

# Departures and Variances

# DEFINITIONS

## DEPARTURE

- A sentence outside the guideline range in accordance with the Guidelines Manual.

## VARIANCE

- A sentence outside the applicable guideline range (above or below) for any reason that is not in accordance with the guidelines or policy statements.

## Prohibited and Discouraged Grounds for Departure

- Race, Sex, National Origin, Religion, Socio-Economic Status
- Lack of Guidance as a Youth
- Physical Condition Including Drug or Alcohol Dependence or Abuse, Gambling Addiction

## Don't Be Fooled

- You can get a variance on any of these grounds
- Departure precedents do not bind district court's with respect to variance decisions, U.S. v. Chase, 560 F.3d 828 (8<sup>th</sup> Cir. 2009)

# Sentencing Memos

- Deconstruct the Guideline
- Mitigating Circumstances

# Mitigating Factors

- “No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors”  
Amy Baron-Evans and Jennifer Niles Coffin, Sentencing Resource Project
- [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/deconstructing\\_the\\_guidelines/no-more-math-without-subtraction.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/no-more-math-without-subtraction.pdf)

# Deconstructing Guidelines

- Career Offender
- Child Pornography
- Drug
- Firearms
- Fraud
- Immigration
- Relevant Conduct
- Tax
- <https://www.fd.org/sentencing-resources/deconstructing-the-guidelines>

## Legal Basis for Deconstruction

- *Spears v. United States*, 555 U.S. 261 (2009)
- *Kimbrough v. United States*, 552 U.S. 85 (2007)



## Spears

District courts are entitled to reject and vary categorically from the Guidelines based on a policy disagreement with the Guidelines, even when a particular defendant presents no special mitigating circumstances.

## Kimbrough

Where the Guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role” it is not an abuse of discretion for a district court to conclude that the Guidelines yield a sentence greater than necessary to achieve § 3553(a)’s purposes.



# Child Pornography Guideline

## 2G2.2 Specific Offense Characteristics

• Base Offense Level	18	
• Child Under Age 12	+2	95%
• Sadistic/Violent Images	+4	80%
• Use of a Computer	+2	95%
• 600 Images or More	+5	75%
• Total Offense Level	31	
• No Criminal History	108 to 135 months	
• Statutory Max	120 months	

## 2G2.2

- Always Deconstruct 2G2.2
- Why? Because It Works
- Sample Sentencing Memo on WDMo Website Under CJA Training and Events

Residual  
Clause of  
18 U.S.C.  
Section 924(c)

- *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), calls into question constitutionality of the residual clause of §924(c).
- Calls into question Eighth Circuit case called *Prickett*.
- Impacts “crime of violence” cases, like federal robbery.
- Does not impact drug cases.
- Must also argue force clause issue.

Robbery: is it  
an ACCA  
predicate?

- *United States v. Stokeling, 17-5554*: Supreme Court will decide whether Florida robbery satisfies ACCA's force clause based on "slight force."
- Eighth Circuit is granting *Stokeling* stays on Missouri robbery in the second degree. If *Stokeling* is reversed, there is a likelihood that the Eighth Circuit will be reversed in *Swopes*, too.
- Guidelines "crime of violence" issue is more complex.

## Burglary as an ACCA predicate?

- *United States v. Stitt* and *United States v. Sims*, 17-765 (consolidated): Whether a moveable vehicle is generic burglary?
- Regardless of outcome, case should not impact holding that Missouri burglary's definition of "inhabitable structure" is non-generic because it is overbroad.
- Solicitor General, when seeking cert, cast a net of about 20 states that it claimed the issue impacted.



## “Controlled substance offense” under the Guidelines

- **Good result**: Kansas law for possession with intent to sell cocaine and marijuana are not controlled substance offenses. *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017).
- In *Madkins*, Tenth Circuit concluded “offer to sell is broader than distribution as defined in the Guidelines.”
- **Bad result**: Missouri sale of a controlled substance, §195.211.3, requires more than “mere words of an offer” for a sale, thus qualifying as controlled substance offense. *United States v. Thomas*, 886 F.3d 1274, 1277 (8th Cir. 2018).
- Unclear where this issue is headed in the future.

“Reckless”  
offenses: are  
they ACCA  
predicates?

- Direct force vs. indirect force recklessness argument rejected by Eighth Circuit in *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016).
- Circuit split on this *Fogg* issue, and hopefully Supreme Court will take a case to determine what *Voisine* means in the context of the ACCA.
- Not all doom and gloom: Missouri reckless assault is not a crime of violence. *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017), reh'g denied (Nov. 7, 2017).

## Conditions of Supervised Release

- SR conditions must be reasonably related to the 3553(a) factors
- Involve no greater deprivation of liberty than is reasonably necessary
- Consistent with any pertinent policy statements of the USSC

## Conditions of Supervised Release

- A sentencing court may not impose a special condition on all those found guilty of a particular offense
- Conditions must be imposed on an individualized basis.

No Greater  
Deprivation of  
Liberty than  
Reasonably  
Necessary

- “Neither possess nor have under his control any matter that is pornographic/erotic”
- “any material that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material”

## Legal Basis for Objection

- Banning material that is erotic, depicts nudity, alludes to sexual activity:
  - is overly broad in that it violates the right to view non-obscene material protected by the First Amendment
  - Is vague in violation of the Due Process Clause, in that it fails to provide adequate notice of what constitutes prohibited material

## Restrictions on Use of a Computer and Internet Access

- “Shall not possess or use any computer or electronic device with access to any on-line computer service, without the prior approval of the Probation Office.”
- “Shall not maintain or create a user account on any social networking site that allows access to persons under age 18, or allows for the exchange of sexually explicit material or instant messaging.”

## 8<sup>th</sup> Circuit Cases

- The Court has held that banning computer use and internet access without prior approval from the Probation Office does not involve a greater deprivation of liberty than is reasonably necessary.
  - Not a complete ban on internet access since prior approval may be obtained
  - Convictions were for distribution, not mere possession



## 8th Circuit Cases

- United States v. Mark, 425 F.3d 505 (8<sup>th</sup> Cir. 2005)
- Defendant was prohibited “from using or having access to any online computer programs, and from using or possessing a computer, except under supervised work conditions and on a computer with no Internet connection.”
- The Court said that a complete ban on Internet access is difficult to justify in cases involving simple possession of child pornography and should not be imposed without first considering less restrictive alternatives.

## Procedural vs. substantive sentencing error

- Step #1: Procedural error
- “Procedural error” includes “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.”

*United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009).

## Procedural vs. substantive sentencing error

- Step #2: Substantive error
- The Eighth Circuit has “not yet comprehensively defined the considerations that govern appellate review of a sentence's substantive reasonableness”, but has concluded that “substantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions.” *United States v. Dautovic*, 763 F.3d 927, 934 (8th Cir. 2014).
- Key is to object to sentence as procedurally unreasonable. Don't have to object to substantive reasonableness to preserve issue for appellate review.

## Appealing when you made a mistake calculating the Guidelines

- Everyone makes mistakes. Don't let that prevent you from appealing the Guidelines calculation issue to the Court of Appeals.
- Plain error “will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.”

*Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018).