

Federal Sentencing

Southern District of Illinois

Thursday, August 9, 2012

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U.S. Sentencing Commission

7/31/12

Discussion Outline

- Commission update
- Amendments
- Selected appellate cases
- Selected guideline topics
 - Relevant Conduct
 - Child Sex Offenses

U.S.S.C.

HelpLine

202-502-4545

Web Site

www.usssc.gov

Commission Update

- New Commissioner nominated; in confirmation process
 - Senior U.S. District Judge Charles R. Breyer, ND/CA
- Commission public hearings
 - Child pornography - February 15, 2012
 - *Booker* - February 16, 2012

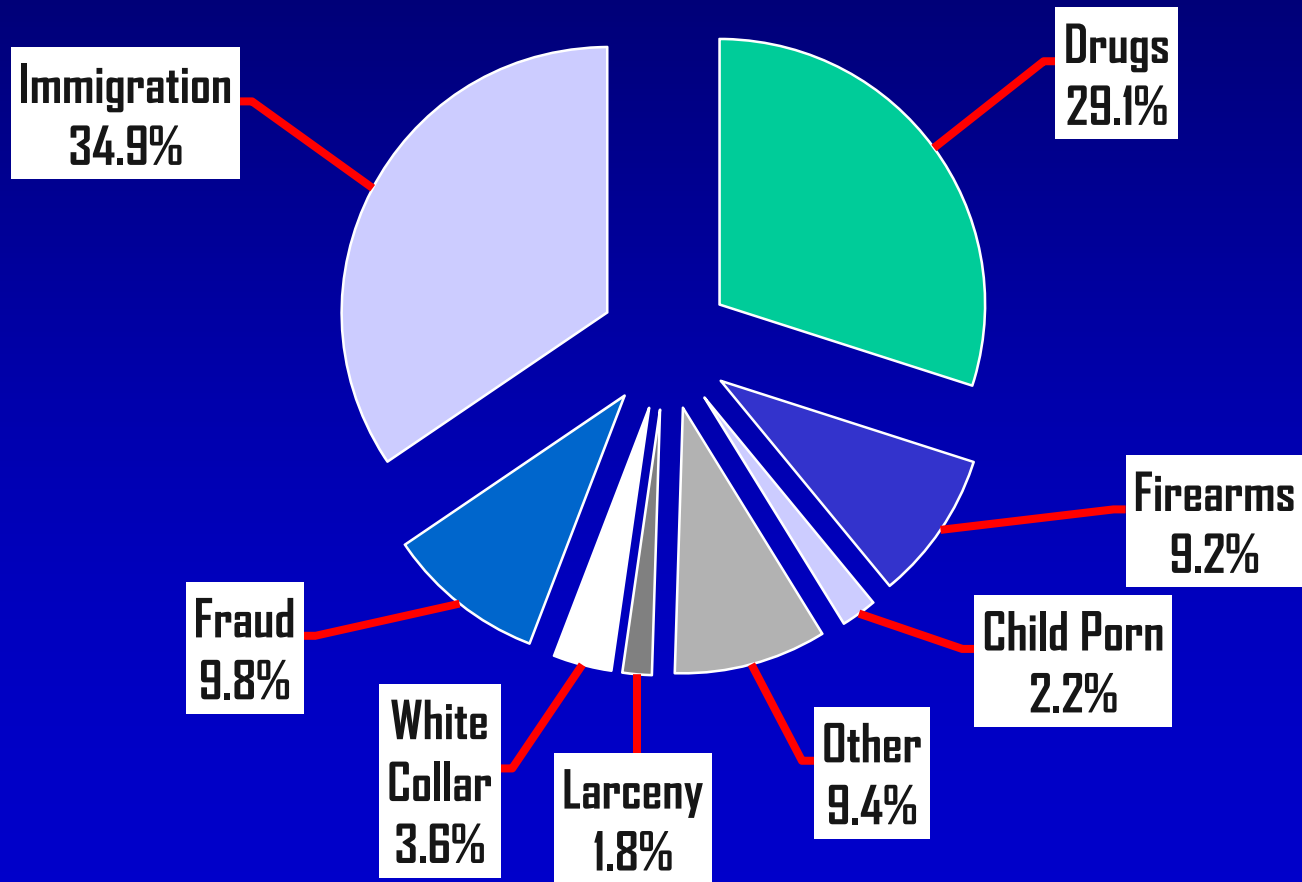
Commission Update (cont.)

- Commission report on *Mandatory Minimum Penalties*, submitted to Congress Oct. 2011
- Setting Commission priorities for 2012-2013
 - Public comment period ended July 23, 2012

Commission Sentencing Statistics

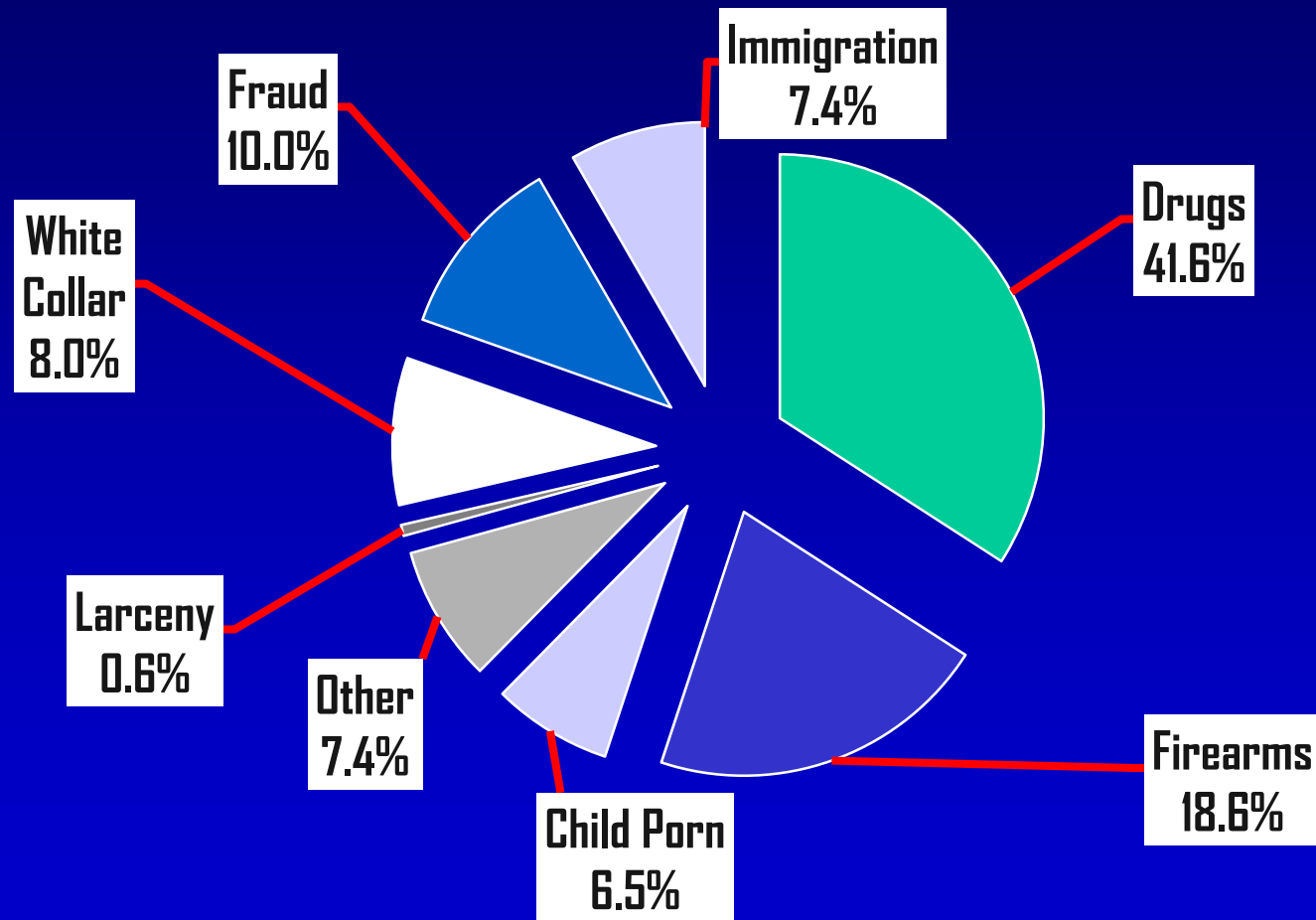
Primary Offense Types

National - FY 2011



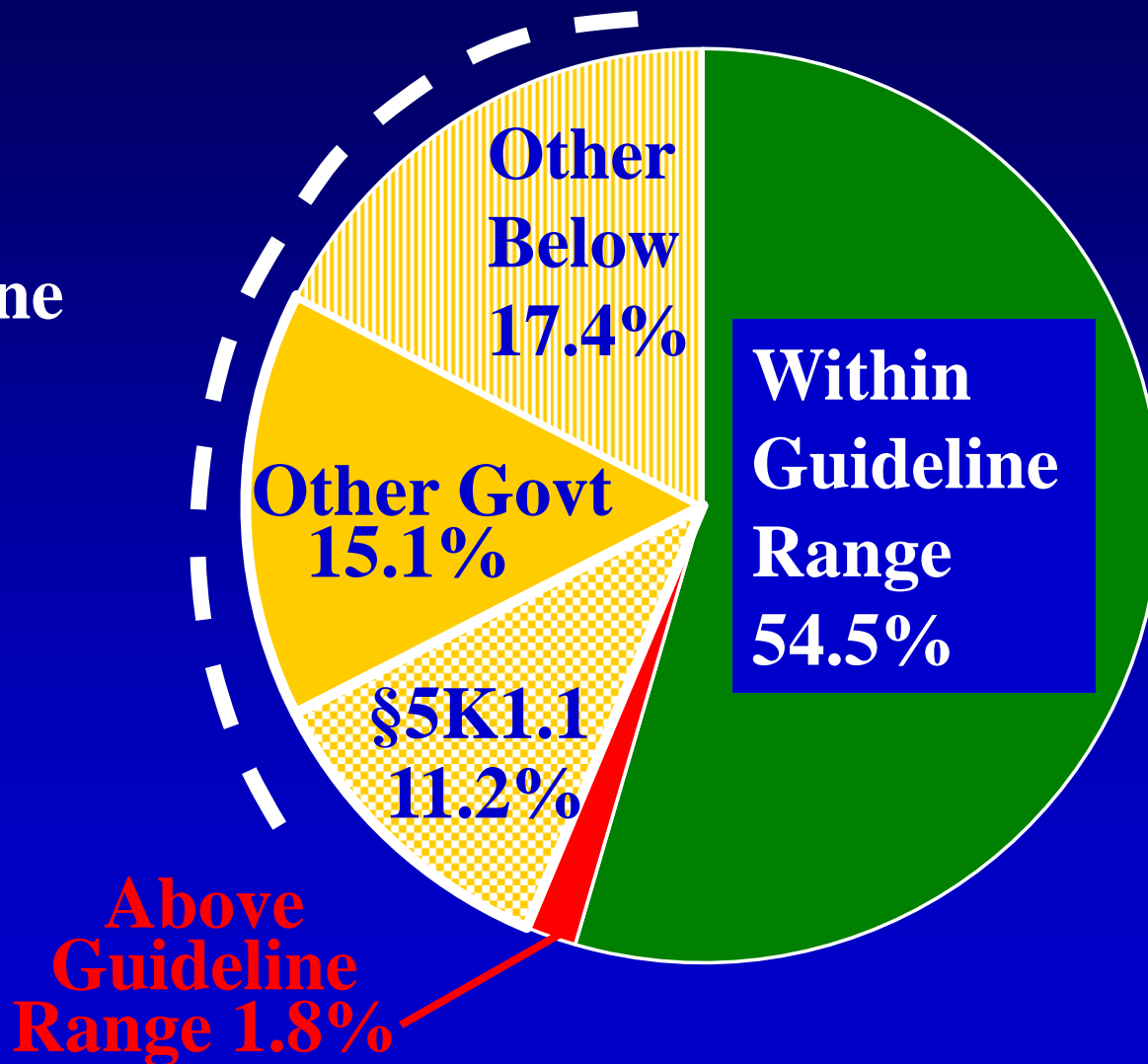
Primary Offense Types

SD/IL - FY 2011



Position of Sentences in Relation to Guideline Range National - FY 2011

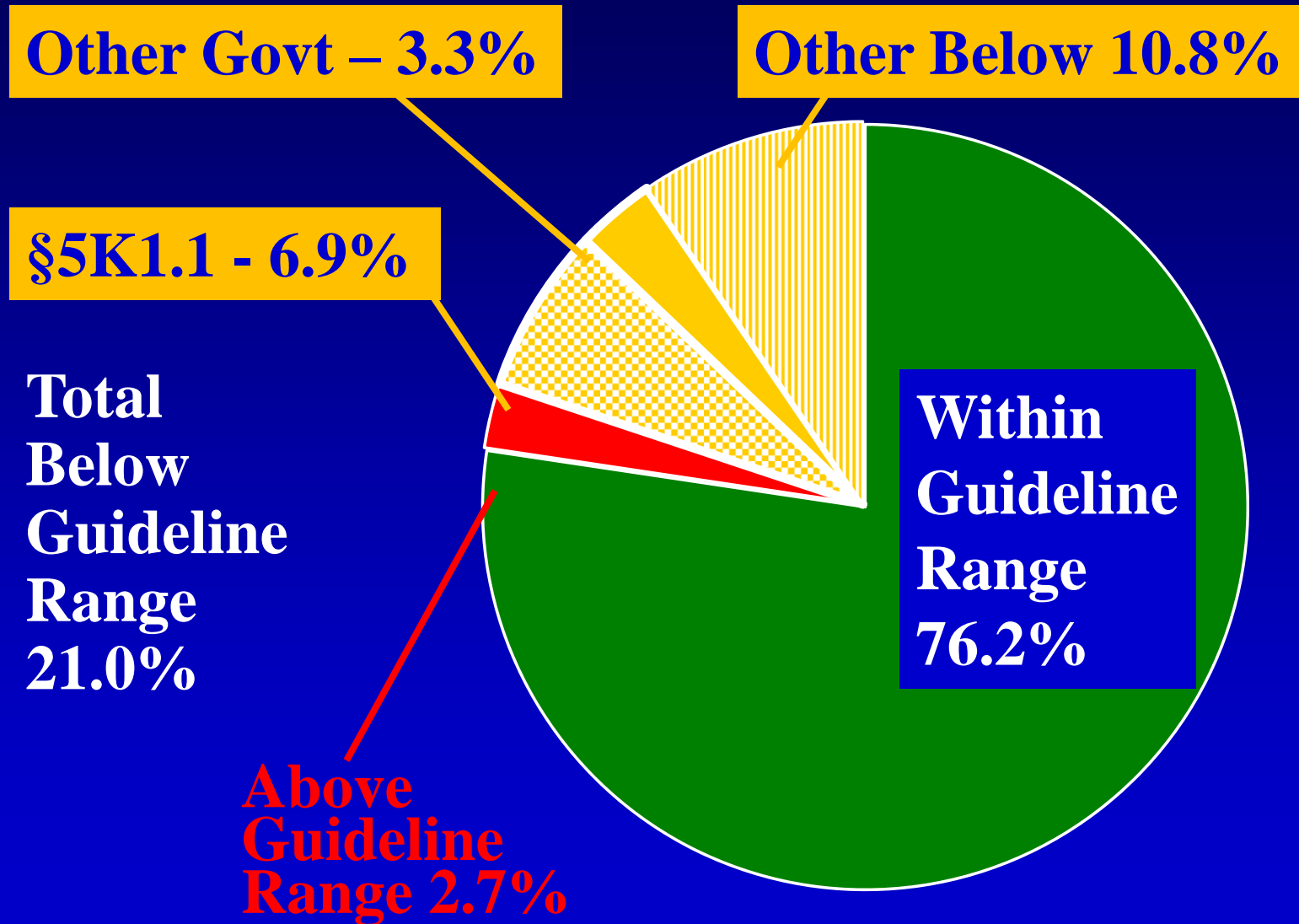
**Total
Below
Guideline
Range
43.7%**



**Above
Guideline
Range 1.8%**

SOURCE: U.S. Sentencing Commission, 2011 Datafile USSCFY11: 84,744 of 86,201 cases

Position of Sentences in Relation to Guideline Range Southern District of Illinois - FY 2011



SOURCE: U.S. Sentencing Commission, 2011 Datafile USSCFY11: 332 of 345 cases

New Interactive Sourcebook of Commission Sentencing Statistics

www.ussc.gov

- Allows re-creation & customization of tables & figures found in printed *Sourcebooks* from 2006 to 2011
 - Data can be shown for one or more particular circuits or districts, and by a single year or multiple years
- Also contains a small number of tables not currently found in the printed *Sourcebook*
 - *E.g.*, amount of loss from each primary guideline

New Interactive Sourcebook of Commission Sentencing Statistics (cont.)

www.ussc.gov

- Tables and figures generated by the user can be saved as a .PDF document, allowing them to be imported into a document or slide show or saved on the user's computer, or as an EXCEL file

2012 Proposed Amendments

Passed by the Commission on April 13, 2012
for Submission to Congress by May 1, 2012

Will Become Effective November 1, 2012
Unless Rejected by Statute

Proposed Amendments for November 1, 2012

Mortgage Fraud – §2B1.1

- Creates a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of plea is the fair market value

Proposed Amendments for November 1, 2012 (cont.)

Securities Fraud – §2B1.1

- New rule for the determination of “loss” in offenses involving fraudulent inflation or deflation in the value of securities
- Provides a departure example of a fraud where the offense level overstates the seriousness of the offense:
 - A fraudulent statement made publicly to the securities market that resulted in numerous victims and a substantial aggregate loss, but only a small amount of loss to each of the victims

Proposed Amendments for November 1, 2012 (cont.)

Insider Trading – §2B1.4

- Adds a new specific offense characteristic setting a minimum offense level 14 if the offense involved an organized scheme of insider trading
- Directs application of §3B1.3 (Abuse of Position of Trust or Use of a Special Skill) if the defendant's employment in securities trading was used to significantly facilitate the commission or concealment of the offense

Proposed Amendments for November 1, 2012 (cont.)

Chemical & Drug Offenses

- A “safety valve” SOC for a 2-level reduction added at §2D1.11 (Listed Chemicals)
- “BZP” added to Drug Equivalency Table at §2D1.1
 - 1 gm BZP = 100 gm marijuana

Proposed Amendments for November 1, 2012 (cont.)

Addressing “Circuit Split”

- In the §2L1.2 (Unlawfully Entering or Remaining in the U.S.) determination of the length of “sentence imposed” for a prior drug trafficking offense, a revocation *after* the illegal reentry is not added to the initial sentence

Proposed Amendments for November 1, 2012 (cont.)

Human Rights Offenses

- Adds a new Adjustment to Chapter Three, §3A1.5, for Serious Human Rights Offenses (genocide, torture, war crimes, and child soldiers)
- Adds a new SOC to §2L2.2 (Fraudulently Acquired Documents, etc.) for an immigration or naturalization offense concealing information related to the defendant and a human rights offense

Proposed Amendments for November 1, 2012 (cont.)

Addressing “Circuit Split”

- DWI & DUI offenses are always counted, even if misdemeanors
 - Never excluded under §4A1.2(c)

Proposed Amendments for November 1, 2012 (cont.)

Other Amendments

- In light of *Pepper v. U.S.*, the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts) is deleted

2011 Amendments

Highlights

Effective November 1, 2011

Supervised Release

§§5D1.1 & 5D1.2

- Lowers the minimum term of supervised release required by the guidelines for certain defendants when a statute does not require a higher minimum term:
 - At least ~~three~~ **two years** but not more than five years for a defendant convicted of Class A or B felony
 - At least ~~two~~ **one years** but not more than three years for a defendant convicted of Class C or D felony

Supervised Release (cont.)

§§5D1.1 & 5D1.2

- New subsection at §5D1.1(c) provides that, unless required by statute, supervised release ordinarily should not be imposed if the defendant is a deportable alien who will likely be deported after imprisonment

Early Termination & Extension of Supervised Release

§5D1.2, App. Note 5

The court may wish to consider early termination if the defendant is a drug or alcohol abuser who successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant

Illegal Reentry - §2L1.2

(a) Base Offense Level

8

(b) Specific Offense Characteristics

(1) Apply the Greatest: If the defendant previously was deported, or unlawfully remained in the U.S. after –

(A) a conviction for a felony that was a (i) drug trafficking offense with sentence imposed > 13 mos., (ii) crime of violence, (iii) firearms offense, (iv) child porn offense, (v) national security or terrorism offense, (vi) human trafficking offense, (vii) alien smuggling offense **increase by 16 levels if conviction receives criminal history points under Chapter Four or by 12 levels if conviction did not receive criminal history points**

Illegal Reentry - §2L1.2 (cont.)

(b) Specific Offense Characteristics (cont.)

(1) (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less **increase by 12 levels** *if the conviction receives criminal history points under Chapter Four* or **by 8 levels** *if the conviction does not receive criminal history points*

(C) a conviction for an aggravated felony, + 8

(D) a conviction for any other felony, + 4

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, + 4

Firearms

§2K2.1

- Increases BOLs for “straw purchasers” convicted under 18 USC § 922(a)(6) or 924(a)(1)(A) who commit the offense with knowledge, intent, reason to believe that the offense would result in transfer of firearm or ammunition to a prohibited person
 - Increased from 12 to 14 generally
 - Increased from 12 to 20 if certain firearms involved
 - Departure provision at App. Note 15 for certain “less culpable” straw purchasers

Firearms (cont.)

§2K2.1

- Adds a new alternative prong to §2K2.1(b)(6) (“in connection with” SOC) which applies if the defendant
 - Possessed any firearm or ammunition while leaving or attempting to leave the U.S., or
 - Possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the U.S.

Exporting Arms or Munitions

§2M5.2

(a) Base Offense Level

- (1) 26, except as provided in subdivision (2) below;
- (2) 14 if the offense involved only (A) non fully-automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ~~ten~~ **two**, (B) *ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500*, or (C) *both*.

Health Care Fraud

New §2B1.1(b)(8)

- If the defendant was convicted of a Federal health care offense involving a Government health care program; and
- Loss under the “loss table” at §2B1.1(b)(1) to the Government health care program was
 - more than \$ 1,000,000 +2 levels
 - more than \$ 7,000,000 +3 levels
 - more than \$20,000,000 +4 levels

Health Care Fraud (cont.)

§2B1.1

- Provides definitions of “Federal health care offense” & “Government health care program”
- Adds new special rule in App. Note 3(F) for determining intended loss in a Federal health care fraud:
 - “The aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, if not rebutted.”

Health Care Fraud (cont.)

§3B1.2 Mitigating Role, App. Note 3(A)

- Amended to indicate that a mitigating role is not precluded for a defendant who is accountable under relevant conduct (§1B1.3) for a loss amount under §2B1.1 that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme

Mitigating Role

§3B1.2

- Deletes unnecessary language that may have discouraged the application of the adjustment
 - App. Note 3(C): “[a]s with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion; that such a role adjustment is warranted.”
 - App. Note 4: “[i]t is intended that the downward adjustment for minimal participant will be used infrequently.”

Fair Sentencing Act: Guideline Amendment

- Re-promulgates as permanent the temporary, emergency amendment of November 1, 2010
- The November 1, 2011 amendment is essentially identical to the emergency amendment except for additional guidance regarding “maintaining a premises” under §2D1.1(b)(12)
 - §2D1.1, App. Note 28

The Permanent Crack *Guideline Amendment*

Amendment 750

- **Part A:** Changes the drug quantity table for crack cocaine at the drug trafficking guideline
- **Part B:** Adds various aggravating and mitigating factors to the drug trafficking guideline for all types of drugs
- **Part C:** Eliminates the cross reference from the guideline for simple possession of crack cocaine to the drug trafficking guideline

“Retroactivity”

§1B1.10

- Gives retroactive effect to **Parts A & C** of Amendment 750 (the permanent guideline amendment made pursuant to the FSA), thereby allowing a court to consider a possible sentence reduction under 18 U.S.C. § 3582(c)(2) for an inmate previously sentenced under the now-amended guideline

“Retroactivity” (cont.)

§1B1.10

- Changes the limitations for available reductions and gives directions regarding the application of §1B1.10

Guideline Amendment Retroactivity

- “Retroactivity” of a *guideline amendment* allows the sentencing court to consider a possible reduction of imprisonment for inmates meeting certain criteria set by statute and the guidelines
 - “Retroactivity” of a *guideline amendment* does not affect the retroactivity of a statutory penalty

Supreme Court Case Involving The Fair Sentencing Act

Fair Sentencing Act Statutory Penalties

Dorsey v. U.S.
132 S. Ct. 2321 (2011)

- The Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders

FSA 2010 *Statutory* Changes of August 3, 2010

- Set “crack - powder ratio” at app. 18 to 1
 - 28 g crack for 5 year mandatory minimum
 - 280 g crack for 10 year mandatory minimum
- Eliminated mandatory minimum for simple possession of crack

Supreme Court Cases Involving Other Sentencing Issues

Apprendi and Fines

Southern Union Co. v. U.S.
132 S. Ct. 2344 (2011)

- The rule of *Apprendi* applies to the imposition of criminal fines

Consecutive Sentence Authority

Setser v. U.S., 132 S. Ct. 1463 (2012)

- A District Court has discretion under 18 U.S.C. § 3584(a) to order that a defendant's sentence run consecutively to his anticipated, but not yet imposed, state sentence

Post-Sentencing Rehabilitation and Remand

Pepper v. U.S.
131 S. Ct. 1229 (2011)

- Upon remand a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under § 3553(a)

Rehabilitation

Tapia v. U.S.
131 S. Ct. 2382 (2011)

- A district court may not impose or lengthen a term of imprisonment in order to promote the defendant's rehabilitation

“Violent Felony” and ACCA

Sykes v. U.S.,
2011 WL 2224437 (U.S. 2011)

- Felony vehicle flight as proscribed by Indiana law is a “violent felony” within the meaning of the Armed Career Criminal Act

“Violent Felony” and ACCA (cont.)

Sykes v. U.S.,
2011 WL 2224437 (U.S. June 9, 2011)

- The crime of using a vehicle to knowingly or intentionally flee from a law enforcement officer is not a strict-liability, negligence, or reckless crime, and as a categorical matter is similar in risk to the crimes enumerated in the ACCA

Reasonableness Review

Procedural Reasonableness and Substantive Reasonableness

- Sentences are first reviewed for procedural reasonableness, *e.g.*,
 - Correct guideline application
 - Proper consideration of the § 3553(a) factors
 - 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.)

- *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

Examples of Below Guideline Sentences Remanded 7th Circuit

- *U.S. v. Vrdolyak*, 593 F.3d 676 (7th Cir. 2010)
 - Fraud
- *U.S. v. Brown*, 610 F.3d 395 (7th Cir. 2010)
 - Crack cocaine and career offender
- *U.S. v. Omole*, 523 F.3d 691 (7th Cir. 2008)
 - Identity theft

Examples of Below Guideline Sentences Affirmed 7th Circuit

- *U.S. v. Carter*, 538 F.3d 784 (7th Cir. 2008)
 - Tax fraud and money laundering

Examples of Above Guideline Sentences Affirmed 7th Circuit

- *U.S. v. Henzel*, 2012 WL 523523 (7th Cir. 2012)
 - Travel sex case
- *U.S. v. Ambrose*, 2012 WL 506741 (7th Cir. 2012)
 - Stealing gov't property/witness tampering
- *U.S. v. Scott*, 657 F.3d 639 (7th Cir. 2011)
 - Fraud
- *U.S. v. Schlueter*, 634 F.3d 965 (7th Cir. 2011)
 - Fraud
- *U.S. v. Eason*, 432 F. App'x 626 (7th Cir. 2011)
 - Drugs
- *U.S. v. Ingram*, 427 F. App'x 531 (7th Cir. 2010)
 - Felon in possession

Examples of Above Guideline Sentences Affirmed 7th Circuit

- *U.S. v. Abebe*, 651 F.3d 653 (7th Cir. 2011)
 - Bank robbery
- *U.S. v. Boling*, 648 F.3d 474 (7th Cir. 2011)
 - Drug trafficking
- *U.S. v. Munoz*, 610 F.3d 989 (7th Cir. 2010)
 - Fraudulent documents
- *U.S. v. Gordon*, 513 F.3d 659 (7th Cir. 2008)
 - Illegal reentry
- *U.S. v. Angle*, 598 F.3d 352 (7th Cir. 2010)
 - Child porn

Examples of Above Guideline Sentences Affirmed 7th Circuit

- *U.S. v. Helton*, 370 F. App'x 709 (7th Cir. 2010)
 - Stolen vehicles
- *U.S. v. Gamble*, 395 F. App'x 290 (7th Cir. 2010)
 - Felon in possession
- *U.S. v. Larsen*, 615 F.3d 780 (7th Cir. 2010)
 - Kidnapping
- *U.S. v. Padilla*, 618 F.3d 643 (7th Cir. 2010)
 - Crack cocaine

Examples of Above Guideline Sentences Affirmed 7th Circuit

- *U.S. v. Houghtaling*, 390 Fed.Appx. 604 (7th Cir. 2010)
 - Threatening communications to judge
- *U.S. v. Aljabari*, 626 F.3d 940 (7th Cir. 2010)
 - Arson
- *U.S. v. Gordon*, 513 F.3d 659 (7th Cir. 2008)
 - Illegal reentry
- *U.S. v. Angle*, 598 F.3d 352 (7th Cir. 2010)
 - Child porn

Examples of Above Guideline Sentences Remanded 7th Circuit

- *U.S. v. Robertson*, 648 F.3d 858 (7th Cir. 2011)
 - Revocation of supervised release
- *U.S. v. Miller*, 601 F.3d 734 (7th Cir. 2010)
 - Sex with a minor
- *U.S. v. Higdon*, 531 F.3d 561 (7th Cir. 2008)
 - Health care fraud

Violent Felony (VF) and Crime of Violence (COV) Cases

Recent 7th Circuit “Crime of Violence” cases

- *U.S. v. Hampton*, 675 F.3d 720 (7th Cir. 2012)
 - IL aggravated battery offense of making insulting or provoking contact with a peace officer is not a VF
- *U.S. v. Raupp*, 2012 WL 752389 (7th Cir. 2012)
 - IN conspiracy to commit robbery is a COV
- *U.S. v. Lee*, 2012 WL 745033 (7th Cir. 2012)
 - IL Aggravated battery with a dangerous weapon is a COV under force section
- *U.S. v. Scanlan*, 667 F.3d 896 (7th Cir. 2012)
 - CA Residential Burglary is a COV
- *U.S. v. Wilson*, 436 F. App’x 717 (7th Cir. 2011)
 - MI using car to elude police is a COV

7th Circuit VF & COV Cases

- *U.S. v. Curtis*, 645 F.3d 937 (7th Cir. 2011)
 - Ill aggravated discharge of a firearm is a COV under force
- *U.S. v. Price*, 434 F. App'x 550 (7th Cir. 2011)
 - IN Criminal Recklessness is a VF
- *U.S. v. King*, 643 F.3d 1003 (7th Cir. 2011)
 - IL burglary is a VF
- *U.S. v. Scott*, 418 F. App'x 548 (7th Cir. 2011)
 - IN class C felony intimidation by use of deadly weaon is a VF
- *U.S. v. Capler*, 636 F.3d 321 (7th Cir. 2011)
 - IL unlawful restraint is a COV
- *U.S. v. Taylor*, 630 F.3d 629 (7th Cir. 2010)
 - IN battery by means of deadly weapon is a COV

7th Circuit VF & COV Cases

- *U.S. v. Sonnenberg*, 628 F.3d 361 (7th Cir. 2010)
 - MN intrafamilial sexual abuse is not a COV
- *U.S. v. Booker*, 579 F.3d 835 (7th Cir. 2009)
 - IL involuntary manslaughter is not a VF
- *U.S. v. Fife*, 624 F.3d 441 (7th Cir. 2010)
 - IL armed violence in connection with drug distribution is a VF
- *U.S. v. Ellis*, 622 F.3d 784 (7th Cir. 2010)
 - IN Class D Felony intimidation not a VF
- *U.S. v. Welch*, 604 F.3d 408 (7th Cir. 2010)
 - IL aggravated fleeing is a VF
- *U.S. v. Sykes*, 598 F.3d 334 (7th Cir. 2010)
 - IN fleeing law enforcement in a vehicle is a VF

7th Circuit VF & COV Cases (cont.)

- *U.S. v. Goodpasture*, 595 F.3d 670 (7th Cir. 2010)
 - CA lewd and lascivious act w/minor under 14 not a VF
- *U.S. v. Dismuke*, 593 F.3d 582 (7th Cir. 2010)
 - WI vehicular fleeing is a VF
- *U.S. v. Rogers*, 363 F. App'x 401 (7th Cir. 2010)
 - IN Class B felony sex misconduct w/minor not a COV
- *U.S. v. McDonald*, 592 F.3d 808 (7th Cir. 2010)
 - WI 2nd degree sex assault is not a COV
- *U.S. v. Clinton*, 591 F.3d 968 (7th Cir. 2010)
 - IN Criminal recklessness if intentional is a COV
- *U.S. v. Hart*, 578 F.3d 674 (7th Cir. 2009)
 - Federal escape is not a COV
- *U.S. v. Foster*, 577 F.3d 813 (7th Cir. 2009)
 - IN Criminal recklessness is not a VF

7th Circuit VF & COV Cases (cont.)

- *U.S. v. Evans*, 576 F.3d 766 (7th Cir. 2009)
 - IL aggravated battery not a COV
- *U.S. v. Gear*, 577 F.3d 810 (7th Cir. 2009)
 - IL reckless discharge of a firearm not a COV
- *U.S. v. Woods*, 576 F.3d 400 (7th Cir. 2009)
 - IL involuntary manslaughter not a COV
- *U.S. v. High*, 576 F.3d 429 (7th Cir. 2009)
 - WI recklessly endangering safety is not a VF
- *U.S. v. Patterson*, 576 F.3d 431 (7th Cir. 2009)
 - Federal transporting minor for prostitution is a COV
- *U.S. v. Smith*, 544 F.3d 781 (7th Cir. 2008)
 - IN criminal reckless not a VF

Relevant Conduct

§1B1.3

9/11/2011

Relevant Conduct: The Gatekeeper

§1B1.3

- Sets the limits of information to be used in *application of the guidelines*
- Note, however, that in the ultimate *determination of the sentence to be imposed*, generally any and all information can be used
 - 18 U.S.C. § 3661
 - §1B1.4
 - *Witte, Watts, Pepper, etc.*

Relevant Conduct in the Application of the Guidelines

§1B1.3(a)

- Relevant conduct does not create any new factors in guideline application; rather, it establishes what facts are relevant for the application of the existing factors, *e.g.*, BOLs, SOCs, cross references, Chapter Three Adjustments

§1B1.3 Relevant Conduct

(a) Chapters Two and Three.

(Unless otherwise specified)

(1) (A) all acts of the defendant

(B) certain acts of others

During, in preparation, avoiding detection
for the offense of conviction

(2) for offenses at §3D1.2(d), “expanded”
relevant conduct (course of conduct or
common scheme or plan)

(3) harms resulting from (a)(1) and (a)(2)

(4) any information specified in guideline

(b) Chapters Four and Five. Conduct specified
in the respective guidelines

Relevant Conduct Includes:

- Acts - (a)(1) & (a)(2)
 - of the defendant and certain acts of others that occurred in a specified time relationship with the offense of conviction
- Harms - (a)(3)
 - resulting from acts determined to be relevant pursuant to (a)(1) & (a)(2)
- Other specific considerations as directed by a guideline - (a)(4)

Relevant Conduct Is Keyed to the Offense of Conviction

§1B1.3

- Defendant accountable for acts he/she did in furtherance of the **offense of conviction**
- Defendant accountable for certain acts others did in furtherance of the **offense of conviction**

Relevant Conduct Is Keyed to the Offense of Conviction (cont.)

§1B1.3

- *For certain offenses* defendant also accountable for his/her acts and certain acts of others in the same course of conduct or common scheme or plan as the **offense of conviction**

(a)(1) & (a)(2): Analysis

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

Preliminary Determination: Does RelCon Include Same Course of Conduct / Common Scheme or Plan?

§1B1.3(a)(2)

- If the applicable Chapter Two guideline is on the “included” list at §3D1.2(d), relevant conduct **will** include same course of conduct or common scheme or plan
- If the applicable Chapter Two guideline is on the “excluded” list at §3D1.2(d) relevant conduct **will not** include the same course of conduct or common scheme or plan

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)

“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

(a)(1) & (a)(2): Analysis

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

Offenses **Excluded** at §3D1.2(d):

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)

“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(a)(1) & (a)(2): Analysis

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)

- Def. convicted of one count of robbery of \$5,000; applicable guideline §2B3.1 which is on the “excluded list” at §3D1.2(d)
- Even if determined that Def. robbed \$5,000 on each of four other occasions, those losses will not be relevant conduct
- Loss will be \$5,000

Holding a Defendant Accountable for the Acts of Others

§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 ⁸⁵

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination based on each defendant's undertaking
- Can be established by either *explicit* agreements or *implicit* agreements
- Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of robbery; applicable GL §2B3.1
- Co-participant carried gun
- If determined that Def.'s undertaking was robbery, co-participant carried gun in furtherance, and that a reasonable person would have foreseen that act, it will be relevant conduct
- Robbery GL SOC for firearm will apply

Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of drug conspiracy; GL §2D1.1
- Conspiracy involved multiple importations; Def. was involved in two of those
- If determined that Def.'s undertaking was two importations, Def. will only be accountable for acts of others within the scope of undertaking
- Drugs outside undertaking will not be used in GL application, even if foreseeable (or known)

Determining Scope in a Conspiracy

“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 not within the scope of the defendant’s undertaking, *even* if those acts were reasonably foreseeable or known to the defendant

Scenario 1: Drug Conspiracy

- Instant conviction: one count citing conspiracy to distribute at least 1000 kg of marijuana from January 1, 2007 to December 31, 2008; violation of 21 USC §§ 846 (to violate § 841(a)) & 841(b)(1)(A); applicable guideline §2D1.1
- Conspiracy involved organizer supplying marijuana on consignment to 30 distributors over a period of two years during which a total of 8,000 kg were distributed

Scenario 1: Drug Conspiracy (cont.)

- Defendant A was a distributor who was involved in the final 30 weeks of the conspiracy, and knew of the broader activity, but dealt only with the organizer from whom he received 1 kg weekly

Scenario 1: Drug Conspiracy (cont.)

- In the application of §2D1.1, for what quantity of marijuana is Defendant A accountable under relevant conduct: The 1,000 kg cited in the count of conviction? The 8,000 kg handled by the conspiracy? A different quantity?

Scenario 2

- Def. A convicted of theft from a federal park, specifically the theft of sports equipment from the park's recreation center on a specific date by Def. A and two co-participants
- Applicable Chapter Two guideline §2B1.1

Scenario 2 (cont.)

- Preliminary determination: Is the applicable Chapter Two guideline on the “included list” or the “excluded list” at §3D1.2(d)?
What is the significance of this determination?

Scenario 2 (cont.)

- It has been determined that in addition to the theft of the sports equipment, Def. A and the two co-participants took various items from various locations in the park on the afternoon theft spree, which included one of the co-participants taking vases from a veterans' memorial in the park

Scenario 2 (cont.)

- The SOC at §2B1.1(b)(1): If the loss exceeded \$5,000, increase the offense level by use of the “loss table” (+2 to +30 levels)
 - App. Note 3: “...loss means the...pecuniary harm...from the **offense**...”

Scenario 2 (cont.)

- In the determination of loss, is Def. A accountable for:
 - His theft of the sporting goods?
 - The theft of the sporting goods by the two co-participants?
 - Other thefts by Def. A in the federal park that day?
 - Other thefts by the two co-participants from the park that day?
 - Will the loss from the theft of the vases be included?

Scenario 2 (cont.)

- The SOC at §2B1.1(b)(6): If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels
- For purposes of SOC §2B1.1(b)(6), is Def. A accountable for the theft from the veterans' memorial?

“Offense” vs. “Defendant”

**Impact on the Relevant Conduct
Used in Application**

Definition of “Offense”

§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

Definition of “Offense” (cont.)

§1B1.1, App. Note 1(H)

- *Example of “offense” meaning all relevant conduct: “if the offense involved carjacking...” at §2B3.1(b)(5)*
- *Example of “offense” when a different meaning is specified: “in any case in which the defendant’s instant offense of conviction is a covered sex crime...” at §4B1.5(a)*

Instances Where “Offense” Is Implied

§1B1.3

- Use of the passive voice
 - *Example:* “if a dangerous weapon *was possessed...*” at §2D1.1(b)(2)
- Use of non-restrictive language
 - *Example:* “the offense level specified in the Drug Quantity Table ...” at §2D1.1(a)(5)

Use of Term “Defendant”

§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)
- *Example:* “If the *defendant* distributed an anabolic steroid to an athlete, increase by 2 levels” at §2D1.1(b)(9)

Impact of “*Defendant*” on (a)(1) & (a)(2) Analysis

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

Use of Term “Defendant”

§1B1.3

- NOTE: 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
- *Example:* If a defendant counseled his co-participant to distribute anabolic steroids to athletes, the defendant is directly responsible.

Scenario 3

- Def. A convicted of drug conspiracy, specifically the distribution of steroids by Def. A and two co-participants over a six month period; applicable guideline §2D1.1

Scenario 3 (cont.)

- Preliminary determination: Is the applicable Chapter Two guideline on the “included list” or the “excluded list” at §3D1.2(d)?
What is the significance of this determination?

Scenario 3 (cont.)

- One of the co-participants fronted the money to buy a stash of steroids from which he, Def. A and the other co-participant would get quantities as needed to complete sales; proceeds were subsequently divided equally

Scenario 3 (cont.)

- Def. A's sales of steroids were to bodybuilders in local gyms; the two co-participants also had sales of steroids to bodybuilders but one of the co-participants also had sales to an "athlete"

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

(5) the offense level from the Drug Quantity Table

EXCEPT if *mitigating* role (§3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

If resulting BOL is greater than 32, and *minimal* role (§3B1.2(a)) applies, decrease to BOL 32

Scenario 3 (cont.)

- In the determination of the quantity of drugs in the application of the Drug Quantity Table at §2D1.1(c), is Def. A accountable for his own sales? Under what section of §1B1.3?

Scenario 3 (cont.)

- Is Def. A accountable for the sales of the two co-participants? Under what section of §1B1.3? If so, for those sales to bodybuilders? For those sales to the athlete?

Scenario 3 (cont.)

- The SOC at §2D1.1(b)(9): If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels
- For purposes of SOC §2D1.1(b)(9), is Def. A accountable for the sale to the athlete?

Scenario 4

- Def. A convicted of distribution of one kilogram of cocaine, specifically the sale on a given date by Def. A and a co-participant; applicable guideline §2D1.1

Scenario 4 (cont.)

- Preliminary determination: Is the applicable Chapter Two guideline on the “included list” or the “excluded list” at §3D1.2(d)?
What is the significance of this determination?

Scenario 4 (cont.)

- While Def. A's co-participant is known to have been involved in five other drug sales of one kilogram each, Def. A is only known to have been involved in this single sale
- At the time of the instant sale Def. A did not have a dangerous weapon, although his co-participant was wearing a pistol

Scenario 4 (cont.)

- In the determination of the quantity of drugs in the application of the Drug Quantity Table at §2D1.1(c), is Def. A accountable for the one kilo sale? Under what section of §1B1.3?
- Is Def. A accountable for the 5 kilos that the co-participant is known to have sold on other occasions? Under what section of §1B1.3?

(b) Specific Offense Characteristics

Level

(1) if dangerous weapon (incl. firearm)
was possessed

+2

(16) if defendant meets the subdivision criteria
(1)-(5) of §5C1.2(a) (“the safety valve”) -2

Scenario 4 (cont.)

- The SOC at §2D1.1(b)(1): If a dangerous weapon (including a firearm) was possessed, increase by 2 levels
- For purposes of SOC §2D1.1(b)(1), is Def. A accountable for the firearm? Under what section of §1B1.3?

Scenario 4 (cont.)

- The SOC at §2D1.1(b)(16): If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels
- Assume Def. A meets the other subdivision criteria; does he also meet subdivision (2) criteria?

§5C1.2(a)

Subdivisions (1) – (5)

1. Defendant does not have more than 1 Criminal History Point
2. **Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense**
3. Offense did not result in death or serious bodily injury

§5C1.2(a) (cont.)

Subdivisions (1) – (5)

4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE
5. Defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan

Scenario 4 (cont.)

- **NOTE:** while a defendant may be accountable for a firearm at §2D1.1(b)(1) based on the act of another, he/she may still qualify for the SOC reduction at §2D1.1(b)(16) (“safety valve” subdivision criteria) or for the “safety valve” itself, because §5C1.2(a)(2) only requires that “the **defendant** did not ...possess a firearm... in connection with the offense”

Distinctions Between the Statutory “Safety Valve” and the Guideline “Safety Valve SOC”

18 USC § 3553(f) and §2D1.1(b)(16)

- The *statutory* “safety valve” (so as to be sentenced without regard to an otherwise applicable mandatory minimum) is available only to a defendant:
 - convicted of certain drug statutes
 - who is facing a mandatory minimum, and
 - who meets the full criteria of §5C1.2 (including the subdivision criteria of §5C1.2(a)(1)-(5))

Distinctions Between the Statutory “Safety Valve” and the Guideline “Safety Valve SOC” (cont.)

18 USC § 3553(f) and §2D1.1(b)(16)

- The *guideline* 2-level-reduction SOC is available to any defendant who meets the **subdivision criteria** of §5C1.2(a) (1)-(5), including a defendant
 - not subject to a mandatory minimum (making the *statutory* “safety valve” at 18 USC § 3553(f) unnecessary), or
 - convicted under a statute for which the *statutory* “safety valve” cannot apply

Child Sex Offenses

Outline

- Child pornography guidelines
- Departures/variances in sex offense cases
- Supervised release conditions

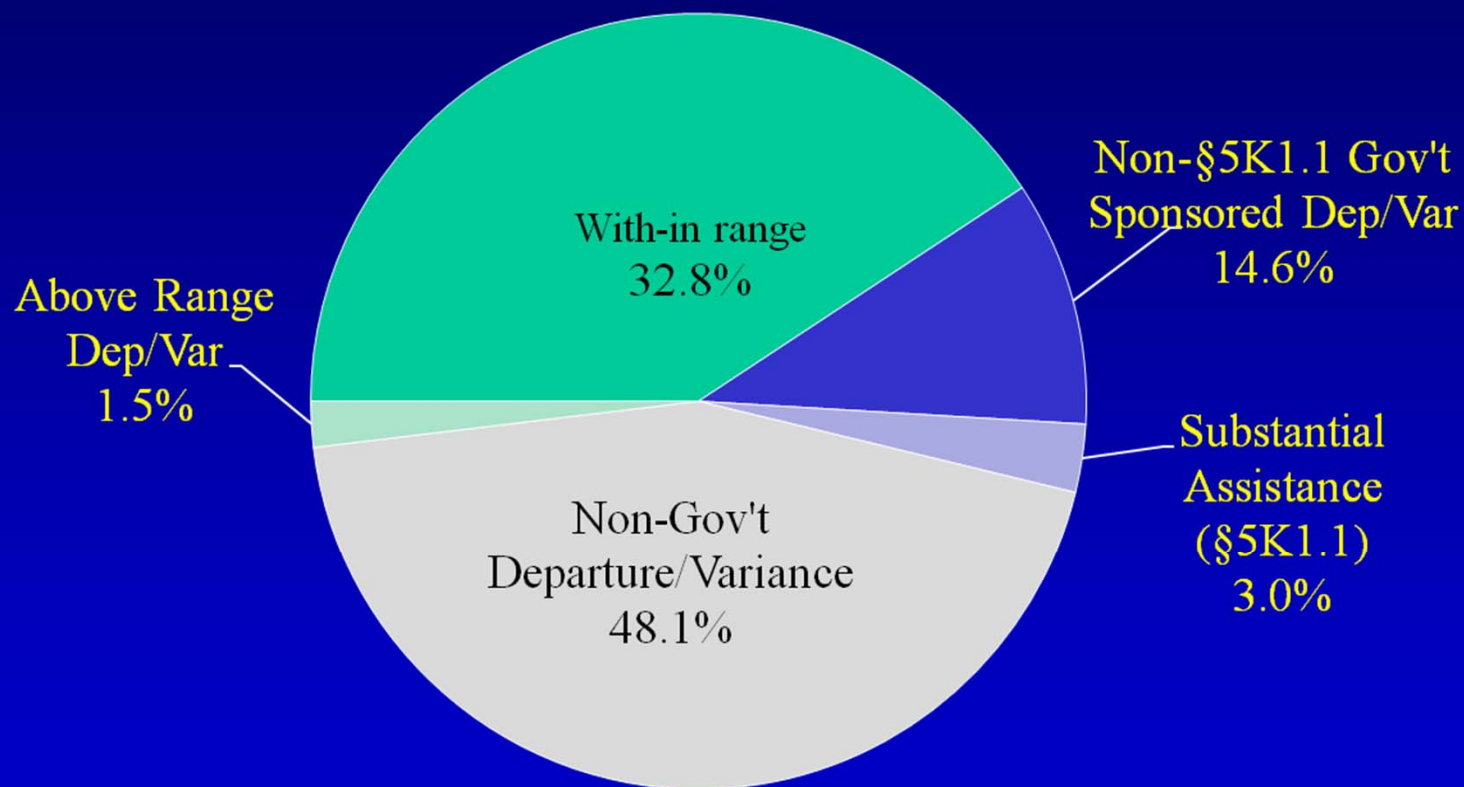
Web site Documents

- February 15, 2012 Child Pornography Hearing Transcript
- Speakers Written Testimony from February 15 hearing
- Primers on Sexual Abuse and Child Porn Guidelines
- Statistical Information

Main Sex Offense Guidelines

§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

§2G2.2 Departures and Variances (N=1,654)



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

Mandatory Minimum Statutory Scheme for Child Porn Offenses

Possession		Receipt/Distribution/ Transportation		Production	
1 st Time Offender	Recidivist *	1 st Time Offender	Recidivist *	1 st Time Offender	Recidivist *
No MM/ 10Y Max.	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15 Y MM/ 30Y Max.	25Y MM/ 50 Max.

* Sections 2252(b) and 2252A(b) both provide for a single "layer" of enhancements for possession and receipt/distribution/transportation recidivists, no matter how many priors (unlike production offenses, which have two layers of recidivist enhancements).

§2G2.2

- Three “starting points”:
 - 18 (possession, obscenity, morphing)
 - 20 (receipt without intent to distribute)
 - 22 (distribution, transportation, receipt with intent to distribute)
- Largely depends on nature of offense of conviction, rather than actual conduct of defendant

§2G2.2 (Trafficking/Receipt/Possession)

- 5-year mandatory minimum for receipt and trafficking offenses (18 U.S.C. §§ 2252 and 2252A)
- Base offense level depends on offense of conviction:
 - 18 for possession offenses
 - 22 for trafficking or receipt offenses
 - *See U.S. v. Hector*, 577 F.3d 1099 (9th Cir. 2009)
U.S. v. Davenport, 519 F.3d 940 (9th Cir. 2008); and
U.S. v Miller, 527 F.3d 54 (3d Cir. 2008)

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

- 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 (5th Cir. 2012)
 - *U.S. v. Fore*, 507 F.3d 412 (6th Cir. 2007)
 - *U.S. v. Burgess*, 576 F.3d 1078 (10th Cir. 2009)

§2G2.2

Specific Offense Characteristics

- (b)(2) Pre-pubescent minor or minor under the age of 12. (+2): **95.3%**
- (b)(3) Distribution: (Total of (A)-(F) = **47.4%**)
 - To a minor or distribution for pecuniary or other gain. (+5): **15.7%**
 - Other distribution. (+2): **27.7%**
- (b)(4) Sadism, masochism, or other depictions of violence. (+4): **79.4%**

§2G2.2

Specific Offense Characteristics (Cont.)

- (b)(5) Pattern of activity. (+5): **12.2%**
- (b)(6) Use of computer. (+2): **97.4%**
- (b)(7) Number of images (Total of (A)-(D) = **96.0%**):
 - 10-149 (+2): **10.8%**
 - 150-299 (+3): **6.4%**
 - 300-599 (+4): **7.9%**
 - 600+ (+5): **70.9%**

§2G2.2(b)(3): Distribution

- Most common increase either 2 or 5 levels
- 5 levels for distribution for receipt/expectation of thing of value, but 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

- *U.S. v. Chiaradio*, 2012 WL 2821892 (1st Cir. 2012) (+2)
- *U.S. v. Corbett*, 453 F. App'x 226 (3d Cir. 2011) (+5)
- *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012) (+5)
- *U.S. v. Brunner*, 393 F. App'x 76 (4th Cir. 2010) (+2)
- *U.S. v. Layton*, 564 F.3d 330 (4th Cir. 2009) (+2)
- *U.S. v. Nielson*, 455 F. App'x 526 (5th Cir. 2011) (+2)
- *U.S. v. Onken*, 440 F. App'x 304 (5th Cir. 2011) (+5)
- *U.S. v. Mauck*, 2012 WL 1253209 (6th Cir. 2012) (+5)
- *U.S. v. Bolton*, 669 F.3d 780 (6th Cir. 2012) (+2)
- *U.S. v. Battaglia*, 624 F.3d 348 (6th Cir. 2010) (+5)
- *U.S. v. Darway*, 255 F. App'x 68 (6th Cir. 2007) (+2)
- *U.S. v. Carani*, 492 F.3d 867 (7th Cir. 2007) (+2)

File Sharing as Basis for Distribution SOC

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

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

- 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 (7th Cir. 2011)

**§2G2.2(b)(4):
Sadistic/Masochistic/Violence (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 (1st Cir. 2007)
 - *U.S. v. Freeman*, 578 F.3d 142 (2^d Cir. 2009)
 - *U.S. v. Maurer*, 639 F.3d 72 (3^d Cir. 2011)
 - *U.S. v. Lyckman*, 235 F.3d 234 (5th Cir. 2000)
 - *U.S. v. Groenendal*, 557 F.3d 419 (6th Cir. 2009)
 - *U.S. v. Myers*, 355 F.3d 1040 (7th Cir. 2004)

§2G2.2(b)(4): Sadistic/Masochistic/Violence (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. Koch*, 625 F.3d 470 (8th Cir. 2010)
 - *U.S. v. Belflower*, 390 F.3d 560 (8th Cir. 2004)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Holt*, 510 F.3d 1007 (9th Cir. 2007)
 - *U.S. v. Kimler*, 335 F.3d 1132 (10th Cir. 2003)
 - *U.S. v. Hall*, 312 F.3d 1250 (11th Cir. 2002)
 - *See also, U.S. v. Burgess*, 2012 WL 2821069 (4th Cir. 2012)

§2G2.2(b)(5): Pattern of Activity

- 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.)

- 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 (4th Cir. 2012)
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)

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

- No time limit on conduct
 - *U.S. v. Clark*, 2012 WL 2877587 (1st Cir. 2012) (24 yrs)
 - *U.S. v. Woodward*, 277 F.3d 87 (1st Cir. 2002) (27 yrs)
 - *U.S. v. Olfano*, 503 F.3d 240 (3^d Cir. 2007) (16 yrs)
 - *U.S. v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (30 yrs)
 - *U.S. v. Quinn*, 257 F. App'x 864 (6th Cir. 2007) (30 yrs)
 - *U.S. v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
 - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007) (35 yrs)
 - *U.S. v. Turner*, 626 F.3d 566 (11th Cir. 2010) (20 yrs)

§2G2.2(b)(7): Images

Number of Images table:

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

“Images” Instruction

- 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 (6th Cir. 2011) (duplicate digital images should be counted separately)
 - *U.S. v. Sampson*, 606 F.3d 505 (8th Cir. 2010)

“Images” Instruction (cont.)

- 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 (8th Cir. 2012)

§2G2.2(c)(1) Cross Reference

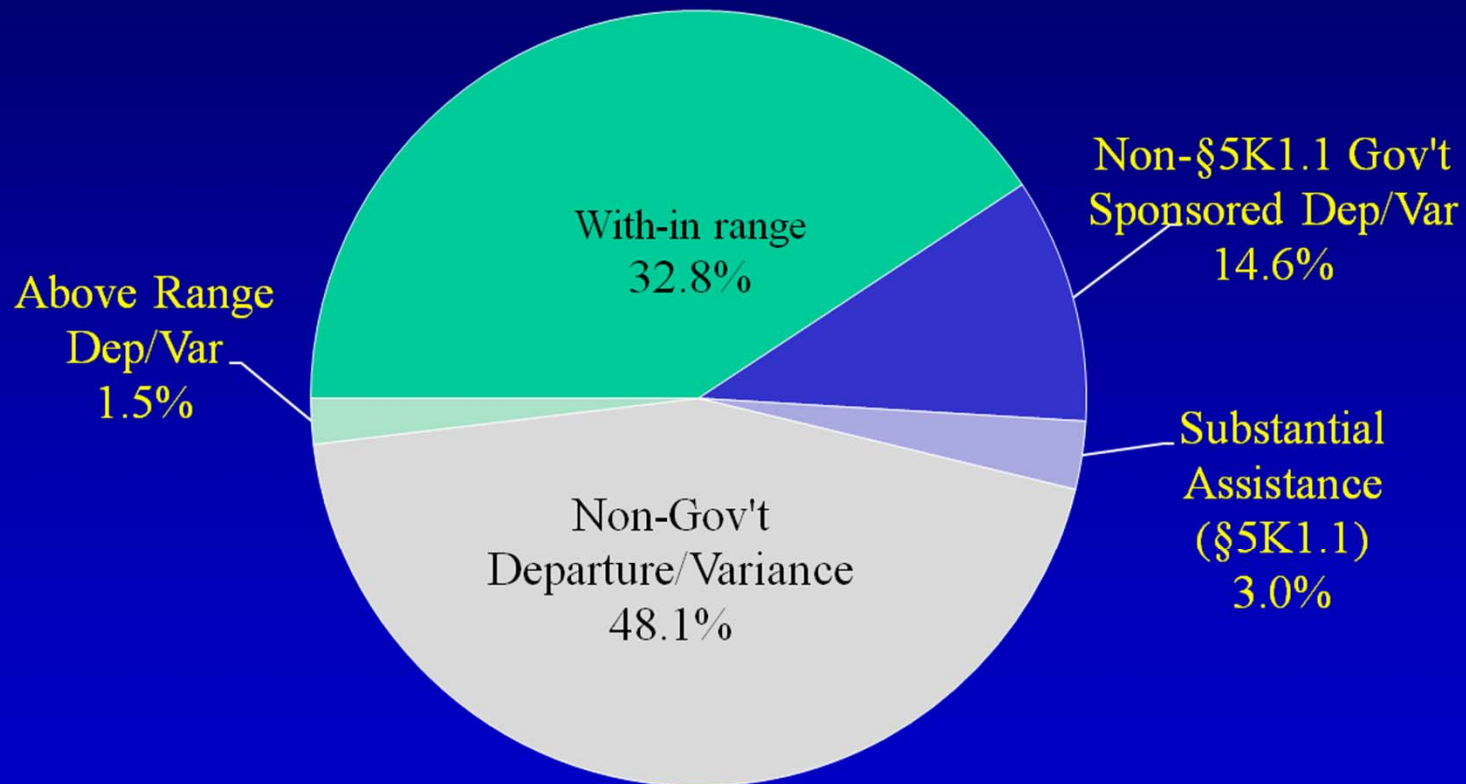
- If offense involved transporting, permitting or offering, or seeking by notice or advertisement a minor to engage in sexually explicit conduct, for purpose of producing a visual depiction of such conduct, apply §2G2.1 (Production)

§2G2.2(c)(1) Cross Reference (cont.)

- Application Note 5 states that the cross reference is to be construed broadly
 - *U.S. v. Bauer*, 626 F.3d 1004 (8th Cir. 2010)
 - *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 (5th Cir. 2011)
 - *U.S. v. Shuler*, 598 F.3d 444 (8th Cir. 2010)
 - *U.S. v. Starr*, 533 F.3d 985 (8th Cir. 2008)
 - *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)

Departures and Variances

Departures and Variances (N=1,654)



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

Articles Regarding Child Pornography

- *The History of the Child Pornography Guidelines,* United States Sentencing Commission
- *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines,* Troy Stabenow
- *Response to a “Reluctant Rebellion,”* Department of Justice

“Policy disagreement” or “lack of empirical evidence” argument in child porn cases

- *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 (9th Cir. 2011)
 - But see
- *U.S. v Miller*, 665 F.3d 114 (5th Cir. 2011)
- *U.S. v Bistline*, 665 F.3d 758 (6th Cir. 2012)
- *U.S. v Pugh*, 515 F.3d 1179 (11th Cir. 2008)

“Policy disagreement” or “lack of empirical evidence” argument in child porn cases

- *U.S. v Meschino*, 643 F.3d 1025 (7th Cir. 2011)
 - “We have recognized that the guidelines for crimes involving sexual exploitation of a minor have been criticized for being “crafted without the benefit of the Sentencing Commission's usual empirical study” and that this criticism “has been gaining traction” in some district courts that have chosen to depart from the guidelines. *United States v. Huffstatler*, 571 F.3d 620, 622 (7th Cir.2009). But § 2G2.2's “somewhat unusual provenance” in no way obligates a judge to depart downward. *Rodgers*, 610 F.3d at 978;”

Below Guideline Sentences Remanded in Child Porn

- *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 (4th Cir. 2010)
 - Possession of child porn

Below Guideline Sentences Remanded in Child Porn

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

Below Guideline Sentences Remanded in Child Porn (cont.)

- *U.S. v. Kane*, 639 F.3d 1121 (8th Cir. 2011)
 - Aggravated sexual abuse
- *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008)
 - Possession of child porn below range remanded
- *U.S. v. Irely*, 612 F.3d 1160 (11th Cir. 2010)
 - Production 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 appeal

Below Guideline Sentences Affirmed in Child Pornography Cases

- *U.S. v. Grober*, 624 F.3d 592 (3d Cir. 2010)
 - Receipt of child porn
- *U.S. v. Rowan*, 530 F.3d 379 (5th Cir. 2008)
 - Possession of child porn
- *U.S. v. Duhon*, 541 F.3d 391 (5th Cir. 2008)
 - Possession of child porn
- *U.S. v. Richards*, 659 F.3d 527 (6th Cir. 2011)
 - Production and possession
- *U.S. v. Stall*, 581 F.3d 276 (6th Cir. 2009)
 - Possession of child porn

Sixth Circuit Below Guideline Sentences Affirmed in Child Pornography Cases

- *U.S. v. Beach*, 275 F. App'x 529 (6th Cir. 2008)
 - Transporting child porn
- *U.S. v. Grossman*, 513 F.3d 592 (6th Cir. 2008)
 - Possession of child porn
- *U.S. v. Autery*, 555 F.3d 864 (9th Cir. 2009)
 - Possession of child porn
- *U.S. v. Huckins*, 529 F.3d 1312 (10th Cir. 2008)
 - Possession of child porn

Above Guideline Sentences Affirmed in Child Porn

- *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 (4th Cir. 2008)
- *U.S. v. McGehee*, 261 F. App'x 771 (5th Cir. 2008)

Above Guideline Sentences Remanded in Child Porn

- *U.S. v. Miller*, 601 F.3d 734 (7th Cir. 2010)
 - Travel case
- *U.S. v. Aleo*, 681 F.3d 290 (6th Cir. 2012)
 - Production of child porn

Restitution

Restitution Issues in Sex Offenses

- Restitution to a victim for a defendant convicted of possession/receipt/trafficking of child porn
 - *U.S. v. Chiaradio*, 2012 WL 2821892 (1st Cir. 2012)
 - *U.S. v. Kearney*, 672 F.3d 81 (1st Cir. 2012)
 - *U.S. v. Aumais*, 656 F.3d 147 (2d Cir. 2011)
 - *U.S. v. Burgess*, 2012 WL 2821069 (2d Cir. 2012)

Restitution Issues in Sex Offenses

- Restitution to a victim for a defendant convicted of possession/receipt/trafficking of child porn
 - *U.S. v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011)
 - *U.S. v. Baxter*, 394 F. App'x 377 (9th Cir. 2010)
 - *U.S. v. McGarity*, 669 F.3d 1218 (11th Cir. 2012)
 - *U.S. v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011)
 - *U.S. v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011)

Child Sex Crimes and Supervised Release

Supervised Release Statutes and Guidelines

- 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

- 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 (4th Cir. 2010)
 - *U.S. v. Gonzalez*, 445 F.3d 815 (5th Cir. 2006)
 - *U.S. v. Burnette*, 414 F. App'x 795 (6th Cir. 2011)
 - *U.S. v. Inman*, 666 F.3d 1001 (6th Cir. 2012) (court did not explain why it imposed a life term of supervised release)

Term of Supervised Release

- Supervised release term can be imposed for life
 - *U.S. v. McGlothin*, 391 F. App'x 542 (7th Cir. 2010)
 - *U.S. v. Cope*, 527 F.3d 944 (9th Cir. 2008)
 - *U.S. v. Apodaca*, 641 F.3d 1077 (9th Cir. 2011)
 - *U.S. v. Williams*, 636 F.3d 1229 (9th Cir. 2011)
 - *U.S. v. Daniels*, 541 F.3d 915 (9th Cir. 2008)
 - *U.S. v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005)
 - *U.S. v. Russell*, 600 F.3d 631 (D.C. 2010) (30 years)
 - *But see U.S. v. Miller*, 594 F.3d 172 (3d Cir. 2010)¹⁷⁰

18 U.S.C. § 3583(d)

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)

Notice Requirement

- *U.S. v. Rivera-Maldonado*, 560 F.3d 16 (1st Cir. 2009) (failure to inform the defendant that he faced a possible life term of supervised release was plain error)
- *U.S. v. Moran*, 573 F.3d 1132 (11th Cir. 2009) (district court was not required to notify defendant before it imposed special conditions to address his proclivity for sexual misconduct)
- *U.S. v. Wise*, 391 F.3d 1027 (9th 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)

Notice Requirement (cont.)

- *U.S. v. Cope*, 527 F.3d 944 (9th 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)

Not Convicted of a “Sex Offense”

- 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 (1st Cir. 2010)
 - *U.S. v. Dupes*, 513 F.3d 338 (2^d Cir. 2008)
 - *U.S. v. Perkins*, 207 F. App’x 559 (6th Cir. 2006)
 - *But see U.S. v. Carter*, 463 F.3d 526 (6th Cir. 2006)
(condition not reasonably related to def. criminal history)
 - *U.S. v. Ross*, 475 F.3d 871 (7th Cir. 2007)
 - *U.S. v. Kelly*, 677 F.3d 373 (8th Cir. 2012)
 - *U.S. v. Smart*, 472 F.3d 556 (8th Cir. 2006)
 - *U.S. v. Vinson*, 147 F. App’x 763 (10th Cir. 2005)
 - *U.S. v. Miles*, 411 F. App’x 126 (10th Cir. 2010)

Specific Conditions of Supervised Release for Sex Offenders

Restriction on Computer and Internet Use

- Complete ban upheld
 - *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001)
 - *U.S. v. Mark*, 425 F.3d 505 (8th Cir. 2005)
- 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 (6th Cir. 2010)

Restriction on Computer and Internet Use

- Restrict use with USPO approval
 - *U.S. v. Crume*, 422 F.3d 728 (8th Cir. 2005)
(vacating condition only possession and receipt)
 - *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
(vacating condition)
 - *U.S. v. Morais*, 670 F.3d 889 (8th Cir. 2012)
 - *U.S. v. Demers*, 634 F.3d 982 (8th Cir. 2011)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Walser*, 275 F.3d 981 (10th Cir. 2001)
 - *U.S. v. Zinn*, 321 F.3d 1084 (11th 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 (1st Cir. 2009) (at least where Internet was not used to commit offense)
 - *U.S. v. Sofsky*, 287 F.3d 122 (2^d Cir. 2002)
 - *U.S. v. Voekler*, 489 F.3d 139 (3^d Cir. 2007)
 - *U.S. v. Lantz*, 443 F. App'x 135 (6th Cir. 2011)
 - *U.S. v. Holm*, 326 F.3d 872 (7th Cir. 2003)
 - *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
 - *U.S. v. Sales*, 476 F.3d 732 (9th Cir. 2007)
 - *U.S. v. White*, 244 F.3d 1199 (10th Cir. 2001)
 - *U.S. v. Russell*, 600 F.3d 631 (D.C. Cir. 2010)

No Contact with Minors

- *U.S. v. Roy*, 438 F.3d 140 (1st 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. Loy*, 237 F.3d 251 (3d Cir. 2001)
(upholding condition that def. have no unsupervised contact with minors)
- *U.S. v. Voelker*, 489 F.3d 139 (3d Cir. 2007)
(lacked clarity-- remand)
- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001)
(affirmed prohibition on contact with minors)

No Contact with Minors (cont.)

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

Cannot Frequent Places Frequented by Children

- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001) (def. must avoid places, areas, and establishments frequented by minors)
- *U.S. v. Schaefer*, 675 F.3d 1122 (8th Cir. 2012)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
- *U.S. v. Ristine*, 335 F.3d 692 (8th Cir. 2003)
- *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (def. cannot loiter w/in 100 feet of area frequented by children)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (same)

Cannot Reside Near Places Frequented by Children

- *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)
- *U.S. v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002)
(condition that def. not reside in close proximity to
places frequented by children too vague;
remanded to specify precise distance limitation)

Polygraph Condition Allowed

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

Participate in Mental Health or Sex Treatment Program

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

Ban on Possession of Sexually Explicit Materials

- *U.S. v. Deatherage*, 682 F.3d 755 (8th Cir. 2012)
(ban acceptable b/c likely abuse of children)
- *U.S. v. Olsen*, 667 F.3d 958 (8th Cir. 2012)
- *U.S. v. Bender*, 566 F.3d 748 (8th Cir. 2009)
- *U.S. v. Lantz*, 443 F. App'x 135 (6th 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

Other Conditions

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

Other Conditions (cont.)

- Abel Test
 - *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008))
- Prescribed Medication
 - *U.S. v. Cope*, 527 F.3d 944 (9th Cir. 2008) (court must make individualized finding)
 - *U.S. v. Mike*, 632 F.3d 686 (10th 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 (1st Cir. 2005)
 - *U.S. v. Gill*, 523 F.3d 107 (2^d Cir. 2008)
 - *U.S. v. Carter*, 652 F.3d 894 (8th Cir. 2011)
 - *U.S. v. Weber*, 186 F. App'x 751 (9th Cir. 2006)
 - *U.S. v. Mike*, 632 F.3d 686 (10th Cir. 2011) (need to make specific finding)