



# Fifth Circuit Case Law Update

October 2023

## Compassionate Release

*U.S. v. Stanford*, 79 F.4th 461 (5th Cir. 2023)  
*U.S. v. Escajeda*, 58 F.4th 184 (5th Cir. 2023)  
*U.S. v. Melendez*, 57 F.4th 505 (5th Cir. 2023)  
*U.S. v. Rollins*, 53 F.4th 353 (5th Cir. 2023)  
*U.S. v. Handlon*, 53 F.4th 348 (5th Cir. 2022)  
*U.S. v. Rodriguez*, 27 F.4th 1097 (5th Cir. 2022)  
*U.S. v. Jackson*, 27 F.4th 1088 (5th Cir. 2022)  
*U.S. v. Perez*, 27 F.4th 1101 (5th Cir. 2022)

## Safety Valve (18 U.S.C. § 3553(f))

*U.S. v. Palomares*, 52 F.4th 640 (5th Cir. 2022)

## Relevant Conduct

*U.S. v. Lopez*, 70 F.4th 325 (5th Cir. 2023)  
*U.S. v. Appellant I*, 56 F.5th 385 (5th Cir. 2022)

## Drugs Offenses (§2D1.1)

### Drug Weight

*U.S. v. Hill*, 80 F.4th 595 (5th Cir. 2023)  
*U.S. v. Lujan*, 25 F.4th 324 (5th Cir. 2022)

### Specific Offense Characteristics

*U.S. v. Ajayi*, 64 F.4th 243 (5th Cir. 2023) (§2D1.1(b)(2): violence)  
*U.S. v. Dennis*, 41 F.4th 732 (5th Cir. 2022) (§2D1.1(b)(12): maintaining establishment)

## Fraud Offenses (§2B1.1)

### Determining Loss

*U.S. v. Hamilton*, 37 F.4th 246 (5th Cir. 2022)  
*U.S. v. Alfaro*, 30 F.4th 514 (5th Cir. 2022)  
*U.S. v. Mesquias*, 29 F.4th 276 (5th Cir. 2022)  
*U.S. v. Lagos*, 25 F.4th 329 (5th Cir. 2022)



## Substantial Financial Hardship (§2B1.1(b)(2))

*U.S. v. Aderinoye*, 33 F.4th 751 (5th Cir. 2022)

*U.S. v. Alfaro*, 30 F.4th 514 (5th Cir. 2022)

## Sophisticated Means (§2B1.1(b)(12))

*U.S. v. Davis*, 53 F.4th 833 (5th Cir. 2023)

*U.S. v. Alfaro*, 30 F.4th 514 (5th Cir. 2022)

## Firearms (§2K2.1)

*U.S. v. Luna-Gonzalez*, 34 F.4th 479 (5th Cir. 2022) (base offense level)

*U.S. v. Sharp*, 62 F.4th 951 (5th Cir. 2023) (§2K2.1(b)(4): ghost guns)

*U.S. v. Choulat*, 75 F.4th 489 (5th Cir. 2023) (§2K2.1(b)(6): in connection with)

*U.S. v. Singletary*, 29 F.4th 313 (5th Cir. 2022) (§2K2.1(b)(6): in connection with)

## Sex Offenses

*U.S. v. Northington*, 77 F.4th 331 (5th Cir. 2023) (18 U.S.C. § 2251(e): prior conviction)

*U.S. v. Moore*, 71 F.4th 392 (5th Cir. 2023) (§ 2251(e): prior conviction)

*U.S. v. Grzwinski*, 57 F.4th 237 (5th Cir. 2023) (§ 2251(e): prior conviction)

*U.S. v. Butler*, 65 F.4th 199 (5th Cir. 2023) (§2G2.1(a)2): sex act)

*U.S. v. McGavitt*, 28 F.4th 571 (5th Cir. 2022) (§2G2.1(b)(3): distribution)

*U.S. v. Sadeek*, 77 F.4th 320 (5th Cir. 2023) (§4B1.5)

## Immigration Offenses

### Alien Smuggling (§2L1.1)

*U.S. v. Buendia*, 73 F.4th 336 (5th Cir. 2023)

*U.S. v. Hernandez*, 48 F.4th 367 (5th Cir. 2022)

*U.S. v. Ramirez*, 37 F.4th 233 (5th Cir. 2022)

*U.S. v. Castillo-Palma*, 30 F.4th 284 (5th Cir. 2022)

### Illegal Reentry (§2L1.2)

*U.S. v. Cordova-Lopez*, 34 F.4th 442 (5th Cir. 2022)

## Chapter 3 Adjustments

*U.S. v. Swenson*, 25 F.4th 309 (5th Cir. 2022) (§3A1.1)

*U.S. v. Hamilton*, 37 F.4th 246 (5th Cir. 2022) (§3B1.1)

*U.S. v. Aderinoye*, 33 F.4th 751 (5th Cir. 2022) (§3B1.1)

*U.S. v. Anguiano*, 27 F.4th 1070 (5th Cir. 2022) (§3B1.1)

*U.S. v. Lara*, 23 F.4th 459 (5th Cir. 2022) (§3B1.4)

*U.S. v. Mora-Carillo*, 80 F.4th 712 (5th Cir. 2022) (§3C1.1)



## Chapter 3 Adjustments (con't)

*U.S. v. Mendoza-Gomez*, 69 F.4th 273 (5th Cir. 2023) (§3C1.1)

*U.S. v. Ajayi*, 64 F.4th 243 (5th Cir. 2023) (§3C1.1)

*U.S. v. Melendez*, 57 F.4th 505 (5th Cir. 2023) (§3C1.2)

*U.S. v. Kelly*, 40 F.4th 276 (5th Cir. 2022) (§3C1.2)

## Categorical Approach

### ACCA

*U.S. v. Kerstetter*, -F.4th-, 2023 WL 6210601 (5th Cir. Sept. 25, 2023)

*U.S. v. Alkequani*, 78 F.4th 203 (5th Cir. 2023)

*U.S. v. Powell*, 78 F.4th 203 (5th Cir. 2023)

*U.S. v. Sosebee*, 59 F.4th 151 (5th Cir. 2023)

*U.S. v. Thompson*, 54 F.4th 49 (5th Cir. 2022)

*U.S. v. Clark*, 49 F.4th 889 (5th Cir. 2022)

*U.S. v. Valencia*, 66 F.4th 1032 (5th Cir. 2023)

*U.S. v. Jackson*, 30 F.4th 269 (5th Cir. 2022)

*U.S. v. Garrett*, 24 F.4th 485 (5th Cir. 2022)

### Career Offender (§4B1.2)

*U.S. v. Vargas*, 74 F.4th 673 (5th Cir. 2023)

*U.S. v. Kelly*, 40 F.4th 276 (5th Cir. 2022)

*U.S. v. Garner*, 28 F.4th 678 (5th Cir. 2022)

*U.S. v. Bates*, 24 F.4th 1017 (5th Cir. 2022)

### Other definitions

*U.S. v. Hill*, 63 F.4th 335 (5th Cir. 2023) (18 U.S.C. § 924(c))

*U.S. v. Stoglin*, 34 F.4th 415 (5th Cir. 2022) (18 U.S.C. § 3559)

*U.S. v. Rodriguez-Flores*, 25 F.4th 385 (5th Cir. 2022) (8 U.S.C. § 1326)

## Above Guideline Sentences

*U.S. v. Jones*, 75 F.4th 502 (5th Cir. 2023)

*U.S. v. Cortez-Balderas*, 74 F.4th 786 (5th Cir. 2023)

*U.S. v. Hammond*, 24 F.4th 1011 (5th Cir. 2022)

## Restitution

*U.S. v. Shah*, -F.4th-, 2023 WL 6385685 (5th Cir. Oct. 2, 2023)

*U.S. v. Bopp*, 79 F.4th 567 (5th Cir. 2023)

*U.S. v. Teijeiro*, 79 F.4th 387 (5th Cir. 2023)

*U.S. v. Richardson*, 67 F.4th 268 (5th Cir. 2023)



## Restitution (con't)

*U.S. v. Sepublveda*, 64 F.4th 700 (5th Cir. 2023)

*U.S. v. Alfred*, 60 F.4th 979 (5th Cir. 2023)

*U.S. v. Hagen*, 60 F.4th 932 (5th Cir. 2023)

*U.S. v. Davis*, 53 F.4th 833 (5th Cir. 2022)

*U.S. v. Tarnawa*, 26 F.4th 720 (5th Cir. 2022)

*U.S. v. Swenson*, 25 F.4th 309 (5th Cir. 2022)

## Supervised Release Conditions

*U.S. v. Pelayo-Zamarripa*, 81 F.4th 456 (5th Cir. 2023)

*U.S. v. Reyna*, 80 F.4th 628 (5th Cir. 2023)

*U.S. v. Caillier*, 80 F.4th 564 (5th Cir. 2023)

*U.S. v. Baez-Adriano*, 74 F.4th 292 (5th Cir. 2023)

*U.S. v. Villaneuva-Cardenas*, 59 F.4th 759 (5th Cir. 2023)

*U.S. v. Prado*, 53 F.4th 316 (5th Cir. 2022)

*U.S. v. Martinez*, 47 F.4th 364 (5th Cir. 2022)

*U.S. v. Pinon-Saldana*, 44 F.4th 264 (5th Cir. 2022)

*U.S. v. Badillo*, 36 F.4th 660 (5th Cir. 2022)

*U.S. v. Meija-Banegas*, 32 F.4th 450 (5th Cir. 2022)

*U.S. v. Perez-Espinoza*, 31 F.4th 988 (5th Cir. 2022)

*U.S. v. Aguilar-Cerda*, 27 F.4th 1093 (5th Cir. 2022)

## Supervised Release Revocations

*U.S. v. Greer*, 59 F.4th 158 (5th Cir. 2023)

*U.S. v. Porter*, 43 F.4th 467 (5th Cir. 2022)

## Miscellaneous Issues

*U.S. v. Scott*, 70 F.4th 846 (5th Cir. 2023) (Harmless error)


*U.S. v. Sansbury*, 66 F.4th 612 (5th Cir. 2023) (Robbery)

*U.S. v. Hill*, 63 F.4th 335 (5th Cir. 2023) (Harmless error)

*U.S. v. Meredith*, 52 F.4th 984 (5th Cir. 2022) (Appeal waiver)

*U.S. v. Hernandez*, 48 F.4th 367 (5th Cir. 2022) (New evidence)





Eastern District of Texas

## Federal Sentencing Update

October 26, 2023

This document is produced and disseminated at U.S. taxpayer expense.

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### Topics

- 2023 Amendments
- Supreme Court and Fifth Circuit Case Law



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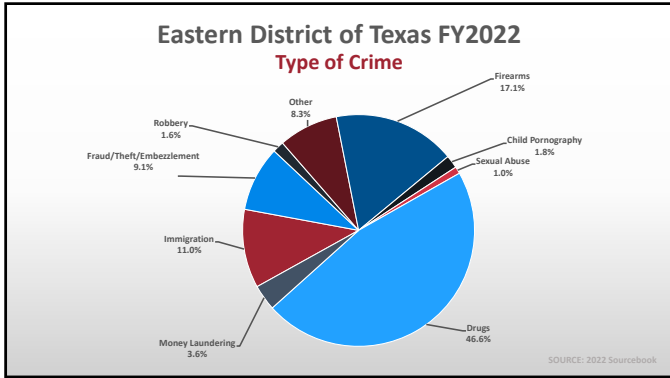
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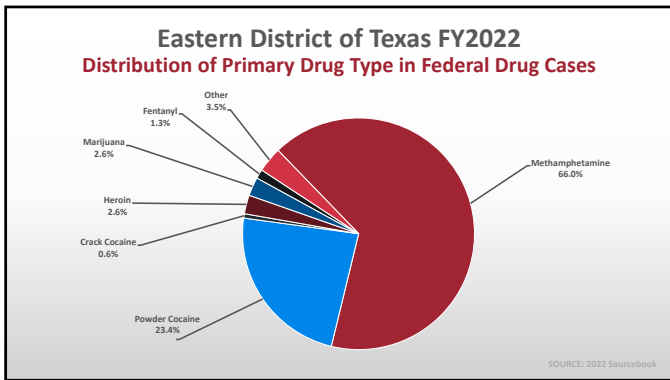
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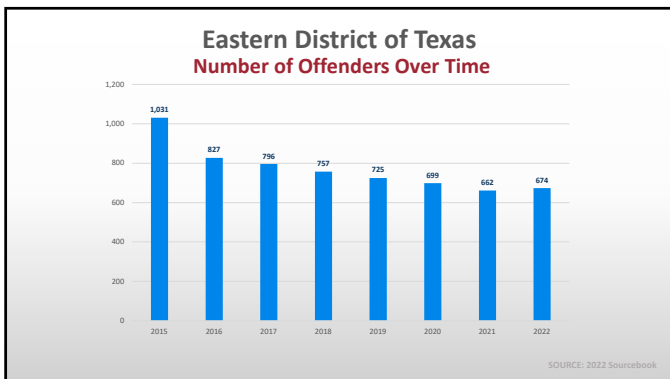
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### 2023 Amendments

- Public Comment *Over 10,000 received*
- Four days of hearings *62 witnesses*
- Advisory Group Input *Meetings with experts*

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### 2023 Amendments

- Criminal History
- Compassionate Release
- First Step Act Safety Valve
- Career Offender
- Firearms
- Circuit Conflict
- Fake Pills

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### Criminal History Amendments

- Status Points
- Zero-Point Offenders
- Marijuana Convictions

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### Why did the Commission Act on Criminal History?

“Status points” do not improve predictive value of criminal history score

Recidivism studies show “zero-point offenders are less likely to be arrested than even “one-point offenders”



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### Criminal History Amendments

**1** Status Points

Numeric Redesignation

7 or More Points Required

Add 1 Point, Not 2 Points



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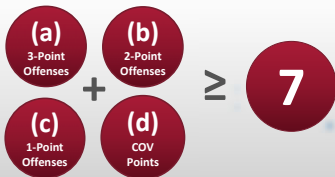
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### Status Points

Proposed § 41A(d)(e)

- (e) Add 1 point if the defendant...
  - (1) receives 7 or more points under subsections (a) through (d), AND
  - (2) committed the instant offense while under any criminal justice sentence ...



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### Criminal History Amendments

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Zero-Point Offenders

Two-Level Decrease

Sentences Other Than Incarceration




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### Adjustment for Certain Zero-Point Offenders

Promulgated §4C1.1(a)

Two-Level Decrease If . . .

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No Criminal History Points

§4C1.1(a)(1)

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No Offense Exclusions

§4C1.1(a)(2)–(10)




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### Conviction-Based Exclusions

Promulgated §§4C1.1(a)(5), (8)–(9)

Conviction-Based

Sex Offense

Individual Rights | §2H1.1

Serious Human Rights Violation | §3A1.5




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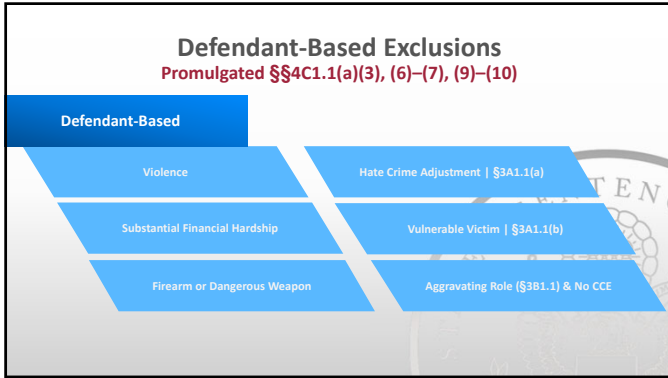
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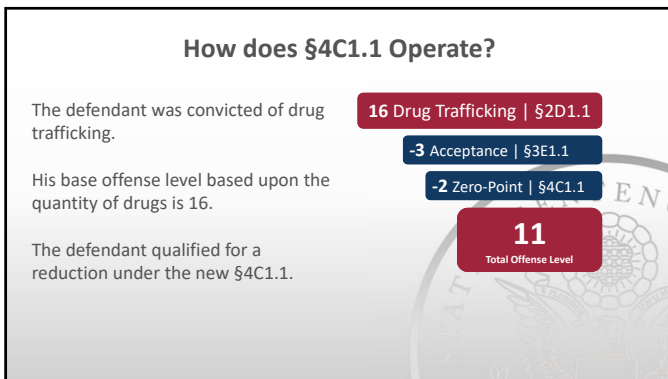
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**Assuming no other exclusions, does the defendant qualify for a reduction under the new §4C1.1?**

The defendant has zero criminal history points but received a 2-level increase under §2D1.1(b)(1) because a firearm was possessed.

- A. No
- B. Yes
- C. Maybe




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Tanya McQuoid has three prior convictions for drug trafficking. She was released from incarceration on all three offenses 16 years before her instant offense began.

Assuming no offense exclusions, does Ms. McQuoid qualify for a reduction under the new §4C1.1?

- A. No
- B. Yes




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**Implementation of 28 U.S.C. § 994(j)**

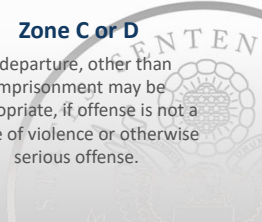
If defendant **qualifies under §4C1.1:**

**Zone A or B**

a sentence other than imprisonment is generally appropriate.

**Zone C or D**

a departure, other than imprisonment may be appropriate, if offense is not a crime of violence or otherwise serious offense.




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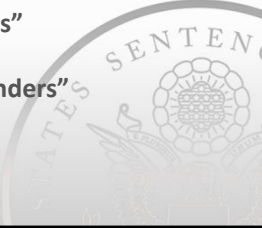
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**Retroactivity of  
"Status Points"  
and  
"Zero-Point Offenders"**



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**18 U.S.C. § 3582(c)(2)**

"In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has **subsequently been lowered by the Sentencing Commission** pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion..."



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**18 U.S.C. § 3582(c)(2)**

"**The court may** reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a **reduction is consistent with applicable policy statements issued by the Sentencing Commission.**"



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### §1B1.10 (Reduction in Term of Imprisonment)

“Status points” and “Zero-Point Offenders” added to the list at §1B1.10.

#### Delayed Implementation

The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court’s order is February 1, 2024, or later.

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### §1B1.10 | 3-Step Process

1. Determine if defendant is eligible for a reduction.
2. Determine extent of reduction allowed.
3. Consider factors to determine, if and to what extent, a reduction is warranted.

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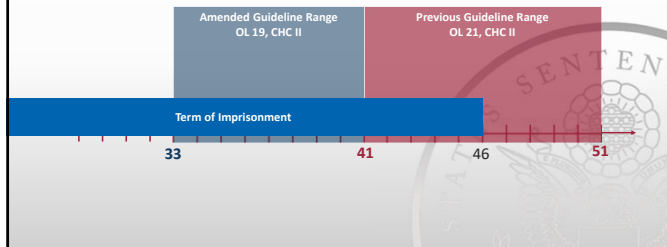
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### Example of *General Limitation*: Previous Sentence *Within Range*

§1B1.10(b)(1) & (2)(A) & App. Note 3



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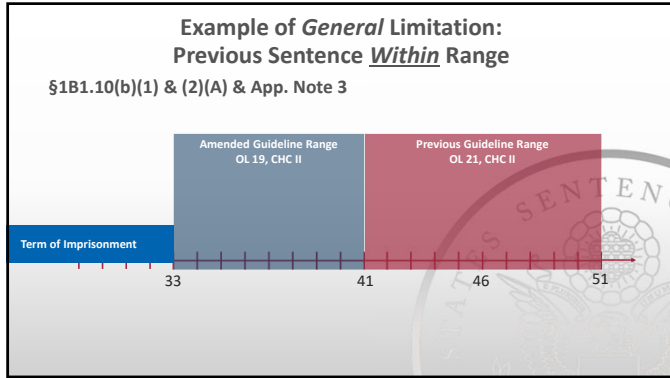
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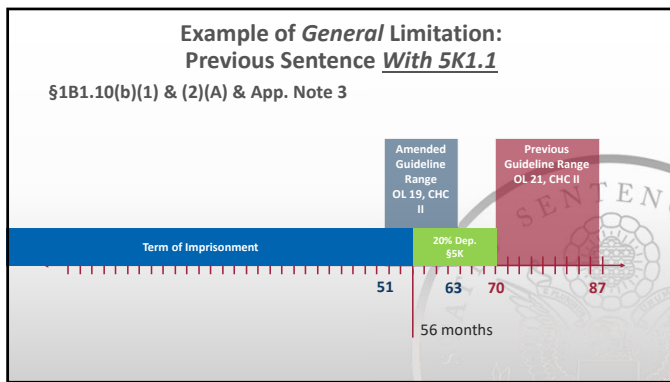
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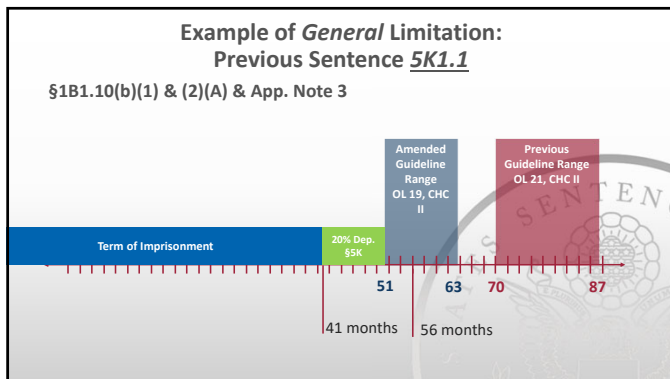
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**“I got status points, why am I not eligible?”**

- Change to the individual’s criminal history score did not change the Criminal History Category
- CHC determined by another guideline (e.g., §4B1.2)
- Current sentence is below the new guideline range and no §5K1.1 departure
- Individual was sentenced to the mandatory minimum sentence

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***Dillon v. U.S.***  
**560 U.S. 817 (2010)**

**The Nature of 18 U.S.C. § 3582(c)(2)**

Given the limited scope and purpose of hearings under § 3582(c)(2), the interests identified in *Booker* are not implicated.

Courts are bound by policy statement §1B1.10

- “18 U.S.C. § 3582(c)(2) does not authorize a resentencing. Instead it permits a sentence reduction within the narrow bounds established by the U.S. Sentencing Commission.”

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**Reduction in  
Sentencing/Compassionate  
Release**

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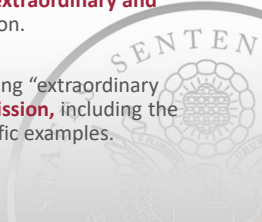
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### Reduction in Sentencings

Section 3582(c)(1)(A) authorized a court, upon motion of the **Director of the Bureau of Prisons**, to reduce a defendant's term of imprisonment if **"extraordinary and compelling reasons"** warrant a reduction.

Congress delegated the task of describing "extraordinary and compelling reasons" **to the Commission**, including the criteria to be applied and a list of specific examples.



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### Key Changes to §1B1.13

- 1 Applies to Defendant-Filed Motions
- 2 Moves Commentary to Guidelines
- 3 Revises and Expands E&C
- 4 Adds New Commentary



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### Defendant-Filed Motions

~~Original § 1B1.13(a)~~  
**Proposed § 1B1.13(a)**

(a) In General -

Upon motion of the Director of the Bureau of Prisons

**on the defendant's motion** § 3582(c)(1)(A) . . .



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### Key Changes to §1B1.13

**2** Moves Commentary to Guidelines

Extraordinary and Compelling Reasons

- App. Note 1(A) (Medical Condition) → §1B1.13(b)(1)
- App. Note 1(B) (Age of Defendant) → §1B1.13(b)(2)
- App. Note 1(C) (Family Circumstances) → §1B1.13(b)(3)
- App. Note 1(D) (Other Reasons) → §1B1.13(b)(5)

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### Key Changes to §1B1.13

**2** Moves Commentary to Guidelines

Rehabilitation

App. Note 3 → §1B1.13(d)

Other Factors + Rehabilitation

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### Key Changes to §1B1.13

**3** Revises and Expands E & C

- Medical Circumstances
- Family Circumstances
- Victims of Abuse
- Catchall
- Unusually Long Sentences

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**Inadequate Medical Care**  
Promulgated §1B1.13(b)(1)(C)

1 Long-Term or Specialized Medical Care

2 Not Being Provided

3 Serious Deterioration in Health or Death

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**Health Emergencies**  
Promulgated §1B1.13(b)(1)(D)

1 Infectious Disease or Public Health Emergency

2 Severe Medical Complications or Death

3 Inadequate Mitigation

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**Key Changes to §1B1.13**

- Family Circumstances
- Children Incapable of Self-Care
- Incapacitated Parents
- Catchall for Family Circumstances

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**Victims of Abuse**  
Promulgated §1B1.13(b)(4)

Sexual Abuse Involving a Sexual Act  
OR  
Physical Abuse Resulting in Serious Bodily Injury



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**Victims of Abuse: Prior Findings**  
Promulgated §1B1.13(b)(4)



Criminal Conviction  
Civil Case  
or  
Administrative Proceeding

Exception above if undue delay

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**Catchall**  
Promulgated §1B1.13(b)(5)

Other Circumstance  
Combination of Other Circumstances

Similar in gravity to...

Medical    Age    Family    Abuse

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### Key Changes to §1B1.13

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Revises and Expands E & C

Unusually Long Sentences




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### Changes in Law Promulgated §§1B.13(b)(6), (c)

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Changes in Law

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Otherwise E & C

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§ 3553(a) Factors

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Unusually Long Sentences

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Otherwise E & C

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§ 3553(a) Factors




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### Circuit Split: Changes in Law

May Not Consider	May Consider
<i>United States v. Andrews</i> , 12 F.4th 255 (3d Cir. 2021)	<i>United States v. Ruvalcaba</i> , 26 F.4th 14 (1st Cir. 2022)
<i>United States v. McMoryion</i> , 2023 WL 4118015 (5th Cir. 2023) (not reported)	<i>United States McCoy</i> , 981 F.3d 271 (4th Cir. 2020)
<i>United States v. McCall</i> , 56 F.4th 1048 (6th Cir. 2022)	<i>United States v. Chen</i> , 48 F.4th 1092 (9th Cir. 2022)
<i>United States v. King</i> , 40 F.4th 594 (7th Cir. 2022)	<i>United States v. McGee</i> , 992 F.3d 1035 (10th Cir. 2021)
<i>United States v. Crandall</i> , 25 F.4th 582 (8th Cir. 2022)	
<i>United States v. Jenkins</i> , 50 F.4th 1185 (D.C. Cir. 2022)	

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48

**Unusually Long Sentences**  
Promulgated §1B1.13(b)(6)

The infographic consists of four red rectangular boxes arranged horizontally, each with a white circle containing a number above it. The boxes are connected by a faint line. The background features a watermark of the United States Sentences Commission seal.

- 1 Unusually Long Sentence
- 2 Ten Years Served
- 3 Change in Law Creates Gross Disparity
- 4 Individualized Circumstances

49

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***United States v. Escajeda***  
**58 F.4th 184 (5th Cir. 2023)**

A prisoner cannot use § 3582(c) to challenge the legality or the duration of his sentence under compassionate release motion

Because the defendant's claims would have been cognizable under § 2255, they are not cognizable under § 3582(c)

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***United States v Stanford***  
**79 F.4th 461 (5th Cir. 2023)**

Remand for the court to explain the reasons for denying compassionate release motion

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**First Step Act – Drug Offenses**

**Safety Valve**

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52

**Statutory Safety Valve**  
18 U.S.C. § 3553(f)

**First Step Act (Section 402)** Expanded Criminal History Eligibility

Defendant does not have:

- +4 Criminal History Points\*
- +3 Point Offense
- &
- +2 Point Violent Offense

\*excluding any criminal history points resulting from a 1-point offense

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53

John Jones was convicted of 21 U.S.C. § 841 and is being sentenced on November 3, 2023. Mr. Jones has five prior 2-point drug trafficking convictions for a total of 10 criminal history points

Is Mr. Jones currently excluded from relief under the safety valve in the Fifth Circuit?

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54

### Circuit Split: Statutory Safety Valve

<div style="background-color: #800000; color: white; padding: 5px; text-align: center; font-weight: bold;">Disjunctive (And = Or)</div> <ul style="list-style-type: none"> <li><small><i>United States v. Palomares</i>, 52 F.4th 640 (5th Cir. 2022)</small></li> <li><small><i>United States v. Haynes</i>, 55 F.4th 1075 (6th Cir. 2022)</small></li> <li><small><i>United States v. Pace</i>, 48 F.4th 741 (7th Cir. 2022)</small></li> <li style="border: 2px solid orange; padding: 2px;"><small><i>United States v. Pulsifer</i>, 39 F.4th 1018 (8th Cir. 2022)</small></li> </ul>	<div style="background-color: #000080; color: white; padding: 5px; text-align: center; font-weight: bold;">Conjunctive (And = And)</div> <ul style="list-style-type: none"> <li><small><i>United States v. Jones</i>, 60 F.4th 230 (4th Cir. 2023)</small></li> <li><small><i>United States v. Lopez</i>, 998 F.3d 431 (9th Cir. 2021)</small></li> <li><small><i>United States v. Garcon</i>, 54 F.4th 1274 (11th Cir. 2022)</small></li> </ul>
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→ Supreme Court granted certiorari in this case.

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55

### *Pulsipher v. United States*

**Question Presented:**

Whether a defendant satisfies the criteria in 18 U.S.C. § 3553(f)(1) as amended by the First Step Act of 2018 in order to qualify for the federal drug-sentencing “safety valve” provision so long as he does not have (a) more than four criminal history points, (b) a three-point offense, and (c) a two-point offense, or whether the defendant satisfies the criteria so long as he does not have (a), (b), or (c).

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56

### Safety Valve Reduction: Drug Trafficking

**§2D1.1(b)(18)**

2-level reduction

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Defendant Satisfies §5C1.2

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57

### Career Offender Amendments

- 1 Moves Commentary to Guidelines
- 2 Robbery Definition



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### Career Offender Amendments

- 1 Moves Commentary to Guidelines
  - \* App. Note 1 (Inchoate Offenses) → §4B1.2(c)
  - App. Note 1 (Forcible Sex Offense) → §4B1.2(e)(1)
  - App. Note 1 (Extortion) → §4B1.2(e)(2)

\* Resolves Circuit Split



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### Circuit Split: Application Note 1

<p style="text-align: center; font-weight: bold;">Held Invalid</p> <p><i>United States v. Nasir</i>, 982 F.3d 144 (3d Cir. 2020)</p> <p><i>United States v. Campbell</i>, 22 F.4th 438 (4th Cir. 2022)</p> <p><i>United States v. Havis</i>, 927 F.3d 382 (6th Cir. 2019)</p> <p><i>United States v. Castillo</i>, 69 F.4th 648 (9th Cir. 2023)</p> <p><i>United States v. Dupree</i>, 57 F.4th 1269 (11th Cir. 2023)</p> <p><i>United States v. Winstead</i>, 890 F.3d 1082 (D.C. Cir. 2018)</p>	<p style="text-align: center; font-weight: bold;">Held Valid</p> <p><i>United States v. Lewis</i>, 963 F.3d 16 (1st Cir. 2020)</p> <p><i>United States v. Tabb</i>, 949 F.3d 81 (2d Cir. 2020)</p> <p><i>United States v. Vargas</i>, 74 F.4th 673 (5th Cir. 2023)</p> <p><i>United States v. Smith</i>, 989 F.3d 575 (7th Cir. 2021)</p> <p><i>United States v. Maloid</i>, 71 F.4th 795, 813 (10th Cir. 2023)</p>
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### Career Offender Amendments

2 **Robbery Definition | §4B1.2(e)(3)**

“‘Robbery’ is the unlawful taking or obtaining of personal property from the person . . . by means of actual or threatened force . . . to his person **or property** . . .”

**Hobbs Act Robbery – Crime of Violence** ✔

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61

### Firearm Amendments

1 **Straw Purchasing and Trafficking Offenses**

2 **Ghost Guns**

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62

### Specific Offense Characteristic: Straw Purchasing or Trafficking Promulgated §2K2.1(b)(5)

**Apply the Greatest**

+2
§§ 933(a)(2), (a)(3) Convictions

+2
Straw Purchasing & Trafficking Conduct

+5
Multiple Firearms + Particular Individuals

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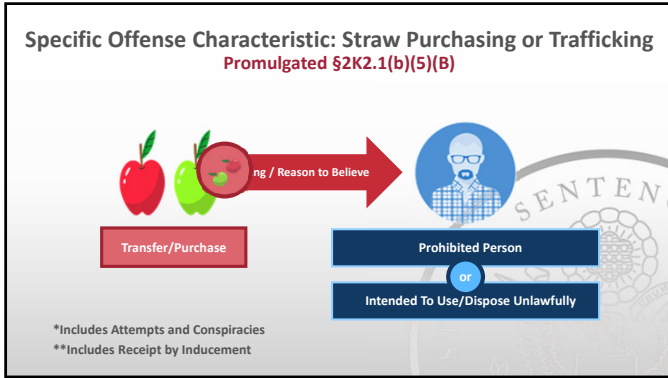
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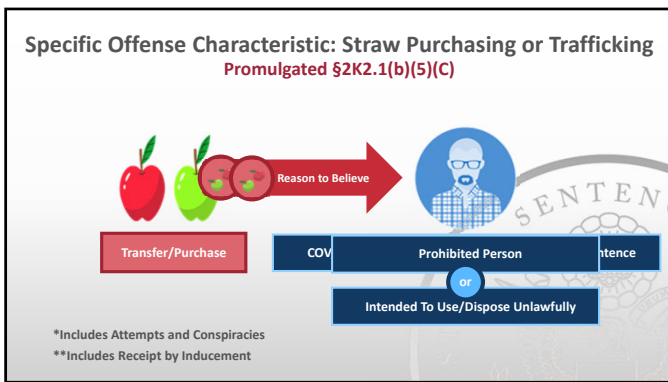
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**Trafficking/Straw Purchasing: Mitigating Circumstances**  
 Promulgated §2K2.1(b)(9)

**A** If §2K2.1(b)(5) applies

**B** 1 or fewer criminal history points

**C** **i** Familial Relationship Threats/Fear  
**&** **ii** vulnerable to persuasion due to mental or physical condition  
**OR**  
**&** Otherwise Unlikely

**-2**

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**Ex Post Facto Clause**  
 Section 1B1.11(b)(1) & App. Note 2 (pp. 44-45)

Use guidelines in effect on date of sentencing UNLESS . . .

crime was committed before new guidelines take effect **AND** new guideline punishments are higher than previous versions.

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**Firearm Amendments**

**2** Ghost Guns

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**United States v. Sharp**  
**62 F.4th 951 (5th Cir. 2023)**

The four-level enhancement at §2K2.1(b)(4)(B) “does not apply when there is no evidence that [a] firearm ever had a serial number.” “The text of §2K2.1(b)(4)(B) is clear that it only applies when the firearm ‘had an altered or obliterated serial number,’” and “something cannot be ‘altered or obliterated’ if it never existed in the first place.

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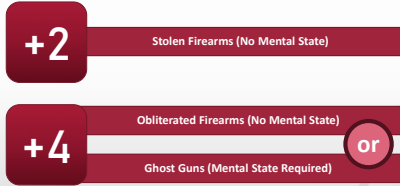
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**Specific Offense Characteristic: Ghost Guns**

**Current §2K2.1(b)(4) & App. Note 8(B) (pp. 252, 255)**  
**Promulgated §2K2.1(b)(4)**



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**Acceptance of Responsibility**  
**§3E1.1 (p. 376)**



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### Circuit Split: Suppression Motion

<div style="background-color: #800000; color: white; padding: 5px; text-align: center; font-weight: bold;">May Withhold §3E1.1(b)</div> <ul style="list-style-type: none"> <li><i>United States v. Drennon</i>, 516 F.3d 160 (3d Cir. 2008)</li> <li style="border: 1px solid yellow; padding: 2px;"><i>United States v. Langoria</i>, 958 F.3d 372 (5th Cir. 2020)</li> <li><i>United States v. Collins</i>, 683 F.3d 697 (6th Cir. 2012)</li> </ul>	<div style="background-color: #000080; color: white; padding: 5px; text-align: center; font-weight: bold;">May Not Withhold §3E1.1(b)</div> <ul style="list-style-type: none"> <li><i>United States v. Marroquin</i>, 136 F.3d 220 (1st Cir. 1998)</li> <li><i>United States v. Vargas</i>, 961 F.3d 566 (2d Cir. 2020)</li> <li><i>United States v. Kimple</i>, 27 F.3d 1409 (9th Cir. 1994)</li> <li><i>United States v. Marquez</i>, 337 F.3d 1203 (10th Cir. 2003)</li> <li><i>United States v. Price</i>, 409 F.3d 436 (D.C. Cir. 2005)</li> </ul>
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### Circuit Split: Sentencing Factors

<div style="background-color: #800000; color: white; padding: 5px; text-align: center; font-weight: bold;">May Withhold §3E1.1(b)</div> <ul style="list-style-type: none"> <li><i>United States v. Beatty</i>, 538 F.3d 8 (1st Cir. 2008)</li> <li><i>United States v. Adair</i>, 38 F.4th 341 (3d Cir. 2022)</li> <li><i>United States v. Jordan</i>, 877 F.3d 391 (8th Cir. 2017)</li> <li><i>United States v. Sainz-Preciado</i>, 566 F.3d 708 (7th Cir. 2009)</li> </ul>	<div style="background-color: #000080; color: white; padding: 5px; text-align: center; font-weight: bold;">May Not Withhold §3E1.1(b)</div> <ul style="list-style-type: none"> <li><i>United States v. Lee</i>, 653 F.3d 170 (2d Cir. 2011)</li> <li style="border: 1px solid yellow; padding: 2px;"><i>United States v. Castillo</i>, 779 F.3d 318 (5th Cir. 2015)</li> </ul>
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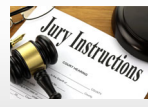

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### Timely Notification Promulgated §3E1.1(b)

Preparing for trial ordinarily indicated by actions close to trial, such as:

 Preparing Witnesses for Trial	 Preparing Jury Instructions	 Witness and Exhibit Lists
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**Timely Notification**  
Promulgated §3E1.1(b)

Preparing for trial is **NOT**:



Pretrial Proceedings



Post-Conviction Matters

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**Fentanyl and Fentanyl Analogue Enhancements**  
Promulgated by §2D1.1(b)(1)(A)(3)

+4

The defendant...

- knowingly misrepresented / knowingly marketed

+2

The defendant...

- represented or marketed as a legitimately manufactured drug; AND
- acted with willful blindness / conscious avoidance of knowledge

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Fifth Circuit and Supreme Court Case Law

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### Wooden v. United States

142 S. Ct. 1063 (2022)



**Holding:**  
Offenses arising from a single criminal episode do not occur on different occasions.

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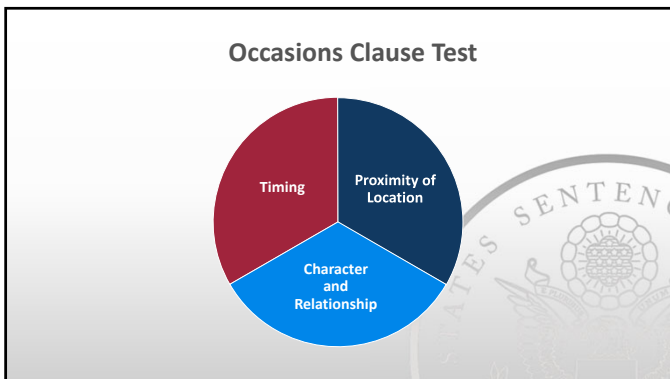
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### Occasions Clause: Judge or Jury?

#### Judge Decides

*United States v. Brown*, 67 F.4th 200 (4th Cir. 2023)

*United States v. Valencia*, 66 F.4th 1032 (5th Cir. 2023)

*United States v. Belcher*, 40 F.4th 430 (6th Cir. 2022)

*United States v. Hatley*, 61 F.4th 536 (7th Cir. 2023) (plain error)

*United States v. Reed*, 39 F.4th 1285 (10th Cir. 2022)

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82

### *United States v. Alkheqani* 78 F.4th 707 (5th Cir. 2023)

The district court erred in relying on the PSR alone to determine if the prior offenses occurred on occasions different from one another.

The court needs to examine *Shepard* documents.

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83

### Armed Career Criminal Act 18 U.S.C. § 924(e)



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84



### What Is a Violent Felony?

**18 U.S.C. § 924(e)(2)(B)**

The term “**violent felony**” means any crime punishable by imprisonment for a term exceeding one year . . .

<b>Force Clause</b>	has as an element the use, attempted use, or threatened use of physical force against the person of another
<b>Enumerated Clause</b>	is burglary, arson, or extortion, involves use of explosives

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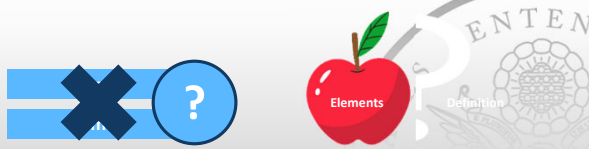
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### What is the Categorical Approach?

A method for determining whether an offense meets a given definition, such as “violent felony” or “serious drug offense.”



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### What Mental State Is Required?



<b>Intentional or Knowing</b>	<input checked="" type="checkbox"/>
<b>Negligence / None</b>	<input type="checkbox"/>
<b>Recklessness</b>	<input type="checkbox"/>

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**United States v. Kelley**

40 F.4th 276 (5th Cir. 2022)

Texas assault on a public servant (22.02(b)(1)) is not a crime of violence under §4B1.2 because the indivisible offense can be committed recklessly.



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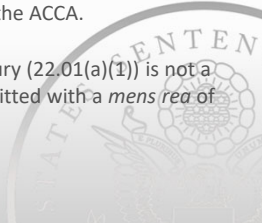
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**United States v. Clark**

49 F.4th 889 (5th Cir. 2022)

Texas Aggravated assault by threat of bodily injury (22.01(a)(2)) is a violent felony under the ACCA.

Texas Aggravated assault by bodily injury (22.01(a)(1)) is not a violent felony because it can be committed with a *mens rea* of recklessness.



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**What does physical force mean generally?**

Requires a **substantial** degree of force.



Physical Pain or Injury



De Minimis Force?



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**United States v. Sosebee**  
59 F.4th 151 (5th Cir. 2023)

Texas robbery by threat is a violent felony, while Texas robbery by injury is not a violent felony.

See also, *U.S. v. Garrett*, 24 F.4th 485 (5th Cir. 2022) and *U.S. v. Powell*, 78 F.4th 203 (5th Cir. 2023).

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**United States v. Hill**  
63 F.4th 335 (5th Cir. 2023)

Aiding and abetting Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c).

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**Selected Cases**

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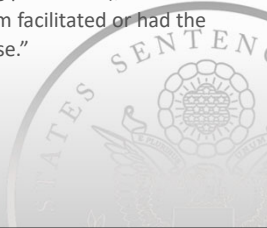
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**United States v. Choulat,**  
**75 F.4th 489 (5th Cir. 2023)**

“For most felonies (including basic drug possession), the government must show that the firearm facilitated or had the potential of facilitating the other offense.”



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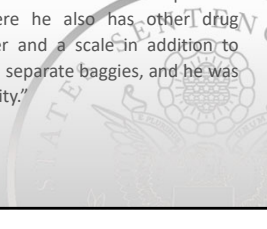
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**United States v. Choulat,**  
**75 F.4th 489 (5th Cir. 2023)**

“Although Choulat was carrying only a small quantity of drugs, small amounts can still be trafficked. The inference that an individual plans to distribute his drugs is strengthened where he also has other drug paraphernalia. Choulat possessed a grinder and a scale in addition to drugs. He also had multiple kinds of drugs in separate baggies, and he was stopped in an area known for narcotics activity.”



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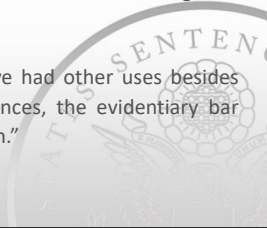
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**United States v. Ajayi**  
**64 F.4th 243 (5th Cir. 2023)**

Section 2D1.1(b)(12) applied to a defendant who sold drugs out of his pharmacy.

“While the pharmacy itself might have had other uses besides illegally distributing controlled substances, the evidentiary bar for a premises enhancement is not high.”



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**United States v. Sadeek**

**77 F.4th 320 (5th Cir. 2023)**

Cross reference at §2G1.3 to §2A3.1 (Aggravated Sexual Abuse) applied because the defendant raped the victim multiple times and physically prevented her from leaving

§4B1.5 pattern of activity can apply if the sexual assaults constitute "separate occasions" even if on the same day. Here, the assaults occurred on separate days

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97

**United States v. Butler**

**65 F.4th 199 (5th Cir. 2023)**

The 2-level increase at §2G2.1(b)(2) for the commission of a sex act can apply based on masturbation only.

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98

**United States v. Moore**

**71 F.4th 392 (5th Cir. 2023)**

Section 18 U.S.C. § 2251(e)'s use of the phrase "relating to the sexual exploitation of children" refers to any criminal sexual conduct involving children.

Texas indecency with a child qualifies as a prior conviction relating to the sexual exploitation of children.

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99

**United States v. Grzwinski**

57 F.4th 237 (5th Cir. 2023)

Texas aggravated sexual assault of a minor is a prior sex offense conviction under 18 U.S.C. § 2251(e).

See also *U.S. v. Northington*, 77 F.4th 331 (5th Cir. 2023) (MS unlawful touching)



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100

**United States v. Melendez**

57 F.4th 505 (5th Cir. 2023)

Section 3C1.2 can apply to a defendant who threw methamphetamine out of the window while being chased by police.



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101

**Restitution Cases**



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102

**United States v. Shah**  
**-F.4th-, 2023 WL 6385685 (5th Cir. Oct. 2, 2023)**

The categorical approach does not apply to MVRA.

Court can look to facts and circumstances of the case to determine if the offense is an "offense against property"

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**United States v. Bopp**  
**79 F.4th 567 (5th Cir. 2023)**

Restitution is not limited to only the victims who appeared in the four images specified in the indictment for a defendant convicted of possession of child pornography

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**United States v. Richardson**  
**67 F.4th 268 (5th Cir. 2023)**

A corporation can be a victim under the MVRA.

Court should have used \$3500 rather than \$4,000 as amount of lost earnings in determining restitution.

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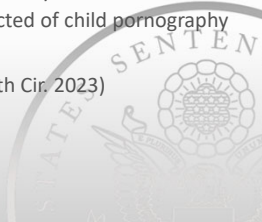
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**United States v. Alfred**  
**60 F.4th 979 (5th Cir. 2023)**

The district court conducted a *Paroline* analysis for the restitution order for a defendant convicted of child pornography offenses.

See also *U.S. v. Teijeiro*, 79 F.4th 387 (5th Cir. 2023)



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106

**United States v. Sepulveda**  
**64 F.4th 700 (5th Cir. 2023)**

Restitution can include the victim's loss income from not being able to work after a sexual assault.



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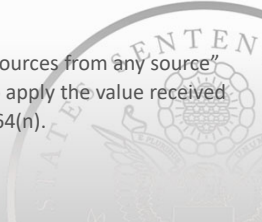
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107

**United States v. Stark**  
**56 F.4th 1039 (5th Cir. 2023)**

Entire stimulus payment can be applied to the restitution owed.

If a defendant "receives substantial resources from any source" while still imprisoned, he is required to apply the value received to any restitution under 18 U.S.C. § 3664(n).



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108



**Supervised Release and Revocation**



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***United States v. Villanueva-Cardenas***  
**59 F.4th 759 (5th Cir. 2023)**

A court cannot order a defendant to self-deport as a condition of supervised release.



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***United States v. Martinez***  
**47 F.4th 364 (5th Cir. 2022)**

A court must identify where the standard conditions of supervised release he is imposing is located.



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**United States v. Greer**  
59 F.4th 158 (5th Cir. 2023)

A district court cannot impose multiple terms of imprisonment, concurrent or consecutive, upon revoking a single term of supervised release.



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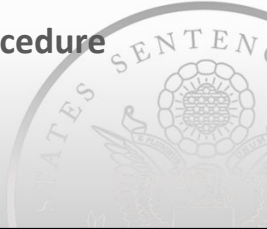
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**Sentencing Procedure**



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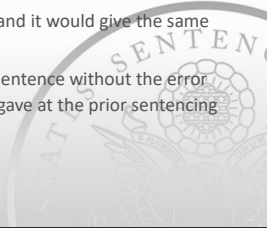
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**United States v. Hill**  
63 F.4th 335 (5th Cir. 2023)

Two methods to show harmless error in sentencing:

1. District court considered both ranges and it would give the same sentence
2. Court would have imposed the same sentence without the error and would be for the same reasons it gave at the prior sentencing



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**Comments**



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