



Federal Sentencing Update
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EXAMPLE: ACCA
Definition for “Violent Felony”
 18 USC § 924(e)(2)(B)

- **....has as an element** the use, attempted use, or threatened use of physical force against the person of another, or
- **is** burglary, arson, or extortion, involves use of explosives, or
- **otherwise involves conduct** that presents a serious potential risk of physical injury to another....



ACCA

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

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



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Issues Related to *Johnson*

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- How does *Johnson* impact cases on direct appeal?
- How does *Johnson* impact other sections of the ACCA?
- How does *Johnson* impact the guidelines? How does *Johnson* impact other statutes?
- How does *Johnson* impact successive § 2255 motions?



Johnson and Direct Appeal

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- *U.S. v. Peoples*, 2015 WL 4932217 (5th Cir. 2015)
- *U.S. v. Holder*, 2015 WL 5091208 (6th Cir. 2015)
- *U.S. v. Langston*, 2015 WL 5236093 (8th Cir. 2015)
- *U.S. v. Brown*, 795 F.3d 924 (8th Cir. 2015)
- *U.S. v. Snyder*, 793 F.3d 1241 (10th Cir. 2015)



Johnson and the Residual Clause

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U.S. v. Snyder, 793 F.3d 1241 (10th Cir. 2015)

- “Given this holding, we conclude that the district court violated Snyder’s due process rights when it sentenced him under the ACCA based on an application of the Act’s residual clause.”



Johnson and Other Sections of the ACCA

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- *U.S. v. Taylor*, 2015 WL 5011012 (6th Cir. 2015)
- “Accordingly, the Supreme Court’s holding in *Johnson* leaves unaffected this Court’s determination that simple robbery in Tennessee is a predicate offense under “the use of physical force” clause.”



ACCA Enumerated Offenses ⁹

- *U.S. v. Taylor*, 2015 WL 5011012 (6th Cir. 2015)
 - *U.S. v. Bailey*, 2015 WL 4257103 (6th Cir. 2015)
 - *U.S. v. Ker Yang*, 2015 WL 4978999 (7th Cir. 2015)
 - *U.S. v. Turner*, 2015 WL 4978692 (10th Cir. 2015)
 - *U.S. v. Hill*, 2015 WL 5023791 (11th Cir. 2015)
 - *U.S. v. Tinker*, 2015 WL 4430678 (11th Cir. 2015)
 - *U.S. v. Murray*, 2015 WL 5165998 (11th Cir. 2015)
- 

Guidelines that might be impacted by *Johnson* ¹⁰

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

Career Offender Guideline Definition for “Crime of Violence” ¹¹

§4B1.2(a)

- **has as an element** the use, attempted use, or threatened use of physical force against the person of another, or
 - **is** burglary of a dwelling, arson, or extortion, involves use of explosives, or
 - **otherwise involves conduct** that presents a serious potential risk of physical injury to another
- 

Johnson and Career Offender ¹²

- *U.S. v. Harbin*, 610 F. App'x 562 (6th Cir. 2015)
 - “Accordingly, Harbin is entitled to the same relief as offenders sentenced under the residual clause of the ACCA.”
 - *U.S. v. Matchett*, 2015 WL 5515439 (11th Cir. 2015)
 - “We reject Matchett’s argument that the definition of “crime of violence” in the Sentencing Guidelines is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The vagueness doctrine applies only to laws that prohibit conduct and fix punishments, not advisory guidelines. We affirm.”
- 

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Johnson and the Guidelines

- *U.S. v. Castro-Vazquez*, 2015 WL 5172839 (1st Cir. 2015)
- *U.S. v. Wilson*, 2015 WL 4760494 (5th Cir. 2015)
- *U.S. v. Collins*, 2015 WL 4997453 (6th Cir. 2015)
- *U.S. v. Ozier*, 796 F.3d 597 (6th Cir. 2015)
- *U.S. v. Willis*, 795 F.3d 986 (9th Cir. 2015)



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Johnson and Other Guidelines

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

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



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Impact of *Johnson* on Successive § 2255 Motions



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“*Habeas*”

- *Price v. U.S.*, 2015 WL 4621024 (7th Cir. 2015)
 - The court held that the Supreme Court’s invalidation of the residual clause of the Armed Career Criminal Act in *Johnson v. United States* was a new substantive rule of constitutional law, and was thus retroactive for purposes of collateral review under 28 U.S.C. § 2255
- *In re: Gilberto Rivero*, 2015 WL 4747749 (11th Cir. 2015)
 - *Johnson* did not establish a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Thus, the circuit denied the prisoner’s request to file a successive 28 U.S.C. § 2255 petition



“Habeas”

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- *In re Gieswein*, 2015 WL 5534388 (10th Cir. 2015)
 - “Therefore, we hold that *Johnson* announced a new rule of constitutional law.”
 - “The Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review. Therefore, *Gieswein’s* motion does not “satisf[y] the stringent requirements for the filing of a second or successive [motion]... Accordingly, we deny *Gieswein’s* motion for authorization to file a second or successive § 2255 motion.”



Restitution in Child Pornography Offenses

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



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Factors to Consider

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1. The number of past criminal defendants found to have contributed to the victim’s general losses;
2. Reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim’s general losses;
3. Any available and reasonably reliable estimate of the broader number of offenders involved;

**Factors to Consider**

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4. Whether the defendant reproduced or distributed images of the victim;
5. Whether the defendant had any connection to the initial production of the images;
6. How many images of the victim the defendant possessed and other facts relevant to the defendant’s relative causal role.”
7. Other facts relevant to defendant’s causal role



Appellate Cases Discussing *Paroline* Factors ²¹

- *U.S. v. Miner*, 2015 WL 5516102 (2d Cir. 2015)
 - Affirmed \$2,000 to “Jblonde” and \$3,065 to Andy
- *U.S. v. Reynolds*, 2015 WL 5315518 (6th Cir. 2015)
 - Affirmed \$11,000 and \$15,500 amounts to two victims
- *U.S. v. Evans*, 2015 WL 5472313 (8th Cir. 2015)
 - Affirmed \$3,250 to Vicky



Appellate Cases Discussing *Paroline* Factors ²²

- *U.S. v. Beckmann*, 786 F.3d 672 (8th Cir. 2015)
 - Court did not err in ordering restitution of \$9,000 (\$3,000 per victim)
- *U.S. v. Dunn*, 777 F.3d 1171 (10th Cir. 2015)
 - Remanding \$583,9555 award to “Vicky”
- *U.S. v. Rogers*, 758 F.3d 37 (1st Cir. 2014)
 - Affirming \$3,150 restitution order for “Vicky”



District Cases Discussing *Paroline* Factors ²³

- *U.S. v. Monge*, 2015 WL 787099 (C.D. CA 2015)
 - District court ordered \$21,000 to 7 victims (\$3,000 each)
- *U.S. v. Randjelovich*, 2015 WL 4095655 (E.D. CA 2015)
 - Court ordered \$4,000 to “Angela” & \$1,000 to “Andy” and \$6,000 to “Sarah”
- *U.S. v. Hite*, 2015 WL 3941513 (D. DC 2015)
 - District court ordered \$16,750 to 5 victims



District Cases Discussing *Paroline* Factors ²⁴

- *U.S. v. Crisostomi*, 31 F. Supp.3d 361 (D. RI 2014)
 - Court ordered \$713.68 to “Vicky” & \$638.41 to “Cindy”
- *U.S. v. Galan*, 2014 WL 3474901 (D. OR 2014)
 - District court ordered \$3,433 in restitution to “Cindy”
- *U.S. v. Hernandez*, 2014 WL 2987665 (E.D. CA 2014)
 - District court ordered \$2,282.86 to “Vicky”





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Proposed Amendments

Effective November 1, 2015,
absent Congressional action to the contrary

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Inflationary Adjustments

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



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Loss Table

§2B1.1(b)(1)

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



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Loss Table (cont.)

§2B1.1(b)(1)

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



Proposed Amendments to §2B1.1

4-Part Amendment

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



Victims Table

§2B1.1(b)(2)

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



Victims Table

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



“Substantial Financial Hardship”

Application Note 4(F)

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



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Retroactivity of Drugs Minus 2



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

- 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***

Amendment 788 to §1B1.10 (Policy Statement)



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Retroactive Application of Drugs Minus Two

	Total	Granted	Denied	Avg. ↓
National	17,446	13,187 (76%)	4,259 (24%)	23 mos.
1 st Circuit	582	443 (76%)	139 (29%)	20 mos.
2 nd Circuit	616	455 (74%)	161 (26%)	22 mos.
3 rd Circuit	570	459 (80%)	111 (20%)	21 mos.
4 th Circuit	2,579	1,945 (75%)	634 (25%)	23 mos.
5 th Circuit	3,313	2,439 (74%)	874 (26%)	21 mos.
6 th Circuit	1,344	867 (65%)	477 (35%)	21 mos.



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Position of Retroactive Application of Drugs Minus Two

	Total	Granted	Denied	Avg. ↓
7 th Circuit	1,175	1,009 (86%)	166 (14%)	30 mos.
8 th Circuit	2,742	1,882 (69%)	860 (31%)	25 mos.
9 th Circuit	1,466	1,301 (89%)	165 (11%)	21 mos.
10 th Circuit	926	772 (83%)	154 (17%)	24 mos.
11 th Circuit	2,088	1,570 (75%)	518 (25%)	26 mos.
DC Circuit	45	45 (100%)	0 (0%)	11 mos.



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New Statement of Reasons Form

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Determination of a Variance

Page 3, Section VI, Part C

C 18 U.S.C. § 3553(a) and other reasons for a variance (Check all that apply)

- The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
- Means Recs Extensive Conduct Dismissed/Uncharged Conduct
- Role in the Offense Victim Impact
- General Acquiescence or Mitigating Factors (Specify)
- The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- Time Served (or would be served) Nature of Offense History of Offense
- Policy/Programs available for treatment (including 18 U.S.C. § 3553(e) options)
- Other (Specify): _____

D State the basis for a variance. (Use Section 102 of Form 100)

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Determination of a Variance

The Nature and Circumstance of the Offense

C 18 U.S.C. § 3553(a) and other reasons for a variance (Check all that apply)

- The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
- Means Recs Extensive Conduct Dismissed/Uncharged Conduct
- Role in the Offense Victim Impact
- General Acquiescence or Mitigating Factors (Specify)
- The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- Time Served (or would be served) Nature of Offense History of Offense
- Policy/Programs available for treatment (including 18 U.S.C. § 3553(e) options)
- Other (Specify): _____

D State the basis for a variance. (Use Section 102 of Form 100)

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Determination of a Variance

The History and Characteristics of the Defendant

C 18 U.S.C. § 3553(a) and other reasons for a variance (Check all that apply)

- General Acquiescence or Mitigating Factors (Specify)
- The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
 - Aberrant Behavior Lack of Youthful Guidance
 - Age Mental and Emotional Condition
 - Charitable Service/Good Works Military Service
 - Community Ties Non-Violent Offender
 - Diminished Capacity Physical Condition
 - Drug or Alcohol Dependence Pre-sentencing Rehabilitation
 - Employment Record Remorse/Lack of Remorse
 - Family Ties and Responsibilities Other (Specify): _____
 - Issues with Criminal History (Specify): _____

E To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, the sentence should be _____



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