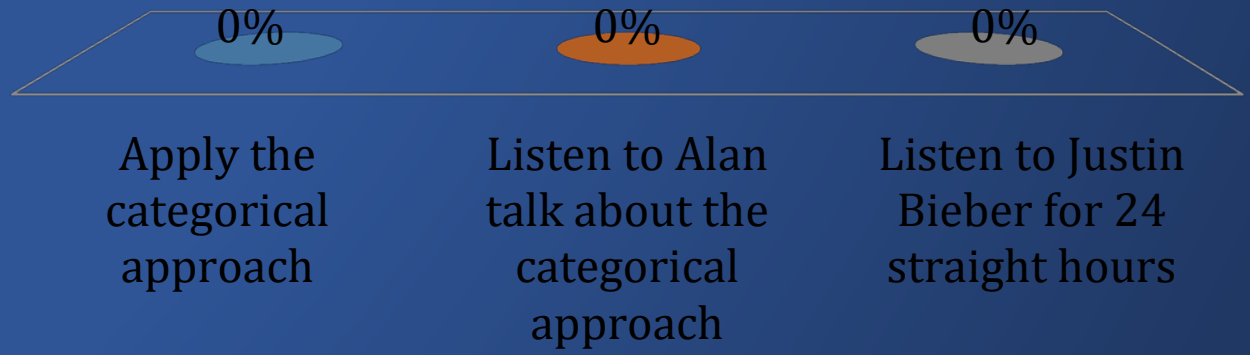
- *U.S. v. Sanchez*, 850 F.3d 767 (5th Cir. 2017)
  - "In imposing a 135-month sentence, the court stated "to the extent that I erred in the application of the enhancement of plus six, the sentence would still be the same." This court has held that similar statements during sentencing provide sufficient basis to conclude that any potential error resulting from an improperly calculated Guidelines range is harmless. The record demonstrates that the judge "thought the sentence it chose was appropriate irrespective of the Guidelines range."

Alternative Sentences

- *U.S. v. Miller,* 657 F. App'x 265 (11th Cir. 2016)
  - "Substantial disparity between the imposed sentence and the applicable Guideline range warrants the exercise of our discretion to correct the error."
  - "But nothing explicitly and unequivocally indicates that the court would have imposed the same sentence as a fifteen-month variance or otherwise irrespective of the Guidelines range."

Which would you rather do?

A. Apply the categorical approach
B. Listen to Alan talk about the categorical approach
C. Listen to Justin Bieber for 24 straight hours



Categorical Approach

Taylor v. U.S., 495 U.S. 575 (1990)

When to use Categorical and Modified Categorical Approach

- Whether a prior conviction is a crime of violence or violent felony (*e.g.,* §4B1.2, 924(c), ACCA,)

- Whether a prior conviction is a controlled substance offense or serious drug trafficking offenses (*e.g., §*4B1.2, ACCA)

- Whether a prior conviction is a prior sex offense (*e.g.*, § 2251(e))

- Whether a prior conviction is a Tier III, II, or I under SORNA

Possible Exceptions to Categorical Approach

- Whether instant offense is a crime of violence
  - *U.S. v. Robinson,* 844 F.3d 137 (3d Cir. 2016)
  - *U.S. v. Perez-Jimenez,* 654 F.3d 1136 (10th Cir. 2010)

- SORNA and determining age of victim in prior conviction
  - *U.S. v. Berry,* 814 F.3d 192 (4th Cir. 2016)

- Under the MVRA, whether the defendant committed an "offense against property"
  - *U.S. v. Ritchie*, 858 F.3d 201 (4th Cir. 2017)
  - *U.S. v. Collins,* 854 F.3d 1324 (11th Cir. 2017)

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

- Iowa burglary is not a violent felony under the categorical approach because statute was too broad

- The Eighth Circuit incorrectly used the modified categorical approach because the statute did not contain multiple elements

- Distinguishing between elements and facts is therefore central to ACCA's operation

What is an "element?"

- "'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 and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty."
- *Mathis v. United States*, 136 S. Ct. 2243 (2016)

How is an element different from a fact?

- "Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements . . . 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."

- *Mathis v. United States*, 136 S. Ct. 2243 (2016)

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

- "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 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

Categorical Approach Comments

- "It surprises me that we have arrived at this point, because in theory, the categorical approach makes a good deal of sense. I had high hopes for it. But what was fine in theory has sometimes proven to be less so in practice."

- "For starters, the purported administrative benefits of the categorical approach have not always worked as advertised. Judges have simply swapped factual inquiries for an endless gauntlet of abstract legal questions."
  - Judge Wilkinson, *U.S. v. Doctor*, 842 F.3d 306 (4th Circuit 2016) (concurring)

Categorical Approach View

- "The average person on the street would ordinarily think that the state crime of assault and battery on a police officer would meet the ACCA definition of crime of violence, that is "the use, attempted use, or threatened use of physical force against the person of another."

- "My concern is that use of these tests can lead courts to reach counterintuitive results, and ones which are not what Congress intended."
  - Judge Lynch, *U.S. v. Faust*, 853 F.3d 39 (1st Cir. 2017) (concurring)

Views on Categorical Approach

- "I applaud the United States Sentencing Commission for reworking § 2L1.2 to spare judges, lawyers, and defendants from the wasteland of *Descamps*…."

- "I continue to urge the Commission to simplify the Guidelines to avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls."
  - Judge Owens, *U.S. v. Perez-Silvan,* 861 F.3d 935 (9th Cir. 2017) (concurring)

Views on Categorical Approach

- "This case does not present a novel expansion of the doctrine, but it does highlight a consistently troubling feature: its requirement that judges ignore the real world."
- "[T]he categorical approach often asks judges to feign amnesia. It requires them to "peek" at portions of the factual record to determine under which division of a statute an offender's past conviction falls."
- "The judge must ignore facts already known and instead proceed with eyes shut."

  - Judge Jordan, *U.S. v. Chapman*, -866 F.3d 129 (3d Cir. 2017) (concurring)

Tools to Use in Deciding Whether Elements or Means

1. Statute on its face will provide the answer (*e.g.*, different punishments)

2. State court decisions may answer the question (*e.g.*, state supreme court cases)

3. Record of a prior conviction itself

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

Different Punishments

- *U.S. v. Pam*, -F.3d-, 2017 WL 3481853 (10th Cir. 2017)
  - "On its face, § 30-3-8(B) describes three alternative crimes that carry varying punishments based on the existence and degree of a resulting injury to another person. Because the statutory alternatives carry different punishments, they must be elements."

Different Punishments

- *U.S. v. Perez-Silvan*, 861 F.3d 935 (9th Cir. 2017)
  - "At the time of Perez–Silvan's conviction, Tennessee Code Annotated § 39–13–102(d)(1) provided that an "[a]ggravated assault under subdivision (a)(1) ... is a Class C felony," while "[a]ggravated assault under subdivision (a)(2) is a Class D felony." Thus, because (a)(1) and (a)(2) carry different penalties, they necessarily contain distinct elements, rather than alternative means of committing aggravated assault. Thus, under Mathis, § 39–13–102(a) is divisible into two crimes: aggravated assault in violation of (a)(1) and aggravated assault in violation of (a)(2).

Tools to Use in Deciding Whether Elements or Means

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2. **State court decisions may answer the question (*e.g.*, state supreme court cases)**

3. Record of a prior conviction itself ("Peek at the records")

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

State Court Decisions

- *U.S. v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017)
  - "We find that the Texas Court of Criminal Appeals has answered this precise question by concluding that the Texas Legislature intended the "act or omission" language in § 22.04(a) to "constitute the means of committing the course of conduct element of injury to a child" rather than elements of the offense "about which a jury must be unanimous." *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006); *see also Villanueva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007)."

Tools to Use in Deciding Whether Elements or Means

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3. **Record of a prior conviction itself ("Peek at the records")**

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

Record of Prior Conviction

- "If an indictment or jury instruction includes the statute's alternative terms, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element."

- "Conversely, an indictment ... could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime."

- *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017)
- *See also, U.S. v. Gundy*, 842 F.3d 1156 (11th Cir. 2016)

Divisibility

- *U.S. v. Tanksley,* 848 F.3d 347 (5th Cir. 2017)
  - TX Possession with intent to deliver is an indivisible statute because it provides several different means for committing the offense of delivery of a single quantity of drugs
  - *See also, U.S. v. Hinkle,* 832 F.3d 569 (5th Cir. 2016) and *U.S. v. Howell,* 838 F.3d 489 (5th Cir. 2016)

Divisibility

- *U.S. v. Green*, 842 F.3d 1299 (11th Cir. 2016)
  - FL battery under § 784.03 is a divisible statute.
  - "The statutes for both battery under § 784.03 and battery under § 784.041—which share the same first element—are divisible. The Florida Supreme Court has explained that § 784.0315 is "disjunctive, [and] the prosecution can prove a battery in one of three ways ... [that he] '[i]ntentionally caus [ed] bodily harm,' that he 'intentionally str[uck]' the victim, or that he merely '[a]ctually and intentionally touche[d]' the victim."

Divisibility

- *U.S. v. Martinez-Lopez,* 864 F.3d 1034 (9th Cir. 2017) *(en banc)*
  - CA 11353 is a divisible statute

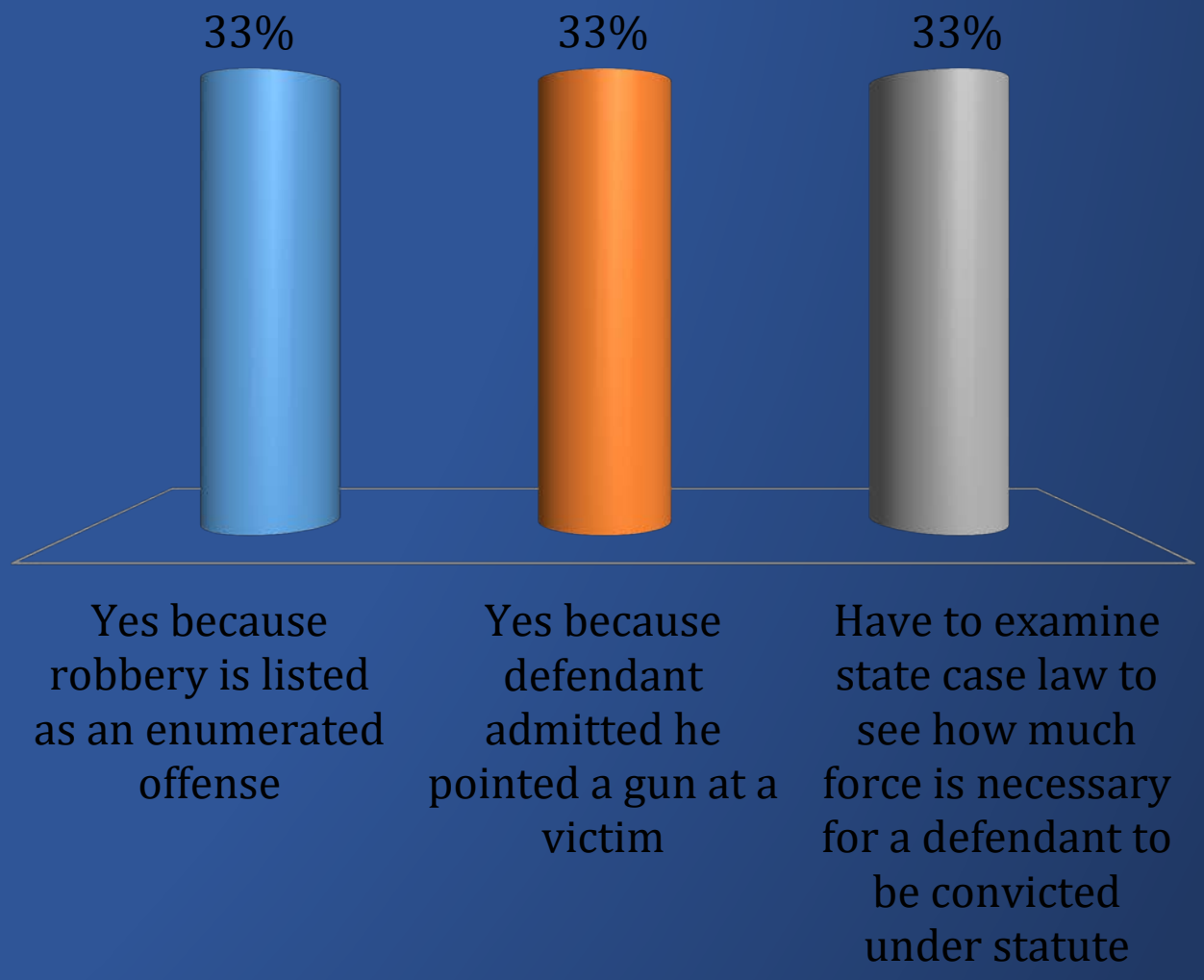
- *U.S. v. Ocampo-Estrada*, -F.3d-, 2017 WL 3707900 (9th Cir. 20176)
  - CA 11378 is a divisible statute.

Divisibility

- *U.S. v. Dozier,* 848 F.3d 180 (4th Cir. 2017)
  - WV attempt statute is not divisible
- *U.S. v. Uribe,* 838 F.3d 667 (5th Cir. 2016)
  - Texas Burglary 30.02 is a divisible statute
- *U.S. v. Faust,* 853 F.3d 39 (1st Cir. 2016)
  - MA ABPO is a divisible statute

4. Is this offense a crime of violence

A. Yes because robbery is listed as an enumerated offense
B. Yes because defendant admitted he pointed a gun at a victim
C. Have to examine state case law to see how much force is necessary for a defendant to be convicted under statute



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, (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

- "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 Not a Violent Felony (VF)

- ME robbery (17-A, § 651(1)) is not a VF
  - *U.S. v. Mulkern*, 854 F.3d 87 (1st Cir. 2017)

- VA common law robbery (18.2-58) is not a VF
  - *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017)

Robbery Not a VF or Crime of Violence (COV)

- AR robbery (5-12-102) is not a VF
  - *U.S. v. Eason*, 829 F.3d 633 (8th Cir. 2016)
- MO 2nd degree robbery (569.030.1) is not a COV
  - *U.S. v. Bell*, 840 F.3d 963 (8th Cir. 2016)
- DC attempted robbery (22-2801) is not a COV
  - *U.S. v. Sheffield,* 832 F.3d 296 (D.C. Cir. 2016)

Robbery is a VF

- IN Robbery (35-42-5-1) is a VF
  - *U.S. v. Duncan,* 833 F.3d 751 (7th Cir. 2016)

- SC strong arm robbery is a VF
  - *United States v. Doctor,* 842 F.3d 306 (8th Cir. 2016)

Robbery Might be a VF or Crime of Violence

- OH robbery (2911.02(A)(3)) is not a COV
  - *U.S. v. Yates*, -F.3d-, 2017 WL 3402084 (6th Cir. 2016)
- OH aggravated robbery (2911.01(A)(1)) is a VF
  - *U.S. v. Patterson,* 853 F.3d 298 (6th Cir. 2017)

- NC common law robbery not a VF
  - *U.S. v. Gardner,* 823 F.3d 793 (4th Cir. 2016)
- NC robbery with a dangerous weapon (§14-87) is a VF
  - *U.S. v Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017)

Robbery Might be a VF or Crime of Violence

- FL robbery (812.13(a)) is a VF
  - *U.S. v. Fritts*, -F.3d-, 2017 WL 3712155 (11th Cir. 2011)

- FL robbery (812.13(a)) is not a VF
  - *U.S. v. Geozos,* -F.3d-, 2017 WL 3712155 (9th Cir. 2017)

Robbery is a COV

- Hobbs Act Robbery (18 U.S.C. § 1951) is a COV
  - *U.S. v. Hill,* 832 F.3d 135 (2d Cir. 2016)
  - *U.S. v. Robinson,* 844 F.3d 137 (3d Cir. 2016)
  - *U.S. v. Gooch,* 850 F.3d 285 (6th Cir. 2017)
  - *U.S. v. Anglin*, 846 F.3d 954 (7th Cir. 2017)
  - *U.S. v. House*, 825 F.3d 381 (8th Cir. 2016)
  - *U.S. v. Harris*, 844 F.3d 1260 (10th Cir. 2017)
  - *In re Fluer*, 824 F.3d 1337 (11th Cir. 2016)

Robbery is a COV

- Federal Robbery (18 U.S.C. § 2113) is a COV
  - *U.S. v. McNeal*, 818 F.3d 141 (4th Cir. 2016)
  - *U.S. v. Brewer*, 848 F.3d 711 (5th Cir. 2017)
  - *U.S. v. McBride,* 826 F.3d 293 (6th Cir. 2016)
  - *U.S. v. Harper*, -F.3d-, 2017 WL 3613336 (8th Cir. 2017)

- Federal Carjacking (18 U.S.C. §2119(a)) is a COV
  - *United States v. Evans,* 848 F.3d 242 (4th Cir. 2017)

Manslaughter

- FL manslaughter (782.07) does not qualify as manslaughter at §2L1.2
  - *U.S. v. Mendoza-Padilla*, 833 F.3d 1156 (9th Cir. 2016)

- CA manslaughter (CA 192(a)) is a COV
  - *U.S. v. Rivera-Muniz*, 854 F.3d 1047 (9th Cir. 2016)

- Involuntary manslaughter (18 U.S.C. § 1112) is not a COV
  - *U.S. v. Benally*, 843 F.3d 350 (9th Cir. 2016)

Attempted Murder

- FL attempted second-degree murder (782.04(2)) is not a COV
  - *U.S. v. Hernandez-Montes,* 831 F.3d 284 (5th Cir. 2016)

- MA armed assault with intent to murder (265, § 18(b)) is a VF
  - *U.S. v. Edwards*, 857 F.3d 420 (1st Cir. 2017)

Discharging or Pointing a Firearm

- NM shooting at or from a motor vehicle is a VF
  - *U.S. v. Pam*, -F.3d-, 2017 WL 3481853 (10th Cir. 2017)
- OK pointing a firearm at another (21 § 1289.16) is not a VF
  - *U.S. v. Titties,* 852 F.3d 1257 (10th Cir. 2017)
- CA maliciously and willfully discharging a firearm at a motor vehicle (256) is divisible and is a COV
  - *U.S. v. Mendez-Henriquez,* 847 F.3d 214 (5th Cir. 2017)

Voisine v. U.S, 136 S. Ct. 2272 (2016)

- Reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under statute prohibiting possession of a firearm by person convicted of a misdemeanor crime of domestic violence (921(a)(33)(A))

Voisine v. U.S, 136 S. Ct. 2272 (2016)

- "Our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states."

Impact of *Voisine*

- *U.S. v. Pam,* -F.3d-, 2017 WL 3481853 (10th Cir. 2017)
  - "Mr. Pam argues § 30-3-8(B) cannot satisfy the similarly-phrased provision in the ACCA because the statute may be violated with a showing of recklessness. But the Supreme Court's recent decision in *Voisine v. United States* leads us to conclude otherwise. 136 S.Ct. 2272 (2016).

Impact of *Voisine*

- *U.S. v. Howell*, 838 F.3d 489 (5th Cir. 2016)
  - Mental state of recklessness may qualify as a crime of violence after *Voisine*

- *U.S. v. Fogg,* 836 F.3d 951 (8th Cir. 2017)
  - "After *Voisine*, reckless conduct can constitute 'use of force' under the ACCA. Thus, Arkansas conviction of drive by shooting required a mens rea requirement of reckless, it qualified as a violent felony under the ACCA." (*but see U.S v. Fields*, 863 F.3d 1012 (8th Cir. 2017))

Impact of *Voisine*

- *Bennett v. U.S.*, -F.3d-, 2017 WL 2857620 (1st Cir. 2017)
  - The reckless part of Maine's aggravated assault statute is not a violent felony under the ACCA.
  - First circuit applied rule of lenity and refused to extend *Voisine* to the ACCA.

Realistic Probability

- *Jones v. U.S.*, -F.3d-, 2017 WL 3711759 (7th Cir. 2017)
  - However, as discussed above, Wisconsin cases provide no realistic basis to conclude that courts would find such low-level conduct sufficient to support a conviction under the statute. See United States v. Bell, 840 F.3d 963, 966 (8th Cir. 2016) ("Although the 'theoretical possibility' that a state may apply its statute to conduct falling short of violent force is not enough to disqualify a conviction, a 'realistic probability' will suffice."). The simple fact that the word "illness" is included in the definition of bodily harm is insufficient to render the statute overbroad.

Realistic Probability

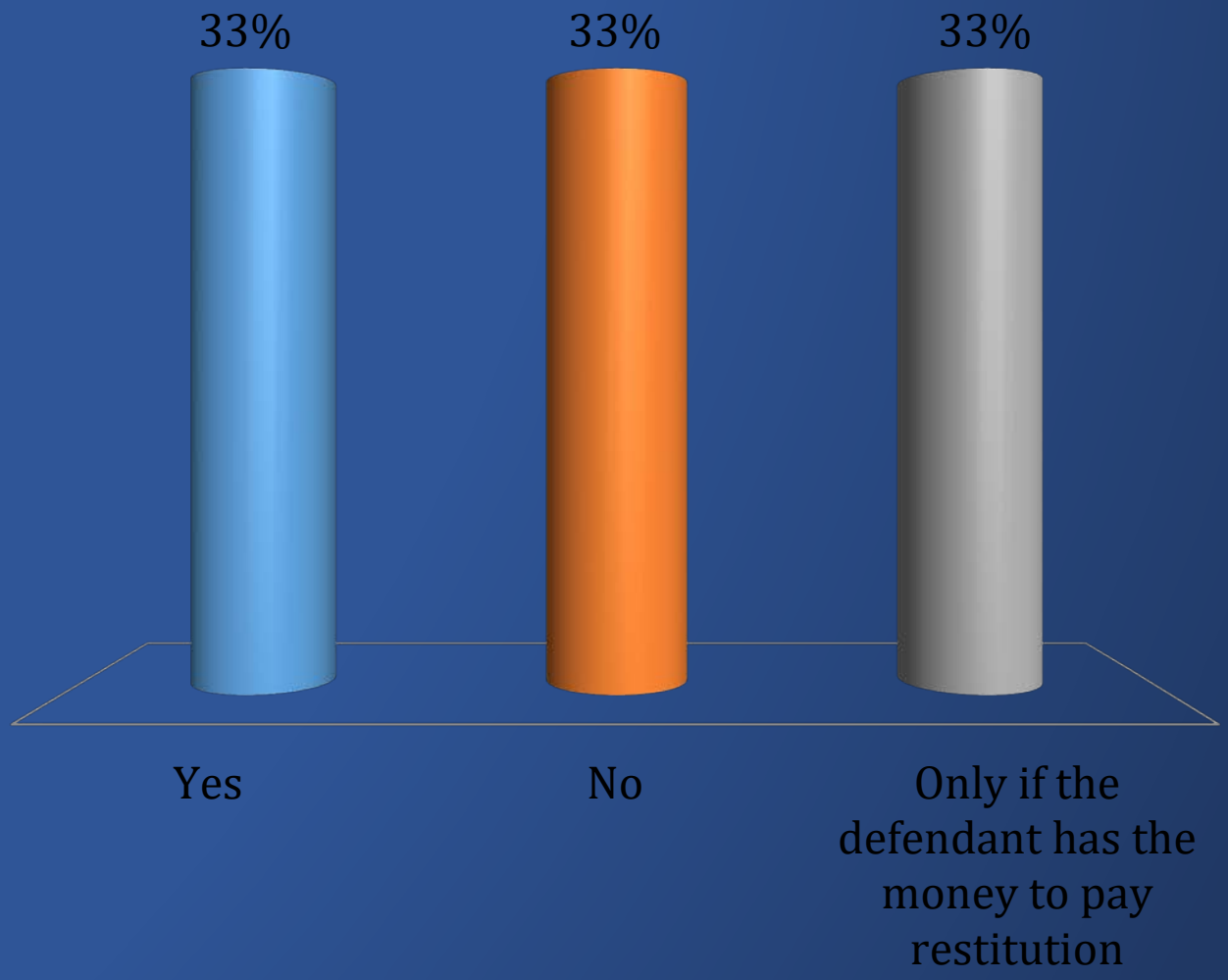
- "[W]e see no realistic probability of Massachusetts convicting someone of armed assault with intent to murder who had not used, attempted, or threatened "force capable of causing physical pain or injury to another person," … the possibility Edwards pushes falls under the heading of imaginative thinking, which the Supreme Court has told us not to rely on in applying the categorical approach."
  - *U.S. v. Edwards*, 857 F.3d 420 (1st Cir. 2017)

Restitution

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

5. Is this order of restitution correct?

A. Yes
B. No
C. Only if the defendant has the money to pay restitution



Restitution and Conspiracy

- *U.S. v. Fowler*, 819 F.3d 298 (6th Cir. 2016)
  - "Thus, the evidence also indicates that Fowler was held responsible for prescriptions written before he became involved in the conspiracy … we conclude that the district court's restitution order was based on clearly erroneous findings…so we conclude that the district court abused its discretion."

Restitution Remands

- Restitution outside the offense of conviction
  - *U.S. v. Foley,* 783 F.3d 7 (1st Cir. 2015)
  - *U.S. v. Lozano*, 791 F.3d 535 (5th Cir. 2015)
  - *U.S. v. Rice*, 776 F.3d 1021 (9th Cir. 2015)
  - *U.S. v. Camick,* 796 F.3d 1206 (10th Cir. 2015)

- Including "unrelated" losses in order
  - *U.S. v. Johnson,* 854 F.3d 1098 (9th Cir. 2017)
  - *U.S. v. Thomsen,* 830 F.3d 1049 (9th Cir. 2016)

Restitution Remands

- Not offsetting restitution amount
  - *U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016)

- Determining amount of restitution
  - *U.S. v. Finazzo,* 850 F.3d 94 (2d Cir. 2017)
  - *U.S. v. Anderson,* -F.3d-, 2017 WL 3366456 (7th Cir. 2017)
  - *U.S. v. Titus*, 821 F.3d 930 (7th Cir. 2016)
  - *U.S. v. Yihao Pu,* 814 F.3d 818 (7th Cir. 2016)
  - U.S. v. Stein, 846 F.3d 1135 (11th Cir. 2017)

Restitution Issues

- Who is a victim of restitution
  - *U.S. v. Sizemore,* 850 F.3d 821 (6th Cir. 2017) (funeral expenses)
  - *U.S. v. Benedict,* 855 F.3d 880 (8th Cir. 2017)(corporation can be a victim)
  - *U.S. v. Sawyer*, 825 F.3d 287 (6th Cir. 2016) (EPA can be victim)

- What types of expenses can be included in restitution orders
  - *U.S. v. Osman*, 853 F.3d 1184 (11th Cir. 2017) (future therapy)
  - *U.S. v. Lagos*, 864 F.3d 320 (5th Cir. 2017) (investigative costs)

Restitution Issues

- Types of offenses
  - *U.S. v. Collins*, 854 F.3d 1324 (11th Cir. 2017) (can use conduct underlying offense of conviction and not categorical to determine offense against property)

  - *U.S. v. Diaz*, -F.3d-, 2017 WL 3159918 (4th Cir. 2017) (Interference with flight crew (49 U.S.C. § 46504) is not a crime of violence, therefore, restitution was not mandatory, only discretionary)

Restitution Issues

- Types of offenses
  - *U.S. v. Funke,* 846 F.3d 998 (2d Cir. 2017) (child porn case)
  - *U.S. v. Osman*, 853 F.3d 1184 (11th Cir. 2017) (production of child porn)
  - *U.S. v. Thunderhawk,* 860 F.3d 633 (8th Cir. 2017) (abusive sexual contact)
  - *U.S. v. Westbrooks,* 858 F.3d 317 (5th Cir. 2017) (restitution in tax case only as condition of supervised release)

Supervised Release

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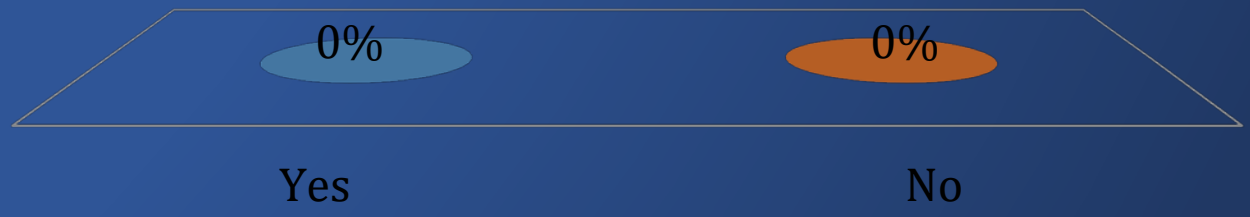
6. Is this an appropriate condition of supervised release?

A. Yes
B. No



Software Installation

- *U.S. v. Ferndandez*, 776 F.3d 344 (5th Cir. 2016)
  - 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 Conditions Remands

- Treatment or Therapy
- Associations with Others
- Access to Sexually Stimulating Materials
- Geography Locations
- Computer Restrictions
- Alcohol or Drug Treatment or Restrictions
- Lifestyle Restrictions

Supervised Release Conditions Remands

- Treatment or Therapy
  - *U.S. v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016)
  - *U.S. v. Douglas,* 850 F.3d 660 (4th Cir. 2017)
  - *U.S. v. Franklin,* 838 F.3d 564 (5th Cir. 2016)

Mental Health Therapy

- *U.S. v. Franklin,* 838 F.3d 564 (5th Cir. 2016)
  - "[i]f the district court intends that the therapy be mandatory but leaves a variety of details, including the selection of a therapy provider and schedule to the probation officer, such a condition of probation may be imposed. If, on the other hand, the court intends to leave the issue of the defendant's participation in therapy to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included."

Supervised Release Conditions Remands

- Association Condition
  - *U.S. v. Jenkins*, 854 F.3d 181 (2nd Cir. 2017) (under 18)
  - *U.S. v. Fey*, 834 F.3d 1 (1st Cir. 2016) (children)
  - *U.S. v. Hobbs*, 845 F.3d 365 (8th Cir. 2016) (spouse)
  - *U.S. v. Ly*, 650 F. App'x 503 (9th Cir. 2016) (wife)

- Geography Condition
  - *U.S. v. Dickson*, 849 F.3d 686 (7th Cir. 2017) (remain in jurisdiction)
  - *U.S. v. LaCoste*, 821 F.3d 1187 (9th Cir. 2016) (4 counties)

Supervised Release Conditions Remands

- Accessing or Possessing Sexually Stimulated Materials or Adult Pornography
  - *U.S. v. Huor,* 852 F.3d 392 (5th Cir. 2017) (will not prevent future conduct)
  - *U.S. v. Gall*, 829 F.3d 64 (1st Cir. 2016) (possession and can't enter any location where sold)
  - *U.S. v. Sainz*, 827 F.3d 602 (7th Cir. 2016) (too vague)

Supervised Release Conditions Remands

- Computer Restrictions
  - *U.S. v. West*, 829 F.3d 1013 (9th Cir. 2016) (creating websites—was a tax accountant)
  - *U.S. v. LaCoste*, 821 F.3d 1187 (9th Cir. 2016) (no internet)
  - *U.S. v. Hinkle*, 837 F.3d 111 (1st Cir. 2016) (online chats)

Please Fill Out Evaluation