

# Federal Sentencing

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Western District of Missouri  
Kansas City, MO  
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U.S. Sentencing Commission

**U.S.S.C.**

**Website**

***www.usssc.gov***

***HelpLine***

***202-502-4545***

# Discussion Outline

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- Commission update
  - Commission activities
  - Sentencing statistics
  - Amendments
  - Selected appellate cases
- Selected guideline topics
  - Categorical Approach
  - Child Sex Offenses
  - Relevant Conduct
- Q&A

# Commission Reports to Congress

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- *Report on the Continuing Impact of U.S. v. Booker on Federal Sentencing*, submitted January 30, 2013
- *Federal Child Pornography Offenses*, submitted February 27, 2013

Visit [www.ussc.gov](http://www.ussc.gov) to view a recorded webcast discussion on these reports:  
“USSC Update: Recent Congressional Reports”

# Planned Symposium and “Roundtable”

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- Commission symposium on economic crimes
  - Fall 2013, New York
- Commission staff “Roundtable” on recidivism
  - Fall 2013



# Highlights of Proposed Guideline Amendments Submitted to Congress

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To Become Effective November 1, 2013  
Unless Rejected by Legislation

For all the 2013 amendments go to the  
Commission website (“Legal” icon) to see the  
“Reader-Friendly” Version of 2013  
Amendments Submitted to Congress

# §3E1.1(b) – Acceptance of Responsibility

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## Addressing “Circuit Splits”

- The government’s discretion to withhold the motion for the third level of Acceptance
- The court’s discretion to deny the third level of Acceptance when the government has made the motion

# The Government's Discretion to Withhold the Motion for the Third Level of Acceptance

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§3E1.1(b), App. Note 6

- The government *should not* withhold the motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his/her right to appeal



# The Court's Discretion to Deny the Third Level of Acceptance When the Government Has Made the Motion

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## §3E1.1(b)

- The sentencing court will decide whether to grant the government's motion by also determining that the defendant's notification to plead guilty was timely and thereby
  - permitted the government to avoid preparing for trial
  - and
  - permitted the government and the court to allocate their resources efficiently

# §2T1.1 – Tax

## Addressing “Circuit Split”

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### §2T1.1, New App. Note 3

- In determining tax loss the court should account for
  - Standard deductions and personal and dependent exemptions to which the defendant was entitled
  - Any unclaimed credit, deduction, or exemption needed to ensure a reasonable estimate of tax loss, *but only* within the limitations outlined in the new application note

# Consecutive/Concurrent Sentences for State Sentences Not Yet Imposed

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## §5G1.3 Background Commentary Regarding *Setser v. United States*, 132 S. Ct. 1443 (2012)

- In addition to the discretion under 18 USC § 3584, federal courts generally have discretion under *Setser* to impose sentences to run concurrently or consecutively with state sentences that are anticipated but not yet imposed

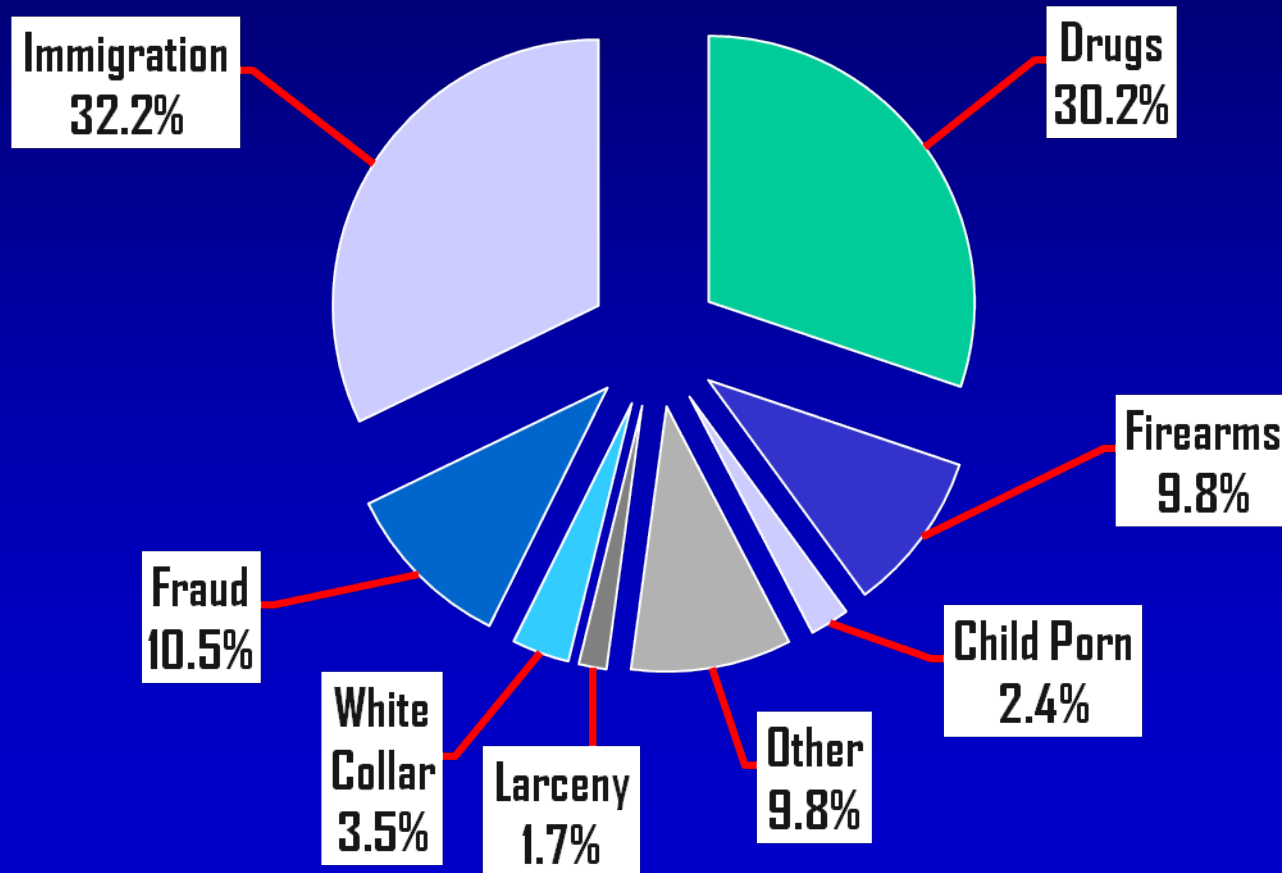


# Commission Sentencing Statistics

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# Primary Offense Types

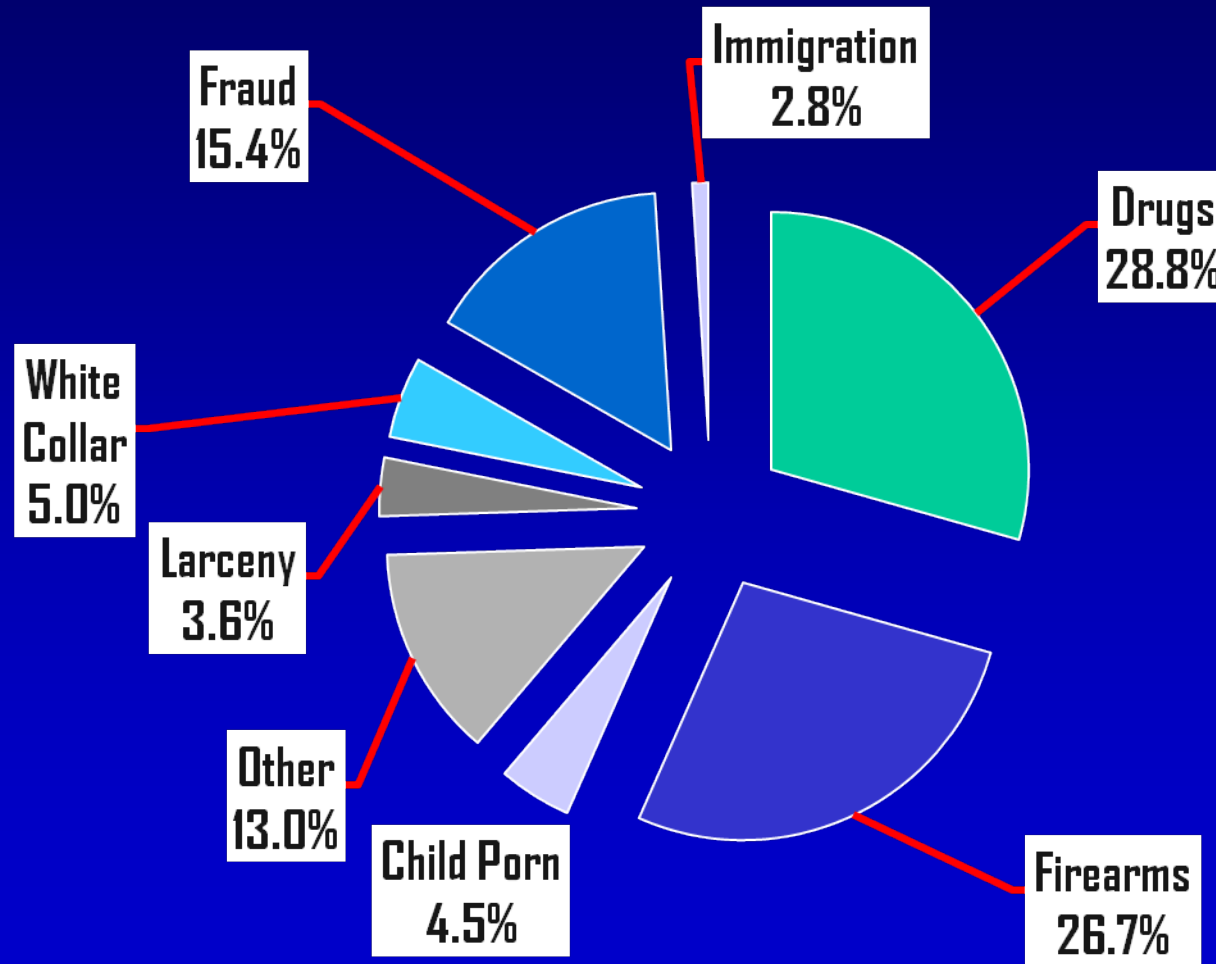
National - FY 2012



SOURCE: U.S. Sentencing Commission, 2012 Datafile USSCFY12: 84,173 cases

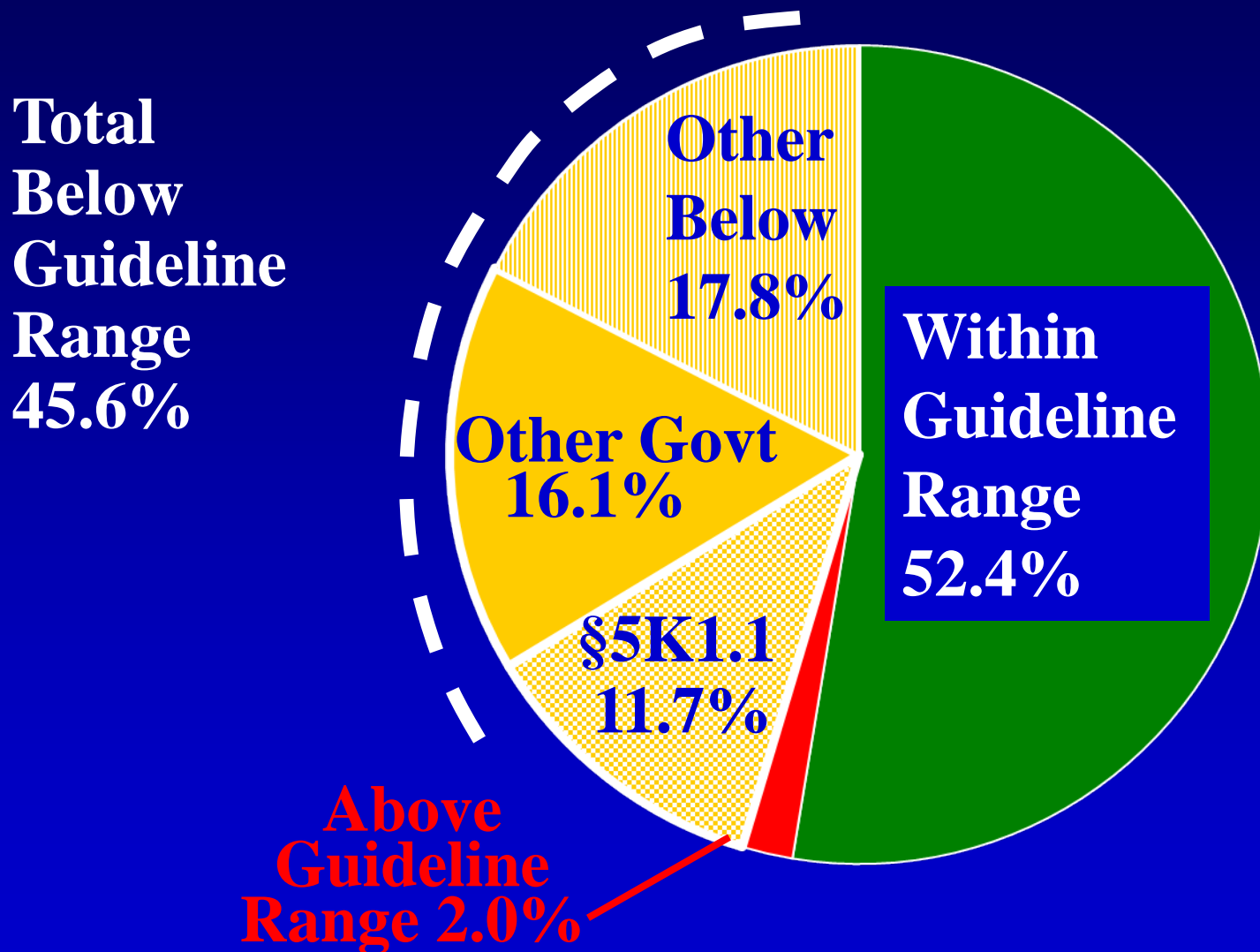
# Primary Offense Types

WD, MO - FY 2012



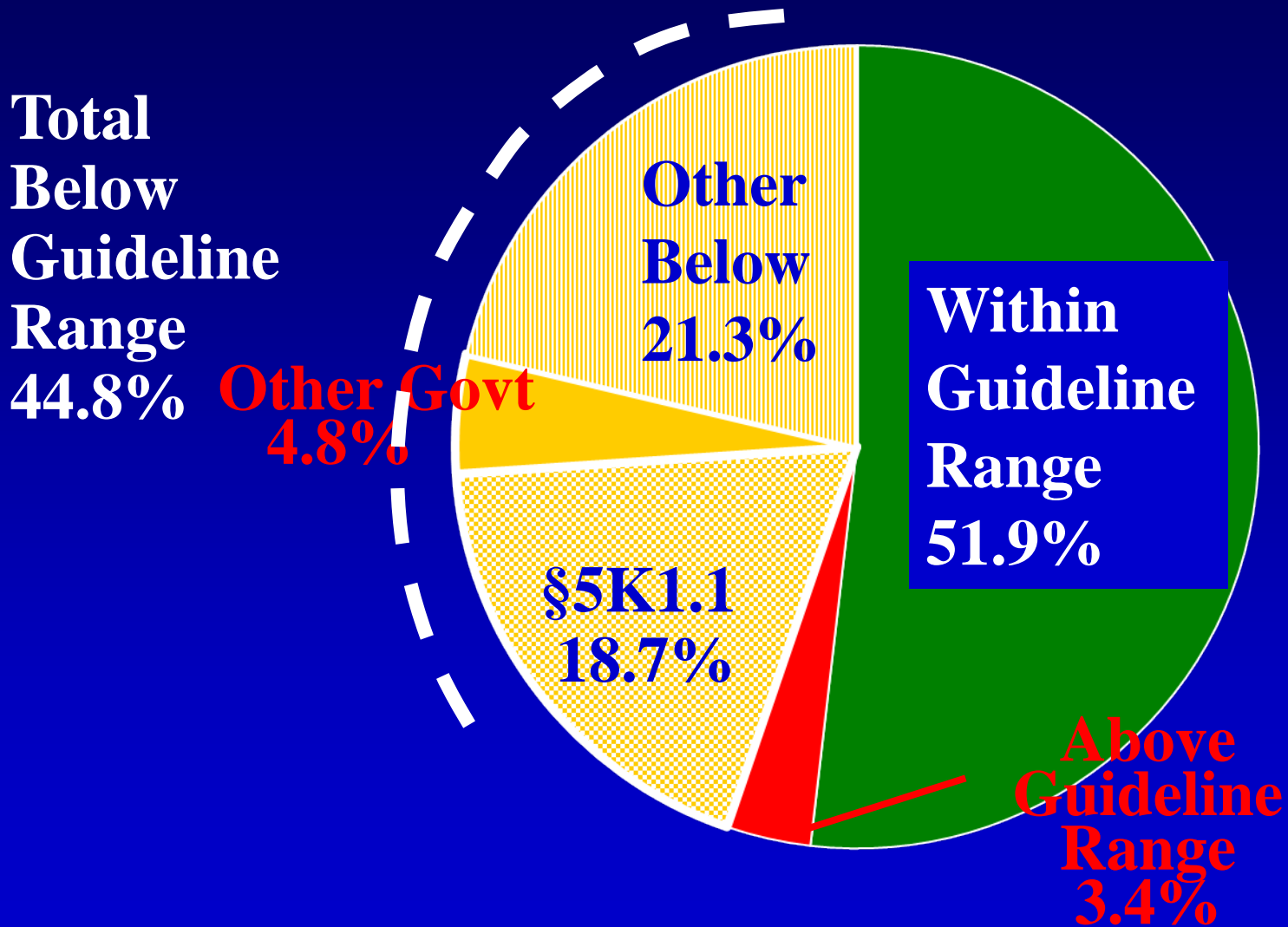
SOURCE: U.S. Sentencing Commission, 2012 Datafile USSCFY12: 775 cases

# Position of Sentences in Relation to Guideline Range National - FY 2012



SOURCE: U.S. Sentencing Commission, 2012 Datafile USSCFY12: 82,674 of 84,173 cases

# Position of Sentences in Relation to Guideline Range Western District of Missouri - FY 2012



SOURCE: U.S. Sentencing Commission, 2012 Datafile USSCFY12: 775 cases





# Supreme Court Cases

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# Ex Post Facto

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*U.S. v. Peugh*, 133 S. Ct. 2072 (2013)

- There is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.

# Mandatory Minimums

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*Alleyne v. U.S.* 133 S. Ct. 2151 (2013)

- Any fact that increases mandatory minimum sentence for crime is an “element” of crime, not a “sentencing factor,” that must be submitted to a jury, overruling *Harris v. US*, 536 U.S. 545 (2002)
- Finding as to whether defendant brandished a gun is an element of the offense and must be submitted to the jury

# ACCA and Modified Categorical Approach

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*Descamps v. U.S.* 133 S. Ct. 2276 (2013)

- Courts may not apply the modified categorical approach to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements.
- Defendant's prior burglary conviction under California law was not for a violent felony within the meaning of ACCA.

# Reasonableness Review

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# Procedural Reasonableness and Substantive Reasonableness

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- Sentences are first reviewed for procedural reasonableness, *e.g.*,
  - Correct guideline application
  - Proper consideration of the § 3553(a) factors
  - The guidelines were not treated as mandatory
  - All non-frivolous arguments by the parties were addressed
  - No clearly erroneous facts were relied upon
  - The chosen sentence was adequately explained

## Procedural Reasonableness and Substantive Reasonableness (cont.)

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- *If* procedural reasonableness has been met, then sentences are reviewed for substantive reasonableness
  - In reviewing for substantive reasonableness, “the appellate court will take into account the totality of the circumstances, including the extent of any variance from the Guidelines range”

- *Gall*

# Appellate Cases Regarding Departures and Variances

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# Examples of Below Guideline Sentences Remanded 8<sup>th</sup> Circuit

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- *U.S. v. Bertling*, 611 F.3d 477 (8<sup>th</sup> Cir. 2010)
  - Witness tampering

# Examples of Below Guideline Sentences Affirmed 8<sup>th</sup> Circuit

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- *U.S. v. Feemster*, 572 F.3d 455 (8<sup>th</sup> Cir. 2009)(en banc)
  - Crack cocaine
- *U.S. v. Burns*, 577 F.3d 887 (8<sup>th</sup> Cir. 2009)
  - Substantial assistance
- *U.S. v. Jensen*, 586 F.3d 620 (8<sup>th</sup> Cir. 2009)
  - Substantial assistance
- *U.S. v. Shy*, 538 F.3d 933 (8<sup>th</sup> Cir. 2008)
  - Methamphetamine
- *U.S. v. McGhee*, 512 F.3d 1050 (8<sup>th</sup> Cir. 2008)
  - Crack cocaine

# Examples of Below Guideline Sentences Affirmed 8<sup>th</sup> Circuit (cont.)

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- *U.S. v. Anderson*, 533 F.3d 623 (8<sup>th</sup> Cir. 2008)
  - Money laundering and insider training
- *U.S. v. McFarlin*, 535 F.3d 808 (8<sup>th</sup> Cir. 2008)
  - Cocaine
- *U.S. v. Lehmann*, 513 F.3d 805 (8<sup>th</sup> Cir. 2008)
  - Felon-in-possession

# Examples of Above Guideline Sentences Affirmed 8<sup>th</sup> Circuit

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- *U.S. v. Richart*, 662 F.3d 1037 (8<sup>th</sup> Cir. 2012)
  - Making a false statement
- *U.S. v. Carter*, 425 F.3d 527 (8<sup>th</sup> Cir. 2011)
  - Access device fraud
- *U.S. v. Johnson*, 648 F.3d 940 (8<sup>th</sup> Cir. 2011)
  - Robbery and firearms
- *U.S. v. Osborne*, 424 F. App'x 587 (8<sup>th</sup> Cir. 2011)
  - Counterfeiting
- *U.S. v. Griffin*, 418 F. App'x 574 (8<sup>th</sup> Cir. 2011)
  - Bank robbery
- *U.S. v. Goines*, 430 F. App'x 552 (8<sup>th</sup> Cir. 2011)
  - Enticement of a minor

# Examples of Above Guideline Sentences Affirmed 8<sup>th</sup> Circuit

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- *U.S. v. Fiorito*, 640 F.3d 338 (8<sup>th</sup> Cir. 2011)
  - Mail fraud
- *U.S. v. Ortiz*, 636 F.3d 389 (8<sup>th</sup> Cir. 2011)
  - Shoplifting merchandise
- *U.S. v. Mangum*, 625 F.3d 466 (8<sup>th</sup> Cir. 2010)
  - Felon in possession
- *U.S. v. Ferguson*, 623 F.3d 627 (8<sup>th</sup> Cir. 2010)
  - Possession of prohibited object in prison
- *U.S. v. Lozoya*, 623 F.3d 624 (8<sup>th</sup> Cir. 2010)
  - Voluntary manslaughter
- *U.S. v. Foy*, 617 F.3d 1029 (8<sup>th</sup> Cir. 2010)
  - Threatening communications

# Examples of Above Guideline Sentences Affirmed 8<sup>th</sup> Circuit

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- *U.S. v. Mireles*, 617 F.3d 1029 (8<sup>th</sup> Cir. 2010)
  - Misprision of a felony
- *U.S. v. Townsend*, 618 F.3d 915 (8<sup>th</sup> Cir. 2010)
  - Distributing drugs
- *U.S. v. Jones*, 612 F.3d 1040 (8<sup>th</sup> Cir. 2010)
  - Possession of sawed off shotgun
- *U.S. v. Foy*, 617 F.3d 1029 (8<sup>th</sup> Cir. 2010)
  - Threatening communications
- *U.S. v. Jarvis*, 606 F.3d 552 (8<sup>th</sup> Cir. 2010)
  - Felon in possession
- *U.S. v. Wallace*, 605 F.3d 477 (8<sup>th</sup> Cir. 2010)
  - Sex trafficking

END



# The Categorical Approach: *Taylor v. U.S., Et Al*

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The Approach for Determining If a  
Conviction Meets the Criteria for a Certain  
Category of Offense



# Discussion Outline

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- Key Supreme Court cases establishing the categorical approach
- What is the categorical approach?
- Statutes and guidelines most commonly requiring use of the categorical approach
- Step-by-step process for using the categorical approach
- Scenario demonstrating the analysis in the categorical approach

# Key Supreme Court Cases Establishing the Categorical Approach

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- *Taylor v. United States*, 495 U.S. 575 (1990)
- *Shepard v. United States*, 544 U.S. 13 (2005)
- *James v. United States*, 550 U.S. 192 (2007)
- *Begay v. United States*, 128 S. Ct. 1581 (2008)

## Key Supreme Court Cases Establishing the Categorical Approach (cont.)

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- *United States v. Chambers*, 129 S. Ct. 687 (2009)
- *Johnson v. United States*, 130 S. Ct. 1265 (2010)
- *Sykes v. United States*, 131 S. Ct. 2267 (2011)
- *Descamps v. United States*, 133 S. Ct. 2276 (2013)

# The Categorical Approach

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- The determination of whether a prior *conviction* (or possibly the instant offense of conviction) meets the criteria of a certain category of offense

## The Categorical Approach (cont.)

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- In this determination, only *the elements of the offense of conviction can be considered*
  - **Do not** rely on the title of the statute
  - **Do not** use relevant conduct
  - **Do not** look to the facts of the specific case

# Examples of Statutes Where the Categorical Approach Is Used

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- 18 USC § 924(e) (Armed Career Criminal Act: ACCA)
- 18 USC § 924(c) (use, carry, possession of firearm in crime of violence or drug trafficking)
- 18 USC § 16 (used for “aggravated felony” determination for illegal entry)

# Examples of Guidelines Where the Categorical Approach Is Used

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- §2K2.1 (Firearms)
- §2L1.2 (Immigration - Illegal Entry)
- §§4B1.1 & 4B1.2 (Career Offender)

# Example: Immigration Guideline

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- Defendant is awaiting sentencing in federal court upon conviction for illegal reentry (8 USC § 1326(b))
- The determination is being made as to whether a 16-level increase at specific offense characteristic §2L1.2(b)(1)(A)(ii) applies; specifically whether Defendant's prior 2009 Texas state conviction for Sexual Assault of a Child meets the definition of a "crime of violence"



# Example: Career Offender Guideline

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- Defendant is awaiting sentencing in federal court upon conviction for armed bank robbery (18 USC § 2113(a)&(d))
- The determination is being made as to whether Defendant is a Career Offender (§§4B1.1 & 4B1.2); specifically whether Defendant’s prior state convictions meet the definition of “crime of violence”:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714

# The Categorical Approach

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**Step-by-Step**

# Steps in the Categorical Approach

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1. Examine the definition under consideration
2. Establish the offense of conviction
  - Examine the statute of conviction: “the Categorical Approach”
  - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified* Categorical Approach”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Step 1

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# Steps in the Categorical Approach

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1. **Examine the definition under consideration**
2. Establish the offense of conviction
  - Examine the statute of conviction: “the Categorical Approach”
  - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified* Categorical Approach”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Definitions Frequently Considered in the Categorical Approach

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- “Violent felony”
  - Armed Career Criminal Act (ACCA)  
(18 USC § 924(e))
- “Crime of violence”
  - Career Offender (§4B1.2)
- “Crime of violence”
  - Illegal Entry (§2L1.2)

# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- Elements section
  - List of the elements that will include an offense in the category
- Enumerated section
  - List of offenses included in the category
- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category

# 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....



# EXAMPLE: Career Offender Guideline Definition for “Crime of Violence”

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## §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

## **EXAMPLE: Career Offender Guideline Definition for “Crime of Violence” (cont.)**

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### §4B1.2(a)(2), App. Note 1

- Note that the application note enumerates offenses in addition to those in §4B1.2(a)(2)

# EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

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## §2L1.2, App. Note 1(B)(iii)

- *means* .... murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offense ....that *has as an element* the use, attempted use, or threatened use of physical force against the person of another

# Step 2

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# Steps in the Categorical Approach

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1. Examine the definition under consideration
- 2. Establish the offense of conviction**
  - **Examine the statute of conviction: “the Categorical Approach”**
  - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Examine the Statute of Conviction: The Categorical Approach

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- When the judgment cites only the statute of conviction, examine **only** the statute of conviction
  - Example: Defendant has prior conviction of State Statute § 301, Burglary: 1<sup>st</sup> Degree
  - Determine if the elements of the statute meet the categorical definition

# Example 1

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## **State Statute § 301: Burglary – 1<sup>st</sup> Degree**

Burglary is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a felony

## Examine the Statute of Conviction: The Categorical Approach (cont.)

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- When the judgment cites the *subsection* of the statute of conviction, examine **only** the subsection
  - Example: Defendant has prior conviction of State Statute § 500(b): Burglary
  - Determine if the elements of the subsection meet the categorical definition



# Example 2

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## State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony
- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony**
- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal
- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal

## Examine the Statute of Conviction: The Categorical Approach (cont.)

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- If the statute has subsections, but the judgment only cites the statute and not the specific subsection of conviction, determine if **ALL** the subsections meet the categorical definition or if **NONE** of the subsections meet the categorical definition

# Example 3

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## State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony
- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony
- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal
- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal

# Steps in the Categorical Approach

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1. Examine the definition under consideration
- 2. Establish the offense of conviction**
  - Examine the statute of conviction: “the Categorical Approach”
  - **Only if necessary, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”**
3. Analyze the offense of conviction to determine if it meets the category of offense

# The Modified Categorical Approach

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- If the judgment cites only to the statute of conviction and that statute can be violated in multiple ways, some of which satisfy the definition and some do not, use *the modified categorical approach* to determine if the additional documents clarify the defendant's specific offense of conviction

# The Use of Documents Beyond the Statute of Conviction

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- Documents can be used only if the statute for the offense of conviction alone does not establish whether the offense of conviction falls within the category in question
- When documents are used, only limited documents are allowed

# Examples of Documents Allowed in the Modified Categorical Approach

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- Charging document (*e.g.*, indictment)
- Plea agreement
- Plea colloquy in which the defendant confirmed the elements of the offense of conviction
- Jury instructions
- Comparable judicial record
- Judicially-ruled documents

# Examples of Documents Generally NOT Allowed in the Modified Categorical Approach

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- Police reports
- Presentence reports
- Rap sheets
- Complaints



# Documents Not Allowed in the Modified Categorical Approach

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- **NOTE:** The fact a document may not be allowed in the modified categorical approach does not necessarily preclude the use of that document in other aspects of guideline application or sentencing
- **Example:** The court can use a “rap sheet” to determine the length of a prior sentence for purposes of determining criminal history points

# Step 3

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# Steps in the Categorical Approach

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1. Examine the definition under consideration
2. Establish the offense of conviction
  - Examine the statute of conviction: “the Categorical Approach”
  - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified* Categorical Approach”
3. **Analyze the offense of conviction to determine if it meets the category of offense**

# NOTE

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- In the determination as to whether a prior conviction for a state statute falls within the definition under consideration, the state court interpretation of their own statute can be critical

**Analysis:**  
**Whether a Conviction Meets**  
**the *Elements Section***  
**of a Categorical Definition**

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# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- **Elements section**
  - List of the elements that will include an offense in the category
- Enumerated section
  - List of offenses included in the category
- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category

# EXAMPLE: ACCA

## Definition for “Violent Felony”

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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....*

# Supreme Court Case Involving *Elements Section* of “Violent Felony”

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*Johnson v. U.S.*, 130 S. Ct. 1265 (2010)

- Florida’s battery conviction is **not** a violent felony under the “force” component because the statute did not require physical force of a violent nature
- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another



**Analysis:**  
**Whether a Conviction Meets**  
**the *Enumerated Section***  
**of a Categorical Definition**

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# The Structure of a Definition of a Category of Offense

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- ***is burglary, arson, or extortion, involves use of explosives,*** or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....

# EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

---

## §2L1.2, App. Note 1(B)(iii)

- ***means* .... murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or**
- **any other offense ....that has as an element the use, attempted use, or threatened use of physical force against the person of another** <sup>76</sup>

## Analysis: *Enumerated Section* (cont.)

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- Requires a determination of whether the elements of the offense of conviction meet the definition for the enumerated offense
- The elements of the offense of conviction must meet the elements of the enumerated offense in its **generic, contemporary definition**
  - It is not sufficient that the offense of conviction has the same title as an enumerated offense

## Analysis: *Enumerated Section* (cont.)

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- Generic form of burglary (based on *Taylor*):
  - Unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime
- Illinois burglary:
  - Unlawfully enters without authority and remains within a building, house-trailer, watercraft, aircraft, motor vehicle, railroad car with intent to commit a felony or theft

## Analysis: *Enumerated Section* (cont.)

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- Generic form of robbery:
  - Property to be taken from a person or person's presence by means of force or putting in fear
- DC robbery:
  - Whoever by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value

**Analysis:**  
**Whether a Conviction Meets  
the *Residual Clause Section*  
of a Categorical Definition**

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# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- Elements section
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  - List of offenses included in the category
- **Residual clause section**
  - **“Otherwise involves conduct” section**
  - **Describes conduct of an offense that will be included in the category**

# EXAMPLE: ACCA

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### 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....***

# Pointer Regarding the *Residual Clause Section*

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- Requires a determination of whether the *elements of the offense of conviction* meet the conduct requirement



**Recent Supreme Court Cases Involving  
the *Residual Clause Section* of the  
Armed Career Criminal Act (ACCA)  
Definition of “Violent Felony”**

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*Begay v. U.S.*, 128 S. Ct. 1581 (2008)

*Sykes v. U.S.* 131 S. Ct. 2267 (2011)



# Conducting an Analysis Under the Residual Clause

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# Threshold Question: *Mens Rea* Requirement

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## The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- Must first determine if the statute is one that is strict liability, negligent, reckless, or intentional conduct, because there are different tests based on whether the statute requires intentional conduct

## Threshold Question: *Mens Rea* Requirement (cont.)

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### The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- If a statute has various sections, some for intentional conduct, some for non-intentional (such as negligent), the categorical approach must be used to determine which section of a statute the defendant was convicted of

# Intentional Crimes

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- If the offense the offense of conviction has a mens rea requirement of intentional conduct, the court must determine **only**
  - Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another



## Intentional Crimes (cont.)

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- To decide if the crime has a serious potential risk of physical injury to another, the court must determine if in the typical case the crime is roughly similar in kind and similar in degree of risk to the enumerated offenses (*e.g.*, the ACCA lists burglary, arson, extortion, or use of explosives)
- Statistical information might be helpful (*Chambers and Sykes*)

# Reckless, Negligent, or Strict Liability Crimes

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- If the offense has a mens rea requirement of reckless, negligent, or strict liability conduct, the court must determine **both**
  1. Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another

**AND**

  2. Whether the conduct was purposeful, violent, **and** aggressive conduct (per *Begay*)

## Reckless, Negligent, or Strict Liability Crimes (cont.)

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- Under the requirement of purposeful, violent, **and** aggressive conduct
  - It is unlikely that a strict liability crime or a negligent crime will meet the “purposeful” requirement
  - It is questionable whether a reckless crime will meet the “purposeful” requirement

# Examples Involving the *Residual Clause Section* of “Violent Felony”

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- Indiana felony vehicle flight which involved intentional fleeing is a “violent felony” (*Sykes*)
- New Mexico DUI, which is not intentional, and is not purposeful, violent **and** aggressive is not a “violent felony” (*Begay*)

# Pointers Regarding the Analysis Used for the Residual Clause Section (Pursuant to *Sykes* and *Begay*)

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- The analysis in the determination of a violent offense under the *residual clause section*
  - Does NOT apply if the violent offense falls under the *elements section* (the “use of physical force” part of the definition)
  - Does NOT apply if the violent offense falls under the *enumerated section*

# Scenario

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Demonstrating the Step-by-Step  
Process of the Categorical Approach

# Steps in the Categorical Approach

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1. Examine the definition under consideration
2. Establish the offense of conviction
  - Examine the statute of conviction: “the Categorical Approach”
  - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified* Categorical Approach”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Career Offender Scenario

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- Defendant is awaiting sentencing in federal court upon conviction for armed bank robbery (18 USC § 2113(a)&(d))
- The determination is being made as to whether Defendant is a Career Offender (§§4B1.1 & 4B1.2); specifically whether Defendant’s prior state convictions meet the definition of “crime of violence”:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714



## Scenarios (cont.)

---

- Determine if each of the prior convictions meets the “crime of violence” definition for Career Offender (§§4B1.1 & 4B1.2)

# The Structure of a Definition of a Category of Offense

---

## Three Potential Sections

- Elements section
  - List of the elements that will include an offense in the category
- Enumerated section
  - List of offenses included in the category
- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category

# 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

# Judgments

---

- The judgment for each of the three convictions only provides the name and code section of the statute of conviction:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714

# Assault on a Law Enforcement Officer

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## State Statute § 999

- Whoever uses physical force in a manner that causes bodily injury to an individual known to be a law enforcement officer is guilty of a felony third degree.

## Assault on a Law Enforcement Officer (cont.)

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- Would it matter if the indictment and the written plea agreement both state that the defendant discharged a firearm, shooting the victim and causing bodily injury, when the victim identified himself as a law enforcement officer?

# Causing Injury to a Child

---

## State Statute § 204

- Whoever
  - a. uses physical force against a child with intent to cause bodily injury, or
  - b. negligently places a child in an unsafe environment which results in the child suffering bodily injury
- is guilty of a felony third degree.

## Causing Injury to a Child (cont.)

---

- Would it matter if the indictment only cites the language of the statutory code, which includes both ways in which the statute can be violated, the date and location of the offense, and that the defendant's three year old child suffered bodily injury in a fall down an open stairwell?
- Would it matter if neither the plea agreement nor the plea colloquy confirm that the plea was to the offense of using physical force against the child?



## Causing Injury to a Child (cont.)

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- Would it matter if the police report in the case states that the defendant's wife called the police when her husband in a fit of rage kicked the child down the open stairwell?

# Failure to Stop for Blue Light

---

## State Statute § 714

- A driver of a motor vehicle who willfully fails to stop the vehicle upon notification by a blue light operated by an authorized law enforcement officer is guilty of a felony fourth degree.

## Failure to Stop for Blue Light (cont.)

---

- Would it matter if the indictment only cites the language of the statutory code, and the date, highway and duration of the defendant failing to stop?
- Would it matter if the plea agreement and the plea colloquy provide no more than the indictment?

## Failure to Stop for Blue Light (cont.)

---

- Would it matter if the police report in the case states that law enforcement officer with blue light in operation pursued the car driven by the defendant for 15 miles, at speeds up to 100 miles per hour, and that the defendant swerved his car into the law enforcement officer's car in an attempt to force the officer's car into a bridge abutment?

**Armed Career Criminal Act (ACCA)  
Violent Felony (VF) Cases  
&  
§4B1.1 - Career Offender  
Crime of Violence (COV) Cases**

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# 8<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Montgomery*, 701 F.3d 1218 (8<sup>th</sup> Cir. 2012)
  - MO 2<sup>nd</sup> degree domestic assault is a VF
- *U.S. v. Coleman*, 700 F.3d 329 (8<sup>th</sup> Cir. 2012)
  - GA aggravated assault is a VF
- *U.S. v. Bartel*, 698 F.3d 658 (8<sup>th</sup> Cir. 2012)
  - MN fleeing in motor vehicle is a VF
- *U.S. v. Williams*, 690 F.3d 1056 (8<sup>th</sup> Cir. 2012)
  - 18 U.S.C. § 844(e) is a COV
- *U.S. v. Dawn*, 685 F.3d 790 (8<sup>th</sup> Cir. 2012)
  - AR 2<sup>nd</sup> degree sexual assault is a COV
  - AR 2<sup>nd</sup> degree battery is not categorically a COV

## 8<sup>th</sup> Circuit VF & COV Cases (cont.)

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- *U.S. v. Lillard*, 685 F.3d 773 (8<sup>th</sup> Cir. 2012)
  - NE possession of a short shotgun is a VF
- *U.S. v. Dunning*, 666 F.3d 1158 (8<sup>th</sup> Cir. 2012)
  - MO resisting arrest by fleeing is a VF
- *U.S. v. Linngren*, 652 F.3d 868 (8<sup>th</sup> Cir. 2011)
  - MN criminal sex conduct in 5<sup>th</sup> degree COV modified
- *U.S. v. Watson*, 650 F.3d 1084 (8<sup>th</sup> Cir. 2011)
  - OK possessing firearms while committing a drug felony is a COV
- *U.S. v. Williams*, 664 F.3d 719 (8<sup>th</sup> Cir. 2011)
  - NE escape is a COV under modified
- *U.S. v. Tessmer*, 659 F.3d 716 (8<sup>th</sup> Cir. 2011)
  - U.S. Mailing threatening communications is a COV

## 8<sup>th</sup> Circuit VF & COV Cases (cont.)

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- *U.S. v. Scudder*, 648 F.3d 630 (8<sup>th</sup> Cir. 2011)
  - IN felony child molestation is a VF
- *U.S. v. Ossana*, 638 F.3d 895 (8<sup>th</sup> Cir. 2011)
  - AZ aggravated assault not automatically a COV
- *U.S. v. Vinton*, 631 F.3d 476 (8<sup>th</sup> Cir. 2011)
  - MO 2<sup>nd</sup> degree assault was a COV under modified
- *U.S. v. Boyce*, 633 F.3d 708 (8<sup>th</sup> Cir. 2011)
  - MO possession of weapon in correctional facility is VF
- *U.S. v. Craig*, 630 F.3d 717 (8<sup>th</sup> Cir. 2011)
  - TN sexual battery is a COV



## 8<sup>th</sup> Circuit VF & COV Cases (cont.)

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- *U.S. v. Forrest*, 611 F.3d 908 (8<sup>th</sup> Cir. 2010)
  - CO felony menacing is a VF
  - KS attempted burglary is a VF
- *U.S. v. Parks*, 620 F.3d 911 (8<sup>th</sup> Cir. 2010)
  - MO escape from confinement is a COV
- *U.S. v. Malloy*, 614 F.3d 852 (8<sup>th</sup> Cir. 2010)
  - WA extortion is a COV
  - IA interference w/official acts causing injury is a COV
  - IA fleeing is a COV
- *U.S. v. Martinez*, 602 F.3d 1166 (8<sup>th</sup> Cir. 2010)
  - AZ attempted burglary not a VF

## 8<sup>th</sup> Circuit VF & COV Cases (cont.)

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- *U.S. v. Hennecke*, 590 F.3d 619 (8<sup>th</sup> Cir. 2010)
  - MO physically stealing from person is VF
- *U.S. v. Sawyer*, 588 F.3d 548 (8<sup>th</sup> Cir. 2009)
  - AR attempted robbery is a COV
- *U.S. v. Salean*, 583 F.3d 1059 (8<sup>th</sup> Cir. 2009)
  - MN aiding and abetting assault in 4<sup>th</sup> Degree is a VF
- *U.S. v. Richardson*, 581 F.3d 824 (8<sup>th</sup> Cir. 2009)
  - KS eluding a police officer is a COV
- *U.S. v. Stymiest*, 581 F.3d 759 (8<sup>th</sup> Cir. 2009)
  - SD third degree burglary is a COV

END



# Child Sex Offenses

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# Outline

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- Resources
- Child pornography guidelines
- Departures/variances in sex offense cases



# Commission Report to the Congress

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Report of February 27, 2013

*Federal Child Pornography Offenses*

# Details of Report Available at

[www.usssc.gov](http://www.usssc.gov)

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- The full report, including the executive summary and appendices
- A recorded webcast of an in-depth discussion of the report: “USSC Update: Recent Congressional Reports” (the second half)

# Child Porn Report Takeaways

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- The non-production child pornography guideline is outdated (i.e., it does not account for recent technological changes in offense conduct) and also do not reflect the variations in offenders' culpability and sexual dangerousness
- There is widespread inconsistent application of both the non-production guideline and the penal statutes carrying mandatory minimum penalties



# Takeaways (cont.)

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- The non-production guideline produces overly severe sentencing ranges for some offenders and unduly lenient ranges for other offenders

# Takeaways (cont.)

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- Three primary sentencing factors best account for non-production offenders' culpability and dangerousness:
  - Content of offender's child pornography collection and the nature of an offender's collecting behavior
  - Degree of an offender's involvement with other offenders – in particular, in an Internet child pornography “community”
  - Offender's history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense

# Child Porn Report Recommendations

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- Three broad factors (content of collection, involvement in offender communities, and other sex offending) should be the primary considerations in determining the punishments imposed on child pornography offenders
- The guidelines should be amended to address these factors, and Congress should authorize the Commission to amend guideline provisions that were promulgated pursuant to specific congressional directives or legislation

# Child Porn Report Recommendations

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- Congress should amend current statutes to reflect the changing nature of this offense:
  - Penalties for simple possession and receipt should be aligned at a level below the current 5 year mandatory minimum for receipt
  - Victim notification and restitution provisions should be amended to minimize trauma but ensure victims receive timely notification and courts order appropriate restitution

# Other Documents on Commission's Website

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- Commission child pornography public hearing, February 15, 2012: transcript & written testimony
- *The History of the Child Pornography Guidelines*, U.S. Sentencing Commission
- *Sex Offense Primers*
  - *Commercial Sex Acts & Sexual Exploitation of Minors*
  - *Sexual Abuse & Failure to Register Offenses*
  - Also see: *Departure & Variance Primer*
- Statistical information

# Application

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## Selected §2G Guidelines

# Main Sex Offense Guidelines

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§2A3.1	18 U.S.C. § 2241	Rape
§2A3.2	18 U.S.C. § 2243	Statutory Rape
§2A3.4	18 U.S.C. § 2244	Sex Abuse
§2G1.3	18 U.S.C. §§ 2422 & 2423	Travel
§2G2.1	18 U.S.C. § 2251	Production
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Traffic, Receipt, Possession

# Statutory Penalty Scheme for Child Porn Offenses

## Mandatory Minimums and Statutory Maximums

Possession		Receipt/Distribution/ Transportation		Production	
1 <sup>st</sup> Time Offender	Recidivist	1 <sup>st</sup> Time Offender	Recidivist	1 <sup>st</sup> Time Offender	Recidivist*
No MM/ 10Y Max.; 20Y Max. if > age 12	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.

\* Section 2251(e) has additional enhancements for recidivists with multiple priors



**§2G2.2:  
Trafficking/Receipt/Possession**

---

**Application**

## §2G2.2: Trafficking/Receipt/Possession

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- Base offense level depends on offense of conviction:
  - 18 for possession offenses
  - 22 for receipt or trafficking offenses
    - Note: 5-year mandatory minimum for receipt & trafficking offenses (18 U.S.C. §§ 2252 & 2252A)

## §2G2.2: Trafficking/Receipt/Possession (cont.)

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- 2-level decrease (§2G2.2(b)(1)) for receipt if no intent to traffic or distribute material
- Defendant's burden to prove this
  - *U.S. v. Goluba*, 672 F.3d 304 (5<sup>th</sup> Cir. 2012)
  - *U.S. v. Fore*, 507 F.3d 412 (6<sup>th</sup> Cir. 2007)
  - *U.S. v. Burgess*, 576 F.3d 1078 (10<sup>th</sup> Cir. 2009)

## §2G2.2

# Specific Offense Characteristics

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- (b)(2) Pre-pubescent minor/minor under 12 (+2)
- (b)(3)(A)-(F) Distribution
  - To minor or distribution for pecuniary/other gain (+5)
  - Other distribution (+2)
- (b)(4) Sadism/masochism/other depictions of violence (+4)

## §2G2.2

### Specific Offense Characteristics (Cont.)

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- (b)(5) Pattern of activity (+5)
- (b)(6) Use of computer (+2)
- (b)(7)(A)-(D) Number of images
  - 10-149 (+2)
  - 150-299 (+3)
  - 300-599 (+4)
  - 600+ (+5)

## §2G2.2(b)(3): Distribution SOC

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- Most common increase either 2 or 5 levels
- 5 levels for distribution for receipt/expectation of thing of value, even if not pecuniary gain (*e.g.*, trading images)
- File sharing enhancement normally either 2 or 5 levels (*e.g.*, Limewire or Frostwire)

# File Sharing as Basis for Distribution SOC

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- *U.S. v. Chiaradio*, 684 F.3d 265 (1<sup>st</sup> Cir. 2012) (+2)
- *U.S. v. Corbett*, 453 F. App'x 226 (3d Cir. 2011) (+5)
- *U.S. v. Strieper*, 666 F.3d 288 (4<sup>th</sup> Cir. 2012) (+5)
- *U.S. v. Brunner*, 393 F. App'x 76 (4<sup>th</sup> Cir. 2010) (+2)
- *U.S. v. Layton*, 564 F.3d 330 (4<sup>th</sup> Cir. 2009) (+2)

## File Sharing as Basis for Distribution SOC (cont.)

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- *U.S. v. Nielson*, 455 F. App'x 526 (5<sup>th</sup> Cir. 2011) (+2)
- *U.S. v. Onken*, 440 F. App'x 304 (5<sup>th</sup> Cir. 2011) (+5)
  
- *U.S. v. Mauck*, 469 F. App'x 424 (6<sup>th</sup> Cir. 2012) (+5)
- *U.S. v. Bolton*, 669 F.3d 780 (6<sup>th</sup> Cir. 2012) (+2)
- *U.S. v. Battaglia*, 624 F.3d 348 (6<sup>th</sup> Cir. 2010) (+5)
- *U.S. v. Darway*, 255 F. App'x 68 (6<sup>th</sup> Cir. 2007) (+2)
  
- *U.S. v. Carani*, 492 F.3d 867 (7<sup>th</sup> Cir. 2007) (+2)



## File Sharing as Basis for Distribution SOC (cont.)

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- *U.S. v. Durham*, 618 F.3d 921 (8<sup>th</sup> Cir. 2010) (none)
- *U.S. v. Ultsch*, 578 F.3d 827 (8<sup>th</sup> Cir. 2009) (+5)
- *U.S. v. Griffin*, 482 F.3d 1008 (8<sup>th</sup> Cir. 2007) (+5)
  
- *U.S. v. Geiner*, 498 F.3d 1104 (10<sup>th</sup> Cir. 2007) (+5)
  
- *U.S. v. Vadnais*, 667 F.3d 1206 (11<sup>th</sup> Cir. 2012) (+2)  
(reversing +5)
- *U.S. v. Spriggs*, 666 F.3d 1284 (11<sup>th</sup> Cir. 2012) (+2)  
(reversing +5)
- *U.S. v. DuFran*, 430 F. App'x 855 (11<sup>th</sup> Cir. 2011) (+2)
- *U.S. v. Gaughran*, 429 F. App'x 877 (11<sup>th</sup> Cir. 2011)<sub>37</sub>(+5)

## §2G2.2(b)(4): Sadistic/Masochistic/Violence SOC

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- If offense involved material that portrays sadistic or masochistic conduct or other depictions of violence increase by 4 levels
- Application Note 2: SOC applies regardless of whether defendant specifically intended to possess, receive, or distribute such materials
  - *U.S. v. Maurer*, 639 F.3d 72 (3d Cir. 2011)
  - *U.S. v. Meschino*, 643 F.3d 1025 (7<sup>th</sup> Cir. 2011)

**§2G2.2(b)(4):  
Sadistic/Masochistic/Violence SOC (cont.)**

---

- Courts apply broadly; most circuits have per se rule: if image involves something being inserted into young child, the SOC applies
  - *U.S. v. Hoey*, 508 F.3d 687 (1<sup>st</sup> Cir. 2007)
  - *U.S. v. Freeman*, 578 F.3d 142 (2<sup>d</sup> Cir. 2009)
  - *U.S. v. Maurer*, 639 F.3d 72 (3<sup>d</sup> Cir. 2011)
  - *U.S. v. Lyckman*, 235 F.3d 234 (5<sup>th</sup> Cir. 2000)
  - *U.S. v. Groenendal*, 557 F.3d 419 (6<sup>th</sup> Cir. 2009)
  - *U.S. v. Myers*, 355 F.3d 1040 (7<sup>th</sup> Cir. 2004)

## §2G2.2(b)(4):

### Sadistic/Masochistic/Violence SOC (cont.)

---

- Courts apply broadly; most circuits have per se rule: if image involves something being inserted into young child, the SOC applies (cont.)
  - *U.S. v. Koch*, 625 F.3d 470 (8<sup>th</sup> Cir. 2010)
  - *U.S. v. Belflower*, 390 F.3d 560 (8<sup>th</sup> Cir. 2004)
  - *U.S. v. Holt*, 510 F.3d 1007 (9<sup>th</sup> Cir. 2007)
  - *U.S. v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003)
  - *U.S. v. Kimler*, 335 F.3d 1132 (10<sup>th</sup> Cir. 2003)
  - *U.S. v. Hall*, 312 F.3d 1250 (11<sup>th</sup> Cir. 2002)
  - *See also, U.S. v. Burgess*, 684 F.3d 445 (4<sup>th</sup> Cir. 2012)

## §2G2.2(b)(5): Pattern of Activity SOC

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- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels

## §2G2.2(b)(5): Pattern of Activity (cont.)

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- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred
  - during the course of offense
  - involved the same minor, or
  - resulted in a conviction for such conduct
  - can be unidentified, generalized individual (attempts)
    - *U.S. v. Strieper*, 666 F.3d 288 (4<sup>th</sup> Cir. 2012)
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)

## §2G2.2(b)(5): Pattern of Activity (cont.)

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- No time limit on conduct
  - *U.S. v. Clark*, 685 F.3d 72 (1<sup>st</sup> Cir. 2012) (24 yrs)
  - *U.S. v. Woodward*, 277 F.3d 87 (1<sup>st</sup> Cir. 2002) (27 yrs)
  - *U.S. v. Olfano*, 503 F.3d 240 (3<sup>d</sup> Cir. 2007) (16 yrs)
  - *U.S. v. Bacon*, 646 F.3d 218 (5<sup>th</sup> Cir. 2011) (30 yrs)
  - *U.S. v. Quinn*, 257 F. App'x 864 (6<sup>th</sup> Cir. 2007) (30 yrs)
  - *U.S. v. Lovaas*, 241 F.3d 900 (7<sup>th</sup> Cir. 2001) (26 yrs)
  - *U.S. v. Garner*, 490 F.3d 739 (9<sup>th</sup> Cir. 2007) (35 yrs)
  - *U.S. v. Turner*, 626 F.3d 566 (11<sup>th</sup> Cir. 2010) (20 yrs)

# §2G2.2(b)(7): Images SOC

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## Number of Images:

- 10-149 images      2-level increase
- 150-299            3-level increase
- 300-599            4-level increase
- 600 or more        5-level increase



# “Images” Instruction

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- Application Note 4 contains definition (*See* 18 U.S.C. § 2256(5) and (8))
- Each photo, picture, computer image, or any similar depiction shall be considered one image
  - *U.S. v. McNerney*, 636 F.3d 772 (6<sup>th</sup> Cir. 2011)  
(duplicate digital images should be counted separately)
  - *U.S. v. Sampson*, 606 F.3d 505 (8<sup>th</sup> Cir. 2010)

## “Images” Instruction (cont.)

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- Each video, video-clip movie, or similar recording shall be considered to have 75 images
- Thumbnail images created by video editing process when videos reviewed and edited could be considered to determine images
  - *U.S. v. Nissen*, 666 F.3d 486 (8<sup>th</sup> Cir. 2012)

## §2G2.2(c)(1) Cross Reference

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- If offense involved transporting, permitting or offering, or seeking by notice or advertisement a minor to engage in sexually explicit conduct, for purpose of producing a visual depiction of such conduct, apply §2G2.1 (Production)

## §2G2.2(c)(1) Cross Reference (cont.)

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- Application Note 5 states that the cross reference is to be construed broadly
  - *U.S. v. Castro-Valenzuela*, 304 F. App'x 986 (3d Cir. 2008)
  - *U.S. v. Long*, 304 F. App'x 982 (3d Cir. 2008)
  - *U.S. v. Caudill*, 427 F. App'x 301 (5<sup>th</sup> Cir. 2011)
  - *U.S. v. Bauer*, 626 F.3d 1004 (8<sup>th</sup> Cir. 2010)
  - *U.S. v. Shuler*, 598 F.3d 444 (8<sup>th</sup> Cir. 2010)
  - *U.S. v. Starr*, 533 F.3d 985 (8<sup>th</sup> Cir. 2008)
  - *U.S. v. Stoterau*, 524 F.3d 988 (9<sup>th</sup> Cir. 2008)

**§2G2.1:  
Production of Child Porn**

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# §2G2.1: Production

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- High frequency SOCs (FY 2011)
  - age of victim
  - sex act or contact
  - custody/care
- Note: 15 year mandatory minimum for 18 U.S.C. § 2251 (Production)

**§2G1.3:  
Travel Cases  
& Child Sex Trafficking**

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# §2G1.3: Travel Cases and Child Sex Trafficking

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- Note: mandatory minimum 10 years for 18 U.S.C. §§ 2422(b) & 2423(a) offenses
- Base Offense Levels
  - 34 (§1591(b)(1) – victim under 14)
  - 30 (§1591(b)(2) – victim between 14-18)
  - 28 (§§ 2422(b) or 2423(a) – enticement or transport of minor)
  - 24 otherwise



## §2G1.3

# Specific Offense Characteristics

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- Use of a computer (+2)
- Sex act, sexual contact, or commercial sex act (+2)
- Misrepresentation of identity/undue influence (+2)
  - Undue influence does not apply if sting case only
- Age of victim (+8) (does not apply to § 1591 cases) (note: might be subject to cross-reference)
- Care, custody, control (+2)

## §2G1.3 Cross References

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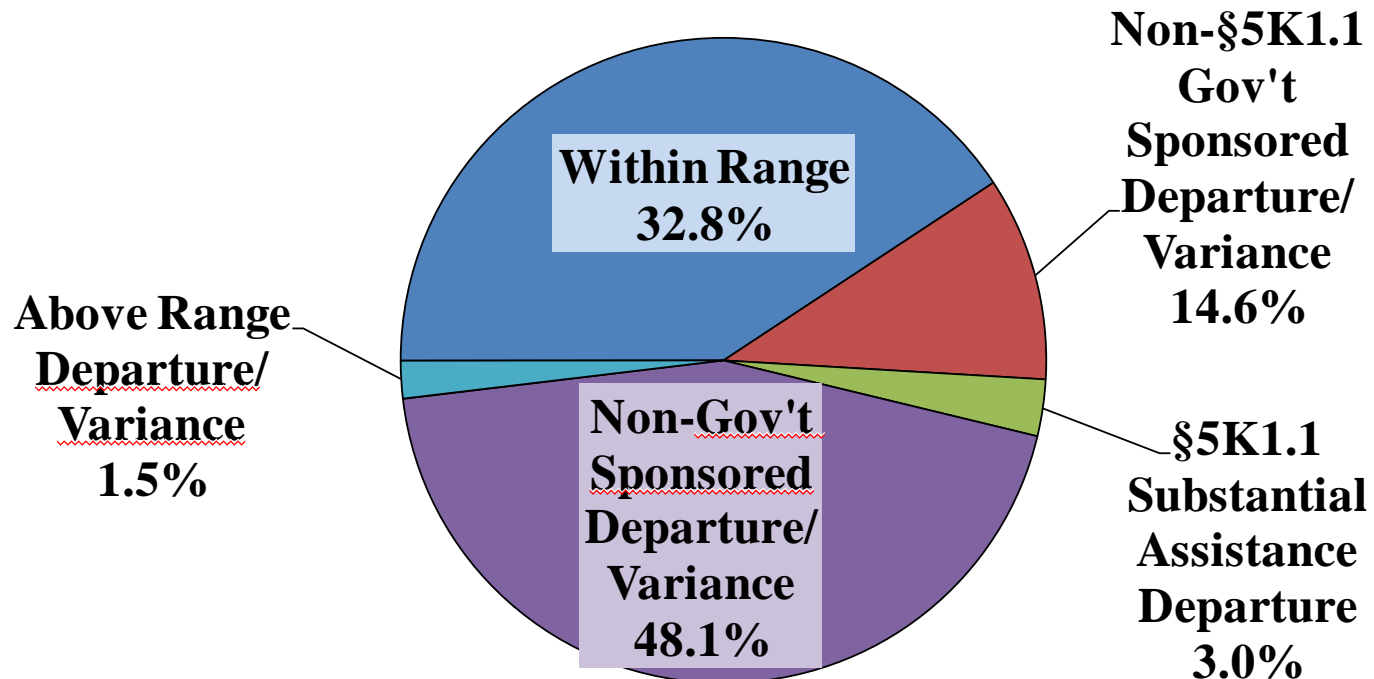
- §2G1.3(c)(1) to §2G2.1 (Production)
  - *U.S. v. Dye*, 2010 WL 4146187 (3d Cir. 2010)
  - *U.S. v. Veazey*, 491 F.3d 700 (7<sup>th</sup> Cir. 2007)
  - *U.S. v. Mai*, 291 F. App'x 910 (10<sup>th</sup> Cir. 2008)
  - *U.S. v. Bohannon*, 476 F.3d 1246 (11<sup>th</sup> Cir.)
- §2G1.3(c)(3) to §2A3.1 (Rape)
  - Offense involved conduct described in 18 U.S.C. §§ 2241 or 2242
  - *U.S. v. Henzel*, 668 F.3d 972 (7<sup>th</sup> Cir. 2012)
- Cross references can apply to sting cases

# Departures and Variances

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# §2G2.2 – Trafficking/Receipt/Possession Departures & Variances

Based on 1,654 Cases in FY 2011



Note: Percentages may not sum to exactly 100.0% due to rounding.  
SOURCE: U.S. Sentencing Commission, 2011 Datafile, USSCFY11.

# Factors Argued for Departures/Variations

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- Psychosexual evaluations
- Risk of touching
- Length of time looking at child pornography
- Material in images (*e.g.*, babies in image)
- Age of victims and the age of the defendant
- Computer sophistication
- Experts
- Rehabilitation
- Physical condition of defendant

# “Policy Disagreement” or “Lack of Empirical Evidence” Argument in Child Porn Cases

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- Compare
  - *U.S. v Dorvee*, 616 F.3d 174 (2d Cir. 2010)
  - *U.S. v. Grober*, 624 F.3d 592 (3d Cir. 2010)
  - *U.S. v. Henderson*, 649 F.3d 955 (9<sup>th</sup> Cir. 2011)
- With
  - *U.S. v. Miller*, 665 F.3d 114 (5<sup>th</sup> Cir. 2011)
  - *U.S. v Bistline*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)
  - *U.S. v. Pugh*, 515 F.3d 1179 (11<sup>th</sup> Cir. 2008)

# Disagreements with Congress's Policy in Child Porn Cases

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*U.S. v. Bistline*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)

- “Of course, Congress can choose to act on empirical grounds; and when it does, a district court must contend with those grounds in explaining its disagreement (in the case of a guideline) with Congress's policy judgment. But it is also Congress's prerogative to dictate sentencing enhancements based on a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result.”

[continued on next page]

## Disagreements with Congress's Policy in Child Porn Cases (cont.)

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*U.S. v. Bistline*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)

[continued from previous page]

- “When a congressional directive reflects such a judgment, a district court that disagrees with the guideline that follows must contend with those grounds too. Thus, when a guideline comes bristling with Congress's own empirical and value judgments—or even just value judgments—the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough*.”



# Lack of Empirical Evidence Argument

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*U.S. v. Dorvee*, 616 F.3d 174 (2<sup>nd</sup> Cir. 2010)

- “...the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what 18 U.S.C. § 3553 requires. Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. However, the Commission did not use this

[continued on next page]

## Lack of Empirical Evidence Argument (cont.)

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*U.S. v. Dorvee*, 616 F.3d 174 (2<sup>nd</sup> Cir. 2010)

[continued from previous page]

- empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under §2G2.2 several times since their introduction in 1987, each time recommending harsher penalties.”

# Below Guideline Sentences Remanded in Child Porn Cases

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- *U.S. v. DeSilva*, 613 F.3d 352 (2d Cir. 2010)
  - Receipt of child porn
- *U.S. v. Lychock*, 578 F.3d 214 (3d Cir. 2009)
  - Possession of child porn
- *U.S. v. Goff*, 501 F.3d 250 (3d Cir. 2007)
  - Possession of child porn
- *U.S. v. Morace*, 594 F.3d 340 (4<sup>th</sup> Cir. 2010)
  - Possession of child porn

## Below Guideline Sentences Remanded in Child Porn Cases (cont.)

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- *U.S. v. Robinson*, 669 F.3d 767 (6<sup>th</sup> Cir. 2012)
  - Possession of child porn
- *U.S. v. Bistline*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)
  - Possession of child porn
- *U.S. v. Christman*, 607 F.3d 1110 (6<sup>th</sup> Cir. 2010)
  - Possession of child porn
- *U.S. v. Camiscione*, 591 F.3d 823 (6<sup>th</sup> Cir. 2010)
  - Possession of child porn
- *U.S. v. Harris*, 339 F. App'x 533 (6<sup>th</sup> Cir. 2009)
  - Possession/distribution of child porn

## Below Guideline Sentences Remanded in Child Porn Cases (cont.)

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- *U.S. v. Kane*, 639 F.3d 1121 (8<sup>th</sup> Cir. 2011)
  - Aggravated sexual abuse
- *U.S. v. Irey*, 612 F.3d 1160 (11<sup>th</sup> Cir. 2010)
  - Production of child porn below range remanded
- *U.S. v. Pugh*, 515 F.3d 1179 (11<sup>th</sup> Cir. 2008)
  - Possession of child porn below range remanded
- \*\*\**U.S. v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009)\*\*\*
  - Possession of child porn below range ***remanded upon defendant's appeal***

## Below Guideline Sentences Affirmed in Child Porn Cases

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- *U.S. v. Grober*, 624 F.3d 592 (3d Cir. 2010)
  - Receipt of child porn
- *U.S. v. Rowan*, 530 F.3d 379 (5<sup>th</sup> Cir. 2008)
  - Possession of child porn
- *U.S. v. Duhon*, 541 F.3d 391 (5<sup>th</sup> Cir. 2008)
  - Possession of child porn

## Below Guideline Sentences Affirmed in Child Porn Cases (cont.)

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- *U.S. v. Richards*, 659 F.3d 527 (6<sup>th</sup> Cir. 2011)
  - Production and possession
- *U.S. v. Stall*, 581 F.3d 276 (6<sup>th</sup> Cir. 2009)
  - Possession of child porn
- *U.S. v. Beach*, 275 F. App'x 529 (6<sup>th</sup> Cir. 2008)
  - Transporting child porn
- *U.S. v. Grossman*, 513 F.3d 592 (6<sup>th</sup> Cir. 2008)
  - Possession of child porn

**Below Guideline Sentences**  
**Affirmed in Child Porn Cases (cont.)**

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- *U.S v. Autery*, 555 F.3d 864 (9<sup>th</sup> Cir. 2009)
  - Possession of child porn
  
- *U.S. v. Huckins*, 529 F.3d 1312 (10<sup>th</sup> Cir. 2008)
  - Possession of child porn



# Above Guideline Sentences Affirmed in Child Porn Cases

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- *U.S. v. Gilmore*, 599 F.3d 160 (2d Cir. 2010)
- *U.S. v. Martinucci*, 561 F.3d 533 (2d Cir. 2009)
- *U.S. v. McGowan*, 315 F. App'x 338 (2d Cir. 2009)
  
- *U.S. v. Larkin*, 629 F.3d 177 (3d Cir. 2010)
- *U.S. v. King*, 604 F.3d 125 (3d Cir. 2010)
  
- *U.S. v. Whorley*, 550 F.3d 326 (4<sup>th</sup> Cir. 2008)
  
- *U.S. v. McGehee*, 261 F. App'x 771 (5<sup>th</sup> Cir. 2008)<sub>169</sub>

# Above Guideline Sentences Remanded in Child Porn Case

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- *U.S. v. Aleo*, 681 F.3d 290 (6<sup>th</sup> Cir. 2012)
  - Production of child porn

# **Restitution Issue in Child Porn Convictions for Possession/Receipt/Trafficking**

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# Cert. Granted: Restitution in Child Porn Offenses

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*Paroline v. U.S.* 701 F.3d 749 (5<sup>th</sup> Cir. 2012),  
*cert granted*, 2013 WL 497856 (U.S. 2013)

- Question presented: What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259?

# Restitution to a Victim When Defendant Convicted of Possession, Receipt or Trafficking of Child Porn

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- *U.S. v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012)
- *U.S. v. Kearney*, 672 F.3d 81 (1st Cir. 2012)
- *U.S. v. Burgess*, 684 F.3d 445 (2d Cir. 2012)
- *U.S. v. Aumais*, 656 F.3d 147 (2d Cir. 2011)
- *In Re: Amy Unknown*, 701 F.3d 749 (5<sup>th</sup> Cir. 2012)

## Restitution to a Victim When Defendant Convicted of Possession, Receipt or Trafficking of Child Porn (cont.)

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- *U.S. v. Kennedy*, 643 F.3d 1251 (9<sup>th</sup> Cir. 2011)
- *U.S. v. Baxter*, 394 F. App'x 377 (9<sup>th</sup> Cir. 2010)
  
- *U.S. v. McGarity*, 669 F.3d 1218 (11<sup>th</sup> Cir. 2012)
- *U.S. v. McDaniel*, 631 F.3d 1204 (11<sup>th</sup> Cir. 2011)
  
- *U.S. v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011)

END

# Child Sex Crimes and Supervised Release

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# Supervised Release Statutes and Guidelines

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- 18 U.S.C. § 3583(k): The authorized term for most sex offenses is 5 years to life
- §§5D1.1 - 5D1.3 – Supervised Release Terms and Conditions
- §5D1.2(b): If instant offense of conviction is sex offense, statutory maximum term of supervised release is recommended

# Term of Supervised Release

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- Supervised release term can be imposed for life
  - *U.S. v. Hayes*, 445 F.3d 536 (2d Cir. 2006)
  - *U.S. v. Proctor*, 281 F. App'x 72 (3d Cir. 2008)
  - *U.S. v. Hayes*, 404 F. App'x 753 (4<sup>th</sup> Cir. 2010)
  - *U.S. v. Gonzalez*, 445 F.3d 815 (5<sup>th</sup> Cir. 2006)

## Term of Supervised Release (cont.)

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- Supervised release term can be imposed for life
  - *U.S. v. Burnette*, 414 F. App'x 795 (6<sup>th</sup> Cir. 2011)
  - *U.S. v. Inman*, 666 F.3d 1001 (6<sup>th</sup> Cir. 2012) (court did not explain why it imposed a life term of supervised release)
  - *U.S. v. Apodaca*, 641 F.3d 1077 (9<sup>th</sup> Cir. 2011)
  - *U.S. v. Williams*, 636 F.3d 1229 (9<sup>th</sup> Cir. 2011)
  - *U.S. v. Daniels*, 541 F.3d 915 (9<sup>th</sup> Cir. 2008)
  - *U.S. v. Cope*, 527 F.3d 944 (9<sup>th</sup> Cir. 2008)

## Term of Supervised Release (cont.)

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- Supervised release term can be imposed for life
  - *U.S. v. Moriarty*, 429 F.3d 1012 (11<sup>th</sup> Cir. 2005)
  - *U.S. v. Russell*, 600 F.3d 631 (D.C. 2010) (30 yrs.)
  - *But see U.S. v. Miller*, 594 F.3d 172 (3d Cir. 2010)

# 18 U.S.C. § 3583(d)

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## Conditions of Supervised Release

- Must be reasonably related to 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)
- Cannot involve greater deprivation of liberty than is reasonably necessary to achieve the goals of (a)(2)(B), (a)(2)(C), and (a)(2)(D)

## 18 U.S.C. § 3583(d) (cont.)

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### Conditions of Supervised Release

- Specifically states that if an offender is required to register under SORNA, the court shall order compliance with SORNA requirements

# Notice Requirement

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- *U.S. v. Rivera-Maldonado*, 560 F.3d 16 (1<sup>st</sup> Cir. 2009) (failure to inform the defendant that he faced a possible life term of supervised release was plain error)
- *U.S. v. Cope*, 527 F.3d 944 (9<sup>th</sup> Cir. 2008) (court has discretion as to form or timing of notice, but court cannot announce the sentence and conditions and only afterward provide defendant an opportunity to object - here, remand was necessary because court failed to provide notice)

## Notice Requirement (cont.)

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- *U.S. v. Wise*, 391 F.3d 1027 (9<sup>th</sup> Cir. 2004) (where a condition of supervised release is not on the list of mandatory or discretionary conditions in guidelines, notice is required before it is imposed)
- *U.S. v. Moran*, 573 F.3d 1132 (11<sup>th</sup> Cir. 2009) (district court was not required to notify defendant before it imposed special conditions to address his proclivity for sexual misconduct)



# Not Convicted of a “Sex Offense”

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- Courts have upheld the imposition of “sex offense” conditions even if the instant offense of conviction is not a sex offense
  - *U.S. v. Sebastian*, 612 F.3d 47 (1<sup>st</sup> Cir. 2010)
  - *U.S. v. Dupes*, 513 F.3d 338 (2d Cir. 2008)
  - *U.S. v. Perkins*, 207 F. App’x 559 (6<sup>th</sup> Cir. 2006)
  - *But see U.S. v. Carter*, 463 F.3d 526 (6<sup>th</sup> Cir. 2006) (condition not reasonably related to def. criminal history)

## Not Convicted of a “Sex Offense” (cont.)

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- Courts have upheld the imposition of “sex offense” conditions even if the instant offense of conviction is not a sex offense (cont.)
  - *U.S. v. Ross*, 475 F.3d 871 (7<sup>th</sup> Cir. 2007)
  - *U.S. v. Kelly*, 677 F.3d 373 (8<sup>th</sup> Cir. 2012)
  - *U.S. v. Smart*, 472 F.3d 556 (8<sup>th</sup> Cir. 2006)
  - *U.S. v. Miles*, 411 F. App’x 126 (10<sup>th</sup> Cir. 2010)
  - *U.S. v. Vinson*, 147 F. App’x 763 (10<sup>th</sup> Cir. 2005)

# **Specific Conditions of Supervised Release for Sex Offenders**

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# Restriction on Computer and Internet Use

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## Total Ban Upheld

- *U.S. v. Paul*, 274 F.3d 155 (5<sup>th</sup> Cir. 2001)
- *U.S. v. Mark*, 425 F.3d 505 (8<sup>th</sup> Cir. 2005)

## Restriction on Computer and Internet Use (cont.)

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### Restrict Use With USPO Approval

- *U.S. v. Johnson*, 446 F.3d 272 (2d Cir. 2006)
- *U.S. v. Crandon*, 173 F.3d 122 (3d Cir. 1999)
- *U.S. v. Phillips*, 370 F. App'x 610 (6<sup>th</sup> Cir. 2010)

## Restriction on Computer and Internet Use (cont.)

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### Restrict Use With USPO Approval (cont.)

- *U.S. v. Morais*, 670 F.3d 889 (8<sup>th</sup> Cir. 2012)
- *U.S. v. Demers*, 634 F.3d 982 (8<sup>th</sup> Cir. 2011)
- *U.S. v. Wiedower*, 634 F.3d 490 (8<sup>th</sup> Cir. 2011)  
(vacating condition)
- *U.S. v. Crume*, 422 F.3d 728 (8<sup>th</sup> Cir. 2005)  
(vacating condition only possession and receipt)

## Restriction on Computer and Internet Use (cont.)

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### Restrict Use With USPO Approval (cont.)

- *U.S. v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003)
- *U.S. v. Walser*, 275 F.3d 981 (10<sup>th</sup> Cir. 2001)
- *U.S. v. Zinn*, 321 F.3d 1084 (11<sup>th</sup> Cir. 2003)
- *U.S. v. Love*, 593 F.3d 1 (D.C. Cir. 2010)

## Restriction on Computer and Internet Use (cont.)

---

### Total Ban Prohibited

- *U.S. v. Perazza-Mercado*, 553 F.3d 65 (1<sup>st</sup> Cir. 2009) (at least where Internet not used to commit offense)
- *U.S. v. Sofsky*, 287 F.3d 122 (2d Cir. 2002)
- *U.S. v. Voekler*, 489 F.3d 139 (3d Cir. 2007)
- *U.S. v. Lantz*, 443 F. App'x 135 (6<sup>th</sup> Cir. 2011)



## **Restriction on Computer and Internet Use (cont.)**

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### **Total Ban Prohibited (cont.)**

- *U.S. v. Holm*, 326 F.3d 872 (7<sup>th</sup> Cir. 2003)
- *U.S. v. Wiedower*, 634 F.3d 490 (8<sup>th</sup> Cir. 2011)
- *U.S. v. Sales*, 476 F.3d 732 (9<sup>th</sup> Cir. 2007)
- *U.S. v. White*, 244 F.3d 1199 (10<sup>th</sup> Cir. 2001)
- *U.S. v. Russell*, 600 F.3d 631 (D.C. Cir. 2010)<sup>193</sup>

# No Contact with Minors

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- *U.S. v. Roy*, 438 F.3d 140 (1<sup>st</sup> Cir. 2006)
- *U.S. v. Johnson*, 446 F.3d 272 (2d Cir. 2006)
- *U.S. v. Proctor*, 281 F. App'x 72 (3d Cir. 2008)
- *U.S. v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (lacked clarity-- remand)
- *U.S. v. Loy*, 237 F.3d 251 (3d Cir. 2001) (upholding condition that defendant have no unsupervised contact with minors)
- *U.S. v. Paul*, 274 F.3d 155 (5<sup>th</sup> Cir. 2001 ) (affirmed prohibition on contact with minors)

## No Contact with Minors (cont.)

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- *U.S. v. Davis*, 452 F.3d 991 (8<sup>th</sup> Cir. 2006) (no evidence that defendant had sexually abused a child so condition restricting access to daughter not reasonably related)
- *U.S. v. Blinkinshop*, 606 F.3d 1110 (9<sup>th</sup> Cir. 2010)(remand)
- *U.S. v. Stoterau*, 524 F.3d 988 (9<sup>th</sup> Cir. 2008)
- *U.S. v. Bee*, 162 F.3d 1232 (9<sup>th</sup> Cir. 1998) (def. cannot have contact with child under 18 unless approved by P.O.)
- *U.S. v. Mike*, 632 F.3d 686 (10<sup>th</sup> Cir. 2011)
- *U.S. v. Love*, 593 F.3d 1 (D.C. Cir. 2010) (upheld)<sup>195</sup>

# Restrictions on Residing Near and/or Frequenting Locations Frequented by Children

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- *U.S. v. Macmillen*, 544 F.3d 71 (2d Cir. 2008)
- *U.S. v. Peterson*, 248 F.3d 79 (2d. Cir. 2001)  
(condition barring def. from school, park, etc.  
where children likely to congregate too vague);  
*see U.S. v. Raftopoulos*, 254 F. App'x 829 (2d Cir.  
2007)

## Restrictions on Residing Near and/or Frequenting Locations Frequented by Children (cont.)

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- *U.S. v. Paul*, 274 F.3d 155 (5<sup>th</sup> Cir. 2001)  
(def. must avoid places, areas, and establishments frequented by minors)
- *U.S. v. Schaefer*, 675 F.3d 1122 (8<sup>th</sup> Cir. 2012)
- *U.S. v. Wiedower*, 634 F.3d 490 (8<sup>th</sup> Cir. 2011)
- *U.S. v. Ristine*, 335 F.3d 692 (8<sup>th</sup> Cir. 2003)

## Restrictions on Residing Near and/or Frequenting Locations Frequented by Children (cont.)

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- *U.S. v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003)  
(def. cannot loiter within 100 feet of area frequented by children)
- *U.S. v. Guagliardo*, 278 F.3d 868 (9<sup>th</sup> Cir. 2002 )  
(condition that def. not reside in close proximity to places frequented by children too vague; remanded to specify precise distance limitation)
- *U.S. v. Zinn*, 321 F.3d 1084 (11<sup>th</sup> Cir. 2003)  
(same)

# Polygraph Condition Allowed

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- *U.S. v. Roy*, 438 F.3d 140 (1<sup>st</sup> Cir. 2006)
- *U.S. v. Johnson*, 446 F.3d 272 (2<sup>d</sup> Cir. 2006)
- *U.S. v. Lee*, 315 F.3d 206 (3<sup>d</sup> Cir. 2003)
- *U.S. v. Dotson*, 324 F.3d 256 (4<sup>th</sup> Cir. 2003)
- *U.S. v. Locke*, 482 F.3d 764 (5<sup>th</sup> Cir. 2007)
- *U.S. v. Teeple*, 447 F. App'x 712 (6<sup>th</sup> Cir. 2012)
- *U.S. v Sines*, 303 F.3d 793 (7<sup>th</sup> Cir. 2002)
- *U.S. v. Wiedower*, 634 F.3d 490 (8<sup>th</sup> Cir. 2011)
- *U.S. v. Stoterau*, 524 F.3d 988 (9<sup>th</sup> Cir. 2008)
- *U.S. v. Begay*, 631 F.3d 1168 (10<sup>th</sup> Cir. 2011)
- *U.S. v. Zinn*, 321 F.3d 1084 (11<sup>th</sup> Cir. 2003)

# Participate in Mental Health or Sex Treatment Program

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- *U.S. v. Prochner*, 417 F.3d 54 (1<sup>st</sup> Cir. 2005)
- *U.S. v. Miller*, 594 F.3d 172 (3d Cir. 2010)
- *U.S. v. Teeple*, 447 F. App'x 712 (6<sup>th</sup> Cir. 2012)
- *U.S. v. Wiedower*, 634 F.3d 490 (8<sup>th</sup> Cir. 2011)
- *U.S. v. Stoterau*, 524 F.3d 988 (9<sup>th</sup> Cir. 2008)
- *U.S. v. Lopez*, 258 F.3d 1053 (9<sup>th</sup> Cir. 2001)
- *U.S. v. Morgan*, 44 F. App'x 881 (10<sup>th</sup> Cir. 2002)
- *U.S. v. Zinn*, 321 F.3d 1084 (11<sup>th</sup> Cir. 2003)



# Ban on Possession of Sexually Explicit Materials

---

- *U.S. v. Lantz*, 443 F. App'x 135 (6<sup>th</sup> Cir. 2011)
  - ban on material that “depicts or alludes to sexual activity” is overly broad.
  - ban on any material depicts minors under 18 too broad because not limited to child porn
- *U.S. v. Deatherage*, 682 F.3d 755 (8<sup>th</sup> Cir. 2012) (ban acceptable because likely abuse of children)
- *U.S. v. Olsen*, 667 F.3d 958 (8<sup>th</sup> Cir. 2012)
- *U.S. v. Bender*, 566 F.3d 748 (8<sup>th</sup> Cir. 2009)

# Other Conditions

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- Penile plethysmograph
  - *U.S. v. Dotson*, 324 F.3d 256 (4th Cir. 2003) (acceptable condition)
  - *U.S. v. Warner*, 399 F. App'x 88 (6<sup>th</sup> Cir. 2010) (not ripe for review yet)
  - *U.S. v. Lee*, 502 F.3d 447 (6<sup>th</sup> Cir. 2007) (not ripe for review yet)
  - *U.S. v. Weber*, 451 F.3d 552 (9<sup>th</sup> Cir. 2006 ) (court must make individualized finding before ordering as a condition)

## Other Conditions (cont.)

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- Abel Test
  - *U.S. v. Stoterau*, 524 F.3d 988 (9<sup>th</sup> Cir. 2008))
- Prescribed medication
  - *U.S. v. Cope*, 527 F.3d 944 (9<sup>th</sup> Cir. 2008) (court must make individualized finding)
  - *U.S. v. Mike*, 632 F.3d 686 (10<sup>th</sup> Cir. 2011) (acceptable)

# Occupational Restrictions

---

## §5F1.5

- Court can impose supervised release condition prohibiting defendant from engaging in specified occupation, business, or profession under certain conditions
    - *U.S. v. Prochner*, 417 F.3d 54 (1<sup>st</sup> Cir. 2005)
    - *U.S. v. Gill*, 523 F.3d 107 (2<sup>d</sup> Cir. 2008)
    - *U.S. v. Carter*, 652 F.3d 894 (8<sup>th</sup> Cir. 2011)
    - *U.S. v. Weber*, 186 F. App'x 751 (9<sup>th</sup> Cir. 2006)
    - *U.S. v. Mike*, 632 F.3d 686 (10<sup>th</sup> Cir. 2011)
- (need to make specific finding)

# Relevant Conduct Overview

---

## §1B1.3

# Relevant Conduct – The Gatekeeper

---

## §1B1.3

- Relevant Conduct does not create any additional guideline characteristics or adjustments
- *Rather*, Relevant Conduct serves as a gatekeeper in determining the conduct that can be considered in the application of the existing characteristics and adjustments

# Relevant Conduct Analysis

---

## §1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A) & (a)(1))
- Defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B) & (a)(1))

## Relevant Conduct Analysis (cont.)

---

### §1B1.3

- *For certain offenses* defendant also accountable for acts he/she did, and certain acts others did in the same course of conduct or common scheme or plan as the offense of conviction  
((a)(1)(A) and (a)(1)(B) & (a)(2))



# §1B1.3 Analysis: (a)(1) & (a)(2)

---

## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan

# **Holding a Defendant Accountable for His/Her Acts Under Relevant Conduct**

---

§1B1.3(a)(1)(A)

# §1B1.3 Analysis: (a)(1)(A) & (a)(1)

---

**WHO:** (a)(1)(A): Acts of the defendant  
(Acts committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant)

**WHEN:**

Offense of Conviction

**(a)(1):**

In preparation

During

Avoiding  
detection

# Question 1 (RelCon (a)(1)(A))

---

- Def. convicted of one count of embezzlement, citing a specific occasion and that an amount of at least \$5,000 was taken
- Applicable guideline §2B1.1 (Embezzlement)
- If it is determined that Def. took \$25,000 on that occasion, what is the amount of “loss” for the §2B1.1 specific offense characteristic for loss?

## Question 2

---

- Def. convicted of one count of bank robbery (but not the armed section of the statute), citing a specific occasion and that an amount of at least \$5,000 was taken
- Applicable guideline §2B3.1 (Robbery)

## Question 2 (cont.)

---

- If it is determined that Def. took \$25,000 on that occasion, what is the amount of “loss” for the §2B3.1 specific offense characteristic (SOC)?
- If it is determined that Def. brandished a firearm at the time of the robbery will the §2B3.1 SOC apply for “if a firearm was brandished or possessed”?

## Question 2 – Variation (RelCon (a)(1)(A))

---

- If it were determined that Def. did not possess a firearm in the bank, but prior to the bank robbery used a gun in stealing a car for purposes of the robbery and the getaway, would the §2B3.1 firearm SOC apply?
- With the robbery guideline definition of “loss” being the value of property taken, damaged, or destroyed, would the theft of the getaway car affect this determination?

# **Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct**

---

§1B1.3(a)(1)(B)



## 3-Part Analysis of (a)(1)(B)

---

Determinations required for acts of others  
to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, **and**
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking<sub>217</sub>

# §1B1.3 Analysis: (a)(1)(B) & (a)(1)

---

**WHO:** (a)(1)(B): Certain acts of others  
(3-part analysis:  
- scope of undertaking  
- acts of others in furtherance, **and**  
- reasonably foreseeable)

**WHEN:**

Offense of Conviction

**(a)(1):**

In preparation

During

Avoiding  
detection

# Determination of Scope of Undertaking

---

## §1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others

# Standard for “Reasonable Foreseeability”

---

## §1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
  - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?

# Question 3

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- Def. convicted of bank robbery
- Applicable guideline: §2B3.1
- Co-participant carried a gun in the robbery, a fact unknown to Def. until the commission of the robbery
- Will the §2B3.1 SOC for “if a firearm was brandished or possessed” apply?

## Question 3 – Variation (RelCon (a)(1)(B))

---

- At the direction of Def., the co-participant carried a gun in the commission of the robbery
- Will the §2B3.1 SOC for “if a firearm was brandished or possessed” apply?

**Holding a Defendant Accountable  
for the Acts of Others In a Broadly  
Worded Count of Conviction,  
Such as a Drug Trafficking  
Conspiracy**

---

§1B1.3(a)(1)(B) & (a)(1)

# 3-Part Analysis of (a)(1)(B)

---

Determinations required for acts of others  
to be relevant conduct

- 1. The scope of the defendant's jointly undertaken criminal activity**
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking<sup>224</sup>



# Scope of Undertaking in a Conspiracy

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§1B1.3, App. Note 2

**The scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy**

# Determining Scope in a Conspiracy

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“Bright Line Rule”  
of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

# “Reasonably Foreseeable”

---

## §1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant not accountable for acts of others that were outside the scope of the defendant’s undertaking, *even* if those acts were reasonably foreseeable or known to the defendant

# Example: Holding Defendant Accountable for the Act of Another

---

## §1B1.3(a)(1)(B)

- Def. convicted of drug conspiracy
- Applicable guideline: §2D1.1
- Conspiracy involved multiple importations;  
Def. was involved in two of those

## Example (cont.): Holding Defendant Accountable for the Act of Another

---

### §1B1.3(a)(1)(B)

- If it is determined that Def.'s undertaking was two importations, Def. will only be accountable for acts of others within the scope of undertaking
- Drugs outside Def.'s undertaking will not be used in guideline application, even if foreseeable (or known)

## Question 4 (RelCon (a)(1)(B))

---

- Def. convicted of fraud conspiracy citing many participants and many acts in operations in five cities over five years
- Applicable guideline §2B1.1
- Def. worked two years in one city, along with four other local co-participants, for a “boss from headquarters”

## Question 4 (cont.)

---

- Def. and the four locals each got 10% of the proceeds from that office's proceeds; the "boss" kept 50% of the office proceeds, from which he got a cut and returned the balance to "headquarters"

## Question 4 (cont.)

---

- In the determination of the §2B1.1 SOC for “loss,” will Def. be accountable for:
  - All losses caused by the conspiracy during the five years?
  - All losses caused by the conspiracy during the two years in which Def. was involved?
  - All losses caused by the local office during the time Def. worked there?
  - Only the losses caused directly by Def.?



# **Holding a Defendant Accountable for His/Her Acts and Acts of Others in a Course of Conduct or Common Scheme or Plan**

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§1B1.3(a)(2): “Expanded” Relevant Conduct

# §1B1.3 Analysis: (a)(2)

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**WHO:**

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

**WHEN:**

**Offense of Conviction**

(a)(1):

In preparation

During

Avoiding  
detection

**(a)(2):**

**Same course of conduct/  
Common scheme or plan**

# Offenses for Which “Expanded” Relevant Conduct Applies

---

## §1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct applies if the applicable Chapter Two guideline is on the “included list” (or is of that type) at §3D1.2(d) (the “Rule (d)” multiple counts grouping rule)
- This analysis does not require that there are multiple counts of conviction

# Offenses **Included** at §3D1.2(d):

---

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

# Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

# “Common Scheme or Plan”

---

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
  - Common victims
  - Common accomplices
  - Common purpose
  - Similar *modus operandi*

# “Same Course of Conduct”

---

§1B1.3(a)(2); App. Note 9(B);  
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

See: *U.S. v. Hodge*, 354 F.3d 305 (4<sup>th</sup> Cir. 2004)

# Example:

## RelCon Includes Same Course of Conduct / Common Scheme or Plan

---

### §1B1.3(a)(2)

- Def. convicted of one count of embezzlement of \$5,000
- Applicable guideline: §2B1.1, which is on the “included list” at §3D1.2(d)



**Example (cont.):  
RelCon Includes Same Course of Conduct /  
Common Scheme or Plan**

---

**§1B1.3(a)(2)**

- If it is determined that Def. took \$5,000 on each of four other occasions, and those acts were in the same course of conduct or common scheme or plan as the offense of conviction, those losses will be relevant conduct
- Loss will be \$25,000

## Question 5 (RelCon (a)(2))

---

- Def. convicted of sale of 1 kg on a single occasion
- Applicable guideline: §2D1.1
- It is determined that Def. also sold 1 kg of same drug under same circumstances each week for 40 weeks
- What quantity of drugs will be used in the application of the Drug Quantity Table at §2D1.1?

# Question 6

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- Def. convicted of felon in possession of a firearm, a pistol on a specific date;
- Applicable guideline: §2K2.1
- A search of Def.'s house the day after he possessed the firearm in the offense of conviction discovered two additional firearms, both pistols, one with an obliterated serial number

## Question 6 (cont.)

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- How many firearms will be counted for the §2K2.1 SOC for number of firearms?
- Will the SOC for obliterated serial number apply?

# Offenses for Which “Expanded” Relevant Conduct Does Not Apply

---

## §1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct does not apply if the applicable Chapter Two guideline is on the “excluded list” (or is of that type) at §3D1.2(d) (the “Rule (d)” multiple counts grouping rule)
- This analysis does not require that there are multiple counts of conviction

# Offenses Excluded at §3D1.2(d):

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Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

# Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2)  
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

# §1B1.3 Analysis: When (a)(2) Does Not Apply

## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

~~Same course of conduct/  
Common scheme or plan~~



## Example:

# RelCon Does NOT Include Same Course of Conduct / Common Scheme or Plan

---

## §1B1.3(a)(2) Not Applicable

- Def. convicted of one count of bank robbery (but not the armed section of the statute), citing a specific occasion and that an amount of at least \$5,000 was taken
- Applicable guideline: §2B3.1, on the “excluded” list at §3D1.2(d)

**Example (cont.):**  
**RelCon Does NOT Include Same Course of**  
**Conduct / Common Scheme or Plan**

---

**§1B1.3(a)(1) Not Applicable**

- Def. did not have a firearm in the instant robbery, and took \$5,000
- It is determined that within days of the robbery in the offense of conviction Def. robbed \$5,000 on each on four other occasions, using the same method, and on one of those occasions he had a firearm

**Example (cont.):**  
**RelCon Does NOT Include Same Course of**  
**Conduct / Common Scheme or Plan**

---

**§1B1.3(a)(1) Not Applicable**

- Because §2B3.1 is on the “excluded” list, relevant conduct does not include the same course of conduct or common scheme or plan
- Conduct in the other robberies will not be relevant for application of robbery guideline
  - Losses from the other robberies will not be included
  - The firearm from the other robbery will not be included

## Question 7 (RelCon (a)(2) – excluded)

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- Def. convicted of production of child porn depicting involving one child during the production on a specific date
- Applicable guideline: §2G2.1
- The child in the offense of conviction was age 16
- It has been determined that within a few days of the conduct in the offense of conviction, and under similar circumstances, Def. also produced child porn involving a child age 8

## Question 7 (cont.)

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- Will the §2G2.1 SOC for “If the offense involved a minor who had...not attained the age of twelve years...” apply?
- Will the §2G2.1 Special Instruction for “If the offense involved the exploitation of more than one minor...” apply?

**Impact of Terms  
“Offense” and “Defendant”  
Upon the Relevant Conduct  
Used in Application**

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# Definition of “Offense”

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## §1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) .....  
unless a different meaning is specified or is otherwise clear from the context

# Use of Term “Defendant”

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## §1B1.3

- The use of the term “defendant” limits application from including the use of relevant conduct based on the acts of others under §1B1.3(a)(1)(B)
- Pursuant to §1B1.3(a)(1)(A), the “defendant” is accountable for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused



# Limitation When Term “Defendant” Is Used

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**WHO:**

(a)(1)(A): Acts of the defendant

~~(a)(1)(B): Certain acts of others  
(3-part analysis)~~

**WHEN:**

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan

END

END