

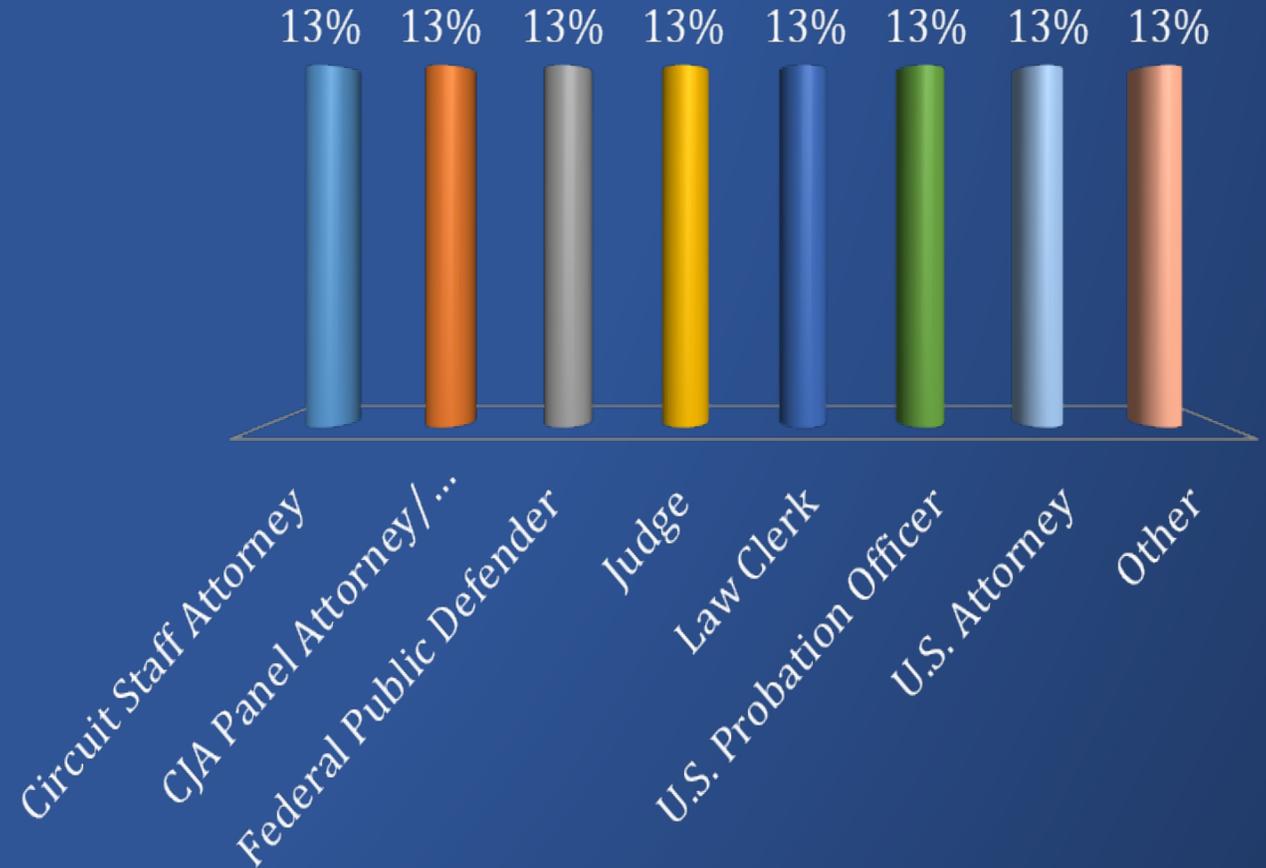


Case Law Update: Recent Case Law

Alan Dorhoffer

Who's in the audience?

- A. Circuit Staff Attorney
- B. CJA Panel Attorney/
Private Defense Attorney
- C. Federal Public Defender
- D. Judge
- E. Law Clerk
- F. U.S. Probation Officer
- G. U.S. Attorney
- H. Other



Years of experience with federal sentencing?

- A. Less than 2 years
- B. 2 to 5 years
- C. 5 to 10 years
- D. More than 10 years



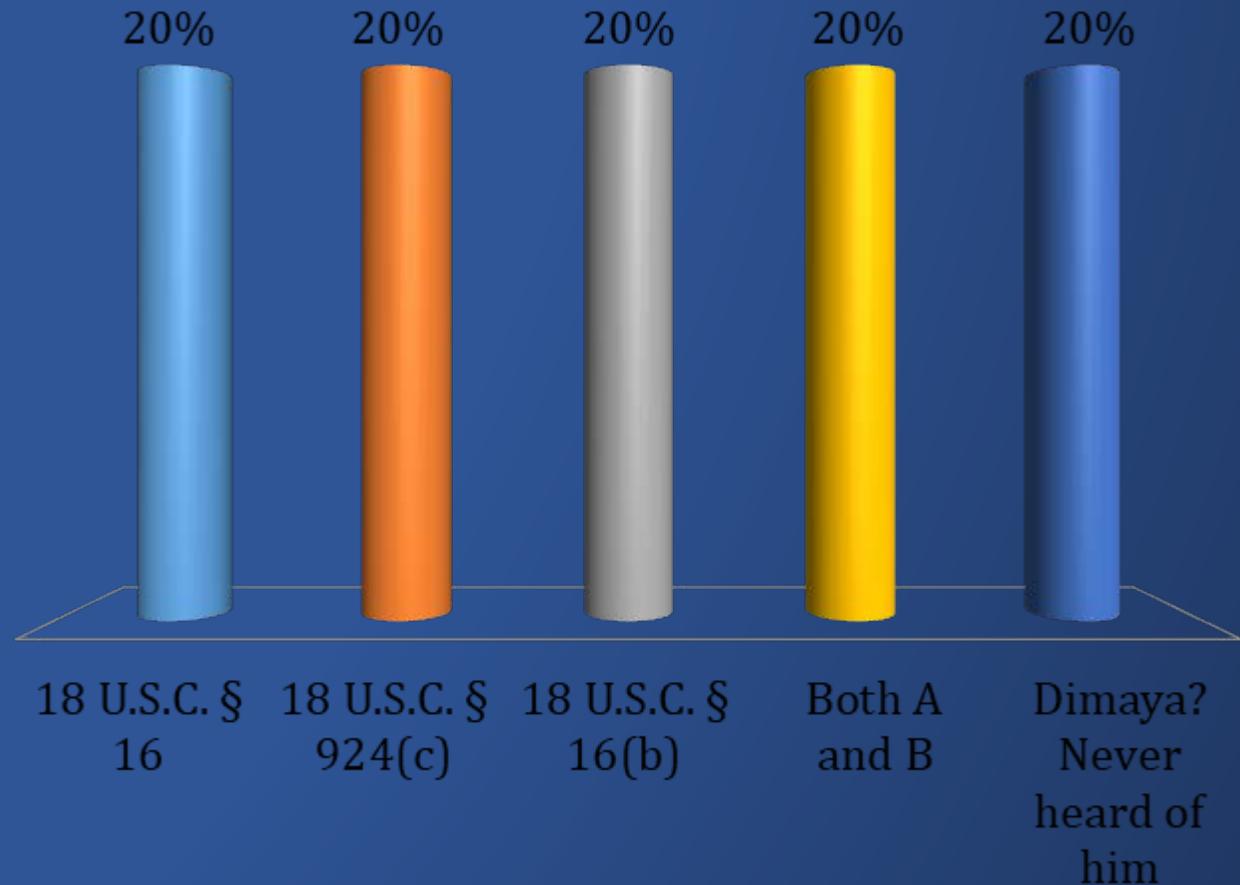
Topics This Session Will Cover

- Recent Supreme Court Cases on Sentencing
- Recent Appellate Cases on Sentencing



The Supreme Court in *Sessions v. Dimaya* found ____ unconstitutional

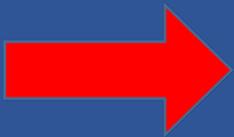
- A. 18 U.S.C. § 16
- B. 18 U.S.C. § 924(c)
- C. 18 U.S.C. § 16(b)
- D. Both A and B
- E. *Dimaya*? Never heard of him



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....



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

- The Armed Career Criminal Act’s “residual clause” is unconstitutionally vague.



Other “Residual Clauses”

- §4B1.2 (Career Offender)
- 18 U.S.C. § 16(b) (Crime of violence defined)
- 18 U.S.C. § 924(c) (“Consecutive” sentence firearm statute)



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.”



18 U.S.C. § 16(b)

- 18 U.S.C. § 16

The term “crime of violence” means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(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.



18 U.S.C. § 16(b)

- *Sessions v. Dimaya*, 138 S. Ct 1204 (2018)
 - 18 U.S.C. § 16(b) (“any other offense . . . 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”) is unconstitutionally vague.



Examples of Statutes That Incorporate 18 U.S.C. § 16(b)

- Three Strikes statute (18 U.S.C. § 3559(c)(2)(F)(ii))
- Failure to Register under SORNA (18 U.S.C. § 2250(c))
- Money Laundering (18 U.S.C. § 1956(c)(7)(B)(ii))
- Violent Crime in Aid of Racketeering (18 U.S.C. § 1959)
- Use of Minors in Crimes of Violence (18 U.S.C. § 25)
- Aggravated Felony Enhancements under Unlawful Re-entry (8 U.S.C. § 1326(b)(2))



Dimaya's Potential Impact

- **18 U.S.C. § 924(c)(3)**

- (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another or

- (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)(3)(B)

- *U.S. v. Salas*, -F.3d-, 2018 WL 2074547 (10th Cir. 2018)
 - “Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combine to produce “more unpredictability and arbitrariness than the Due Process Clause tolerates,” (quoting *Johnson*, 135 S.Ct. at 2558), and *Dimaya's* reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague.”



Supreme Court and Residual Clauses

ACCA (924(e))

“Otherwise involve conduct that presents a serious potential risk”

Johnson
invalidates

18 U.S.C. 16(b)

“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”

Dimaya
invalidates

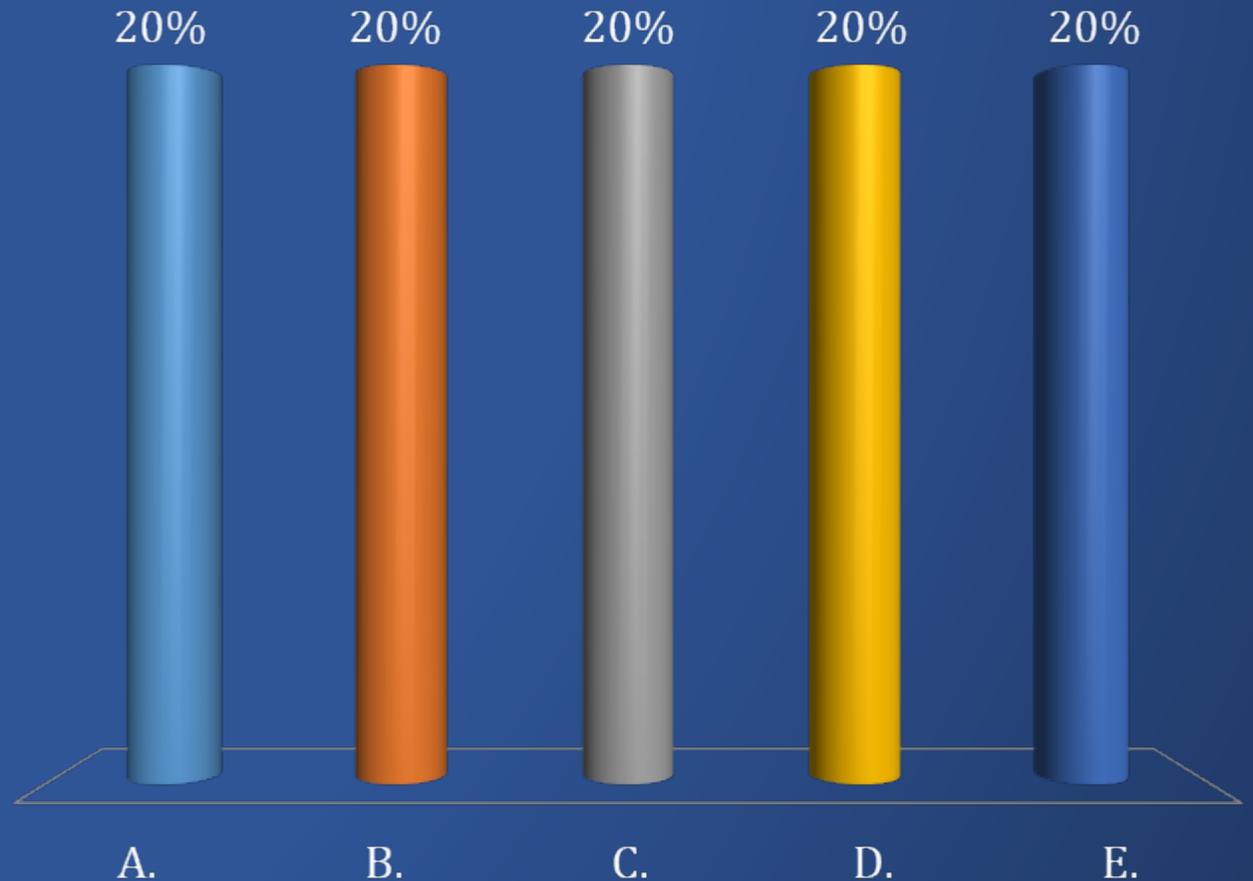
18 U.S.C. § 924(c)(3)(b)

“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”

??????

Which of these were argued before the Supreme Court this term?

- A. Restitution
- B. Use of acquitted conduct at sentencing
- C. Polygraph as a condition of supervised release
- D. Tom Brady and “Deflategate”
- E. Both A and B



Lagos v. U.S., 864 F.3d 320 (5th Cir. 2017),
cert. granted, 138 S. Ct. 55 (2018)

- Whether 18 U.S.C. § 3663A(b)(4) covers costs for reimbursement under the Mandatory Victims Restitution Act that were “neither required nor requested” by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.



United States v. Koons, 850 F.3d 973 (8th Cir. 2017), cert. granted, 138 S. Ct. 543 (2017)

- Whether a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e), is eligible for a further sentence reduction under 18 U.S.C. § 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory sentencing guidelines range that would have applied in the absence of the statutory mandatory minimum.



Hughes v. United States, 849 F.3d 1008 (11th Cir. 2017),
cert. granted, 138 S. Ct. 542 (2017)

- Whether, as a four-justice plurality in *Freeman v. United States* concluded, a defendant who enters into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.



Chavez-Meza v. United States, 854 F.3d 655 (10th Cir. 2017),
cert. granted, 138 S. Ct. 734 (2018)

- Whether, when a district court decides not to grant a proportional sentence reduction under 18 U.S.C. § 3582(c)(2), it must provide some explanation for its decision when the reasons are not otherwise apparent from the record, as the U.S. Courts of Appeals for the 6th, 8th, 9th and 11th Circuits have held, or whether it can issue its decision without any explanation so long as it is issued on a preprinted form order containing the boilerplate language providing that the court has “tak[en] into account the policy statement set forth in 18 U.S.S.G. § 1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,” as the U.S. Courts of Appeals for the 4th, 5th and 10th Circuits have held.



U.S. v. Sims, 842 F.3d 1037 (8th Cir. 2017), *cert. granted*, 2018 WL 1901590 (2018) and *U.S. v. Stitt*, 860 F.3d 854 (6th Cir. 2017), *cert. granted*, 2018 WL 1901589 (2018)

- Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as “burglary” under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).



Stokeling v. United States, 684 F. App'x 870 (11th Cir. 2017), cert. granted, 2018 WL 1568030 (2018)

- Whether a state robbery offense that includes “as an element” the common law requirement of overcoming “victim resistance” is categorically a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.



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. Hill*, 820 F.3d 1003 (8th Cir. 2017)
 - *U.S. v. Dodge*, 597 F.3d 1347 (11th Cir. 2010)(en banc)
- Under MVRA, whether crime was 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)



Harmless Error

- “The categorical approach used to classify prior convictions for purposes of the career criminal Guidelines often invites this approach. The categorical approach can seem “artificial and abstract,” for it becomes easy to lose sight of the defendant’s actual conduct and culpability and to focus instead on hypothetical possibilities for how the offense of conviction might have been committed.”
 - *U.S. v. Musgraves*, 883 F.3d 709 (7th Cir. 2018)



Harmless Error

- “At the resentencing in this case, the judge calculated the guideline range with and without the enhancement, chose a sentence in between the two ranges, and then stated that he “still would have sentenced this defendant to the 240 months” without the enhancement.”
 - *U.S. v. Musgraves*, 883 F.3d 709 (7th Cir. 2018)



Harmless Error

- “Given the district court's detailed explication of its reasons for applying the statutory maximum, the record is clear that “the judge based the sentence he or she selected on factors independent of the Guidelines.” *Molina-Martinez*, 136 S.Ct. at 1346. Under these circumstances, “[a] remand would needlessly burden the district court and counsel with another sentencing proceeding, which ... would produce the same result.”

- *U.S. v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018)



§2L1.2 Immigration

- *U.S. v. Martinez*, 870 F.3d 1163 (9th Cir. 2017)
- *U.S. v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017)
 - DO not add revocation time to prior sentence if revocation occurred after first order of deportation under §2L1.2(b).
- New Commission amendment, effective November 1, 2018 reverses these opinions



Scenario

- The defendant stole rent checks (ranging from \$400-\$800) from a building rent drop box. The stolen checks were rent payments submitted near the rent deadline. Three victims had to borrow money from friends and family, one had to take out a loan at 29% interest, two had to take on an extra job, and one had to work extra shifts.



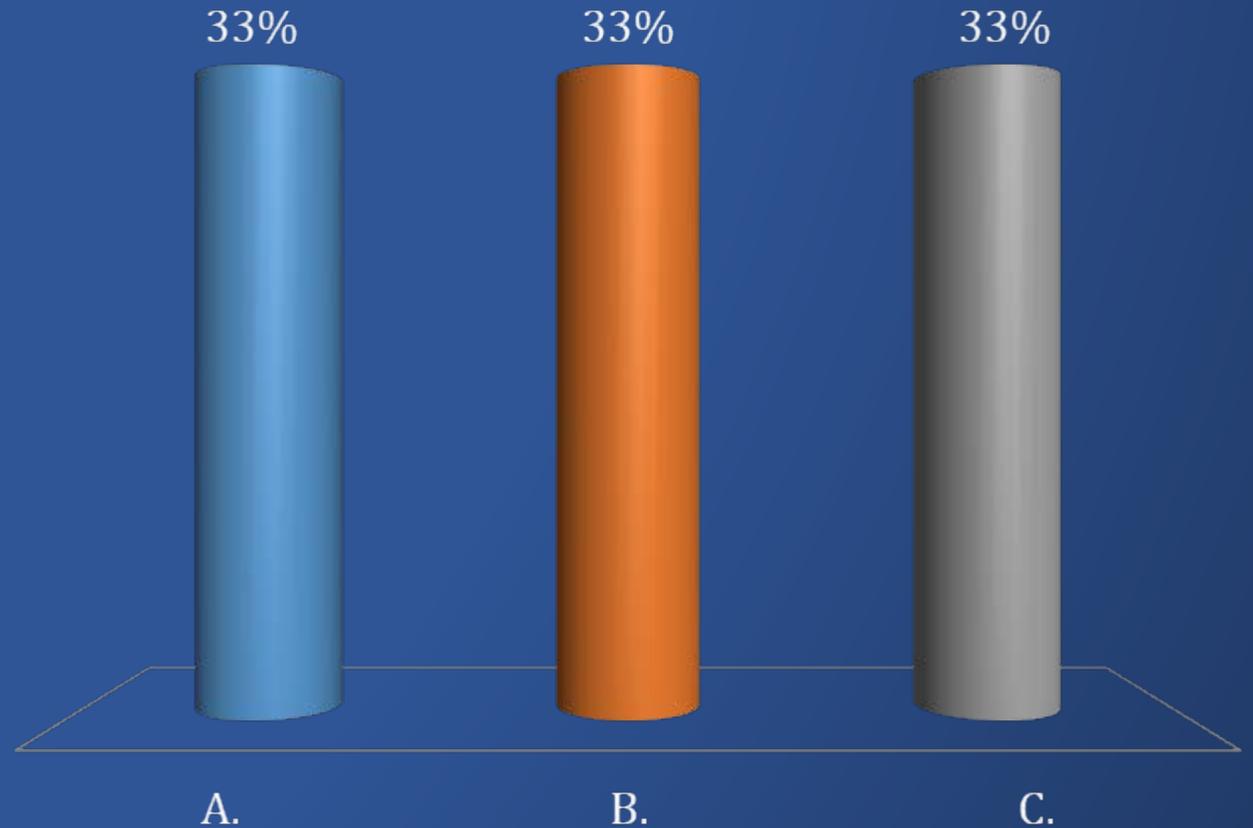
Victims Table

- §2B1.1(b)(2)
 - a) 10 or more victims; mass-marketing; **or**
resulted in substantial financial hardship
to one or more victims +2
 - b) **Resulted in substantial financial hardship**
to five or more victims +4
 - c) **Resulted in substantial financial hardship**
to 25 or more victims +6



Does §2B1.1(b)(2) (victim SOC) apply based on these facts?

- A. Yes, 2-level increase
- B. Yes, 4-level increase
- C. No



“Substantial Financial Hardship”

Application Note 4(F)

- The court shall consider whether the offense resulted in the victim:
 - Becoming insolvent
 - Filing for bankruptcy
 - Suffering substantial loss of a retirement, education, or other savings or investment fund
 - Making substantial changes to employment
 - Making substantial changes to living arrangements
 - Suffering substantial harm to their ability to obtain credit



Substantial Financial Hardship

- *U.S. v. Castaneda-Peza*, 877 F.3d 1249 (11th Cir. 2017)
 - “The record shows that the other five victims were each required to repay \$400–\$800. Because the stolen checks were rent payments submitted near the rent deadline, the repayments were due on short notice to comply with the terms of the victims' leases.”
 - “Consequently, three victims had to borrow money from friends and family, one had to take out a loan at 29% interest, two fell behind on other bills, one had to take on an extra part-time job, and one had to work extra shifts.”



Substantial Financial Hardship

- *U.S. v. Castaneda-Peza*, 877 F.3d 1249 (11th Cir. 2017)
 - “And despite all of those arrangements, two were still threatened with eviction. Castaneda–Poza contends that these circumstances amount to hardships, but not substantial hardships. We respectfully disagree.”



Substantial Financial Hardship

- *U.S. v. Castaneda-Peza*, 877 F.3d 1249 (11th Cir. 2017)
 - “Although each victim's pecuniary loss may not seem great, Castaneda–Poza's actions made his victims insecure in life's basic necessities—housing, electricity, water, and food. Certainly that insecurity is sufficient to raise a substantial hardship, and the district court therefore did not clearly err.”



Substantial Financial Hardship

- *U.S. v. Brandriet*, 840 F.3d 830 (8th Cir. 2018)
 - “Rent and other living expenses are time sensitive, and Brandriet withheld a roughly \$2,700 check for that purpose for four months after it was issued, and then he only passed on two payments of \$735 for a total of \$1,470.”
 - “She ended up having to relocate herself, relocate her business. The Defendant was using money that was hers and should have been hers for the purpose of temporary housing. He didn't give the money to her for that purpose. He spent it himself.”



Substantial Financial Hardship

- *U.S. v. Poulson*, 871 F.3d 261 (3d Cir. 2017)
 - “When applying the term to financial hardship in the sentencing context, we ought to consider not only the pecuniary value of the loss but also such intangibles as its impact on the victim.”
- Here, one victim lost \$16,000 and the loss prevented her from purchasing a house for her and her 87-year old sister. Another victim lost \$9,500 in a joint investment with his wife-- a loss that impacted their savings and the wife’s retirement plans.”



Substantial Financial Hardship

- *U.S. v. Minhas*, 850 F.3d 873 (7th Cir. 2017)
 - “Substantial financial hardship” SOC was justified where the defendant defrauded people of modest means who were saving money to go on a religious pilgrimage. Even though the loss amounts to each victim less than \$5,000, the victims testified that it took them many years to save that money.



Substantial Financial Hardship

- *U.S. v. Minhas*, 850 F.3d 873 (7th Cir. 2017)
 - “While being deprived of this opportunity (for a year at the very least) may not constitute a financial loss in the traditional sense of losing dollars from a bank account, it is a significant alteration in life circumstances, as are many of the factors pertinent to interpreting substantial financial hardship that can be found in a non-exhaustive list in Application Note 4(F), such as making changes to employment or retirement plans or altering one's housing situation.”



Substantial Financial Hardship

- *U.S. v. Sunmola*, 887 F.3d 830 (7th Cir. 2018)
 - Seven victims suffered substantial financial hardship.
- “Some of these victims testified at trial and others submitted victim impact statements. All of these victims reported a loss of at least one, if not more, of the enumerated factors under the Application Note.”



Scenario

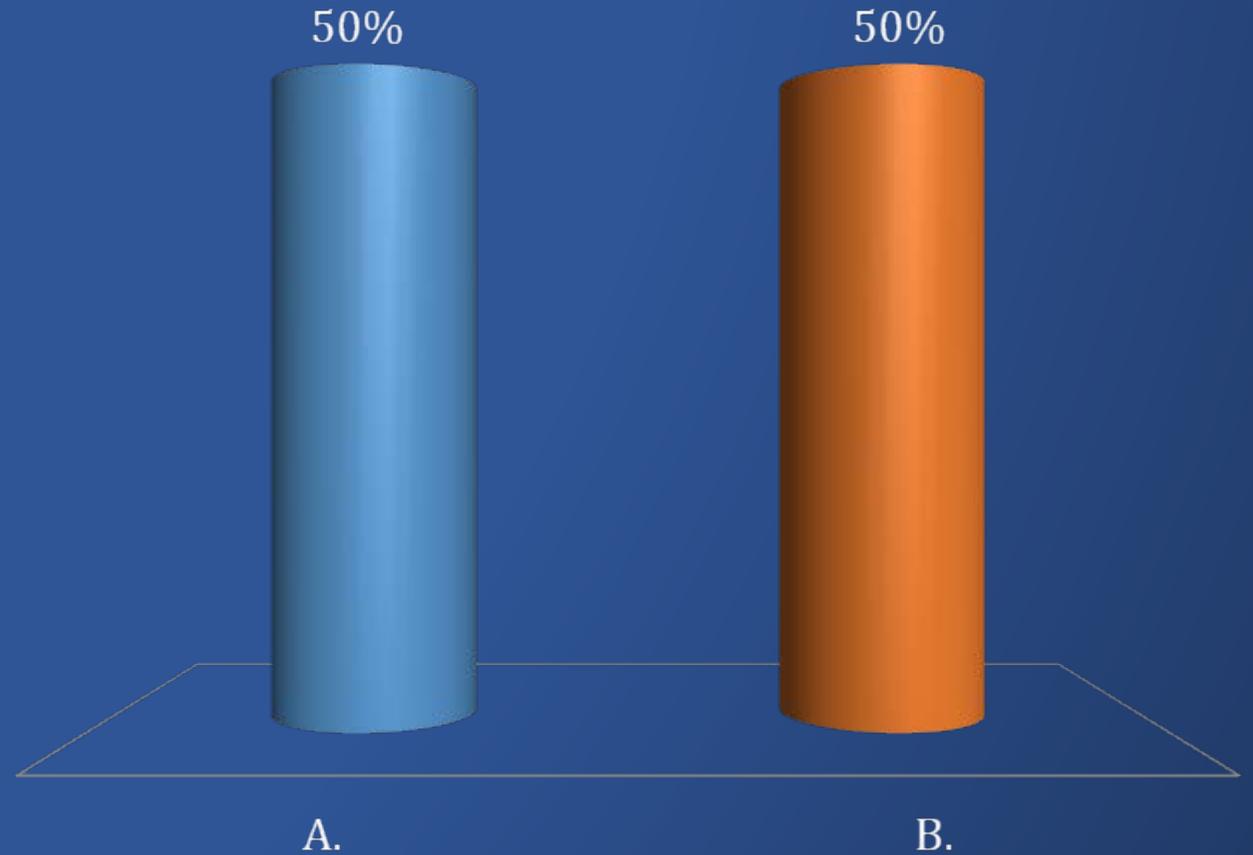
- Defendant was an airline mechanic for American Airlines. Defendant had an “AOA” badge that enabled him to enter the airport terminal without being screened at a TSA checkpoint.
- The defendant picked up drugs and would smuggle the bag into the terminal and transfer it to a courier once inside the secured area of the terminal, or board the plane as passenger with the drugs.



Did a circuit court affirm §3B1.3 (Abuse of Trust) based on these facts?

A. Yes

B. No



§3B1.3 (Abuse of Trust)

- *U.S. v. Douglas*, 885 F.3d 145 (3d Cir. 2018) (*en banc*)
 - “In determining whether abuse a position of trust under §3B1.3 applies, the court must determine that the defendant holds a position of public or private trust and that he abuse it in a manner that significantly facilitated the commission or concealment of the offense.”



§3B1.3 (Abuse of Trust)

- *U.S. v. Douglas*, 885 F.3d 145 (3d Cir. 2018) (*en banc*)
 - In determining whether the defendant occupied a position of trust, the key question is whether the defendant had the power to make decisions substantially free from supervision based on 1) a fiduciary or fiduciary-like relationship, or 2) an authoritative status that would lead his actions or judgement to be presumptively accepted.
- Here, the defendant was an airline mechanic who went through security without being checked and the enhancement should not have applied.



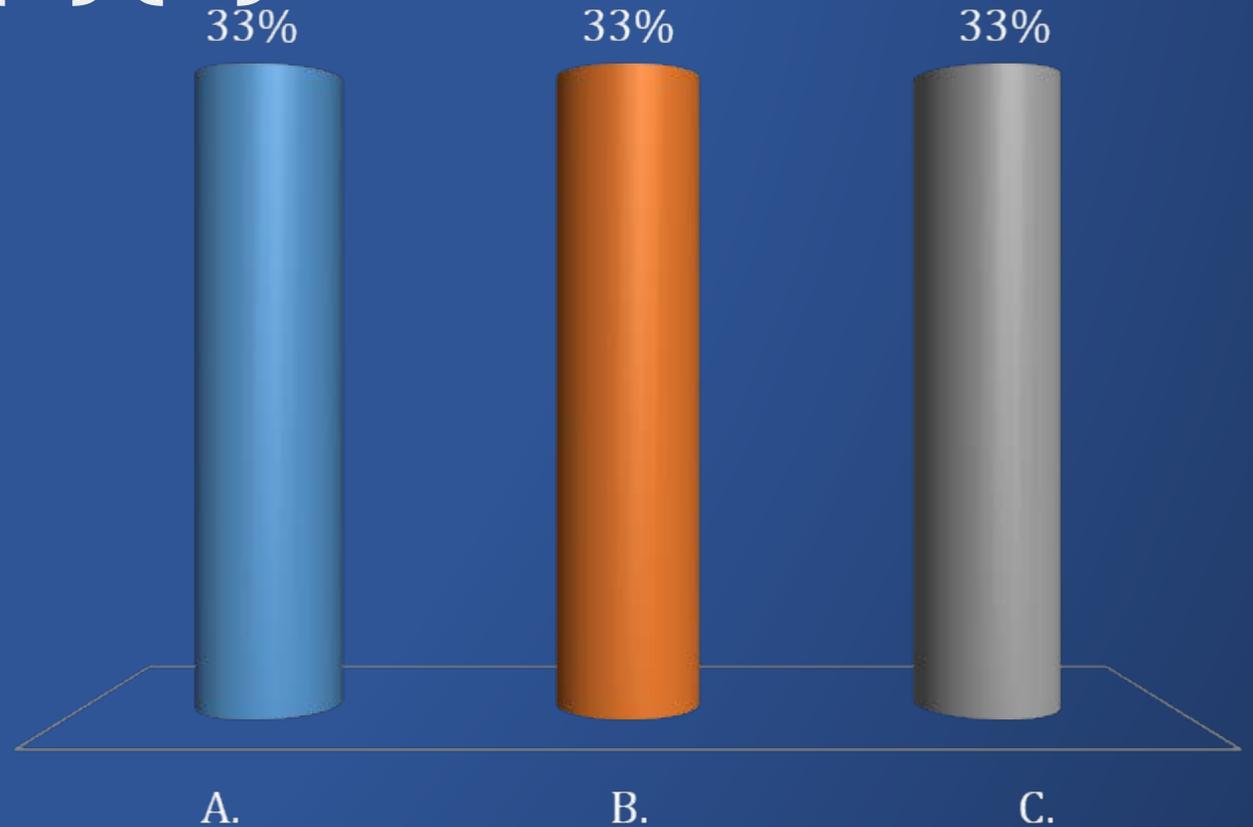
Scenario

- Defendant has two prior convictions for possession of drug paraphernalia. The first offense stemmed from a traffic stop on September 28, 2015; the second from a traffic stop the following day. After each, the police released the defendant from the scene and advised him that the case would proceed via summons. He was sentenced for both offenses on the same day in May 2016.



Is a traffic stop, followed by an issuance of a summons an intervening arrest for purposes of §4A1.2(a)(2)?

- A. Yes
- B. No
- C. Maybe



Single Sentence Criteria

§4A1.2(a)(2)

- Multiple prior sentences will be treated as a “single sentence” *if*
 1. Prior sentences are for offenses **NOT** separated by an intervening arrest

AND
 2. The offenses *either*
 - Were named in the same charging document, *or*
 - Resulted in sentences imposed on the same day



Circuit Split: Intervening Arrest

- *U.S. v. Ley*, 876 F.3d 103 (3d Cir. 2017)
 - Traffic stop, followed by issuance of a summons, is not an intervening arrest at §4A1.2(a)(2).
 - *See also U.S. v. Powell*, 798 F.3d 431 (6th Cir. 2015) (issuance of summons), *U.S. v. Wright*, 862 F.3d 1265 (11th Cir. 2017), and *U.S. v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011) (traffic citation for driving with suspended license)
- But see *U.S. v. Morgan*, 354 F.3d 621 (7th Cir. 2003) (traffic citation is an intervening arrest)



Scenario

- Defendant pled guilty to § 922(g) on 4/1/2018
- Defendant has three prior convictions when he robbed three different victims in San Antonio on 11/24/2009. The first robbery took place on Houston Street at 10:00, the second took place on Durango Street at 10:15, and the third was at Crockett St at 10:45.
- He pled to all 3 robberies and was sentenced on 6/1/2010 to all three and received a 6 year sentence for each robbery to run concurrently.



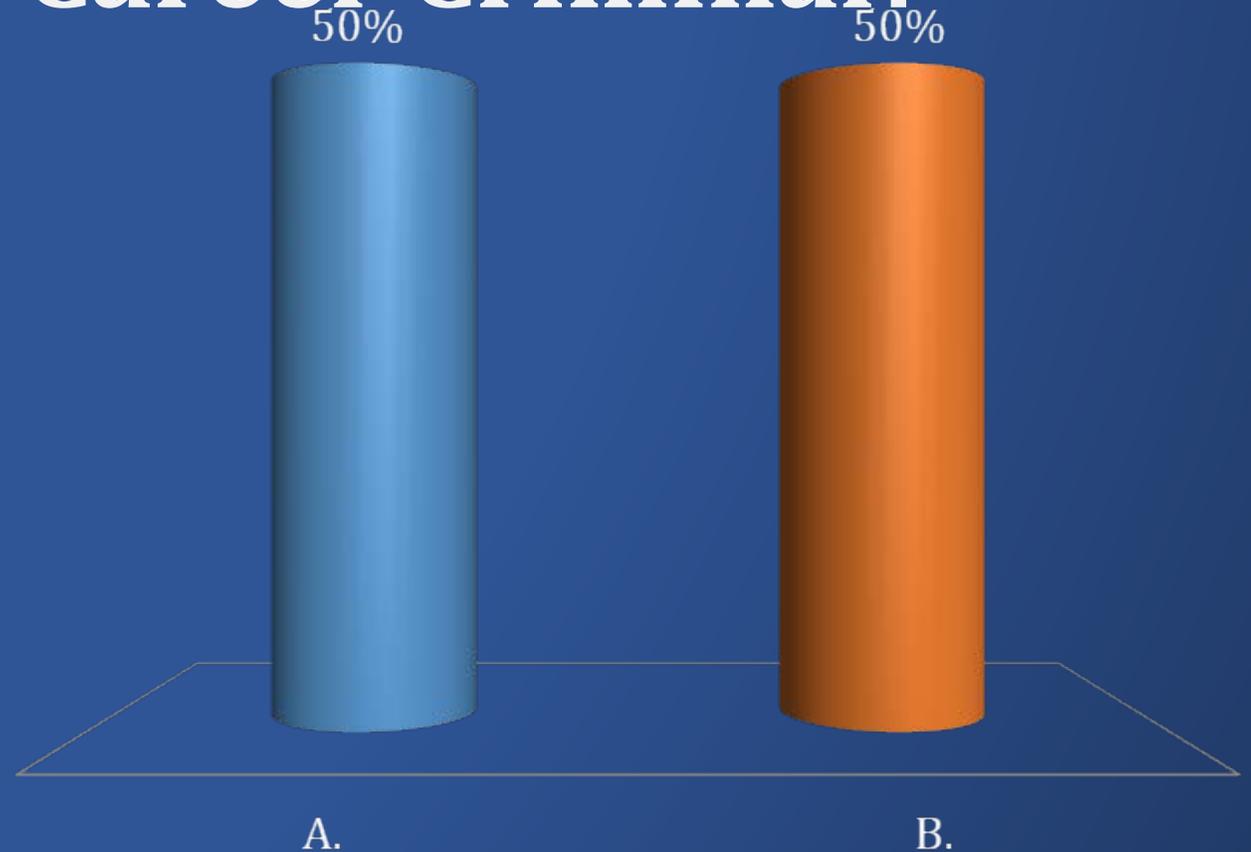
Scenario

- The government believes the defendant qualifies under the ACCA because he has three prior predicate violent felonies under the ACCA.
- The defendant argues that there is only one violent felony because there was no intervening arrest and the offenses were sentenced on the same day.



Assuming that this robbery statute would be a violent felony, does the defendant qualify as an Armed Career Criminal?

- A. Yes, because he has three violent felonies
- B. No, because the offenses are considered a single sentence and thus, he has only one predicate offense



ACCA

- In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another



ACCA: Occasions

- *U.S. v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018)
 - Defendant's three robberies committed between 10:00 and 10:55 pm were separate occasions
 - The three robberies took place at distinct times: about 10:00 p.m., about 10:15 p.m., and about 10:55 p.m.
 - There was also other evidence in the transcript from which the District Court could infer that none of Bordeaux's accomplices had stayed behind at one site while the others moved on to the other sites.
- *See also, Levering v. U.S.*, -F.3d-, 2018 WL 2292939 (8th Cir. 2018)



ACCA: Occasions

- To consider if offenses were committed on occasions different from one another, typically court must use *Shepard* documents
 - *U.S. v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018)
 - *U.S. v. Dantzler*, 771 F.3d 137, 139 (2d Cir. 2014).
 - *U.S. v. Melbie*, 751 F.3d 586 (8th Cir. 2014)
 - *U.S. v. Pham*, 872 F.3d 799 (10th Cir. 2017)



§3A1.1 Vulnerable Victims

- *U.S. v. Sunmola*, 887 F.3d 830 (7th Cir. 2018)
 - “The defendant and his co-conspirators chose the women they developed relationships with, specifically targeting women they believed would be susceptible to their deceitful tactics. Many of these women had been divorced, abandoned, widowed, or ignored by the men in their lives. One victim was 55 years old and recently divorced from her husband of 20 years. Two victims were recent widows, one with cancer. Another, a 66-year-old living on social security, had been abused by her first husband and abandoned by her second. And another was a divorced, single parent living on disability due to partial blindness from a gunshot wound.”



§3A1.1 Vulnerable Victims

- *U.S. v. Sunmola*, 887 F.3d 830 (7th Cir. 2018)
 - “We acknowledge most of the targeted women were middle-aged rather than elderly, however we do not find this conclusive. These women were seeking companionship through online dating, making them particularly susceptible to falling into the vicious trap of a man who deceitfully made them believe they were in love. Their prior relationships left these women unusually vulnerable to falling for Sunmola and his co-conspirators’ deceitful tactics.”



§3A1.1 Vulnerable Victims

- *U.S. v. Murra*, 879 F.3d 669 (5th Cir. 2018)
 - Vulnerable victim enhancement applied to defendant who was convicted of forced labor.
 - “The victims were forced to accept the abusive conditions Murra created for them because they were in an unfamiliar country with no food, clothing, shelter, or money other than what Murra provided. And during the time Murra exercised complete dominion over them, she retained their immigration documents and threatened them with immigration-related retribution if they disobeyed her.”



§3A1.1 Vulnerable Victims

- *U.S. v. Crabtree*, 878 F.3d 1274 (11th Cir. 2018)
 - Numerous patients—many of whom did not qualify for PHP treatment—received inappropriate and inadequate treatment at HCSN, whose entire business was caring for elderly patients with “serious and acutely symptomatic mental illnesses.”
 - The defendant was responsible for reviewing the patients medical needs and qualifications for admission; for developing an individualized treatment plan for their conditions; for overseeing the implementation of treatment plans; and for monitoring each patient’s progress



§3A1.1 Vulnerable Victims

- *U.S. v. Beyer*, 878 F.3d 610 (8th Cir. 2018)
 - “Beyer ignores the combination of factors he knew about R.R. and Mi.F.: (1) R.R.'s disability, limited income and assets, and lack of investment sophistication; and (2) Mi.F.'s health issues and alcoholism. R.R. and Mi.F. were thus “particularly susceptible” to financial fraud.”



§3A1.1 Vulnerable Victim

- *U.S. v. Mathews*, 874 F.3d 698 (11th Cir. 2017)
 - Here, the district court did not clearly err in determining that the Patient was vulnerable—he was 76 years old and recovering from heart surgery in an intensive care unit.
 - Although Martinez argues that he did not “target” the Patient based on his infirmities, § 3A1.1(b) does not require that the defendant “target” the vulnerable victim. Instead, “the vulnerable victim enhancement applies so long as the defendant ‘knew or should have known that a victim of the offense was a vulnerable victim



§3A1.1 Vulnerable Victim

- *U.S. v. Johnson*, 874 F.3d 990 (5th Cir. 2017)
 - Vulnerable victim SOC applied to victims in this scheme were 14 Hispanic families who spoke little or no English.
 - “Some were undocumented ... and all had minimal experience in conducting real estate transactions in the United States ... [E]ach had previously been the victim of real estate fraud perpetrated by a different person, and that made them particularly susceptible to this type of fraud ... They were told to bring cash, and they would only accept cash.



Circuit Split on Access Device

- *U.S. v. Popovski*, 872 F.3d 552 (7th Cir. 2017)
 - A card reprogrammed with a stolen number for use in an ATM is an “unauthorized access device” as defined in 18 U.S.C. § 1029(e)(1), (3).
 - Cards with canceled numbers or whose accounts or credit limits have been exhausted by earlier withdrawals still count
- *See also, U.S. v. Moon*, 808 F.3d 1085 (6th Cir. 2015)
- *But see U.S. v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012) (government must show some proof of usability)



Access Device

- *U.S. v. Wright*, 862 F.3d 1265 (11th Cir. 2017)
 - Access device includes credit cards, debit cards, usernames and passwords, routing and bank numbers (as long as not on a paper check) and merchant account numbers, and social security numbers
- *U.S. v. Tatum*, 518 F.3d 769 (10th Cir. 2008) (counterfeit checks and account numbers on those checks fall outside definition of access device)



Substantive Reasonableness

- *U.S. v. Zuk*, 874 F.3d 398 (4th Cir. 2017)
 - “This is one of the rare cases where we conclude that the sentence imposed by the district court was substantively unreasonable in light of the § 3553(a) factors and therefore must be vacated.”
 - Since the age of 16, Zuk had collected child pornography, favoring images depicting sadistic behavior with very young children. He traded images with others in an online community, including photographs of his younger sister in the nude and other young children being anally raped.



Substantive Reasonableness

- *U.S. v. Zuk*, 874 F.3d 398 (4th Cir. 2017)
 - In addition, on a daily basis during a six-month period, he communicated online with a 16-year-old boy about his sexual abuse of his 5-year-old cousin, even directing the 16-year-old to produce specific sadistic images of the cousin's abuse for Zuk's own sexual gratification. By the time of his arrest, Zuk had accumulated more than 13,800 images of child pornography and 472 videos, using more than 900 email addresses that he created to do so



Substantive Reasonableness

- *U.S. v. Barnes*, -F.3d-, 2018 WL 2224351 (10th Cir. 2018)
 - Court affirms 24 month sentence for jail superintendent reasonable and 12 month sentence for assistant jail superintendent as reasonable

