

# Federal Sentencing

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Eighth Circuit Conference

Omaha, NE

Thursday, August 7, 2014

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U.S. Sentencing Commission

# Discussion Outline

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- Commission update
  - Commission activities
  - Highlights of proposed 2014 amendments
  - Sentencing statistics
  - Selected Supreme Court & circuit cases

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# Commission Update

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7/21/14

# Commission Activities

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- In April the Commission submitted to Congress amendments which will have an effective date of November 1, 2014
- Following a hearing on June 10, 2014, and review of public comment, on July 18, 2014 the Commission voted to make the proposed “Drugs Minus 2” guideline amendment retroactive

# Commission Activities

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- The Commission is reviewing public comment in response to its publication of proposed priorities for the 2014-15 guideline amendment cycle (available on [www.ussc.gov](http://www.ussc.gov))
- The Commission's annual national seminar will be in Philadelphia, September 17-19, 2014; registration has been closed

# Highlights of Proposed Guideline Amendments Submitted to Congress

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To Become Effective November 1, 2014  
Unless Rejected by Legislation

7/22/14

# **“Drugs Minus 2” Guideline Amendment & Retroactivity**

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**§§2D1.1 & 1B1.10**

# Process: “Drugs Minus 2” Amendment

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- August 2014 – Commission priority: review drug guidelines, including consideration of amending the drug quantity table across drug types
- April 10, 2014 – Commission voted unanimously to promulgate amendment
- July 18, 2014 – Commission voted unanimously to make “drugs minus 2” retroactive

# Impact: “Drugs Minus 2” Retroactivity

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- Approximately 46,000 offenders will be *eligible* for a sentence reduction
- Average sentence reduction will be 18%
  - Average reduction will be 25 months
  - Current average sentence: 11 years, 1 month
  - New average sentence: 9 years

# The “Drugs Minus 2” Guideline Amendment

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## Amendment 782 Effective November 1, 2014

- Reduces by two-levels the base offense levels applicable to *most* quantities on the Drug Quantity Table at §2D1.1 (Drugs) and on the quantity tables for chemicals at §2D1.11 (Listed Chemicals)

# Example: §2D1.1 Drug Quantity Table Cocaine BOLs Pre & Post “Drugs Minus 2”

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**Pre**

**11/1/2014**

150 KG ↑

50 KG ↑

15 KG ↑

5 KG ↑

3.5 KG ↑

2 KG ↑

500 G ↑

Level 38

Level 36

Level 34

Level 32

Level 30

Level 28

Level 26

**Post**

**11/1/2014**

450 KG ↑

150 KG ↑

50 KG ↑

15 KG ↑

5 KG ↑

3.5 KG ↑

2 KG ↑

# Example: §2D1.1 Drug Quantity Table

## Cocaine BOLs Pre & Post “Drugs Minus 2” (cont.)

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<b>Pre</b>				<b>Post</b>		
<u>11/1/2014</u>				<u>11/1/2014</u>		
400	G	↑	Level 24	500	G	↑
300	G	↑	Level 22	400	G	↑
200	G	↑	Level 20	300	G	↑
100	G	↑	Level 18	200	G	↑
50	G	↑	Level 16	100	G	↑
25	G	↑	Level 14	50	G	↑
< 25	G	↑	Level 12	< 50	G	↑

# “Drugs Minus 2” Amendment Made Retroactive

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## Amendment 780 to §1B1.10 (Policy Statement)

- Unanimous vote by Commission on July 18, 2014
- Amendment 782 will be included on the retroactive list at §1B1.10(d) as of November 1, 2014
- Adds a new Special Instruction at §1B1.10(e)(1) and a new Application Note 6

# New §1B1.10(e)(1) & App. Note 6 Special Instruction

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## Amendment 780 to §1B1.10 (Policy Statement)

- The court shall not order a reduced term of imprisonment based on Amendment 782 *unless the effective date of the court's order is November 1, 2015, or later*

# New §1B1.10(e)(1) & App. Note 6 Special Instruction (cont.)

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## Amendment 780 to §1B1.10 (Policy Statement)

- This does not preclude the court from conducting sentence reduction proceedings and entering reduction orders before November 1, 2015, *provided* that the effective date of the sentence reduction order is November 1, 2015, or later

# *Guideline Amendment* Retroactivity

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- “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

# *General Limitation on Extent of Possible Reduction*

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## §1B1.10(b)(2)(A)

- The term of imprisonment for the previous sentence cannot be reduced to less than the minimum of the amended guideline range
- An exception applies in the case of substantial assistance

# Exception to General Limitation on the Extent of Reduction: “Substantial Assistance”

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## §1B1.10(b)(2)(B)

- If the previous sentence was pursuant to a government motion for “Substantial Assistance” under §5K1.1, § 3553(e), or Rule 35(b), a reduction comparably less than the minimum of the amended guideline range may be appropriate

# §1B1.10 (Policy Statement) Amendment

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## Amendment Effective November 1, 2014

- Addresses a circuit split on retroactivity when the previous sentence was below a mandatory minimum based on substantial assistance

# Mandatory Minimums and Substantial Assistance

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## §1B1.10(c) & App. Note 4

- If the defendant:
    - is subject to a mandatory minimum
- AND**
- received a government motion under § 3553(e) or Rule 35(b) to reflect substantial assistance to authorities

**continued....**

## Mandatory Minimums and Substantial Assistance (cont.)

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### §1B1.10(c) & App. Note 4

....continued

- The *amended* guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction)

# **Additional Proposed Guideline Amendments Submitted to Congress**

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**To Become Effective November 1, 2014  
Unless Rejected by Legislation**

# Proposed 2014 Amendments

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- §2D1.1 new specific offense characteristic (SOC)
  - If the offense involved marijuana cultivation on state or federal land or while trespassing on tribal or private land
- and**
- the defendant gets Aggravating Role (§3B1.1)
  - Increase by 2 levels
- The new SOC is at (b)(14) which will reorder the remaining SOCs

# Proposed 2014 Amendments

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- Violence Against Women Act
  - Various guidelines amended to address new statutory sections and penalty increases for crimes pertaining to domestic violence, assault, sexual abuse, stalking, and human trafficking

# Proposed 2014 Amendments

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- Felon in Possession (§2K2.1)
  - Clarifies the operation of Relevant Conduct at §2K2.1 regarding possession of a firearm(s) in connection with another offense (SOC (b)(6)(B) and cross reference (c)(1))
    - The circuits have had a range of approaches
  - The cross reference at §2K2.1(c)(1) will be limited to the firearm(s) listed in the *offense of conviction*

# Proposed 2014 Amendments

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- Supervised Release
  - Failure to Register as a Sex Offender (18 U.S.C. § 2250) is *not* a “sex offense” for purposes of §5D1.2(b) (which recommends the maximum term of supervised release for a “sex offense”)
  - The amendment resolves a circuit split

# Proposed 2014 Amendments

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- Other Terms of Imprisonment (§5G1.3)
  - To qualify under §5G1.3(b) (concurrent sentence and credit for time served), the offense for which the defendant is serving an undischarged term of imprisonment only has to be relevant conduct, and *does not* have to also increase the offense level in the instant federal sentencing

# Proposed 2014 Amendments

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- Other Terms of Imprisonment (§5G1.3)
  - If the defendant is facing an anticipated but not yet imposed *state* sentence, then the federal sentence should be imposed concurrently if the state offense is relevant conduct in the instant federal sentencing

# Proposed 2014 Amendments

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- Illegal reentry departure provision
  - §2L1.2, new App. Note 8 provides a departure provision for certain cases in which the defendant is located by immigration authorities while the defendant is serving time in *state* custody

# Proposed 2014 Amendments

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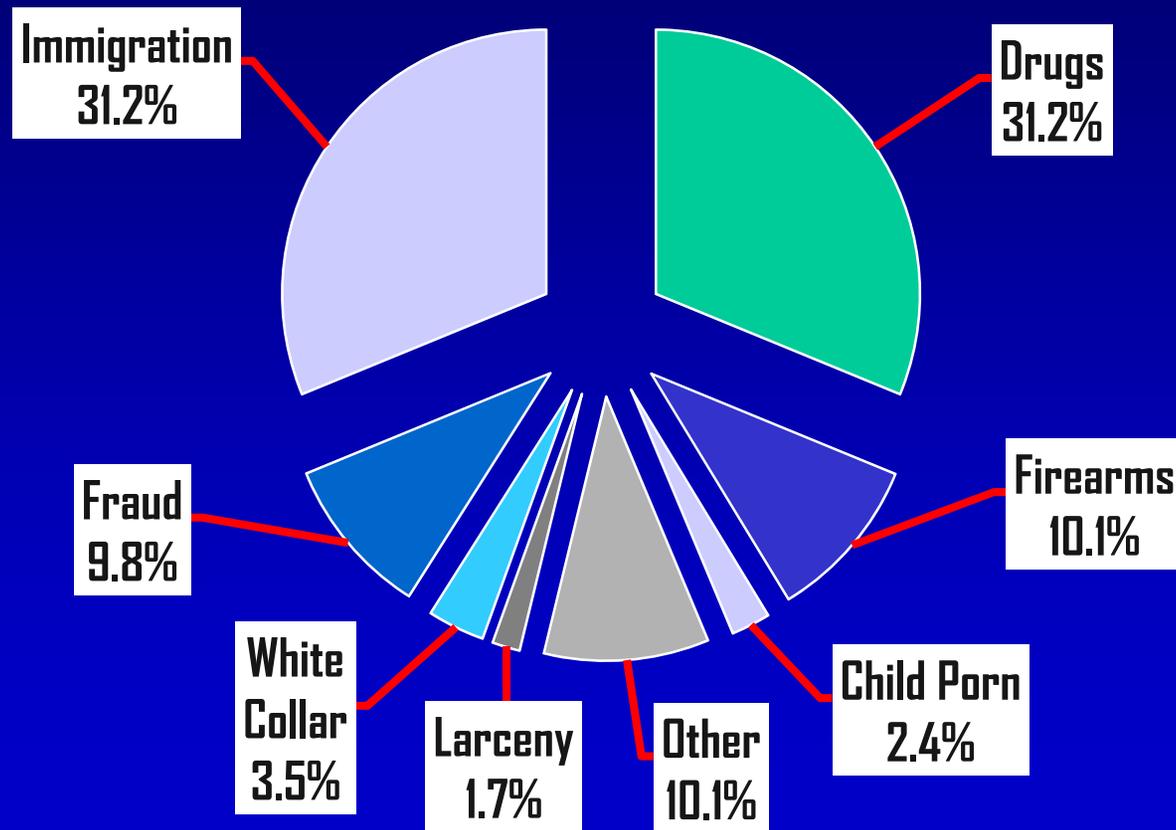
- Alien Smuggling (§2L1.1)
  - Guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements is “reckless endangerment” under §2L1.1(b)(6) (2-level increase, with floor of OL 18)

# Commission Sentencing Statistics

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# Primary Offense Types

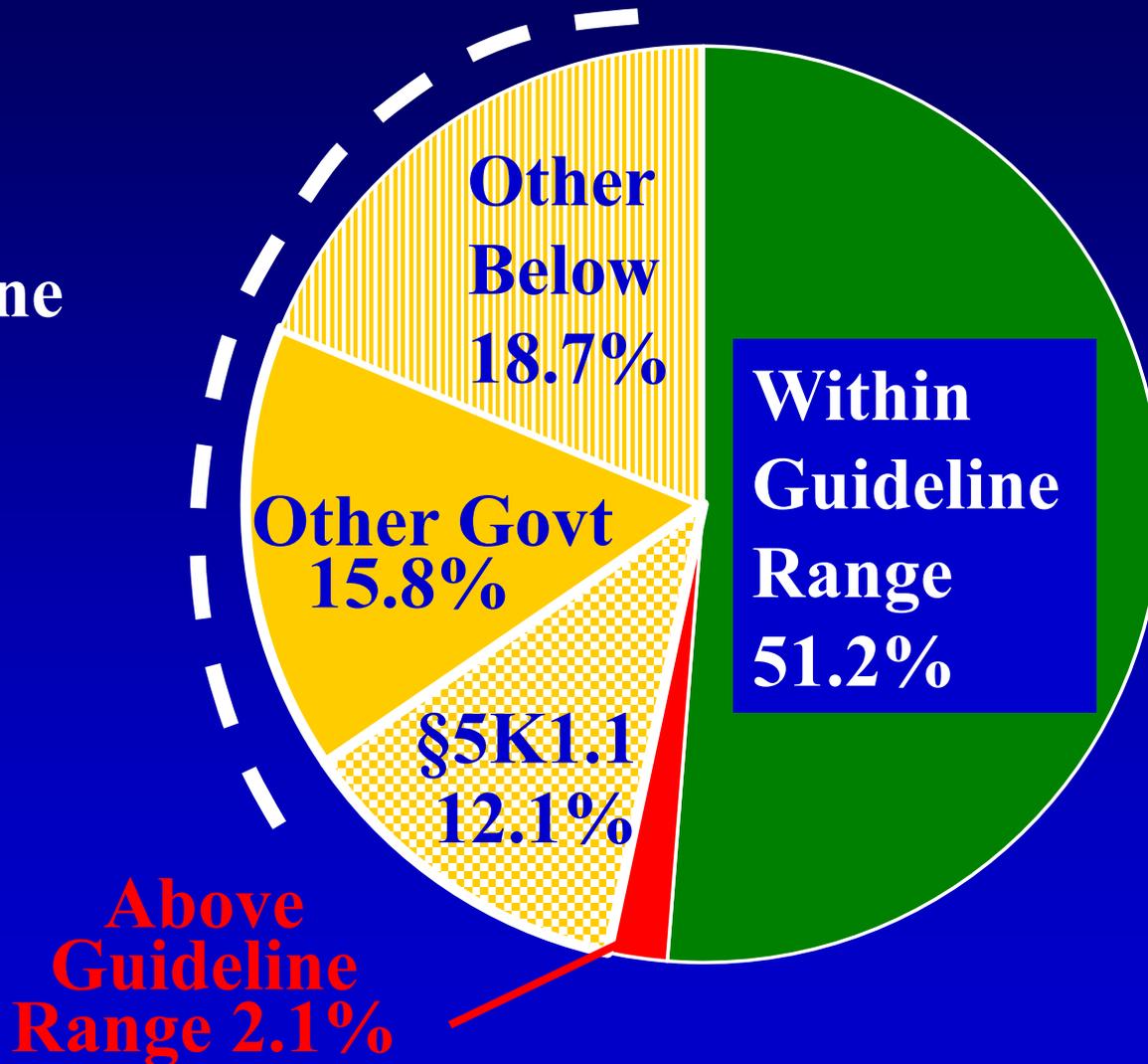
National - FY 2013



SOURCE: U.S. Sentencing Commission, 2013 Datafile USSCFY13: 80,035 cases

# Position of Sentences in Relation to Guideline Range National - FY 2013

**Total  
Below  
Guideline  
Range  
46.6%**



# Supreme Court Cases

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7/21/14

# Restitution in Child Porn Offenses

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*Paroline v. U.S.*, 134 S Ct. 1710 (2014)

“Restitution is proper under § 2259 only to the extent the defendant’s offense proximately caused a victim’s losses. Applying the statute’s causation requirements in this case, victims should be compensated and defendants should be held to account for the their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others.”

## Restitution in Child Porn Offenses (cont.)

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*Paroline v. U.S.*, 134 S Ct. 1710 (2014)

“There are a variety of factors, district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise algorithm for determining restitution. But district courts might, as a starting point, determine the amount of the victim’s images, then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant conduct in producing those losses.”

## Restitution in Child Porn Offenses (cont.)

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*Paroline v. U.S.*, 134 S Ct. 1710 (2014)

“These could include the number of past criminal defendants found to have contributed to the victim’s general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim’s general losses; any available and reasonably reliable estimate of the broader number of offenders involved;

**continued....**

## Restitution in Child Porn Offenses (cont.)

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*Paroline v. U.S.*, 134 S Ct. 1710 (2014)

....continued

whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed and other facts relevant to the defendant's relative causal role.”

# Misdemeanor Crime of Domestic Violence

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*U.S. v Castleman*, 134 S. Ct 1405 (2014)

- Tennessee conviction for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child qualified as a "misdemeanor crime of domestic violence" under 18 U. S. C. § 922(g)(9)

# Mandatory Minimums

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*Burrage v. U.S.*, 134 S. Ct. 881 (2014)

- At least when the use of a drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable for penalty enhancement under the penalty enhancement provision of the Controlled Substance Act unless such use is a but-for cause of the death or injury.

# Ex Post Facto

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

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

# Mandatory Minimums

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

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

# ACCA and the Modified Categorical Approach

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

- Courts may not apply the modified categorical approach to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements
- Prior California burglary offense was not for a violent felony within the meaning of ACCA

## *Cert. granted: ACCA Case*

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*Johnson v. U.S.* 526 F. App'x 708 (8<sup>th</sup> Cir. 2013),  
*cert granted*, 134 S. Ct. 1871 (2014)

- Whether mere possession of a shotgun with a short barrel should be treated as a violent felony under the Armed Career Criminal Act

# Selected Recent Eighth Circuit Cases

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7/21/14

# Reasonableness Cases

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- *U.S. v. Martin*, 2014 WL 2978555 (8<sup>th</sup> Cir. 2014)
  - Above guideline revocation sentence reasonable—court warned defendant at prior revocation that he would get maximum if he comes back on revocation
- *U.S. v. Thomas*, 2014 WL 3056822 (8<sup>th</sup> Cir. 2014)
  - Remand because court did not specify a starting range from which it varied upward

# Reasonableness Cases

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- *U.S. v. Butler*, 743 F.3d 645 (8<sup>th</sup> Cir. 2014)
  - Reasonable for court to give same sentence after remand by varying upward after correcting criminal history mistake
- *U.S. v. Goodrich*, 739 F.3d 1091
  - Above guideline sentence affirmed
- *U.S. v. Cole*, 721 F.3d 1016 (8<sup>th</sup> Cir. 2013)
  - Court did not provide sufficient explanation for below guideline sentence so case remanded

# Reasonableness Cases

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- *U.S. v. Beran*, 751 F.3d 872 (8<sup>th</sup> Cir. 2014)
  - 48 month above guideline revocation sentence affirmed
- *U.S. v. Stokes*, 750 F.3d 767 (8<sup>th</sup> Cir. 2014)
  - Procedural remand because court relied on incorrect facts that he was selling drugs for 10 year period when PSR did not state that

# Procedural Cases

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- *U.S. v. Taylor*, 747 F.3d 516 (8<sup>th</sup> Cir. 2014)
  - Court could rely on attorney admitting defendant committed violations even though defendant never admitted when court gave defendant opportunity to speak after attorney conceded them
- *U.S. v. Sims*, 2014 WL 2576339(8<sup>th</sup> Cir. 2014)
  - Rules of evidence regarding hearsay do not strictly apply in revocation proceedings

# ACCA Cases

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- *U.S. v. Humphrey*, 2014 WL 3538486 (8<sup>th</sup> Cir. 2014)
  - Assault of one victim 15 minutes prior to a robbery on another victim were separate occasions for ACCA purposes
- *U.S. v. Melbie*, 751 F.3d 586 (8<sup>th</sup> Cir. 2014)
  - A prior conspiracy conviction and a prior possession with intent to distribute can be 2 separate offenses for ACCA purposes

# Violent Felony Cases

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- *U.S. v. Bankhead*, 746 F.3d 323 (8<sup>th</sup> Cir. 2014)
  - Ill Armed Robbery is not a VF because not divisible
- *U.S. v. Tucker*, 740 F.3d 1177 (8<sup>th</sup> Cir. 2014)
  - NE escape statute is not a VF
- *U.S. v. Brown*, 734 F.3d 824 (8<sup>th</sup> Cir. 2013)
  - MN possession of short barrel rifle is VF

# Violent Felony Cases

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- *U.S. v. Pate*, 2014 WL 2535302 (8<sup>th</sup> Cir. 2014)
  - MN fleeing law enforcement officer in motor vehicle is a VF
- *U.S. v. Howard*, 2014 WL 2598749 (8<sup>th</sup> Cir. 2014)
  - AK 1<sup>st</sup> degree carnal abuse is a VF

# Crime of Violence Cases

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- *U.S. v. Boose*, 739 F.3d 1185 (8<sup>th</sup> Cir. 2014)
  - AK battery in 1<sup>st</sup> degree is not a COV
- *U.S. v. Martinez*, 2014 WL 2922312 (8<sup>th</sup> Cir. 2014)
  - Court incorrectly applied 16-level enhancement at §2L1.2 by misapplying the modified categorical approach

# Drug Cases

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- *U.S. v. Renteria-Saldana*, 2014 WL 2808133 (8<sup>th</sup> Cir. 2014)
  - §2D1.1(b)(12) “maintaining a premises” SOC applied
- *U.S. v. Loesel*, 728 F.3d 749 (8<sup>th</sup> Cir. 2013)
  - §2D1.1(b)(13) substantial risk can apply even if meth farm is in “rural location”

# Firearms Cases

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- *U.S. v. Humphrey*, 2014 WL 2524676 (8<sup>th</sup> Cir. 2014)
  - §2K.1(b)(6) applied as firearm had express facilitation finding
- *U.S. v. Davis*, 2014 WL 2609715 (8<sup>th</sup> Cir. 2014)
  - §2K2.1(c) cross reference to murder

# Criminal History Cases

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- *U.S. v. Raicho*, 746 F.3d 850 (8<sup>th</sup> Cir. 2014)
  - MN misdemeanor possession of marijuana is not similar to public intoxication thus offense counts for §4A1.2(c)
  - MN misdemeanor possession of marijuana in car is not similar to reckless driving thus offense counts under §4A1.2(c)

# Loss Cases

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- *U.S. v. Huston*, 744 F.3d 589 (8<sup>th</sup> Cir. 2014)
  - §2B1.1(b)(10) sophisticated means applied
- *U.S. v. Zaic*, 744 F.3d 1040 (8<sup>th</sup> Cir. 2014)
  - Court had power to order restitution for medical expenses post-sentencing because defendant was on notice that he would have to pay restitution so 10 day notification before sentencing deadline can be avoided

# Child Porn Case

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- *U.S. v. Lynch*, 2014 WL 3033333 (8<sup>th</sup> Cir. 2014)
  - Government proved defendant had knowledge that he was distributing child porn when he entered the file sharing program and he was fairly computer savvy
  - 210 month sentence affirmed

# Child Porn Cases

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- *U.S. v. Manning*, 738 F.3d 937 (8<sup>th</sup> Cir. 2014)
  - Receipt and possession convictions of child porn acceptable because based on different facts and images
  - 360 month sentence affirmed, defendant abused one of his son

# Reckless Endangerment Case

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- *U.S. v. Collins*, 2014 WL 2598767 (8<sup>th</sup> Cir. 2014)
  - §3C1.2 should not have applied because defendant's action of attempting to stab officer while shackled in interrogation room was not in course of offense or immediate flight for felon in possession

# Miscellaneous Cases

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- *U.S. v. Muckle*, 2014 WL 2978553 (8<sup>th</sup> Cir. 2014)
  - §2J1.2(c)(1) cross reference to §2X2.1 applied
- *U.S. v. Ford*, 750 F.3d 952 (8<sup>th</sup> Cir. 2014)
  - *Burrage* remand b/c no evidence that person died as a but for cause of defendant's actions
- *U.S. v. Mohamed*, 2014 WL 2958623 (8<sup>th</sup> Cir. 2014)
  - §3A1.4 Terrorism enhancement applied

END