



# Case Law Update: Hot Topics

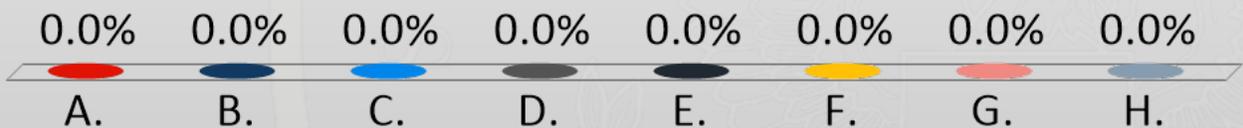
Thursday, September 5, 2019

1:45 p.m. – 3:15 p.m.

Alan Dorhoffer

# Who is 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



## *U.S. v. Davis*, 139 S. Ct 2319 (2019)

The residual clause at 18 U.S.C. § 924(c)(3)(B)'s crime of violence definition is unconstitutionally vague

## *Davis* Issues

- *Kidd v. U.S.*, 929 F.3d 578 (8th Cir. 2019)
  - “Because § 924(c)(3)(A) [force clause] applies in this case, the Supreme Court’s recent decision in *United States v. Davis* does not afford Kidd the relief he seeks.”

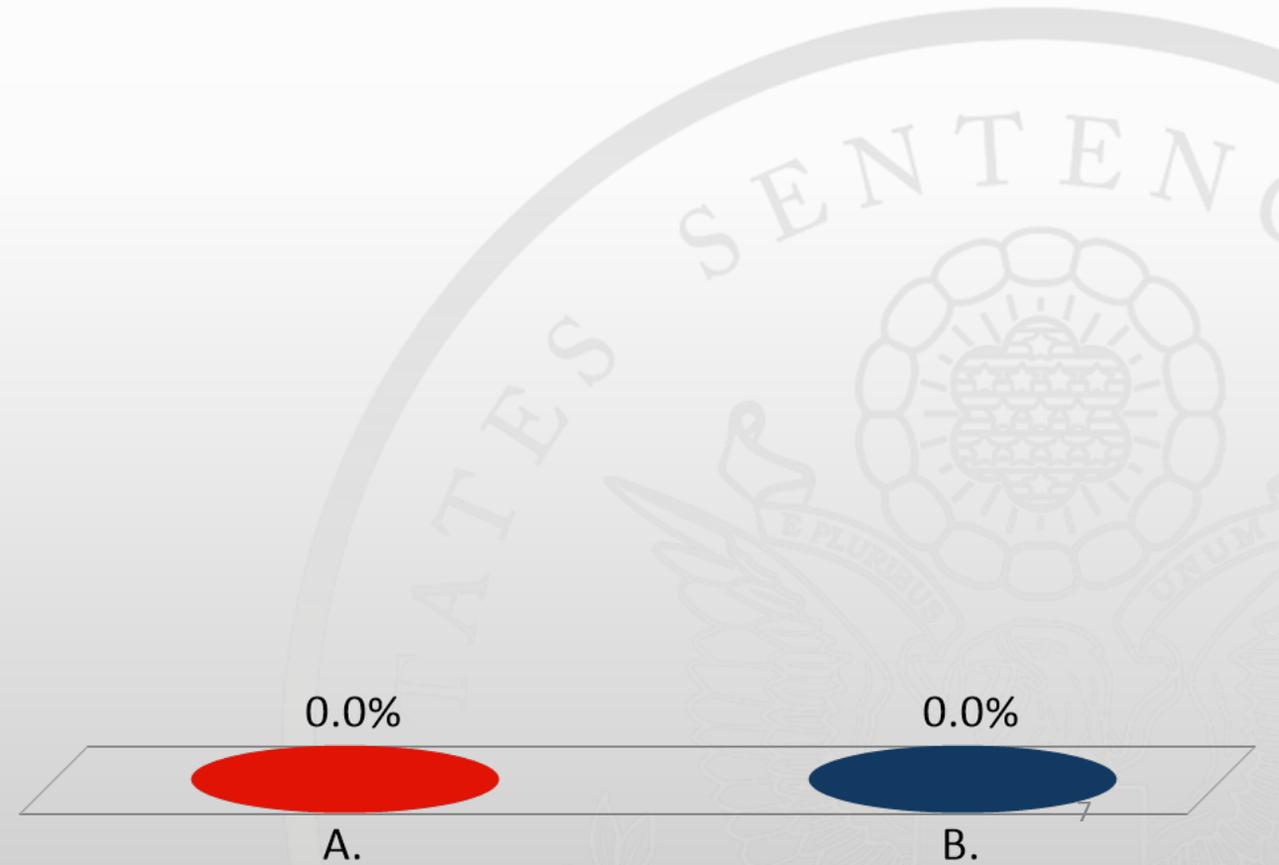
# Pending Supreme Court Case on “Serious Drug Trafficking Offense” at ACCA

- *Shular v. U.S.*, 736 F. App’x 876 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 2773 (2019)
- Whether the determination of a “serious drug offense” under the Armed Career Criminal Act requires the same categorical approach used in the determination of a “violent felony” under the act.

# Scenario 1: Does the ACCA apply?

A. Yes

B. No



## Armed Career Criminal Act

- 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



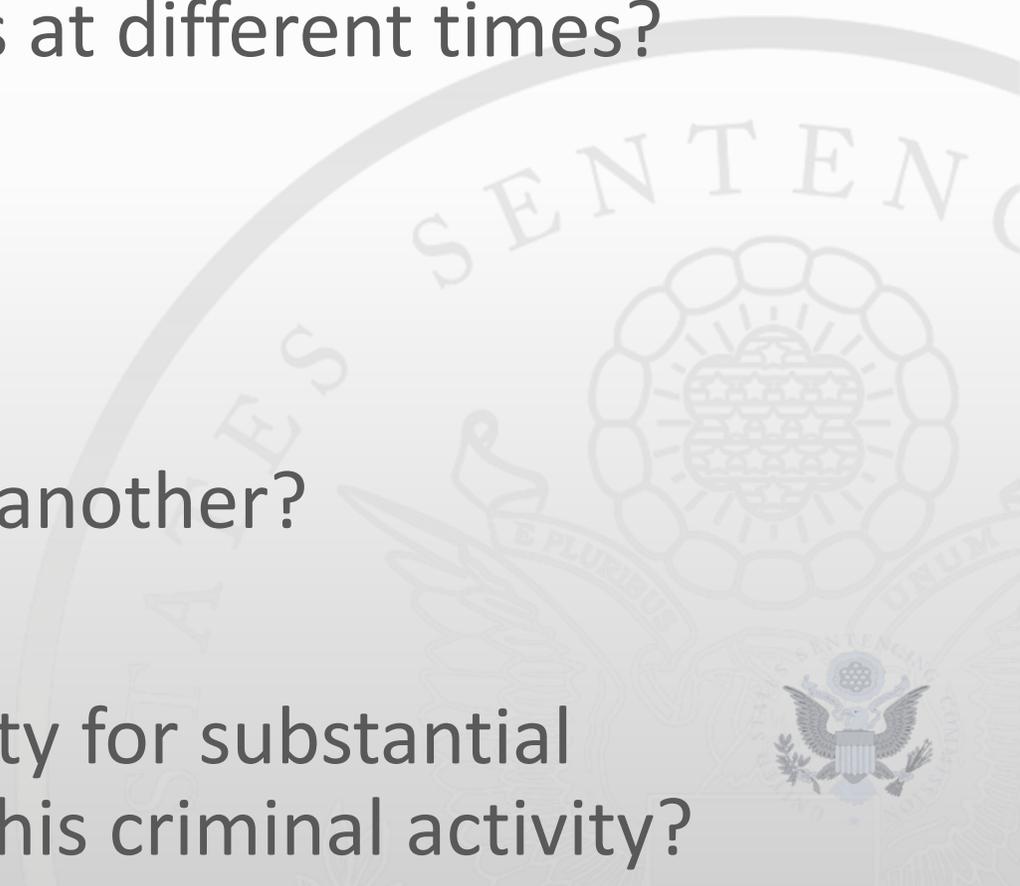
## ACCA: Different Occasions

- *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. and are different occasions
- *See also, Levering v. U.S.*, 890 F.3d 738 (8th Cir. 2018)
- *U.S. v. Hennessee*, -F.3d-, 2019 WL 3418957 (6th Cir. 2019)



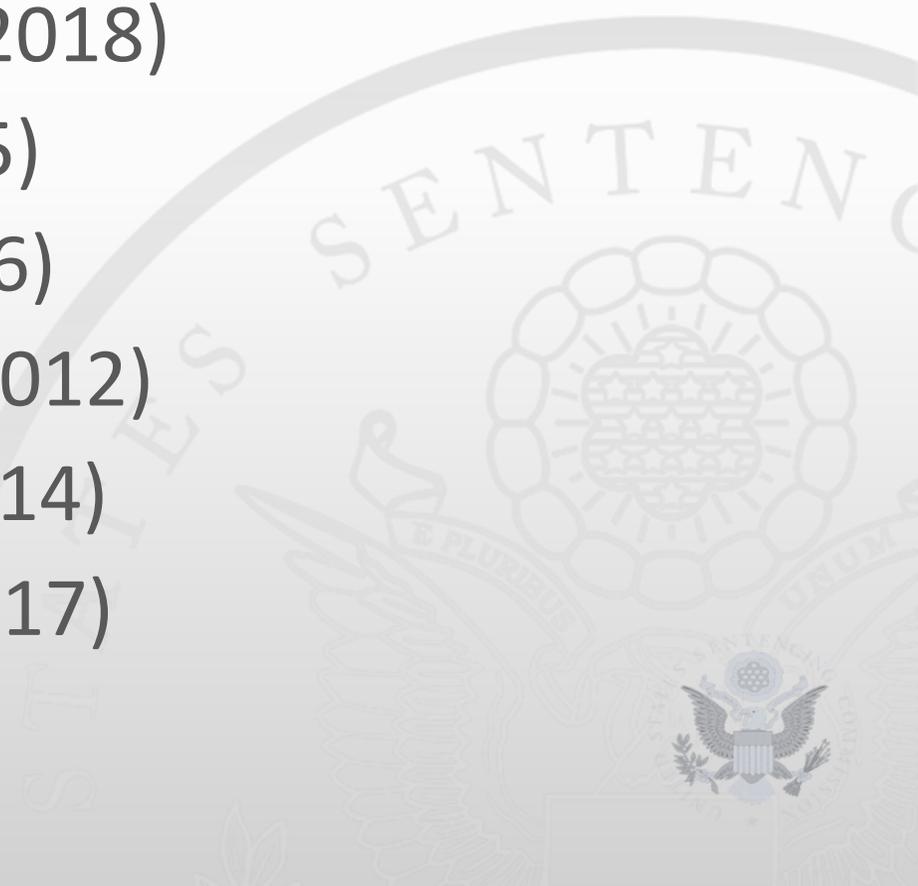
# Factors to Consider When Analyzing Occasions

- Is this one criminal-episode?
- Did defendant commit different crimes at different times?
- Were there separate victims?
- Did defendant travel from one area to another?
- Did defendant have realistic opportunity for substantial reflection where he could have ended his criminal activity?



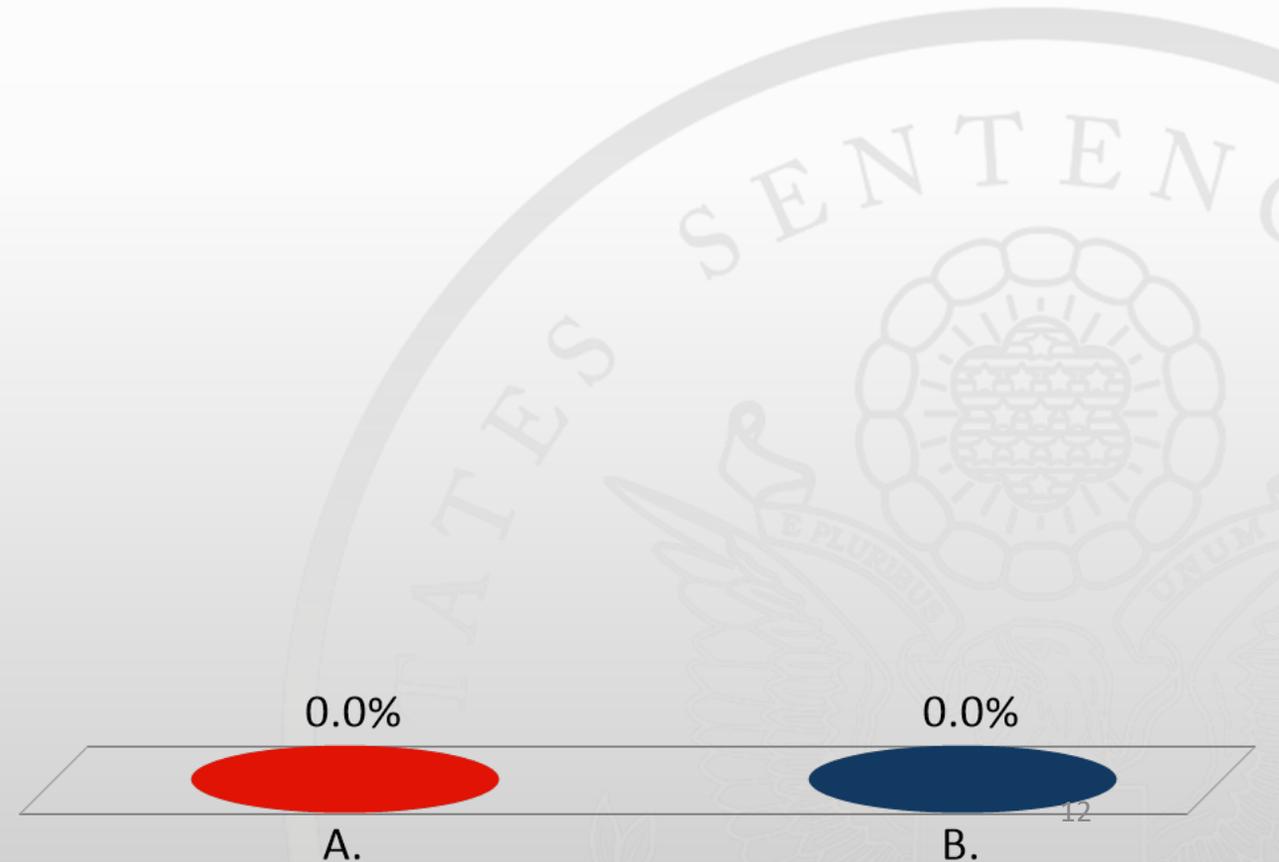
## ACCA: Occasions

- 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. Span*, 789 F.3d 320 (4th Cir. 2015)
  - *U.S. v. Fuller*, 453 F.3d 274 (5th Cir. 2006)
  - *Kirkland v. U.S.*, 687 F.3d 878 (7th Cir. 2012)
  - *U.S. v. Melbie*, 751 F.3d 586 (8th Cir. 2014)
  - *U.S. v. Pham*, 872 F.3d 799 (10th Cir. 2017)



# Scenario 2: Does the enhancement for altered or obliterated serial number apply?

- A. No
- B. Yes



## §2K2.1(b)(4) Altered and Obliterated Serial Number

- *U.S. v. Jones*, 927 F.3d 895 (5th Cir. 2019)
  - Removal of the metal serial-number plate from the frame of a firearm is a material change and alters the serial number and thus alters or obliterates the serial number

## §2K2.1(b)(4) Altered and Obliterated Serial Number

*U.S. v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)

*U.S. v. Harris*, 720 F.3d 499 (4th Cir. 2013)

*U.S. v. Thigpen*, 848 F.3d 841 (8th Cir. 2017)

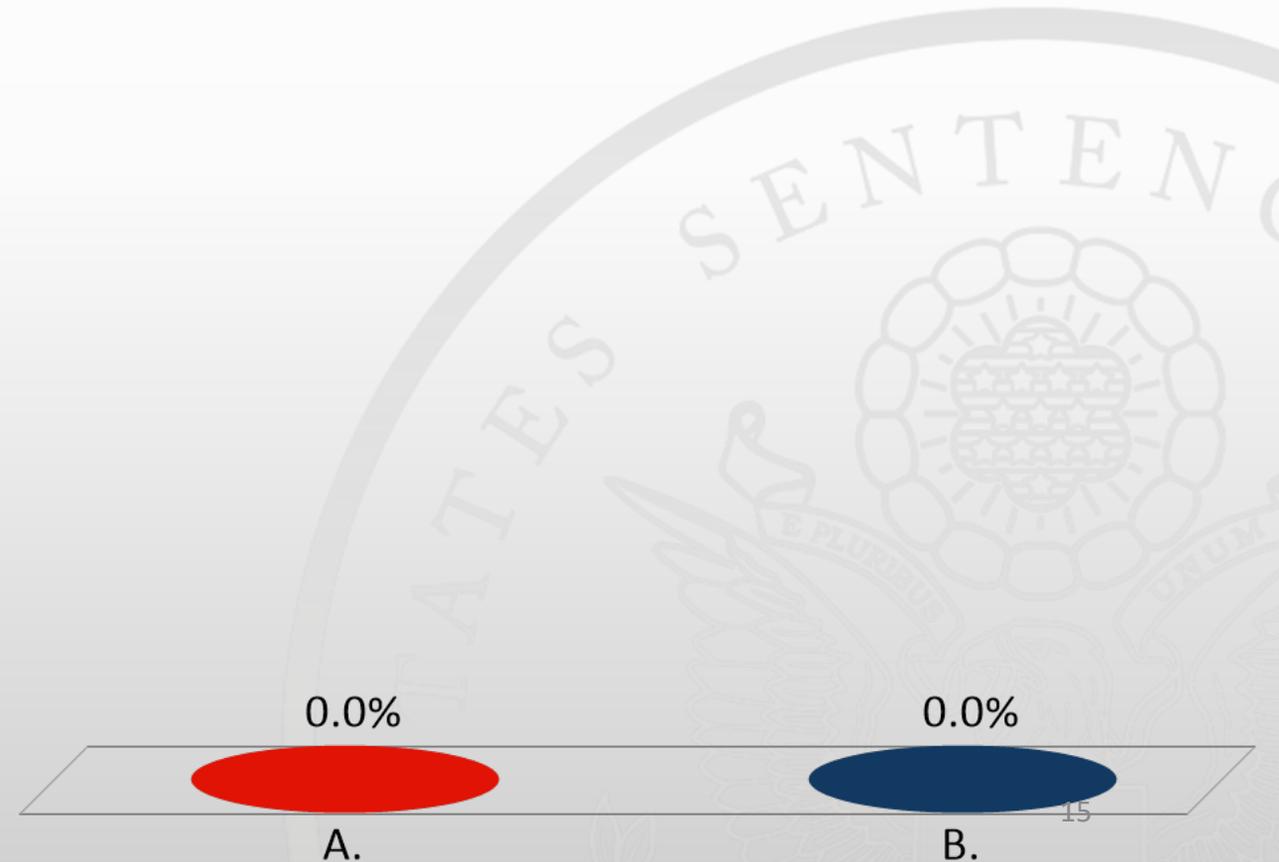
*U.S. v. Carter*, 421 F.3d 909 (9th Cir. 2005)

*U.S. v. Justice*, 679 F.3d 1251 (10th Cir. 2012)

*U.S. v. Warren*, 820 F.3d 406 (11th Cir. 2016)

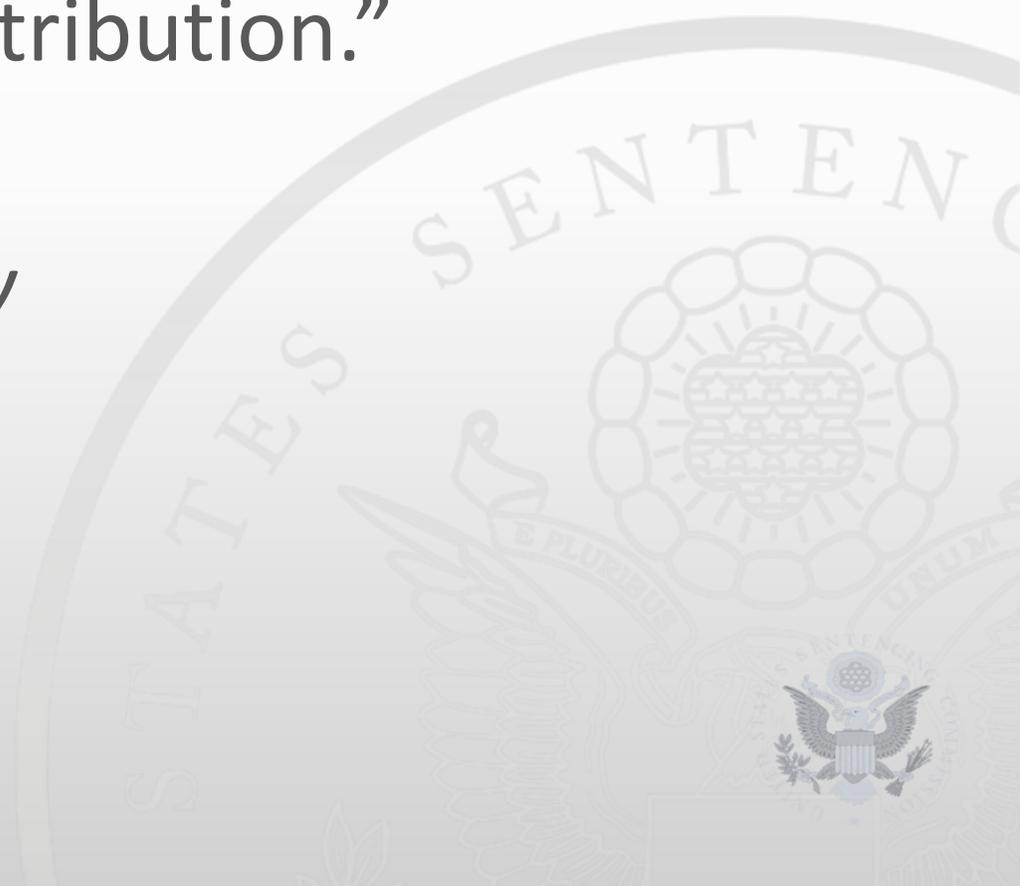
# Scenario 3: Does §2G2.2(b)(3) “distribution” enhancement apply?

- A. No
- B. Yes



## §2G2.2(b)(3)(F): Distribution SOC

- The 2-level specific offense characteristic applies “if the *defendant knowingly* engaged in distribution.”
  - “Defendant” specific
  - Mens rea requirement: *knowingly*



## §2G2.2 Knowledge Standard

- *U.S. v. Lawrence*, 920 F.3d 331 (5th Cir. 2019)
  - Mere use of peer-to-peer file sharing network is insufficient to support the enhancement, but here court made findings to infer defendant's knowledge of how file sharing programs operate
- *See also, U.S. v. Carroll*, 886 F.3d 1347 (11th Cir. 2019) (conviction for distribution overturned)

## §2G2.2(b)(3) Knowing Distribution

- *U.S. v. Montanez-Quinones*, 911 F.3d 59 (1st Cir. 2019)
  - Knowledge requirement can be inferred if government proves defendant knew how file sharing programs operated. Here, government showed that the defendant was a sophisticated and long-time computer user
- *See also, U.S. v. Smith*, 910 F.3d 1047 (8th Cir. 2018)

# Knowledge Findings

- “Although the District Court noted that the record contains evidence that Baldwin may have had some expertise with computers, arguably supporting an inference that Baldwin knew he was distributing files, the District Court made no such finding. Rather, it found only that he “should very well have known.” That statement does not constitute a finding of knowing distribution.”
  - *U.S. v. Baldwin*, 743 F.3d 357 (2d Cir. 2014)



## §2G2.2(b)(3)(B): 5-level Distribution

- Applies “if the *defendant* distributed in exchange for any valuable consideration . . .”



## §2G2.2(b)(3)(B): 5-level Distribution

- “It is apparent from those emails that both Little and Hall wanted to exchange child pornography, and when Little sent Hall child pornography he expected Hall to respond in kind. The court did not err in applying the five-level enhancement under §2G2.2(b)(3)(B).”
  - *U.S. v. Little*, 864 F.3d 1283 (11th Cir. 2017)
  - *U.S. v. Bennett*, 839 F.3d 153 (2d Cir. 2016)
  - *But see U.S. v. Oliver*, 919 F.3d 393 (6th Cir. 2019)



## §2G2.2(b)(3)(B): 5-level Distribution

- Some circuits have specific factors to apply enhancement, government must show the defendant:
  - (1) agreed—either explicitly or implicitly—to an exchange with another person under which
  - (2) defendant knowingly distributed child pornography to that other person
  - (3) for specific purpose of obtaining valuable consideration
  - (4) from that same other person.
  - *U.S. v. Oliver*, 919 F.3d 393 (6th Cir. 2019)

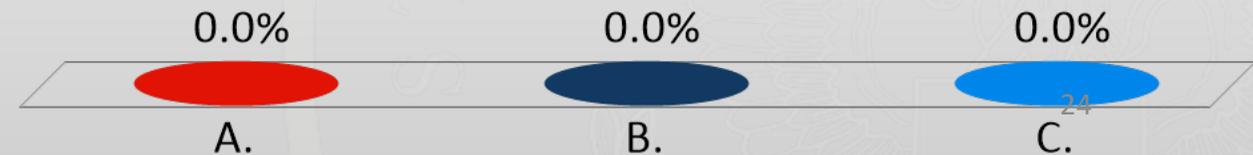


## §2G2.2(b)(1): (2-level reduction)

- *U.S. v. Bleau*, 930 F.3d 35 (2d Cir. 2019)
  - A defendant is not eligible for a two-level reduction under § 2G2.2(b)(1) where his use of peer-to-peer file-sharing software enabled law enforcement officers to remotely access and download images of child pornography from his computer, regardless of whether he intended to distribute this content

# Scenario 4: Does the enhancement apply?

- A. No, because you need 2 convictions
- B. No, because you need to have exploited/abused more than one minor
- C. Yes



## §4B1.5(b) 5-level increase

- The defendant engaged in a pattern of activity involving prohibited sexual conduct
- Pattern means: any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant
- These offenses include: production of child pornography, travel cases, and sex trafficking, sexual abuse

## §4B1.5(b): “Counting Instant Offense”

- *U.S. v. Fox*, 926 F.3d 1275 (11th Cir. 2019)
  - §4B1.5(b) “a pattern of activity” can include conduct from the underlying conviction
- *U.S. v. Broxmeyer*, 699 F.3d 265 (2d Cir. 2012)
- *U.S. v. Rojas*, 520 F.3d 876 (8th Cir. 2008)
- *U.S. v. Evans*, 782 F.3d 1115 (10th Cir. 2015)

## §4B1.5(b)

- Can include multiple sexual offenses involving same minor
  - *U.S. v. Phillips*, 431 F.3d 86 (2d Cir. 2005)
  - *U.S. v. Brattain*, 539 F.3d 445 (6th Cir. 2008)
  - *U.S. v. Gibson*, 840 F.3d 512 (8th Cir. 2017).
  - *U.S. v. Pappas*, 715 F.3d 225 (8th Cir. 2013)
  - *U.S. v. Fox*, 926 F.3d 1275 (11th Cir. 2019)
- Can include attempts and fictitious minors
  - *U.S. v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010)



## §2G1.3(b)(2) “Undue Influence”

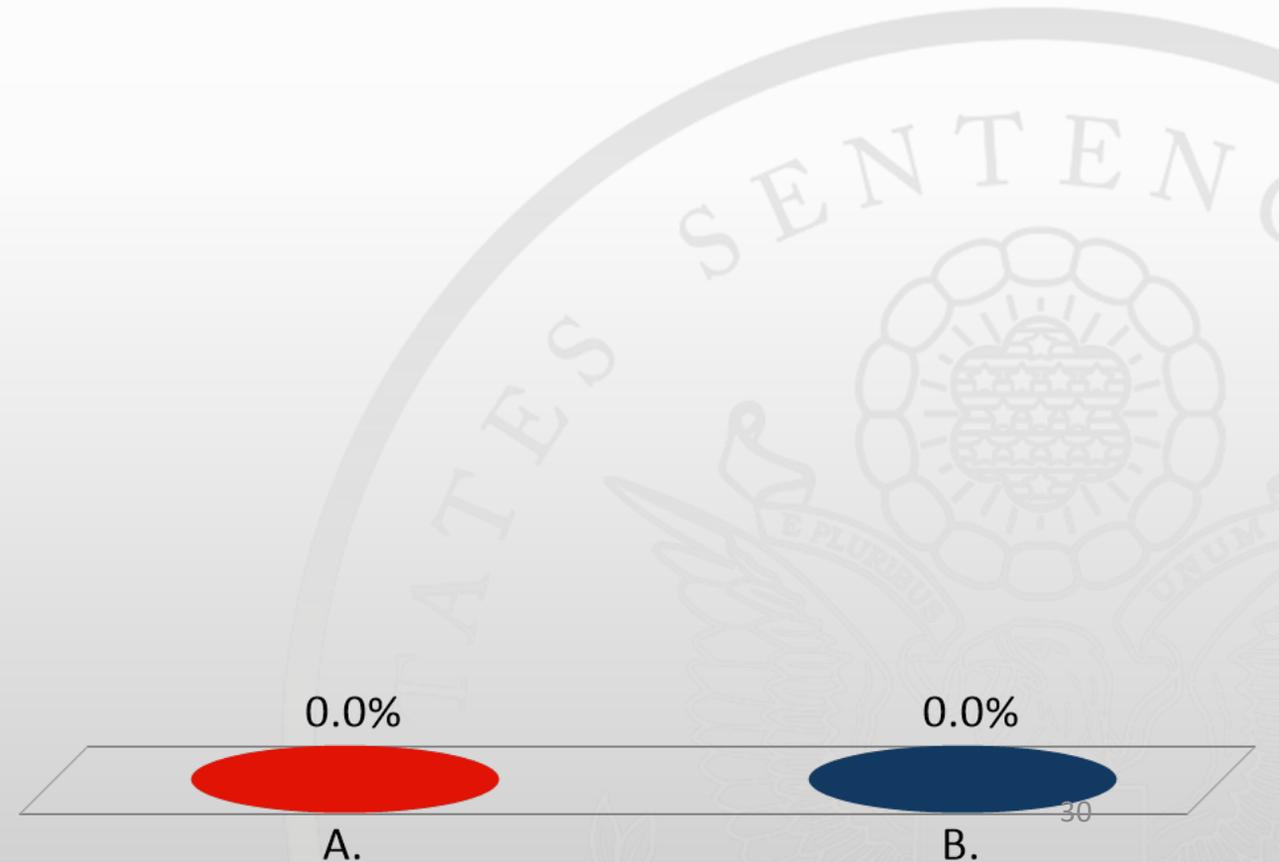
- *U.S. v. Whyte*, 928 F.3d 1317 (11th Cir. 2019)
- Even if a minor has engaged in previous acts of prostitution does not foreclose that a defendant may have unduly influenced her to engage in further acts of prostitution.

## §2G1.3(b)(2) “Undue Influence”

- *U.S. v. Davis*, 924 F.3d 899 (6th Cir. 2019)
  - Court incorrectly applied undue influence enhancement because the court did not consider evidence that the victim had previously engaged in prostitution, willingly engaged in prostitution during events of the case and she contacted defendants to have them procure her clients

# Scenario 5A: Can the court sentence the defendant to 48 months?

- A. Probably not
- B. Probably



## Subsection (b), §5G1.3 & App. Note 2

If there is a term of imprisonment that the defendant is currently serving that is relevant conduct under §1B1.3(a)(1), (2), or (3) to the instant federal offense resulted in the undischarged term of imprisonment then the court shall:

1. Adjust the sentence for the instant offense for the time served on undischarged term and
2. Sentence for instant offense shall run concurrently

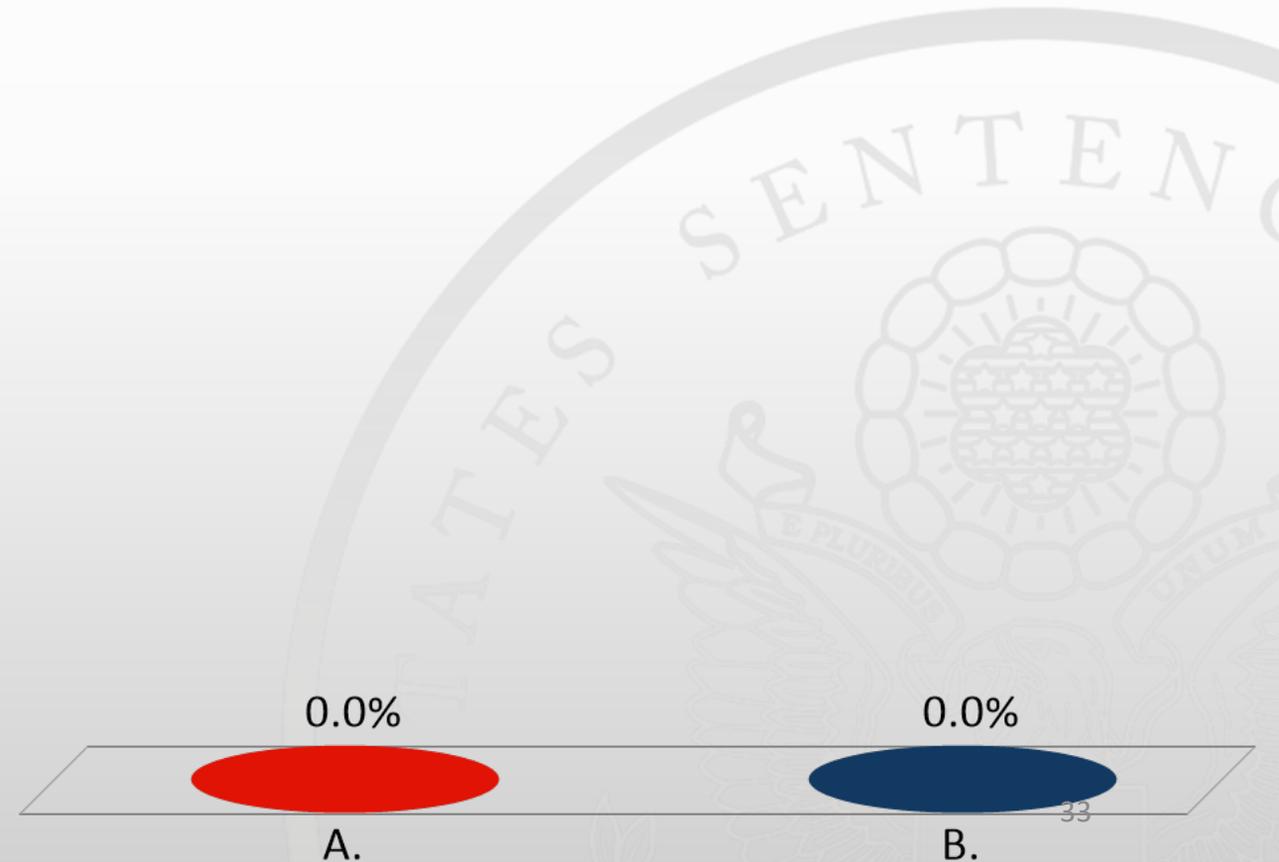


## §5G1.3 and Mandatory Minimums

- *U.S. v. Rivers*, 329 F.3d 119 (2d Cir. 2003)
  - “So long as the total period of incarceration, after the adjustment, is equal or greater than the statutory minimum, the statutory dictate has been observed and its purpose accomplished.”
- *U.S. v. Dorsey*, 166 F.3d 558 (3d Cir. 1999)
- *U.S. v. Ross*, 219 F.3d 592 (7th Cir. 2000)
- *U.S. v. Kiefer*, 20 F.3d 874 (8th Cir. 1994)
- *U.S. v. Drake*, 49 F.3d 1438 (9th Cir. 1995)

# Scenario 5B: Can the court sentence the defendant to 36 months?

- A. Probably not
- B. Probably



## §5K2.23 (Discharged Terms)

A downward departure might be appropriate if the defendant has completed serving a term of imprisonment and §5G1.3(b) would have applied if the defendant was still in custody

## §5K2.23 and Mandatory Minimums

- *U.S. v. Moore*, 918 F.3d 368 (4th Cir. 2019)
  - §5K2.23 does not permit a district court to adjust a federal sentence below the statutory minimum to account for a related state sentence that has already been discharged
- *U.S. v. Lucas*, 745 F.3d 626 (2d Cir. 2014)
- *U.S. v. Cruz*, 595 F.3d 744 (7th Cir. 2010)

## Safety Valve: 18 U.S.C. § 3553(f)

- *U.S v. Collins*, 924 F.3d 436 (7th Cir. 2019)
  - Defendant must carry the burden of establishing eligibility for the safety-valve exemption from a mandatory minimum sentence

## Safety Valve: 18 U.S.C. § 3553(f)

- *U.S v. Valquier*, -F.3d-, 2019 WL 3819331 (8th Cir. Aug. 15, 2019)
  - District court correctly held that the government proved that the defendant had a larger role in the drug conspiracy than he admitted to, and the defendant did not provide complete information.

## Safety Valve: 18 U.S.C. § 3553(f)

- *U.S. v. Cervantes*, 929 F.3d 535 (8th Cir. 2019)
  - The district court's determination that the defendant had not been complete and truthful in his safety-valve interview was not clearly erroneous

## Safety Valve: 18 U.S.C. § 3553(f)

- *U.S. v. Fincher*, 929 F.3d 501 (7th Cir. 2019)
  - “We hold the district court did not err in finding Fincher failed to show by a preponderance of the evidence his possession of the handgun was not in connection with his offense. Thus, the district court properly denied safety-valve relief.”

## Safety Valve: 18 U.S.C. § 3553(f)

- *U.S. v. Davis*, 927 F.3d 9 (1st Cir. 2019)
  - Even though the defendant qualified for the safety valve under § 3553(f), the court does not have to sentence below the mandatory minimum. Here, the range was 108-135 months and the court sentenced to 135 months

## §2L1.2 (Illegal Reentry)

- Court should use the “single sentence rule” at §4A1.2 when determining sentence length at §2L1.2(b)(2) and (b)(3)
  - *U.S. v. Cuevas-Lopez*, -F.3d-, 2019 WL 3884467 (9th Cir. Aug. 19 2019)
  - *U.S. v. Garcia-Sanchez*, 916 F.3d 522 (5th Cir. 2019)

# Circuit Split: Does Government Need to Show “Access Device” Must be Operable at §2B1.1?

## Access device need not be operable

- *U.S. v. Rueda*, -F.3d-, 2019 WL 3451181 (1st Cir. July 31, 2019)
- *U.S. v. Carver*, 916 F.3d 398 (4th Cir. 2019)
- *U.S. v. Moon*, 808 F.3d 1085 (6th Cir. 1999)
- *U.S. v. Popovski*, 872 F.3d 552 (7th Cir. 2017)

## Access device must be operable

- *U.S. v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012)

## §2B1.6 (Aggravated Identity)

- *U.S. v. Flete-Garcia*, 925 F.3d 17 (1st Cir. 2019)
  - The court can apply §2B1.1(b)(2) (“number of victims”) in conjunction with a sentence at §2B1.6 (Aggravated Identity Theft) because the number of victims enhancement does not relate to the transfer, possession or use of the means of identification

## §2K2.1(b)(5) “Trafficking Enhancement”

- *U.S. v. Moody*, 919 F.3d 425 (7th Cir. 2019)
  - The court incorrectly applied §2K2.1(b)(5) because the court did not find that defendant sold guns to individuals that were “unlawful”
  - “And the anonymous participants’ interest in off-the-books gun sales might have given Moody reason to believe that their purchases were unlawful, but not that their possession or use of the guns is unlawful. As Moody emphasizes, those who purchase guns unlawfully do not necessarily fall into the prohibited category defined by §2K2.1(b)(5).”

## §2K2.1(b)(5) “Trafficking”

- If the *defendant* engaged in the trafficking of firearms, increase by 4 levels
- “Trafficking” defined in App. Note 13(A)



## Trafficking Definition: App. Note 13(A)

If the defendant:

- transported, transferred, or otherwise disposed of two or more firearms to another individual or received such firearms with the intent to do so

**and**

- knew or had reason to believe such conduct would result in the transport, transfer or disposal of a firearm to an individual
  - whose possession or receipt would be “*unlawful*”; **or**
  - who intended to use or dispose of the firearm unlawfully

## Trafficking Definition: App. Note 13(A)

Individual whose possession or receipt of the firearm would be “*unlawful*” means an individual who:

- Has a prior felony conviction for a ***crime of violence*** or a ***controlled substance offense***, or a misdemeanor domestic violence offense
- At the time of the offense was under a criminal justice sentence

or



# Circuit Split: §2B3.1(b)(4) “Physically Restrained”

## Need more than an order not to move

- *U.S. v. Herman*, 930 F.3d 872 (7th Cir. 2019)
- *U.S. v. Anglin*, 169 F.3d 154 (2d Cir. 1999)
- *U.S. v. Hickman*, 151 F.3d 446 (5th Cir. 2019)
- *U.S. v. Parker*, 241 F.3d (9th Cir. 2001)
- *U.S. v. Drew*, 200 F.3d 871 (D.C. Cir. 2000)

## Can apply to an order not to move

- *U.S. v. Wallace*, 461 F.3d 15 (1st Cir. 2006)
- *U.S. v. Dimache*, 665 F.3d 603 (4th Cir. 2011)
- *U.S. v. Miera*, 539 F.3d 1232 (10th Cir. 2008)
- *U.S. v. Gonzalez*, 183 F.3d 1315 (11th Cir. 1999)



# Circuit Split: §3B1.3: Do Doctors and Health Care providers occupy a position of trust with Medicaid and Medicare?

## Yes

- *U.S. v. Bikundi*, 926 F.3d 761 (6th Cir. 2019)
- *U.S. v. Tshona*, 156 F.3d 318 (2d Cir. 1998)
- *U.S. v. Sherman*, 160 F.3d 967 (3d Cir. 1998)
- *U.S. v. Adam*, 70 F.3d 776 (4th Cir. 1995)
- *U.S. v. Miller*, 607 F.3d 144 (5th Cir. 2010)
- *U.S. v. Hoogenboom*, 209 F.3d 665 (7th Cir. 2000)

## NO

- *U.S. v. Williams*, 527 F.3d 1235 (11th Cir. 2008)

## §3B1.3 (Special Skill)

- *U.S. v. Lord*, 915 F.3d 1009 (5th Cir. 2019)
  - Court incorrectly applied §3B1.3 to a defendant who used the dark web to sell drugs. Here, the defendant's skills did not come close to being an "expert hacker", had not acquired extraordinary knowledge of computers, and his skills were more self-taught and not in the class of "pilots, lawyers, doctors, accountants, chemists, and demolition experts."

## §3B1.1 Aggravating Role

- *U.S. v. Colon*, 919 F.3d 510 (7th Cir. 2019)
  - “In short, the record reveals only that Colon dealt in large quantities of drugs and occasionally made requests about the terms and locations of drug deliveries. These facts, accurate though they may be as a descriptive matter, do not suffice to show that Colon acted as a manager or supervisor, much less an organizer or leader.”

## §3C1.1 Obstruction of Justice

- *U.S. v. Roberts*, 919 F.3d 980 (6th Cir. 2019)
  - Court incorrectly applied §3C1.1. On remand, the court must either find on the record that the defendant (1) made a false statement under oath, (2) concerning a material matter, (3) with the willful intent to provide false testimony to apply §3C1.1

## *Tapia* and Rehabilitation

- *U.S. v. Kopp*, 922 F.3d 337 (7th Cir. 2019)
  - 20-month sentence in order to guarantee defendant's ability to complete Residential Drug Abuse Program (RDAP) was plain error warranting remand because of *Tapia*
- *See also, U.S. v. Vazquez-Mendez*, 915 F.3d 85 (1st Cir 2019)
- *But see U.S. v. Botello-Zepeda*, -F.3d-, 2019 WL 3559635 (5th Cir. Aug 6, 2019) (rehabilitation was, at most, a secondary concern or additional justification for the sentence)

# Using Prior Arrests as a Factor

- *U.S. v. Fields*, 932 F.3d 316 (5th Cir. 2019)
  - A sentencing court “may properly find sufficient reliability on a presentence investigation report which is based on the results of a police investigation,” especially where the offense report is detailed and includes information gathered from interviews with the victim and any other witnesses.

*See U.S. v. Cloud*, -F.3d-, 2019 WL 2494523 (8th Cir June 17, 2019)

# Questions or Comments?



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