



Federal Sentencing

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Outline

- Sentencing Legislation
- Recent Guideline Amendments
- Supreme Court Cases Involving Sentencing Issues
- Recent Fifth Circuit Cases





Commission Resources



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Sentencing Statistics



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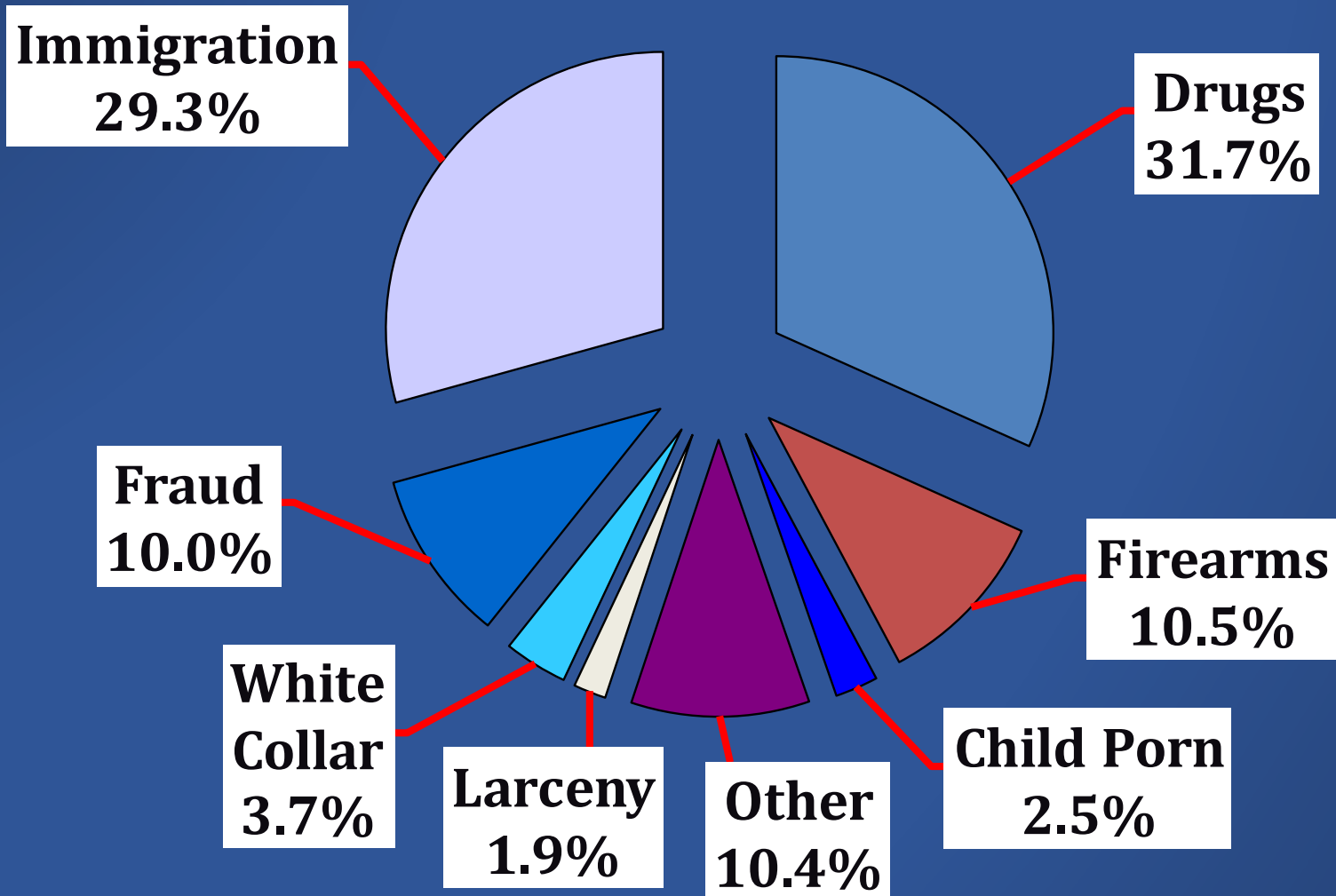
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Primary Offense Types

National - FY 2014

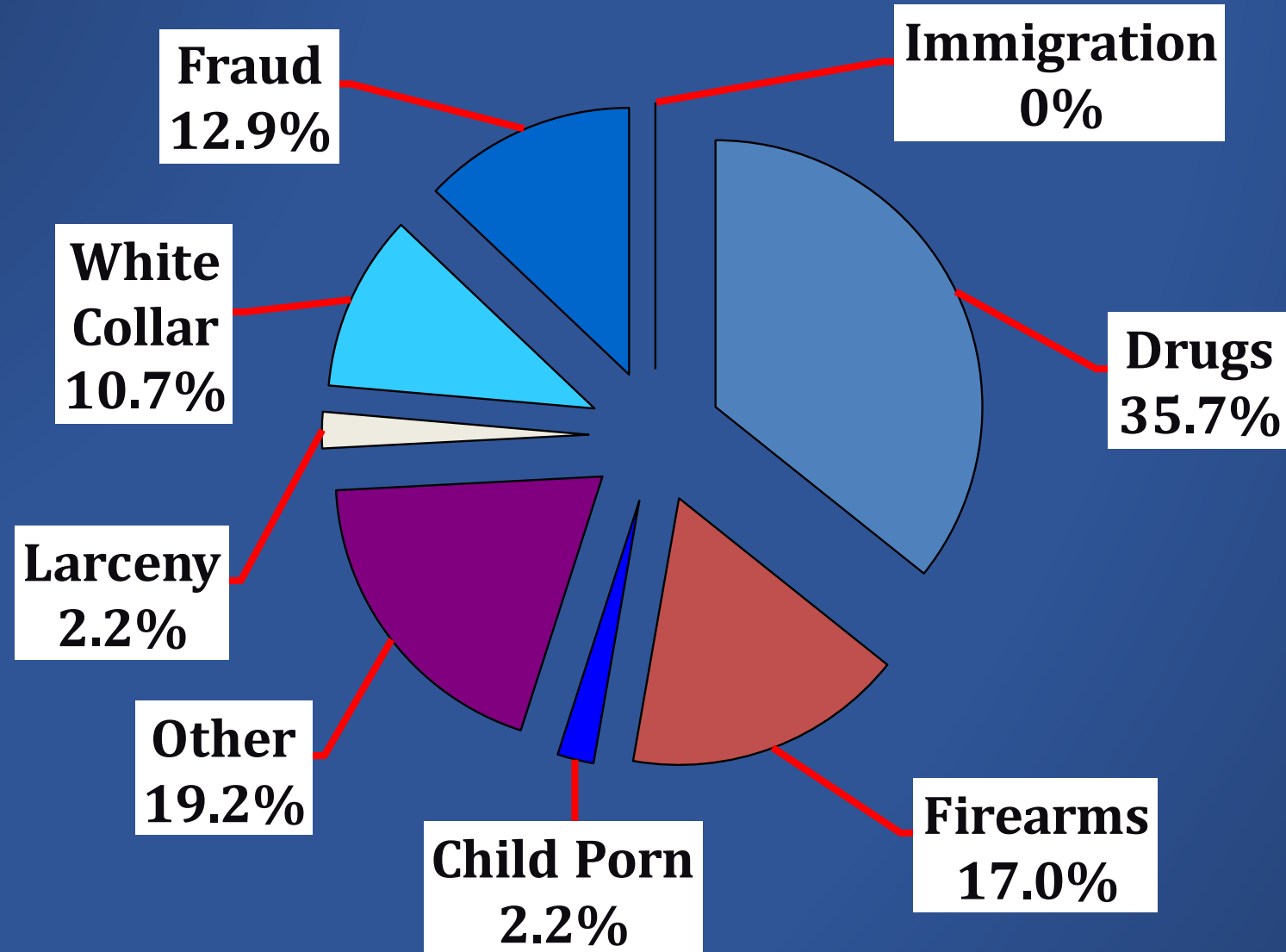


SOURCE: 2014 Sourcebook of Federal Sentencing Statistics



Primary Offense Types

Mississippi Northern - FY 2014

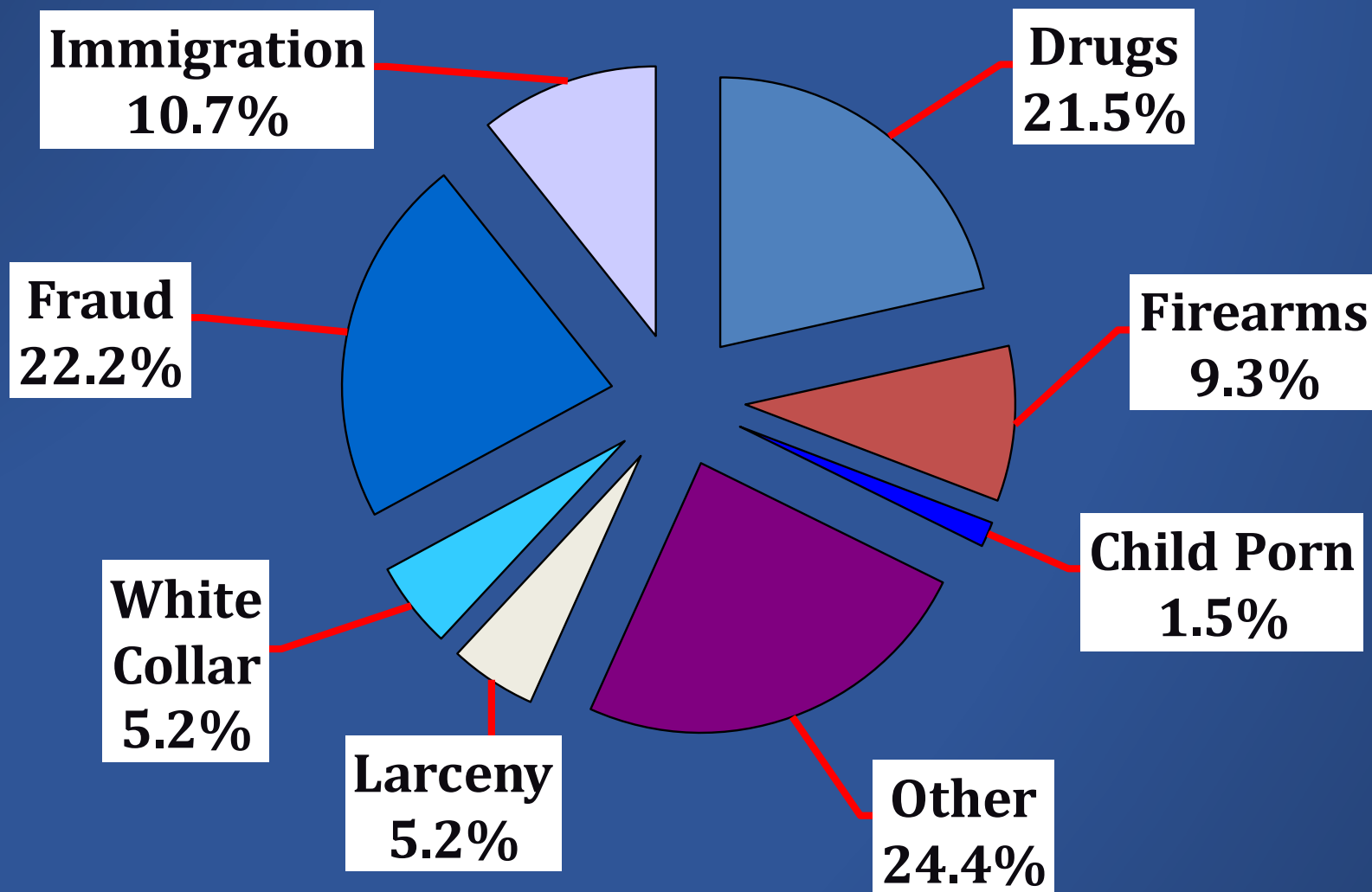


SOURCE: 2014 Sourcebook of Federal Sentencing Statistics



Primary Offense Types

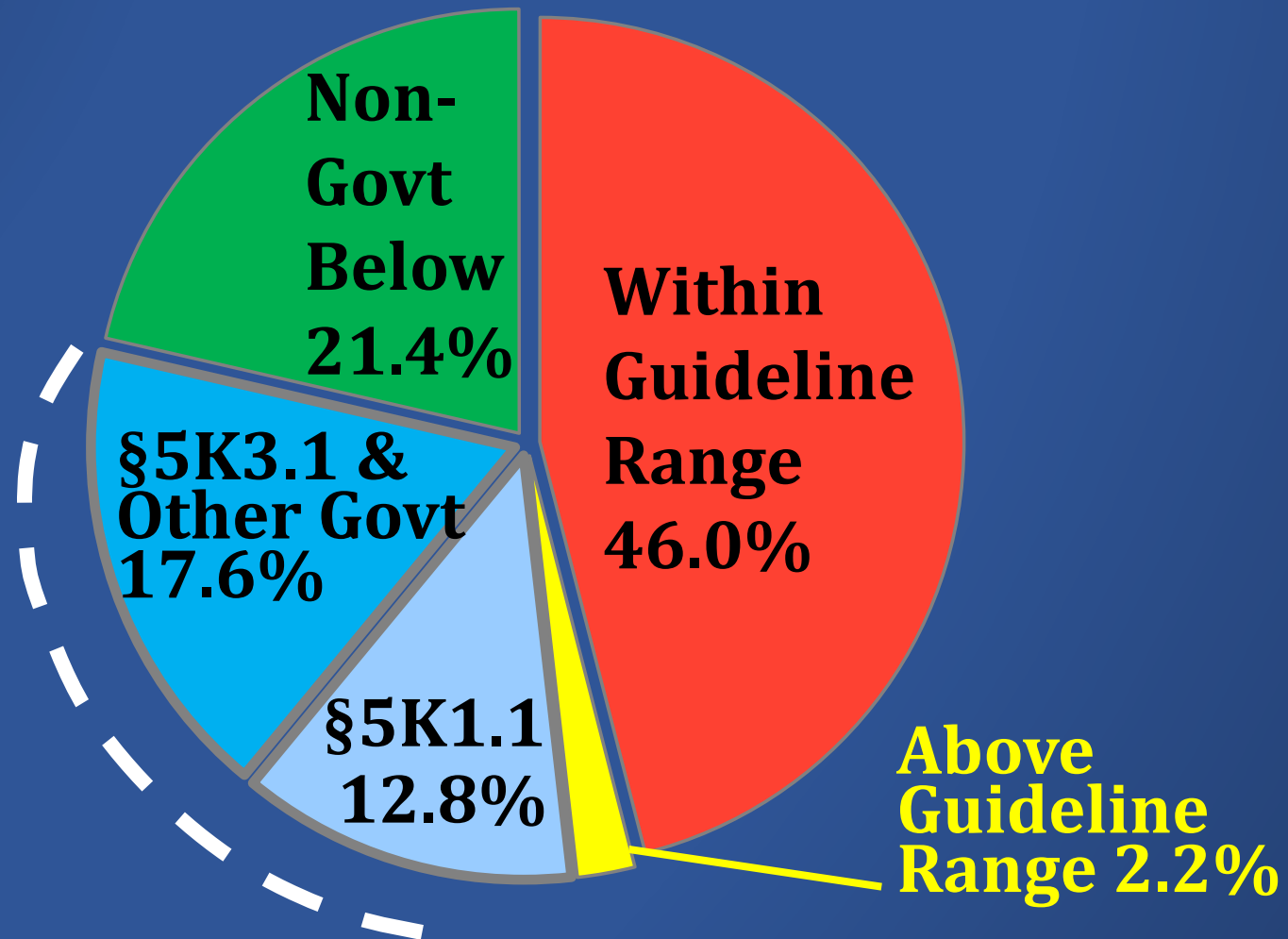
Mississippi Southern - FY 2014



SOURCE: 2014 Sourcebook of Federal Sentencing Statistics



Position of Sentences in Relation to Guideline Range National - FY 2014



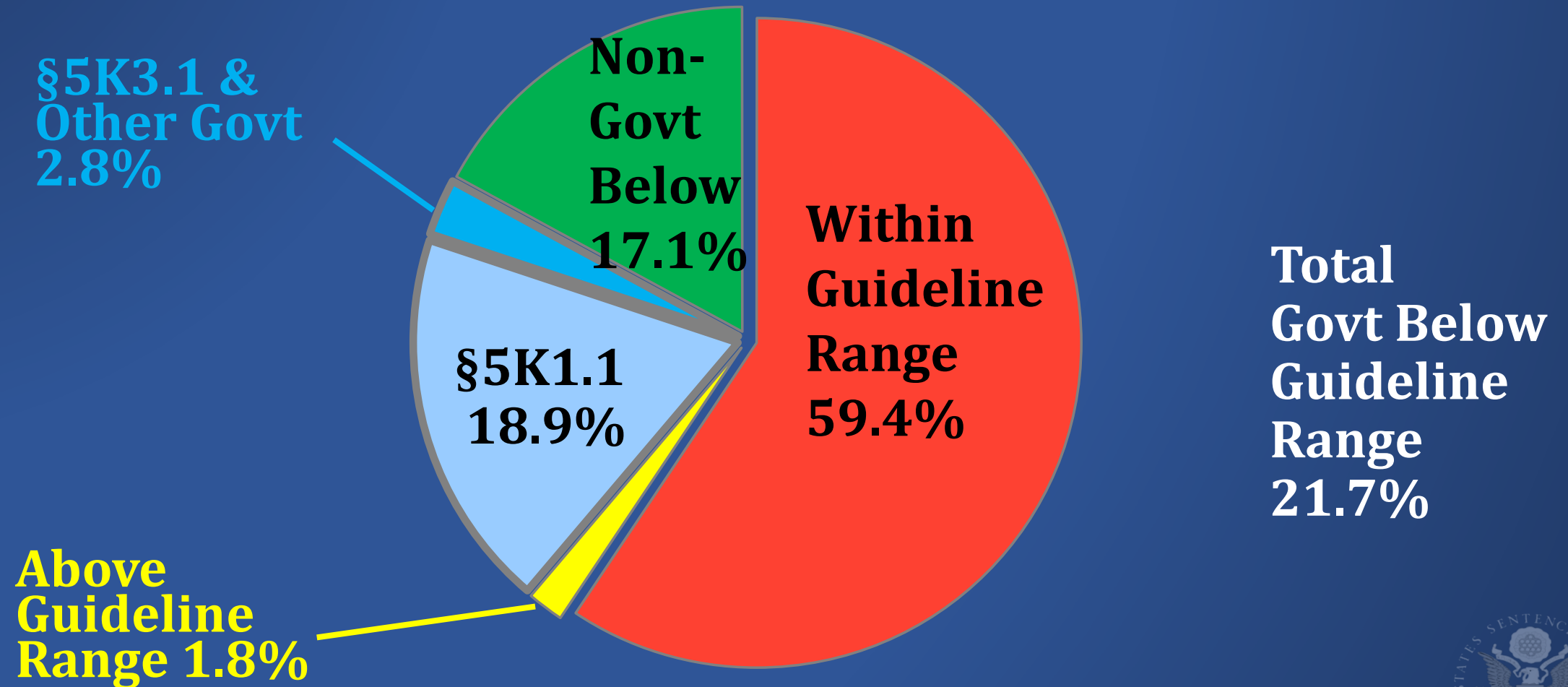
SOURCE: 2014 Sourcebook of Federal Sentencing Statistics; 75,836 Cases Sentenced



Position of Sentences in Relation to Guideline Range

Mississippi Northern - FY 2014

9



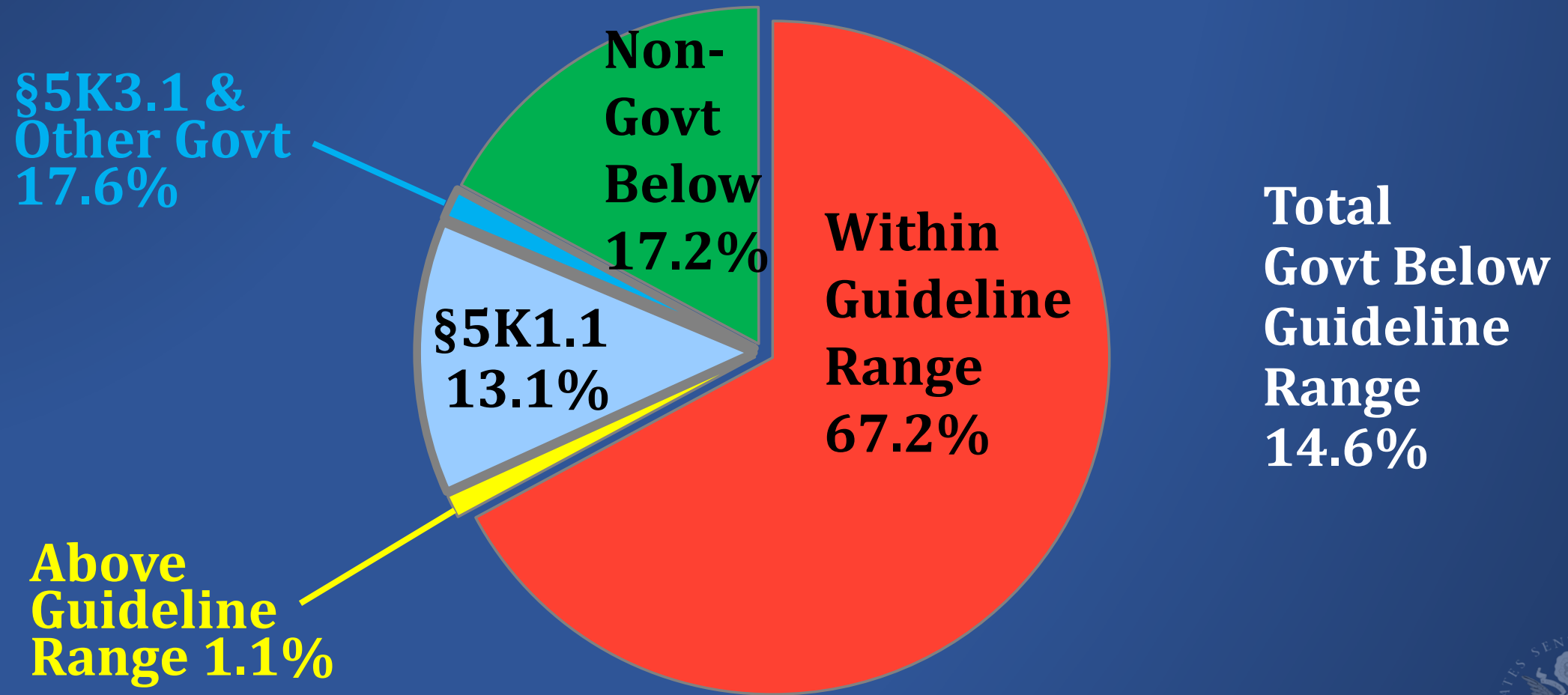
SOURCE: 2014 Sourcebook of Federal Sentencing Statistics; 217 Cases Sentenced



Position of Sentences in Relation to Guideline Range

Mississippi Southern - FY 2014

10



SOURCE: 2014 Sourcebook of Federal Sentencing Statistics; 268 Cases Sentenced





Supreme Court Cases



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ACCA

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

- The Armed Career Criminal Act's "residual clause" is unconstitutionally vague.
- "Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."



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: ACCA

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- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....



- How does *Johnson* impact a defendant who qualified under the ACCA based on the residual whose case “is on direct appeal?”
- How does *Johnson* impact the guidelines? How does *Johnson* impact other “residual clauses”?
- How does *Johnson* impact a defendant who has “exhausted his appeals?”





Impact of *Johnson* for a Defendant on Direct Appeal Regarding Residual Clause and the ACCA



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Johnson and the Residual Clause

U.S. v. Hornyak, 805 F.3d 196 (5th Cir. 2015)

- “An error of constitutional magnitude that transforms a ten-year maximum sentence into a fifteen-year minimum sentence presents an easier call than those cases. We thus conclude that the error in using the ACCA's now-void residual clause to set a fifteen-year minimum sentence satisfies all four of the conditions necessary for us to have discretion to correct it.”



Johnson and the Residual Clause

U.S. v. Neria, 2015 WL 9583955 (5th Cir. 2015)

- “Regarding whether we should exercise our discretion to grant relief under the strict requirements of the fourth prong, it is significant that the government, in a supplemental letter addressing Johnson sent at the request of this court, takes the position that the sentence “cannot stand even on plain-error review” and that “the government recognizes that remand for resentencing is appropriate.” Although we are not bound by a governmental concession of reversible plain error, we are willing, under the circumstances presented here, to exercise our discretion in light of the government's position.”



Johnson and the Residual Clause

U.S. v. Peoples, 613 F. App'x 425 (5th Cir. 2015)

- “The defendant has been sentenced to the mandatory minimum sentence pursuant to the Armed Career Criminal Act because of three prior convictions for violent felonies. Because the Supreme Court has held that the residual clause of the statute is unconstitutional in *Johnson v. United States*, defendant's sentence must be vacated and a new sentence imposed.”





Impact of *Johnson* on Sentencing Guideline Provisions



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Guidelines that might be impacted by *Johnson*

- §4B1.2 (Career Offender)
- §2K2.1 (Firearm offenses)
- §2L1.2 (Illegal Reentry)
- §7B1.1 (Revocation for Grade A Violation)



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



Johnson and Career Offender

U.S. v. Madrid, 805 F.3d 1204 (10th Cir. 2015)

- “Because the Guidelines are the beginning of all sentencing determinations, and in light of the “unavoidable uncertainty and arbitrariness of adjudication under the residual clause,” *Johnson*, 135 S.Ct. at 2562, we hold that the residual clause of § 4B1.2(a)(2) is void for vagueness.”
- “Madrid received an enhanced sentence under an unconstitutional sentencing Guideline, undermining the fundamental fairness of his sentencing proceedings. We thus hold that Madrid has established plain error on appeal and is entitled to resentencing.”



Johnson and Career Offender

U.S. v. Matchett, 802 F.3d 1185 (11th Cir. 2015)

- “We reject Matchett’s argument that the definition of “crime of violence” in the Sentencing Guidelines is unconstitutionally vague in light of *Johnson*. The vagueness doctrine applies only to laws that prohibit conduct and fix punishments, not advisory guidelines. We affirm.”
- “The Florida offense is nevertheless a crime of violence under the residual clause of the career-offender guideline because it “involves conduct that presents a serious potential risk of physical injury to another.”



Johnson and Other Guidelines

U.S. v. Pagan-Soto, 2015 WL 4872453 (1st Cir. 2015) Supplemental Brief of the United States

- “The position of the United States is that *Johnson*’s constitutional holding regarding ACCA’s residual clause applies to the identically worded Guidelines residual clause. This affects the application of the career offender Guideline, U.S.S.G. § 4B1.1, as well as other Guidelines that use the career-offender Guideline’s definition of “crime of violence.” *See* U.S.S.G. §§ 2K1.3 & cmt. n.2 (explosive materials Guideline); 2K2.1 & cmt. n.1 (firearms Guideline); 2S1.1 & cmt. n.1 (money laundering Guideline); 4A1.1(e), 4A1.2(p) (criminal history Guidelines); 5K2.17 & cmt. n.1 (departure Guideline for semi-automatic firearms); and 7B1.1(a)(1) & cmt. n.2 (probation and supervised release Guideline).”





Proposed Crime of Violence Amendment at §4B1.2

Effective August 1, 2016,
absent Congressional action to the contrary



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Proposed Crime of Violence Amendment

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Effective August 1, 2016

- Residual Clause eliminated
- Revises list of enumerated offenses
- Adds definitions for forcible sex offenses and extortion
- Adds two departure provisions



Eliminates Residual Clause

§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



Summary of Changes to the List of Enumerated Offenses at §4B1.2

- Moves a number of enumerated offenses from the commentary to the guideline
- Changes “manslaughter” to “voluntary manslaughter”
- **Eliminates “burglary of a dwelling”** and “extortionate extension of credit” as enumerated offenses
- Creates definitions of “forcible sex offense” and “extortion”



Proposed “Crime of Violence” Definition at Career Offender (§4B1.2(a))

- Means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
 - has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. 841(c)



New Definition of “Forcible Sex Offense”

Application Note 1

- Forcible sex offense includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.
- The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.



New Definition of “Extortion”

Application Note 1

- Extortion is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.



New Departure Provisions

- Upward departure at §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was a burglary involving violence
- Downward departure provision in §4B1.1 for cases in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the of sentencing for the instant federal offense (*e.g.*, South Carolina)



Other Guidelines That Reference “Crime of Violence” Definition at §4B1.2

- §2K2.1 (Felon in Possession)
- §2K1.3 (Explosives)
- §7B1.1 (Revocation for Grade A Violation)





Impact of *Johnson* on Other “Residual Clauses”



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Johnson's Potential Impact

- 18 U.S.C. § 924(c)
 - Crime of violence that is a felony and (a) element of force... or (b) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense
- 18 U.S.C. § 16(b)
 - ... any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.



Johnson and § 16(b)

- *U.S. v. Gonzalez-Longoria*, DN 15-40041 (5th Cir. Feb. 10, 2016)
 - “We hold that § 16 is unconstitutionally vague because, at bottom, § 16 requires courts both to imagine an ordinary/archetypical case and then to judge that imagined case against imprecise standard. Under *Johnson*, this means that § 16 is unconstitutionally vague, and we so hold.”



Johnson and § 16(b)

- *U.S. v. Vivas-Ceja*, 803 F.3d 1110 (9th Cir. 2015)
 - “Applying Johnson's reasoning here, we conclude that § 16(b) is unconstitutionally vague.”



Johnson and § 16(b)

- *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015)
 - “As with ACCA, section 16(b) (as incorporated in 8 U.S.C. §1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a “judicially imagined ‘ordinary case,’” not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague.”



Johnson and SORNA

- *U.S. v. Schofield*, 802 F.3d 722 (5th Cir. 2015)
 - “Based on the Court's reasoning in *Johnson*, we conclude that the SORNA residual clause is not unconstitutionally vague whether applied non-categorically or categorically. Under the non-categorical approach to the residual clause, we apply a qualitative standard—“[a]ny conduct that by its nature is a sex offense against a minor”—to the facts of an individual defendant's case.”



Johnson and SORNA

- *U.S. v. Schofield*, 802 F.3d 722 (5th Cir. 2015)
 - “The Court in *Johnson* noted that “laws [which] require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion,” like the SORNA residual clause, were distinguishable from the law it declared unconstitutionally vague. Similarly, the application of the categorical approach to the SORNA residual clause does not suffer from the same problems as the application of this approach to the ACCA residual clause.”





Impact of *Johnson* on Habeas



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“*Habeas*”

- *In re Williams*, 806 F.3d 322 (5th Cir. 2015)
 - “*Johnson* merely mandates that Congress require such punishment with greater clarity—fair notice to persons it engages. Therefore, *Johnson* is not available to *Williams* on collateral review.”
 - “But, the *prima facie* standard requires at the least a sufficient showing that *Johnson* is available to him on collateral review. Since we have concluded that it is not, his motion for authorization to file a successive 28 U.S.C. § 2255 petition is DENIED.”



Welch v. U.S., 683 F.3d 1304 (11th Cir. 2012),
cert. granted, 2016 WL 90594 (2016)

- Issue: (1) Whether the district court erred when it denied relief on petitioner's section 2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching" did not qualify for Armed Career Criminal Act enhancement pursuant to 18 U.S.C. § 924(e); and (2) whether *Johnson v. United States* announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.



“Habeas Split”

- *Price v. U.S.*, 795 F.3d 731 (7th Cir. 2015)
 - The court held that the Supreme Court’s invalidation of the residual clause of the Armed Career Criminal Act in *Johnson v. United States* was a new substantive rule of constitutional law, and was thus retroactive for purposes of collateral review under 28 U.S.C. § 2255



“Habeas Split”

- *Pakala v. U.S.*, 804 F.3d 139 (11th Cir 2015)
 - “In view of the government's concessions, we certify that Pakala has made the requisite prima facie showing that the new constitutional rule announced in *Johnson* “qualifies as a basis for habeas relief on a second or successive petition, and so we allow him to file his petition with the district court.” The application is granted.”



“Habeas Split”

- *In re: Gilberto Rivero*, 797 F.3d 986 (11th Cir 2015)
 - “Denying certification on the ground that—even assuming that Johnson applies to invalidate the residual clause of U.S.S.G. § 4B1.2(a)(2)—the new substantive rule announced in Johnson has not been “made retroactive to cases on collateral review by the Supreme Court.”



“Habeas Split”

- *In re Gieswein*, 802 F.3d 1143 (10th Cir. 2015)
 - “Therefore, we hold that *Johnson* announced a new rule of constitutional law.”
 - “The Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review. Therefore, *Gieswein*’s motion does not “satisf[y] the stringent requirements for the filing of a second or successive [motion]... Accordingly, we deny *Gieswein*’s motion for authorization to file a second or successive § 2255 motion.”



“Habeas Split”

- *Woods v. U.S.*, 805 F.3d 1152 (8th Cir. 2015)
 - “Here, the United States concedes that Johnson is retroactive, and it joins Woods's motion. Based on the government's concession, we conclude that Woods has made a prima facie showing that his motion contains “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2). Therefore, we grant Woods authorization to file a successive § 2255 motion.”





New Amendments

Effective November 1, 2015



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New Amendments

- Inflationary Adjustments
- Economic Crimes (§2B1.1)
- Mitigating Role (§3B1.2)
- Jointly Undertaken Criminal Activity (§1B1.3)



Inflationary Adjustments

- Adjusts monetary tables in the guidelines to account for inflation
 - §2B1.1 (Fraud/Theft)
 - §2B2.1 (Burglary)
 - §2B3.1 (Robbery)
 - §2R1.1 (Bid-Rigging)
 - §2T4.1 (Tax Table)
 - §5E1.2 (Fines for Individual Defendants)
 - §8C2.4 (Base Fine)*****



Loss Table

§2B1.1(b)(1)

(A) ~~\$5,000~~ \$6,500 or less	no increase
(B) More than ~~\$5,000~~ \$6,500	add 2
(C) More than ~~\$10,000~~ \$15,000	add 4
(D) More than ~~\$30,000~~ \$40,000	add 6
(E) More than ~~\$70,000~~ \$95,000	add 8
(F) More than ~~\$120,000~~ \$150,000	add 10
(G) More than ~~\$200,000~~ \$250,000	add 12
(H) More than ~~\$400,000~~ \$550,000	add 14



Loss Table (cont.)

§2B1.1(b)(1)

(I) More than ~~\$1,000,000~~ \$1,500,000	add 16
(J) More than ~~\$2,500,000~~ \$3,500,000	add 18
(K) More than ~~\$7,000,000~~ \$9,500,000	add 20
(L) More than ~~\$20,000,000~~ \$25,000,000	add 22
(M) More than ~~\$50,000,000~~ \$65,000,000	add 24
(N) More than ~~\$100,000,000~~ \$150,000,000	add 26
(O) More than ~~\$200,000,000~~ \$250,000,00	add 28
(P) More than ~~\$400,000,000~~ \$550,000,000	add 30



New Amendments to §2B1.1

4-Part Amendment

- Definition of “intended loss”
- Victims table
- “Sophisticated means” SOC
- Special rule for determining loss in “fraud on the market” offenses



Definition of Intended Loss

Application Note 3

- Amends the definition to better reflect a defendant's culpability
- “(I) means the pecuniary harm that ~~was intended to result from the offense~~ **the defendant purposefully sought to inflict** and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur”



Victims Table

§2B1.1(b)(2)

- Revises the table to incorporate substantial financial hardship to victims
- Less emphasis on the number of victims



Victims Table

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



“Substantial Financial Hardship”

Application Note 4(F)

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



Sophisticated Means

§2B1.1(b)(10)

- Narrows the scope of the SOC to be more defendant-specific
- “(C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means”



Mitigating Role (§3B1.2)

- Provides additional guidance to assist the courts in the determination of whether a mitigating role adjustment applies
- Synopsis of the amendment: “The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended.



Mitigating Role

Application Note 3(A)

- Specifies that the court should compare defendant to the average participant in the criminal activity at issue, not to the typical offender who commits similar crimes



Mitigating Role

Application Note 3(C)

- Adds a non-exhaustive list of factors for the court to consider:
 - i. The degree to which the defendant understood the scope and structure of the criminal activity
 - ii. The degree to which the defendant participated in the planning/organization of the activity



Factors (continued)

Application Note 3(C)

- iii. The degree to which the defendant exercised decision-making authority
- iv. The nature and extent of the defendant's participation in the commission of the criminal activity
- v. The degree to which the defendant stood to benefit from the criminal activity



Mitigating Role

Application Note 3(C)

- Provides example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment
- Provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative



Relevant Conduct

§1B1.3

- Revises the guideline to set out more clearly the 3-part analysis the court applies in determining whether a defendant is accountable for the acts of others in a “jointly undertaken criminal activity”





Cert. Granted



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Molina-Martinez v. U.S., 588 F. App'x 333 (5th Cir. 2014), *cert. granted* 136 S. Ct. 26 (2015)

- Issue: Whether, where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, an appellate court should presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights.



Lockhart v. U.S., 749 F.3d 148 (2d Cir. 2014),
cert. granted, 135 S. Ct. 2350 (2015)

- Section 2252(b)(2) of title 18, U.S. C., requires a district court to impose a prison term of at least ten years on a defendant convicted of possessing child pornography if he "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."
- The question presented is whether § 2252(b)(2)'s mandatory minimum sentence is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward,"



Torres v. Lynch v. U.S., 764 F.3d 152 (2d Cir. 2014), *cert. granted* 135 S. Ct. 2918 (2015)

- Issue: Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is “described in” a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks



Mathis v. U.S., 786 F.3d 1068 (8th Cir. 2015),
cert. granted, 2016 WL 207258 (2016)

- Issue: Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense?



Recent Fifth Circuit Cases



Mandatory Minimum

- *U.S. v. Benetiz*, 809 F.3d 243 (5th Cir. 2015)
 - “The court, however, erroneously viewed the statutory minimum sentence to be life, and sentenced Casas accordingly. Thus, the mistaken belief about the mandatory minimum likely “affected the outcome of the district court proceedings.”



Mandatory Minimum

- *U.S. v. Haines*, 803 F.3d 713 (5th Cir. 2015)
 - “For purposes of statutory minimums at sentencing[] the relevant quantity is the quantity attributable to the individual defendant,” and this individual quantity must be found by the jury.”



Restitution

- *U.S. v. Benns* 2016 WL 80559 (5th Cir. 2016)
 - “Benns pleaded guilty to one count of submitting a false credit application to Bank of America. There is no indication in the indictment, factual summary, or guilty plea that the filing of the false application was part of a conspiracy, scheme, or pattern of criminal activity. Nor are there any decisions reading such a requirement into the elements of 18 U.S.C. § 1014. Therefore, restitution may only be ordered under the MVRA if HUD's loss was directly and proximately caused by the filing of the false credit application.”



Restitution

- *U.S. v. Benns* 2016 WL 80559 (5th Cir. 2016)
 - “Benns was indicted and pleaded guilty to one count of filing a false credit application in an attempt to refinance a mortgage. It therefore does not follow that the behavior underlying Benns's offense was the cause of HUD's loss.”



Restitution Remand

- *U.S. v. Lozano*, 791 F.3d 535 (5th Cir. 2015)
 - Court incorrectly calculated restitution as the amount included restitution based on losses that occurred outside the proper temporal scope
 - Court accounted for losses sustained prior to the factual basis in the plea which limited the date in the indictment



Restitution Remand

- *U.S. v. Bevon*, 602 F. App'x 147 (5th Cir. 2015)
 - Court erred when it awarded restitution to HSBC based on relevant conduct that went beyond the defendant's offense of conviction
- *U.S. v. Sharma*, 703 F.3d 318 (5th Cir. 2012)
 - Restitution amount in Medicare fraud remanded
- *U.S. v. De Leon*, 728 F.3d 500 (5th Cir. 2013)
 - Incorrect restitution award in Medicare case – court included loss outside the time frame



Restitution Remand in Mortgage Fraud

- *U.S. v. Beacham*, 774 F.3d 267 (5th Cir. 2014)
 - Restitution award remanded because court used the original loan amount which is irrelevant in determining restitution amount when a mortgage is purchased on the secondary market



Procedural Error

- *U.S. v. Garcia*, 797 F.3d 320 (5th Cir. 2015)
 - District court improperly relied on testimony from co-conspirator's separate criminal trial to enhance defendant's sentence because no notice given to the parties in the PSR



- *U.S. v. Juarez*, 2016 WL 425152 (5th Cir. 2016)
 - “Here, although the district court unambiguously sentenced Juarez to ten years' imprisonment, it was ambiguous whether the district court imposed the sentence incorrectly believing it to be within the Guidelines or as a departure or variance. The inconsistencies between the district court's statements at sentencing, the PSR, and the SOR make it impossible to determine with certainty whether the district court committed a “significant procedural error” by improperly calculating Juarez's Guidelines sentence. Accordingly, the proper course is to vacate Juarez's sentence and remand for resentencing.”



- *U.S. v. Washington*, 2016 WL 362983 (5th Cir. 2016)
 - “After we vacated Kenny Washington's sentence, eight years elapsed before the district court re-sentenced him. During those eight years, Washington served his entire sentence of incarceration and completed a term of supervised release. All that remains of his original sentence is a restitution obligation. Because the extraordinary delay between remand and re-sentencing violated Washington's Sixth Amendment rights, Washington is entitled to vacatur of the unpaid portion of his restitution obligation.”



Breach of Plea Agreement

- *U.S. v. Chavful*, 781 F.3d 758 (5th Cir. 2015)
 - Government breached plea agreement by discussing information covered under §1B1.8



Acceptance of Responsibility

- *U.S. v. Castillo*, 779 F.3d 318 (5th Cir. 2015)
 - If the defendant has a good faith dispute as to the accuracy of the factual findings in the PSR, it is impermissible for the government to refuse to move for a reduction under § 3E1.1(b) simply because the defendant requests a hearing to litigate the dispute.
- *U.S. v. Torres-Perez*, 770 F.3d 764 (5th Cir. 2015)
 - §3E1.1 third level cannot be denied only on waiver of appeal





Supervised Release Conditions Individualized Assessment



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Considerations in Individualized Conditions

- Things to consider in imposing conditions
 - What is the offense of conviction?
 - Was the offense a Failure to Register Offense, and if so, what was the underlying conviction which caused the registration requirement?
 - Did the offense involve a computer?
 - Did the offense involve using the computer to chat with a victim or other offenders?
 - Has the defendant “sexually touched” a child?



Considerations in Individualized Conditions

- Things to consider in imposing conditions
 - Does the defendant have children of his own?
 - What are his past offenses or allegations?
 - How long ago were the prior sex offenses?
 - Can the defendant watch adult pornography?
 - Was the victim a child or an adult?



Length of Term for the Condition Remand

- *U.S. v. Duke*, 788 F.3d 392 (5th Cir. 2015)
 - Condition prohibiting accessing computer for rest of his life was unreasonable
 - Lifetime ban on association with minors for life was overbroad



Supervised Release

- *U.S. v. Prieto*, 801 F.3d 547 (5th Cir. 2015)
 - Pornography condition:
 - “There is no record evidence that Prieto has ever even used pornography. *Id.* Moreover, nothing in the record suggests that Prieto “has an abnormal potential for recidivism” or “a high potential for committing future sexual crimes,” much less that pornography would be likely to contribute to future criminal conduct. *Id.* Finally, there is no evidence in the record that pornography use contributed to Prieto's past crimes or “otherwise negatively impact[s] [Prieto's] life in a way that would benefit from ‘correctional treatment.’”
 - However, plain error not met



Supervised Release

- *U.S. v. Prieto*, 801 F.3d 547 (5th Cir. 2015)
 - Geographical restriction:
 - “We construe Prieto's geographic restriction in the same way. Because Prieto's geographic restriction is tailored to “places where a minor or minors are known to frequent,” the restriction on his liberty is not as severe as the one at issue in *Windless*, and in light of *Fields*, Prieto cannot demonstrate plain error.”



Supervised Release

- *U.S. v. Fields*, 777 F.3d 799 (5th Cir. 2015)
 - Supervised release condition prohibiting defendant from residing at or going to places where a minor is known to frequent without prior approval of probation officer was not plain error
- *U.S. v. Ferndandez*, 776 F.3d 344 (5th Cir. 2015)
 - Supervised release condition requiring software installation improper because it was not related to defendant's Failure to Register conviction when his only prior sex offense conviction was for sexual assault of 14 year old which did not involve a computer



“Computer Restrictions”

- *U.S. v. Sealed Juvenile*, 781 F.3d 747 (5th Cir. 2015)
 - “The type of places delineated as well as the limiting language of the condition imply that this condition would not restrict the Juvenile from going to a shopping center or anywhere else where children may be present, but rather from loitering near places primarily used by children under 16. Finally, regarding the Juvenile's third challenge, this condition will not prevent him from establishing any relationships with peers.”



“Contact with 16 year old”

- *U.S. v. Sealed Juvenile*, 781 F.3d 747 (5th Cir. 2015)
 - “The record does not explicitly state how the district court settled on age 16 as the relevant age for the contact restriction. But the predispositional report does show, as noted in Part I, *supra*, that the Juvenile has a history of sexually inappropriate behavior directed toward other children, including his 12-year-old sister and girls at school who are likely close to his age. Because of this history of inappropriate conduct with children closer to 16 years old, and because “district courts have broad discretion in establishing conditions for supervised release,” ..we do not find the age cut-off to be arbitrary.”



“Loitering”

- *U.S. v. Sealed Juvenile*, 781 F.3d 747 (5th Cir. 2015)
 - “The type of places delineated as well as the limiting language of the condition imply that this condition would not restrict the Juvenile from going to a shopping center or anywhere else where children may be present, but rather from loitering near places primarily used by children under 16. Finally, regarding the Juvenile's third challenge, this condition will not prevent him from establishing any relationships with peers.”



Supervised Release

- *U.S. v. Putnam*, 2015 WL 7694538 (5th Cir. 2015)
 - Failure to register is not a sex offense under §5D1.2 so plain error



Contacting Victim's Family

- *U.S. v. Thompson*, 2015 WL 5515857 (5th Cir. 2015)
- “The record reflects that he uses his familial connections to access the children that he sexually abuses (including connections made through his wife, who wrote a letter in his support to the district court). The district court found that Thompson is “a predator” who poses a “threat to children and to society” and is especially dangerous because of his seemingly harmless, fatherly persona—likening him to a “loaded gun that nobody even realizes is there.”
- “The condition requiring him to obtain the probation officer's consent before he contacts the victim's family thus relates to his history and characteristics, the nature of his offense, the need for deterrence, and the need to protect the public.”



Dating anyone who have children under 18

- *U.S. v. Caravayo*, 809 F.3d 269 (5th Cir. 2015)
- “Because the district court made no specific factual findings to establish that Special Condition Six was reasonably related to one of the four factors under § 3553(a), and because the record does not clearly substantiate such a relationship, the district court abused its discretion. A district court must “set forth factual findings to justify special probation conditions” in terms of the § 3553(a) factors.”
- “Caravayo's offense conduct is reprehensible, but unlike the defendants in other cases in which we have upheld similar dating restrictions, Caravayo does not have a history of inappropriate contact with minors or of using relationships with adults to reach children.”



Pornography Condition

- *U.S. v. Ellis*, 720 F.3d 220 (5th Cir. 2013)
 - Pornography condition:
 - Court upheld a lifetime pornography ban for a defendant who had been convicted of possessing child pornography and who, according to testimony at sentencing, had sexually molested numerous male family members during their childhood.
 - “Because Ellis's [offense of conviction] was sexual in nature it was reasonable for the district court to restrict Ellis's access to sexually stimulating material more broadly in an effort to prevent future crimes or aid in his rehabilitation.”



Penile Plethysmograph

- *U.S. v. Hutcheson*, 608 F. App'x 300 (5th Cir. 2015)
 - “Hutcheson argues that the district court erred in requiring that he submit to plethysmograph testing as a special condition of supervised release. He concedes that this argument is foreclosed by circuit precedent, but he raises it to preserve it for further appellate review. Hutcheson is correct that his argument is foreclosed by *United States v. Ellis*, 720 F.3d 220, (2013), which held that a defendant's challenge to a supervised release condition requiring him to participate in a sex offender treatment program, which included the possibility of submitting to psycho-physiological testing, was not ripe for review on direct appeal.”



Drug Type

- *U.S. v. Gil-Cruz*, 808 F.3d 274 (5th Cir. 2015)
 - The government does not need to prove that he knew the type and quantity of the drugs under 21 U.S.C. § 841 and 960.



“AM-2201” Offenses

- *U.S. v. Malone*, 809 F.3d 251 (5th Cir. Dec. 11, 2015)
 - “By this metric, we must affirm the district court’s conclusion that THC is the “most closely related controlled substance” to AM-2201. It is significant that the district court gave this matter studied attention. It held a day-long evidentiary hearing during which two experts testified at length.”
- As we have said before, “[e]mpirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them.”



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “The commentary to § 2D1.1 addresses the resulting gaps by setting forth Drug Equivalency Tables that address controlled substances not referenced in the Drug Quantity Table and that provide a means for combining different controlled substances to obtain a single offense level. See USSG § 2D1.1, comment. (n.8(A)-(D)). For example, as is pertinent here, the Drug Equivalency Table for “Schedule I Marijuana” sets forth that one gram of organic or synthetic THC converts to 167 grams of marijuana equivalent for purposes of calculating a defendant's base offense level. *Id.* § 2D1.1, comment. (n.8(D)).



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “Though requiring several steps, the language of § 2D1.1 and its commentary provide clear directions for how to calculate the marijuana equivalency of mixtures or substances like the marijuana butter and the brown chunky substance that are determined to contain a detectable amount of THC. Our review indicates that the PSR, as adopted by the district court, conscientiously followed each step in light of the available evidence.”



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “Based on the foregoing, we conclude that the district court's step-by-step application of the 1:167 gram ratio to calculate the marijuana equivalency of the marijuana butter and the brown chunky substance, and the resulting Guidelines-sentencing range, was sound. Thus, the district court committed no procedural error, unless, as Koss argues, the sentencing evidence was insufficient to show that the marijuana butter and the brown chunky substance were indeed substances containing detectable amounts of THC.”



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “However, the plain language of the Guidelines states that mixtures or substances containing a detectable amount of THC are properly calculated using the 1:167 gram ratio. The DPS lab reports indicated that the marijuana butter was in fact a substance containing a detectable amount of THC, and Koss put on no evidence at sentencing tending to suggest that the reports' results were inaccurate or that the DPS lab practices failed to test the marijuana butter in a manner that was consistent with the Guidelines. We therefore cannot conclude that the district court's determination was clearly erroneous.”



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “As we meticulously set forth above, § 2D1.1 and its commentary provide that when determining the total drug quantity attributable to a defendant, courts should consider the entire weight of a mixture or substance containing a detectable amount of a controlled substance listed in the Drug Quantity Table or one of the corresponding Drug Equivalency Tables.”



“THC” Offenses

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “If that mixture or substance contains a detectable amount of THC, § 2D1.1 and its commentary provide that the entire weight of that mixture or substance is to be converted to its marijuana equivalent using a 1:167 gram ratio. This language is plain, unambiguous, and makes no mention of THC concentration or purity as relevant considerations. Thus, the rule of lenity and Koss' novel arguments related to the “scheme” of the Guidelines are of no moment.”



THC

- *U.S. v. Koss*, 2016 WL 471394 (5th Cir. 2016)
 - “If that mixture or substance contains a detectable amount of THC, § 2D1.1 and its commentary provide that the entire weight of that mixture or substance is to be converted to its marijuana equivalent using a 1:167 gram ratio. This language is plain, unambiguous, and makes no mention of THC concentration or purity as relevant considerations. Thus, the rule of lenity and Koss' novel arguments related to the “scheme” of the Guidelines are of no moment.”



§2D1.1(b)(12) “Maintaining a drug establishment”

- *U.S. v. Benitez*, 809 F.3d 243 (5th Cir. Dec. 11, 2015)
 - Court properly applied §2D1.1(b)(12)
 - “Navarro kept a key to the apartment, described it as his to the officers, and received water bills there addressed to him (under an alias); Cervantes used the apartment rent-free on the condition that he “would help [Navarro] with his drug distribution.” The district judge did not clearly err in finding that Navarro controlled activities at the apartment.”



§2D1.1(b)(12) “Maintaining a drug establishment”

- *U.S. v. Benetiz*, 809 F.3d 243 (5th Cir. Dec. 11, 2015)
 - “Navarro received drug deliveries at the apartment, and the search of the apartment revealed an air-breathing mask, a cutting agent, and a metal strainer (in addition to the drugs themselves). Based on this evidence, the conclusion that Navarro used the apartment “primarily” to distribute drugs was not clearly erroneous.”



Alien Smuggling

- *U.S. v. Muniz*, 803 F.3d 709 (5th Cir. 2015)
 - §2L1.1(b)(6) (reckless SOC) applied based on “Muniz's failure to get medical aid for Tovar under these circumstances placed him at substantial risk of death or serious injury.”
 - §2L1.1(b)(7) (injury/death SOC) applied based “on the medical expert testimony outlined above, the district court did not clearly err in finding that Muniz's failure to obtain medical help for Tovar was a but-for cause of Tovar's death. The plausibility of this finding is reinforced by the jury's specific determination that Muniz “died as a result of” Muniz's conduct.”



Firearms (§2M5.2)

- *U.S. v. Gonzalez*, 792 F.3d 534 (5th Cir. 2015)
 - “The problem for Gonzalez is that the district found that the lower offense level did not apply both because (1) empty magazines are not “small arms” and (2) the offense involved more than 500 rounds of ammunition. The alternative ammunition ruling was based on a relevant conduct finding that Gonzalez's export scheme also involved selling thousands of 7.62 x 39mm rounds to the same cartel affiliates that purchased the magazines.



Upward Variance

- *U.S. v. Herbert*, 2015 WL 9461503 (5th Cir. 2015)
 - “Assuming, without holding, that the district court could have made a procedural error in applying the cross-reference, the error would be harmless given this alternate basis for the sentence, which was also premised on Bloch's murder.”
 - We find that the upward variance in Hebert's sentence is substantively reasonable. Absent the application of the cross-reference, Hebert's 92-year sentence falls within the statutory maximum of 153 years he could have received but is higher than the six to seven year sentence his initial PSR calculated based on the Guidelines.



Sex Offenses

- *U.S. v. Pringler*, 765 F.3d 445 (5th Cir. 2014)
 - §2G1.3(b)(3) must be followed and not the application note which is in conflict with the guideline
 - Undue influence SOC applied



SORNA

- *U.S. v. Schofield*, 802 F.3d 722 (5th Cir. 2015)
 - 18 U.S.C. § 1470 (attempted transfer of obscene matter to a minor) is a sex offense under SORNA and is a sex offense against a minor under both the categorical and non-categorical approach
 - *See U.S. v. Gonzalez-Median*, 757 F.3d 425 (5th Cir. 2015) applying non-categorical approach to age differential question)



Acceptance of Responsibility

- *U.S. v. Preciado-Delacruz*, 801 F.3d 508 (5th Cir. 2015)
 - “Consequently, any inference that the district court drew from the defendant's silence for purposes of § 3E1.1 was permissible. That, coupled with the other behaviors described in the PSR that are inconsistent with the acceptance of responsibility, suggests that the decision to withhold the downward adjustment was not without foundation.”



Substantial Assistance

- *U.S. v. Malone*, 809 F.3d 251 (5th Cir. 2015)
 - The district court erred in this case by mixing steps two and three; rather than determining the extent of Appellants' § 5K1.1 departures and then considering whether their overall sentences required adjustment in light of the § 3553(a) factors, it jumped ahead and adjusted the § 5K1.1 departures themselves.
 - *However, harmless error.*



Reasonableness

- *U.S. v. Pacheco-Alvarado*, 782 F.3d 213 (5th Cir. 2015)
 - Above guideline sentence in illegal reentry case based on numerous offenses
- *U.S. v. Pillault*, 783 F.3d 282 (5th Cir. 2015)
 - Above guideline sentence for defendant who made threats regarding re-creating a “Columbine Massacre”
 - Court did not violate *Tapia*



Reasonableness

- *U.S. v. Diehl*, 775 F.3d 714 (5th Cir. 2015)
 - 600 month above guideline sentence (range was 210-262) for production of child porn involving 3, 8, and 10 year old girls was reasonable
- *U.S. v. Fuentes*, 775 F.3d 213 (5th Cir. 2014)
 - Above guideline sentenced based on 2L1.2 note 7 because defendant's prior conviction underrepresented seriousness of criminal conduct (indecent contact)
 - Court could use police report facts to base its upward departure



Prior Convictions Pardoned

- *U.S. v. Munoz-Gonzalez* 2016 WL 425154 (5th Cir. 2016)
 - “In light of this court's precedent, as informed by Carlesi, holding that a pardon granted for reasons other than proof of innocence does not vitiate the defendant's prior crimes or convictions, *Watkins*, 623 F.2d at 388, we hold that the district court did not err in applying the 12-level crime of violence sentencing enhancement under USSG § 2L1.2(b)(1)(A)(ii), for the 1994 pardoned arson conviction.”

