

# **SUPREME COURT AND THIRD CIRCUIT CASE HIGHLIGHTS 2015**

**(also Sentencing Guidelines 2015  
amendments and proposed  
amendments)**

**BY THE RESEARCH AND WRITING  
ATTORNEYS OF THE OFFICE OF THE  
FEDERAL PUBLIC DEFENDER (D.N.J.)**

Case digests are already posted and this presentation  
will soon be posted on

<http://nj.f.d.org/content/cja-resources>

# Third Circuit Judges 2015

Theodore A. McKee (Chief)  
Julio M. Fuentes  
D. Michael Fisher  
Kent A. Jordan  
Joseph A. Greenaway, Jr.  
Patty Schwartz

Thomas L. Ambro  
D. Brooks Smith  
Michael Chagares  
Thomas M. Hardima  
Thomas I. Vanaskie  
Cheryl Ann Krause

## SENIOR STATUS

Leonard I. Garth  
Morton I. Greenberg  
Richard L. Nygaard  
Maryanne Trump Barry  
Dolores K. Sloviter  
Anthony J. Scirica

Walter K. Stapleton  
Robert E. Cowen  
Jane R. Roth  
Franklin S. Van Antwerpen  
Marjorie O. Rendell

# D.N.J. Judges 2015

Chief: Jerome B. Simandle

## Newark

District: Madeline Cox Arleo, Claire C. Cecchi, Stanley R. Chesler, Katharine S. Hayden, Jose L. Linares, William J. Martini, Kevin McNulty, Esther Salas, William H. Walls, Susan D. Wigenton, John Michael Vazquez

Magistrate: James B. Clark, III, Joseph A. Dickson, Mark Falk, Michael A. Hammer, Steven C. Mannion, Cathy L. Waldor, Leda Dunn Wettre

## Camden

District: Renee Marie Bumb, Noel L. Hillman, Robert B. Kugler, Joseph H. Rodriguez

Magistrate: Ann Marie Donio, Joel Schneider, Karen M Williams

## Trenton

District: Mary L. Cooper, Peter G. Sheridan, Michael Shipp, Anne E. Thompson, Freda L. Wolfson

Magistrate: Douglas E. Arpert, Tonianne J. Bongiovanni, Lois H. Goodman

# OUTLINE OF PRESENTATION

1. Open questions (cases pending before the U.S. Supreme Court)
2. Fourth Amendment cases
3. Fifth Amendment cases
4. Sixth Amendment cases
5. Miscellaneous cases
6. Sentencing cases
7. 2015 Guidelines amendments (eff. Nov. 1, 2015)
8. Guidelines proposed amendments

# AT THE SUPREME COURT

<http://www.scotusblog.com/>

<http://www.supremecourt.gov/>

# Hobbs Act, 18 U.S.C. § 1951

Robbery: Does robbery of drug dealer as an inherent economic enterprise satisfy, as a matter of law, the interstate commerce element?

Taylor v. U.S. (14-6166) -- set to be argued Feb. 22, 2016

Conspiracy to commit extortion: Does a conspiracy to commit extortion under 18 U.S.C. § 371 require that the conspirators agree to obtain property from *someone outside* the conspiracy?

- Extortion is defined as “the obtaining of a property of another, with his consent ... under color of official right.”

Ocasio v. U.S. (14-361) – argued Oct. 6, 2015

# Fourth Amendment

1. An investigatory stop (later found to be unlawful) produced a valid outstanding warrant.
2. Then, there was a search incident to lawful arrest.
3. Must the evidence be suppressed?

Utah v. Strieff (14-1373) -- set to be argued Feb. 22, 2016

To decide whether a blood or breath test for drunk driving can be made without a search warrant and whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take the test.

- *Question if this will apply to quasi-criminal penalties in NJ*

Birchfield v. North Dakota (No. 14-1468), Bernard v. Minnesota (No. 14-1470), and Beylund v. Levi (14-1507)

# Sentencing

Whether the speedy trial (Sixth Amendment) applies to the sentencing phase of case?

- 14 months between guilty plea and sentencing
- Detriment to defendant: Warrant issued while in local custody, would have been eligible for conditional release, and unable to complete court ordered programs on another case.

Betterman v. Montana (No. 14-1457) – set to be argued March 28, 2016

Plain error review on appeal: Whether the court should presume that an error in the applicable guideline range affected substantial rights?

- Mistake in criminal history category, original range 77-96, sentence 77 months, correct range, 70-87
- *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001) \*\*

Molina-Martinez v. United States (14-8913) -- argued January 12, 2016

# Sex offenses and offenders

Whether the ten-year mandatory minimum for possession of child pornography under 18 U.S.C. § 2252(b)(2) is triggered if a prior sex offense did not involve a minor or ward.

- if a defendant “was previously convicted under state law or a crime relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”

Lockhart v. U.S. (14-8358) -- argued Nov. 3, 2015

- Must a sex offender living abroad register in jurisdiction where he formerly resided?

42 U.S.C. § 16913(a)

Nichols v. United States (No. 15-5238)

# Crimes of violence and violent crimes

(1) Does *Johnson v. United States* (striking residual clause of ACCA) apply retroactively to cases on collateral review? -- *Welch v. United States* (No. 15-6418)

(2) Can uncounseled tribal-court misdemeanors be predicates for DV assault under 18 U.S.C. § 117(a)? -- *United States v. Bryant* (No. 15-420)

(3) Does a misdemeanor crime with a mens rea of recklessness qualify as misdemeanor crime of domestic violence as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(d)(9)? -- *Voisine v. United States* (No. 14-10154)

**Don't care if I can't post bail -**



**the look on the dog's face  
was TOTALLY worth it!**

# Pre-trial and appeal

Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

Luis v. U.S. (14-419) -- argued Nov. 10, 2015

Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal.

Musacchio v. U.S. (14-1095) -- argued Nov. 30, 2015

## FOURTH AMENDMENT

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

# *Terry stop* and reasonable suspicion

*United States v. Lowe*, 791 F.3d 424

- Reasonable suspicion must exist at time of seizure.
- Show of authority occurs when a reasonable person would not feel free to leave the scene or refuse to continue contact with law enforcement officers.
- Seizure occurs when suspect submits to a show of authority.
- A suspect submits under the Fourth Amendment when they remain stationary, do not flee, and make no threatening gestures.

# GPS Tracking and Warrants

*Grady v. North Carolina*, 135 S.Ct. 1368

- North Carolina program that subjected recidivist sex offenders to satellite-based monitoring was physically intrusive and designed to gather information, therefore was a search under the Fourth Amendment.
- The Court did not rule on the program's constitutionality because the state courts did not determine whether the searches conducted through the tracking were reasonable.

# Traffic Stop and Search

*Rodriguez v. United States*, 135 S.Ct. 1609

- A traffic stop exceeding the reasonable time necessary to complete a traffic stop violates the Fourth Amendment.
  - Law enforcement cannot prolong a car stop for purposes of conducting a dog sniffing search, after the normal exchanges associated with a traffic stop have been completed.
- The justification for a traffic stop (seizure) ends after the reasonable time to address the traffic violation has passed.

# Expectation of Privacy

*United States v. Nagle*, 803 F.3d 167

Defendant, the majority owner of a small, family owned business, did not have an expectation of privacy in employees' individual offices, computers or files store on the network server, because he failed to show he had any personal connection to these items or that he made any effort to keep the seized materials private.

# Search Warrant

*United States v. Wright, 777 F.3d 635*

- Search conducted with a search warrant that was missing the affidavit with the list of items to be seized violated the Fourth Amendment, but suppression not automatic.
- Suppression and exclusion are based on the culpability of the agents and the prosecution. Purpose of exclusionary rule is to deter “deliberate, reckless or grossly negligent” acts.
- Court considered (1) how the violation undermined the Fourth Amendment, and (2) what the Government gained from the violation. In this case, the agent’s failure to notice that affidavit was not attached to warrant was a “simple mistake” not gross negligence. Suppression was not warranted.

## FIFTH AMENDMENT

“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . .”

## Miranda Rights

*United States v. Edwards*, 792 F.3d 355

- Government's repeated references to defendant's post-arrest, post-*Miranda* silence was an error. Government asked jury to draw inferences, about defendant's culpability, from his silence.
- The error was not harmless because the credibility of the defendant was a major factor in the outcome of the case.

## Notice and Double Jeopardy

*United States v. Centeno*, 793 F.3d 378

- Constructive amendment of charges deprived defendant of Fifth Amendment right to be tried only on charges made in the Indictment against him.
- Conviction on lesser included offense violated Double Jeopardy Clause.

# Self-Incrimination

## *United States v. Chabot*, 793 F.3d 338

- Foreign bank records maintained in accordance with 31 C.F.R. §1010.420 fall under the required records exception to Fifth Amendment privilege against self-incrimination.
- Foreign banking is voluntary and is conditioned upon keeping certain records. The condition of recordkeeping is essentially a waiver of Fifth Amendment privilege.
- The recordkeeping requirement primarily serves a valid regulatory purposes not connected with the investigation of criminal activity including tax collection, studying monetary policies, and conducting intelligence activities.
- Records and information required under the rule is information that would customarily be kept by account holders.

## SIXTH AMENDMENT

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

# Right to Trial by Jury

*United States v. Lewis*, 802 F.3d 449

- Appellant was charged with and convicted of using a firearm during a crime of violence (5-year mandatory minimum), but sentenced for brandishing a weapon during a crime a violence (7-year mandatory minimum).
- Sentencing a defendant for an aggravated crime, when he was indicted and tried on a lesser crime violates the Sixth Amendment.
- The error was a sentencing error, not a trial error. Error was not harmless because it significantly increased sentencing exposure.

# Confrontation Clause

*Ohio v. Clark*, 135 S.Ct. 2173

- Statements made by 3 year old child to teacher, identifying his abuser, were not testimonial.
- Primary purpose of the teacher interrogating the child was to address an ongoing emergency and protect the child-- not to assist the prosecution of the criminal case against the defendant.
- Teacher's questioning of the child was different from police questioning a suspect or witness.

# Miscellaneous Cases

*Whitfield v. United States,*  
135 S.Ct. 785 (2015)

18 U.S.C. § 2113(e): enhanced penalty for anyone who “forces any person to *accompany* him” in the course of committing or fleeing from a bank robbery.

“Accompany” does not require substantial movement or distance. Need only constitute movement that would normally be described as from one place to another, even if only from one spot within a room or to a different one.

# *McFadden v. United States*, 135 S.Ct. 2298 (2015)

Gov must prove that a defendant knew that the substance with which he was dealing was a “controlled substance,” even in prosecutions involving an analogue.

Knowledge can be established in two ways:

1. Evidence that defendant knew that substance is some controlled substance
2. Evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.

*Henderson v. United States,*  
135 S.Ct. 1780 (2015)

Court could approve proposed transfer to third party for purchase of firearms if, but only if, such disposition prevented felon from later exercising control over firearms.

*United States v. Merlino,*  
785 F.3d 79 (3d Cir. 2015)

18 U.S.C. § 3583(i)

Court can revoke supervised release even after supervised release term ends "*if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.*"

*United States v. Georgiou,*  
777 F.3d 125 (3d Cir. 2015)

- No *Brady* violation where materials equally accessible to parties
- No *Brady* violation where materials accessible only to government

*United States v. Fountain,*  
792 F.3d 310 (3d Cir. 2015)

Hobbs Act extortion, 18 U.S.C. § 1951(a)(1)

- “We will uphold a conviction for Hobbs Act extortion where the evidence indicates (1) that the payor made a payment to the defendant because the payor held a reasonable belief that the defendant would perform official acts in return, and (2) that the defendant knew the payor made the payment because of that belief.”
- Inducement not an element of Hobbs Act extortion under color of official right.

*United States v. Small,*  
793 F.3d 350 (3d Cir. 2015)

Escape, 18 U.S.C. § 751(a)

Custodial requirement of escape statute satisfied if a lawful judgment of conviction has been issued by a federal court against the defendant.

*United States v. Fazio,*  
795 F.3d 421 (2015)

Plea agreement and colloquy remedied any deficient advice by plea counsel regarding immigration consequences of drug trafficking conviction.

*United States v. Bui*,  
795 F.3d 363 (2015)

- Safety valve provision (18 U.S.C. § 3553(f)):
- Includes convictions under 21 U.S.C. §§ 841, 844, 846, 961 and 963
- Does not include 21 U.S.C. § 860 (distributing or manufacturing within 1000-foot of school)
- *Inclusio unius est exclusio alterius*

*Yates v. United States*,  
135 S.Ct. 1074 (2015)

Sarbanes-Oxley Act, 18 U.S.C. § 1519

“A tangible object captured by [the statute] must be one used to record or preserve information.”

# Sentencing Cases

# *United States v. Kolodesh*, 787 F.3d 224

- Healthcare/Medicare/Medicaid Fraud case
- Loss: Court need only make a reasonable estimate of loss; is not required to rely on statistical analysis to determine loss; did not err by relying on co-conspirators' testimony in setting amount of loss
- Combination of a lengthy imprisonment term with a large restitution order does not render a sentence unreasonable; primary goal of restitution is remedial or compensatory, rather than punitive
- Supreme Court's decision in *Paroline v. United States*, 134 S.Ct. 1710 (2014) does not alter long-standing availability of joint-and-several liability in common fraud case; *Paroline* is limited to circumstances involving an "atypical causal process"

# *United States v. Fountain*, 792 F.3d 310

- §2B1.1(b)(10)(C) Sophisticated Means
  - Enhancement applied where defendant (IRS customer service representative) used inside knowledge of IRS's enforcement thresholds to submit claims that would not be flagged for review; concealed her identity from others involved in scheme; developed enforcement mechanism to ensure her fees were paid
  - Enhancement also applied to co-defendant where sophisticated means employed by Fountain were reasonably foreseeable to co-defendant; Fountain and co-defendant lived together and had children together; evidence established that co-defendant was intimately familiar with entire scheme and was instrumental in spreading the scope of the scheme

# 2015 Guidelines Amendments

# §1B1.3 Relevant Conduct: Jointly Undertaken Criminal Activity

- Makes clarifying, rather than substantive, changes to §1B1.3.
- Moves the “three-step process” for evaluating jointly undertaken criminal activity from Commentary to the text of the Guideline
- In determining “jointly undertaken criminal activity” constitutes relevant conduct, the court should consider “all acts and omissions of others that were”:
  - (1) within the scope of the criminal activity that the defendant agreed to jointly undertake;
  - (2) In furtherance of the jointly undertaken criminal activity; and
  - (3) reasonably foreseeable in connection with that criminal activity
- The commentary to §1B1.3 also makes clear that if any one of those criteria is not met, the conduct is “not relevant conduct” under the “jointly undertaken provision.”

## §3B1.2 Mitigating Role

- Study concluded that the mitigating role adjustment is applied inconsistently and more sparingly than the commission intended.
- Amendments designed to facilitate a more consistent use of this guideline.
- Third circuit was already implementing most of these changes. *See United States v. Isaza-Zapata*, 148 F.3d 236, 240 (3d Cir. 1998).

## §3B1.2 Mitigating Role: “Average Participant”

- Adopts the approach of the Seventh and Ninth Circuits, which defines “average participant” by reference to those persons who participated in the criminal activity at issue in the defendant’s case.
- Rejects the approach of the First and Second Circuits, which required a court to consider the defendant’s culpability relative to his co-participants and to the *typical participant* in a similar crime.

# §3B1.2 Mitigating Role: Scope of Reduction

- Added a non-exhaustive list of factors for the court to consider in determining whether to apply a -4, -2, or intermediate adjustment:
  - 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 planning or organizing the criminal activity;
  - iii. the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
  - iv. the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
  - v. the degree to which the defendant stood to benefit from the criminal activity.

## §3B1.2 Mitigating Role: Being “Integral” or “Indispensable” to Scheme Should Not Preclude Reduction

- Adds clarifying language to Commentary:
  - “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 under this guideline.”
  - “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.”
- Thus, even if defendant’s task was central to the crime, if overall role was limited when compared to other participants, defendant may receive a mitigating role adjustment.

# Monetary Tables: Inflationary Adjustments

- While there have been changes to the monetary tables over the years, this is the first change specifically addressing the impact of economic inflation.
- Commission addressed the devaluing effect inflation has had on monetary and tax tables cited within the guidelines.
- Commission used a specific multiplier derived from the consumer price index to calculate for the inflationary adjustments.
- Good news for defendants because it takes higher loss amount to trigger upward adjustment (i.e., loss table now starts at \$6,500, rather than \$5,000)
- Ex post facto: a special instruction clarifies that for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014.

# §4A1.2(a)(2) “Single Sentence” Rule

- When the defendant’s criminal history includes two or more prior sentences that were not separated by an intervening arrest and were either charged in the same charging instrument or sentenced on the same day, those prior sentences are counted as a “single sentence” rather than separately. This operates to reduce the cumulative impact of the prior sentences on the criminal history score.
- Courts were divided over whether this “single sentence” rule also caused certain prior sentences that ordinarily would qualify as predicates under the career offender guideline to be disqualified from serving as predicates.

## §4A1.2(a)(2) “Single Sentence Rule”

- Amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal history points.

# §4A1.2(a)(2) “Single Sentence Rule” - Examples

- SINGLE SENTENCE RULE EXAMPLE #1
  - Eight years ago and on the same day, Defendant received concurrent sentences for the following convictions: Robbery with one year in jail and Theft with two years in jail. These convictions were NOT separated by an intervening arrest and are subject to the Single Sentence Rule.
  - Both convictions occurred within the time limits for receiving criminal history points. The theft sentence, which is the longer of the two concurrent sentences, drives the calculation of the criminal history points. Assuming the robbery meets the definition of a crime of violence, it WILL QUALIFY as a predicate for career offender.
  - What if these crimes occurred thirteen years ago.....

# §4A1.2(a)(2) “Single Sentence Rule” - Examples

- SINGLE SENTENCE RULE EXAMPLE #2
  - Thirteen years ago and on the same day, Defendant received concurrent sentences for the following convictions: Robbery with one year in jail and Theft with two years in jail. These convictions were NOT separated by an intervening arrest and are subject to the Single Sentence Rule.
  - In this case, each conviction must be viewed individually. Though the robbery is a crime of violence, the time limit for scoring criminal history points is ten years. Because the robbery alone would not have received criminal history points, it cannot serve as a career offender predicate.

## §2B1.1 ECONOMIC CRIMES

- Multi-Year study of §2B1.1 and related guidelines.
- CHANGES account for:
  - HARM TO VICTIMS,
  - THE DEFENDANT'S INDIVIDUAL CULPABILITY, AND
  - THE DEFENDANT'S INTENT.

AMENDMENT made changes to:

- Victims table, U.S.S.G. § 2B1.1(b)(2)
- Intended loss, U.S.S.G. § 2B1.1, applic. n. 3(A)(ii)
- Sophisticated means, U.S.S.G. § 2B1.1(b)(10)(c), AND
- Fraud on the market, U.S.S.G. § 2B1.1, applic. n. 3(F)(ix)

**2015 VICTIMS TABLE, U.S.S.G. § 2B1.1(b)(2)**  
(considering financial hardship incurred by the victims)

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;
  - (B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or
  - (C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.

**2014 VICTIMS TABLE**

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
  - (B) involved 50 or more victims, increase by **4** levels; or
  - (C) involved 250 or more victims, increase by **6** levels.

# SUBSTANTIAL FINANCIAL HARDSHIP

Non-exhaustive list of factors to determine financial impact:

- I. Becoming insolvent;
- II. Filing for bankruptcy under the bankruptcy code (Title 11);
- III. Suffering substantial loss of a retirement, education, or other savings or investment fund;
- IV. Making substantial changes to his or her employment, such as postponing his or her retirement plans;
- V. Making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and suffering substantial harm to his or her ability to obtain credit.

# NUMBER OF VICTIMS

- Amendments reflect Commission's overall goal of focusing more on victim harm.
- Revisions to victims table ensures that even on victim suffering substantial financial harm receives increased punishment.
- New amendment does not downplay the number of victims as an indicator to the seriousness of an offense – Table maintains a 2-level enhancement for offenses involving ten or more victims.

# INTENDED LOSS, U.S.S.G. § 2B1.1, Application Note 3(A)(ii)

Focuses on the defendant's specific intent

*2015:*

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

*2014:*

- (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

# SOPHISTICATED MEANS, U.S.S.G. § 2B1.1(b)(10)(C)

- Before: enhancement applied if “the offense otherwise involved sophisticated means.”
- Now: focus on if defendant’s own conduct was sophisticated not on level of sophistication of scheme.
- Reflects individual culpability and minimize application to less culpable offenders.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

**FRAUD ON THE MARKET**  
U.S.S.G. § 2B1.1, applic. n. 3(F)(ix)

- Method used to determine loss in highly complex and fact-intensive cases involving fraudulent inflation or deflation in the value of a publicly traded security or commodity.
- Special rule at application note 3(F)(ix) was initially added as a presumed starting point with a rebuttable presumption that the specific loss calculation methodology provides a reasonable estimate of the actual loss.
- Now, the provided method is one method that courts can consider but are free to use any appropriate method to determine loss.

# 2015 amendment

*(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—*

- (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and*
- (II) multiplying the difference in average price by the number of shares outstanding.*

*In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).*

## 2014 Guideline

*(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—*

- (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and*
- (II) multiplying the difference in average price by the number of shares outstanding.*

*In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).*

# Economic Crimes Conclusion

- **DESIGNED TO BETTER ACCOUNT FOR VICTIM HARM.**
- **BETTER TO GAUGE OFFENDER'S INDIVIDUAL CULPABILITY AND INTENT.**

# §2D1.1 DRUG EQUIVALENCY TABLE

## HYDROCODONE

- Hydrocodone has been rescheduled from a less restricted Schedule III to a more restricted Schedule II drug → significant impact to drug equivalency table
- Now hydrocodone treated like oxycodone.
- Methodology used to calculate hydrocodone involves actual weight (no longer total weight of total number of pills)

### MARIJUANA EQUIVALENCY

2014: 1 unit HYDROCODONE to 1 gram OF MARIJUANA.

2015: 1 gram HYDROCODONE (actual) TO 6700 grams of  
MARIJUANA

# Practice tips on hydrocodone/oxycodone

- The Commission adopted this amendment despite substantial evidence that the oxycodone guideline is not based on empirical evidence and other evidence that hydrocodone does not have the same abuse potential as oxycodone.
- For information that may help challenge the new hydrocodone guideline, see the Defender comments and Statement of Lex Coleman, available on fd.org at <http://bit.ly/1yZ6nTw>.

# Proposed Guidelines Amendments for 2016

# “Crime of Violence”

- Amends the definition of “crime of violence” in §4B1.2(a)(2) in three ways:
  - (1) Eliminates residual clause in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015)
  - (2) Revises the list of enumerated offenses to remove burglary of a dwelling and moves the list of enumerated offenses from the commentary to the guideline. The offenses on the revised list are 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 an explosive material as defined in 18 U.S.C. § 841(c).
  - (3) Amends the Commentary to add definitions for the enumerated offenses of forcible sex offense and extortion.

# “Crime of Violence”

- Adds two departure provisions:
  - (1) Provides an upward departure provision in §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was a burglary involving violence
  - (2) Provides a 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 time of sentencing for the instant federal offense.
- Effective Date: August 1, 2016

# Child Pornography Circuit Conflicts

- Effective Date of these (and the following) proposed amendments would be November 1, 2016.
- Addresses three specific circuit conflicts:
  - Offenses Involving Unusually Young and Vulnerable Minors
  - 2-Level Distribution Enhancement at §2G2.2(b)(3)(F)
  - 5-Level Distribution Enhancement at §2G2.2(b)(3)(B)

# Offenses Involving Unusually Young and Vulnerable Minors

- Because the child pornography offense Guidelines provide for age-based enhancements, a circuit conflict has developed over whether the vulnerable victim adjustment at §3A1.1(b)(1) can also be applied where the victim is unusually young or vulnerable (i.e., an infant or toddler)
- The proposed amendment would provide that application of an age enhancement does not preclude application of the vulnerable victim adjustment. Specifically, if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, §3A1.1(b) applies, assuming the mens rea requirement of §3A1.1(b) is also met (i.e., the defendant knew or should have known of this vulnerability).

## 2-Level Distribution Enhancement at §2G2.2(b)(3)(F)

- When a case involves a file-sharing program, this amendment would clarify that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program.

# 5-Level Distribution Enhancement at §2G2.2(b)(3)(B)

- The 5-level distribution enhancement at subsection (b)(3)(B) applies if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.” The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the “thing of value” is the material received in exchange.
- The proposed amendment would revise subsection (b)(3)(B) to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

# §2L1.1 Alien Smuggling

- Would increase base offense level for alien smuggling
- Would provide for 2-level enhancement where defendant knew or had reason to believe that he was smuggling an unaccompanied minor (i.e., under age 18)
- Would include a new departure provision in the commentary to §2L1.1 for cases in which the offense involved the smuggling, transporting, or harboring of six or more unaccompanied minors.

## §2L1.2 Illegal Reentry

- The proposed amendment would:
  - lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions;
  - base enhancements for prior convictions on the sentence imposed rather than on the type of offense (e.g., “crime of violence”) — in other words, the proposed amendment would eliminate the use of the “categorical approach” for predicate felony convictions in §2L1.2; and
  - account for prior convictions for illegal reentry separately from other types of convictions.

# §2L1.2 Illegal Reentry

- Provides alternative base offense levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses. For defendants without such prior convictions, the proposed amendment increases the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels would apply without regard to whether the prior conviction receives criminal history points.
- Changes how §2L1.2(b)(1) accounts for pre-deportation convictions — basing them not on the type of offense (e.g., “crime of violence”) but on the length of the sentence imposed for a felony conviction.
  - A felony conviction where the sentence imposed was [24] months or more: +8
  - A felony conviction where the sentence imposed was at least [12] months but less than [24] months: +6
  - A felony conviction where the sentence imposed was less than [12] months: +4
  - Three or more convictions for misdemeanors involving drugs or crimes against the person: +2
  - If more than one of these enhancements apply, the court is instructed to apply the greatest.
  - Only permit prior convictions to be considered under this subsection if they receive criminal history points under Chapter Four.

# §2L1.2 Illegal Reentry

- Inserts a new subsection (b)(2) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more felony offenses after the defendant's first deportation or first order of removal. The structure of the new subsection (b)(2) parallels the proposed changes to subsection (b)(1), both in the sentence length required and the level of enhancement to be applied.
- Provides a new departure provision for cases in which the defendant was previously deported on multiple occasions not reflected in prior convictions.
- Revises the departure provision based on seriousness of a prior conviction to bring it more into parallel with §4A1.3 (Adequacy of Criminal History Category) and provide examples related to: (1) cases in which serious offenses do not qualify for an adjustment under subsection (b)(1) and the new subsection (b)(2) because they did not receive criminal history points; and (2) for cases in which a defendant committed one or more felony offenses but no conviction resulted from the commission of such offense or offenses.



**Chill Chill he ain't worth it,  
you on probation son**

# §§5B1.3 and 5D1.3 Conditions of Probation and Supervised Release

- Revises, clarifies, and rearranges the conditions of supervised release to make them more focused and precise, as well as easier for defendants to understand and probation officers to enforce.
  - For example, “the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer” becomes “the defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.”
- Inserts a “knowing” *mens rea* requirement where one was lacking

# §§5B1.3 and 5D1.3 Conditions of Probation and Supervised Release

- Adds two new “special conditions”:
  - Substance Abuse – If defendant is identified as a substance abuser and has been ordered to participate in a substance abuse program, the special condition will also clearly state that the defendant may not use or possess alcohol
  - Support of Dependents - If the defendant—
    - (A) has one or more dependents — a condition specifying that the defendant must support his or her dependents; and
    - (B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order

# §1B1.13 Compassionate Release

- Would revise the list of “extraordinary and compelling reasons” for compassionate release consideration in the Commentary to §1B1.13 to reflect the criteria set forth in the Bureau of Prisons’ program statement.
  - (i) The defendant (I) has been diagnosed with a terminal, incurable disease; and (II) has a life expectancy of 18 months or less.
  - (ii) The defendant has an incurable, progressive illness.
  - (iii) The defendant has suffered a debilitating injury from which he or she will not recover.
  - (iv) The defendant meets the following criteria— (I) the defendant is at least 65 years old; (II) the defendant has served at least 50 percent of his or her sentence; (III) the defendant suffers from a chronic or serious medical condition related to the aging process; (IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and (V) conventional treatment promises no substantial improvement to the defendant’s mental health or physical condition.
  - (v) The defendant (I) is at least 65 years old; and (II) has served at least 10 years or 75 percent of his or her sentence, whichever is greater.
  - (vi) The death or incapacitation of the family member caregiver of the defendant’s child.
  - (vii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

## §2E3.1 Gambling Offenses; Animal Fighting Offenses

- Revises §2E3.1 to provide higher penalties for animal fighting offenses and to respond to two new offenses for attending an animal fighting venture and causing an individual under 16 to attend an animal fighting venture