



The 2015-16 Third Circuit
Update
&
A Primer on *Johnson* and its
Aftermath

with

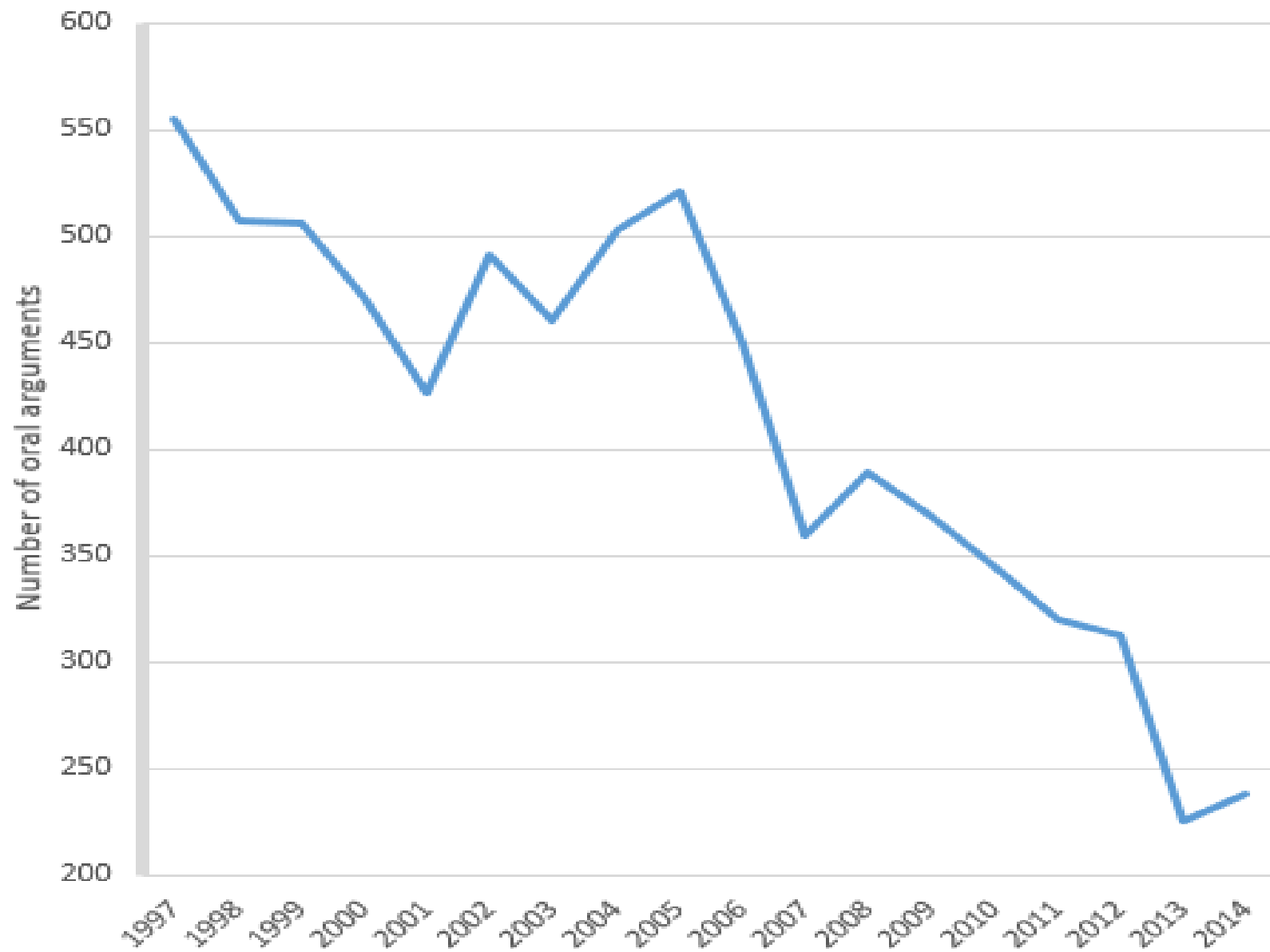
Ron, Tammy & Fritz

Where Have All The Oral Arguments and Opinions Gone?

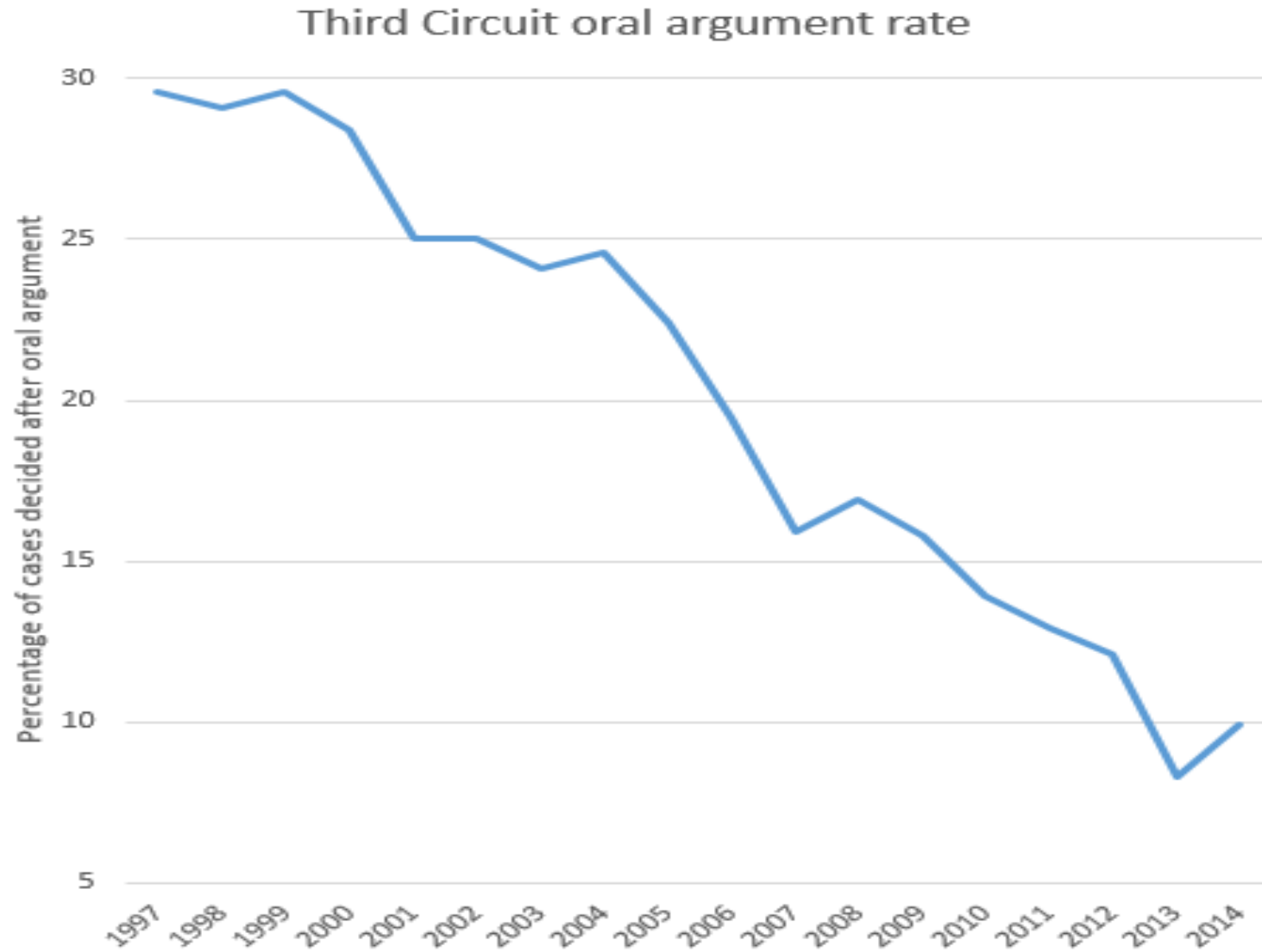


Guess which circuit holds the fewest oral arguments? (Hint: it's the same one that issues the fewest published opinions.)

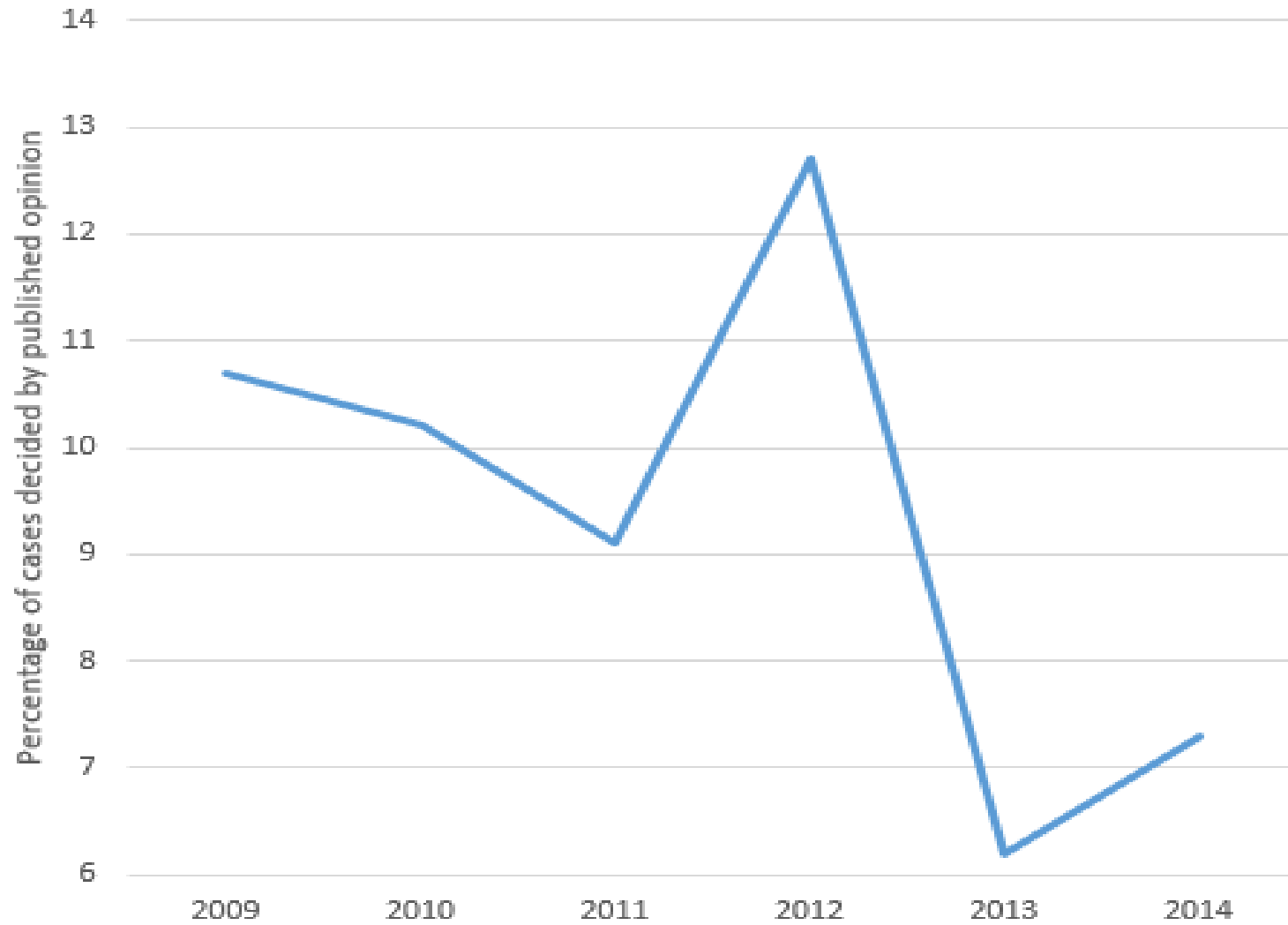
Third Circuit oral arguments



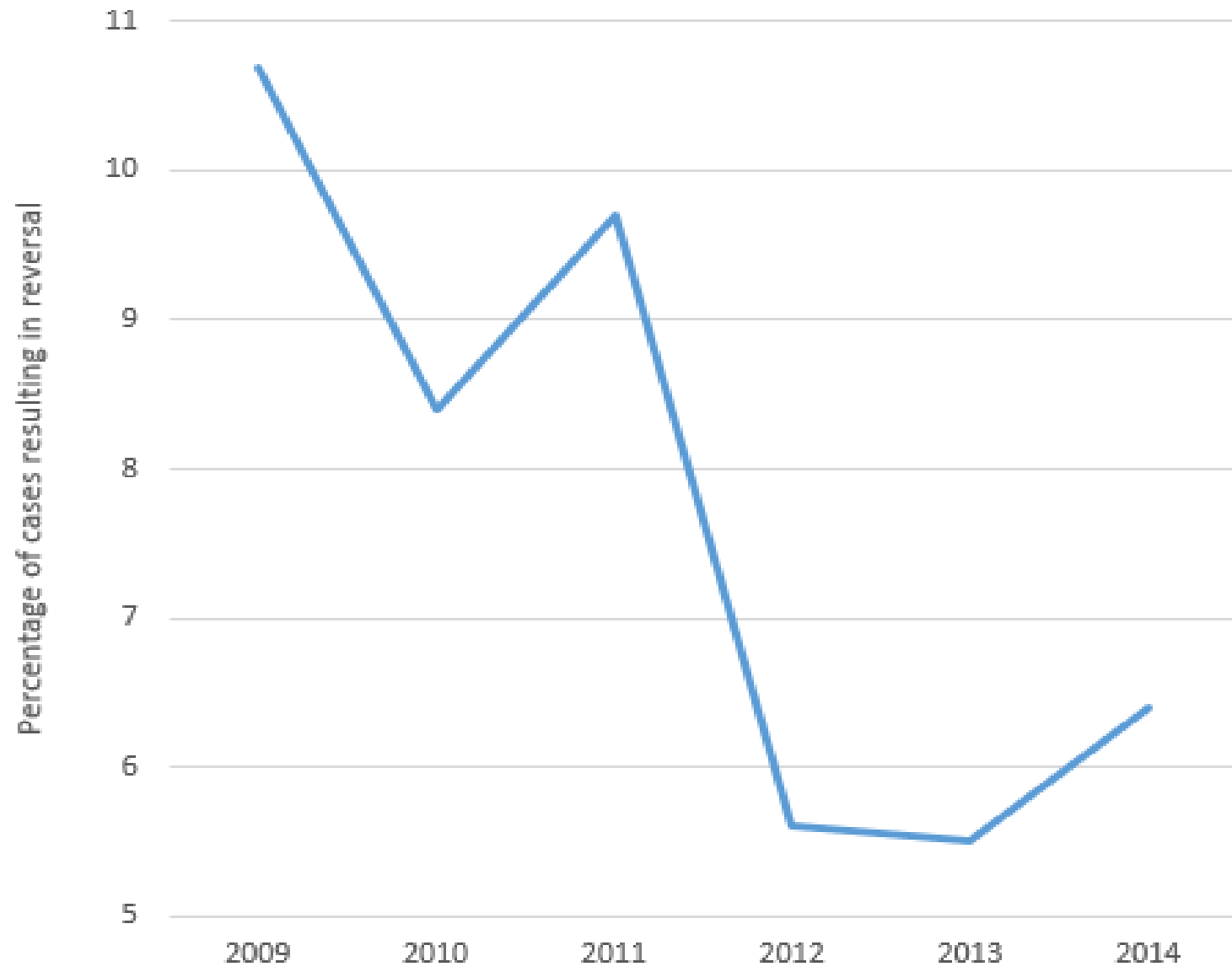
The percentage of the Court's cases in which it heard argument over the same period:



Third Circuit published opinion rate



Third Circuit reversal rate



Search and Seizure



United States v. Lowe, 791 F.3d 424 (3d Cir. 2015)

Facts: Philadelphia Police receive an anonymous tip of a black male wearing a grey hoodie with a gun in his waistband talking to a female at 914 N. Markoe St.

Issue: When was Mr. Lowe seized for purposes of the reasonable suspicion necessary under *Terry v. Ohio*.

Holding: Mr. Lowe was seized when the he “froze” in response to the police show of authority, and the police did not have sufficient reasonable suspicion to conduct a stop and frisk.

United States v. Nagle, 803 F.3d 167 (3d Cir. 2015)

Facts: Messers. Nagle and Fink were co-owners and, respectively, the President/CEO and Chief Operating Officer and Board Chairman of a concrete manufacturing and construction corporations that defrauded the Government. The FBI executed two search warrants at the corporations' offices, seizing and imaging the computers and the file server.

Issue: Did the owners of these closely held corporations have the necessary "legitimate expectation of privacy" to challenge the search?

Holding: No, while the corporate entities could make a challenge, Nagle and Fink would have to show a personal connection to the places searched or the materials seized.

Trial Issues

***United States v. Kolodesh*, 787 F.3d 224 (3d Cir. 2015)**

- No issue of prosecutorial misconduct in the Government's use of translation of Russian recordings, which involved vulgar language, because the defendant had previously stipulated to the truth and accuracy of the recordings and the statements were relevant to the conspiracy.

***United States v. Edwards*, 792 F.3d 355 (3d Cir. 2015)**

- Government comments during closing argument on a defendant's right to remain silent were not harmless. The Third Circuit found that the remarks violated the prohibition in *Doyle v. Ohio*, 426 U.S. 610 (1976).

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

- In an extortion under color of right prosecution based upon fraudulent IRS refunds, the fact that the defendant could not have actually influenced the IRS is not determinative. Rather, the focus is on the victim's state of mind and what she believed.

United States v. Centeno, 793 F.3d 378 (3d Cir. 2015)

- Where the Government argues in closing based upon a theory not charged in the indictment, in this case, accessory after the fact, it amounts to a constructive amendment of the indictment and violates the Fifth Amendment.

Washington v. Sec'y Dep't of Corr., 801 F.3d 160 (3d Cir. 2015)

- Co-defendant's statement was insufficiently redacted under *Bruton* and its progeny that it was transparent to the jurors that it referred to the defendant.

***United States v. Steiner*, No.14-4628, 2016 WL 827989 (3d Cir. March 3, 2016)**

- Although the Court was deeply troubled by the Government's admission of evidence respecting an unrelated arrest of the defendant, the error was harmless. The discussion on the admissibility of evidence "to complete the story" under Rule 404(b) is informative and the Court points out the limited circumstances where such evidence may be admissible.
- The District Court, in a possession of ammunition charge under Section 922(g), was not required to instruct the jurors that they had to be unanimous as to each type of ammunition. The defense maintained that such an instruction was necessary because the indictment was duplicitous in charging, in one count, the possession of different types of ammunition.

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

- District Court lacks jurisdiction to revoke a term of supervised release unless a summons or an arrest warrant are issued before the term expires. The jurisdictional deadline is not subject to equitable tolling and an order by the court directing the issuance of a summons is insufficient.

Sentencing Issues

***United States v. Nagle*, 803 F.3d 167 (3d Cir. 2015)**

- Applying a “Government Benefit” calculation for loss and subtracting from the loss figure the value of the performance of the contracts

***United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (*en banc*)**

- Finding a constitutional sentencing error where the defendant was subject to mandatory seven-year sentence for brandishing a firearm, when such fact had not been found by a jury as required by *Alleyne v. United States*, ___U.S. ___, 133 S. Ct. 2151 (2013). Although the defendant received an 84-month sentence, the Court declines to find the error harmless even though the same sentence would have been imposed under the Guidelines.

***United States v. Moreno*, 809 F.3d 766 (3d Cir. 2016)**

- Cross-examination of defendant as to factual issues of guilt or innocence during allocution when he had not contested such issues constituted plain error and required re-sentencing.

***United States v. Lopez-Esmurria*, No. 14-4166, 2015 WL 6468060 (3d Cir. Oct. 27, 2015)**

- The Court declined to find an *Apprendi* or *Alleyene* error in connection with drug quantity findings at sentencing when the jury specifically found otherwise for purposes of the mandatory minimums. However, the Court remanded for a re-sentencing because the District Court's findings were based upon those in the presentence report and Probation's findings were premised upon unstated assumptions of drug quantities that no witness testified to.

JOHNSON

What's the big deal?

Johnson v. United States, 135 S.Ct. 2551 (2015)

- Residual clause of the Armed Career Criminal Act (ACCA) “denies fair notice to defendants and invites arbitrary enforcement by judges” and “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”
- Residual clause is unconstitutionally vague because it ties the assessment of risk to a judicially imagined “ordinary case” of a crime, not to real-world facts or statutory elements and leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.
- Increasing a defendant’s sentence under the residual clause denies due process of law.
- Overruled *James* and *Sykes*.



Justice Antonin Scalia

1936-2016

- *Johnson v. United States*, 559 U.S. 133 (2010) – force clause
- *Johnson v. United States*, 135 S.Ct. 2551 (2015) – residual clause

Armed Career Criminal Act

18 U.S.C. § 924(e)

15-year mandatory minimum term for felon-in-possession if defendant has 3 prior convictions for a “violent felony” or “serious drug offense”

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

- **Force Clause:** offense “has as an element the use, attempted use, or threatened use of physical force against the person of another”
- **Enumerated Offenses:** burglary, arson, extortion, use of explosives
- **Residual Clause:** offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Pre-Johnson World

- ***Taylor***, 495 U.S. 575 (1990): Adopts formal categorical approach (“generic” burglary)
- ***Shepard***, 544 U.S. 13 (2005): documents for modified categorical approach
- ***James***, 550 U.S. 192 (2007): examine language of a statute & application of state courts (FL attempted burglary of a dwelling)
- ***Begay***, 553 U.S. 137 (2008): predicate offenses must be similar in kind to enumerated offenses – purposeful, violent, aggressive (DUI)
- ***Chambers***, 555 U.S. 122 (2009): predicate offenses must be similar in kind and degree of risk to enumerated offenses (escape – failure to report)

Pre-Johnson World

- ***Johnson***, 559 U.S. 133 (2010): violent physical force required under force clause (FL battery by touching)
- ***Sykes***, 564 U.S. 1 (2011): similar in risk to closest analog among the enumerated offenses (Indiana flight from law enforcement by vehicle)
- ***Descamps***, 133 S.Ct. 2276 (2013): modified categorical approach applies only if statute is divisible; does not apply if statute is overbroad and has single, indivisible set of elements (CA burglary)

Overbroad, Indivisible

... with liberty and justice for all!

Descamps v. United States, 133 S.Ct. 2276 (2013)

Divisible Statute:

- one or more **elements** in the alternative
- Prosecutor must select element and jury must be unanimous
- *e.g.*, burglary involves entry into a building *or* an automobile
- one crime corresponds to generic crime and other does not
- court may look to additional documents (*Shepard*) to determine which offense (generic or non-generic) formed the basis of the defendant's conviction

Descamps v. United States, 133 S.Ct. 2276 (2013)

Indivisible Statute:

- overbroad, sweeps more broadly than generic offense
- *e.g.*, an entry as opposed to an unlawful entry
- conviction under the statute is never a conviction of a generic offense
- not alternative elements but alternative means or methods

US v. Brown, 765 F.3d 185 (3d Cir. 2014)(Pa terroristic threats overbroad)

US v. Fuertes, 805 F.3d 485(4th Cir. 2015)(sex trafficking by force, fraud or coercion indivisible and not COV)

- factfinder is not unanimous on the means or methods

Descamps v. United States, 133 S.Ct. 2276 (2013)

- Modified Categorical Approach applies to divisible statutes only
- if at least one but not all divisible sections matches the generic version, courts may use approved documents to determine which section applied
- if the elements do not match the generic version, the inquiry is over

Mathis v. United States, No. 15-6092

(cert. granted Jan. 19, 2016; argument set for April 26, 2016)

Issue: whether the modified categorical approach may be used whenever there is an “or” between “methods” of committing the offense or may be used only when those methods are actually elements, *i.e.*, the factfinder must find one or the other to convict

* *See* footnote 2 in *Descamps*, 133 S.Ct. at 2285

Other Implications of *Johnson*

- Guideline Definition of Crime of Violence – U.S.S.G. § 4B1.2(a)
- Firearm Used, Carried or Possessed in Furtherance of a Crime of Violence – 18 U.S.C. § 924(c)
- Other firearms offenses – §§ 924(a)(6)(B), 929(a)(1)
- Statutory Definition of Crime of Violence – 18 U.S.C. § 16
- Illegal Reentry – 8 U.S.C. § 1326(b)(2)
- Three Strikes – 18 U.S.C. § 3559(c)(2)(F)(ii)
- Restitution – 18 U.S.C. § 3663A(c)(1)(A)(i)
- Release and detention – 18 U.S.C. § 3156(a)(4)

U.S.S.G. § 4B1.2(a)

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) 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.**

COMMENTARY – Application Note 1

Crime of Violence includes:

- “the offenses of aiding and abetting, conspiring, and attempting to commit such acts.”
- **Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.**
- Possession of a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun, sawed-off rifle, silencer, bomb or machine gun)

COMMENTARY AFTER *JOHNSON*

If the Commentary and the Guideline it interprets are inconsistent, the Guideline controls. *Stinson v. United States*, 508 U.S. 36 (1993).

The Commentary has no freestanding definitional power. *US v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) (“the government skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course, that takes precedence.”)

US v. Soto-Rivera, 811 F.3d 53 (1st Cir. 2016) (“hopeless” to rely on Application Note)

References to Crime of Violence Definition in § 4B1.2

- Career Offender – U.S.S.G. § 4B1.1(a)(2)
- Firearms Offenses – U.S.S.G. § 2K2.1
- Supervised Release Violations – U.S.S.G. § 7B1.1(a)(1)

CAREER OFFENDER – U.S.S.G. § 4B1.1

Enhancement (assigns different Offense Level and Criminal History Category VI) applies if:

- (1) the defendant was at least 18 years old at the time of the instant offense;
- (2) the instant offense is a “crime of violence” or a “controlled substance offense;” and
- (3) the defendant has at least 2 prior felony convictions of either a “crime of violence” or a “controlled substance offense.”

* *Johnson* challenge to instant offense and predicate offenses

PROPOSED AMENDMENT

Effective August 1, 2016:

- deletes residual clause
- revises enumerated offenses – murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, extortion, or use or possession of firearm in 26 U.S.C. § 5845(a) or explosive material defined in 18 U.S.C. § 841(c)
- adds definitions in Commentary for forcible sex offense and extortion
- keeps language in Commentary about conspiracy and attempts

RETROACTIVITY

- FPD handling motions to correct sentence under 28 U.S.C. § 2255
- *Welch v. United States*, No. 15-6418 (cert. granted Jan. 8, 2016; argument set for March 30, 2016)
- DOJ Position: *Johnson* is retroactive for all ACCA cases (direct review and collateral review). *Johnson* applies to pipeline Guideline cases but not on collateral review.
US v. Gumfory, 4:14-CR-0228 (Doc. 35 – Govt Brf).

FIREARMS – 924(c)

Firearm Used, Carried or Possessed in Furtherance of a Crime of Violence

For purposes of this subsection, the term “crime of violence” means an offense that is a felony and –

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that **by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.**

Note: No enumerated offenses & force is against person or property

Johnson Applied to § 924(c)

- *US v. Bell*, 2016 WL 344749 (N.D. Cal.)
- *US v. Edmundson*, 2015 WL 9582763 (D. Md.)
- *US v. Lattanaphom*, 2016 WL 393545 (E.D. Cal.)

Be Aware Of Other Firearms Offenses

References to 924(c):

- 924(g) – interstate acquires, transfers, or attempts to . . . a firearm
- 924(h) – knowingly transfers a firearm
- 924(j) – causes the death of a person through the use of a firearm
- 924(o) – conspiracy

18 U.S.C. § 924(a)(6)(B):

- 922(x) – transferring a gun or ammunition to a juvenile

18 U.S.C. § 929(a)(1) – armor piercing ammunition

18 U.S.C. § 16

The term “crime of violence” means –

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, **by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.**

Note: no enumerated offenses & force is against person or property

Illegal Reentry – 8 U.S.C. § 1326(b)

Increased statutory maximum for an alien who enters the United States after a previous removal which was subsequent to the commission of an “aggravated felony” as defined in 8 U.S.C. § 1101(a)(43)

Subsection (F) is a **crime of violence** as defined in **18 U.S.C. § 16** for which the **term** of imprisonment is at least one year

See also U.S.S.G. § 2L1.2(b)(1)(C) – 8 level increase to offense level if defendant was convicted of an aggravated felony

* Commentary of § 2L1.2 has own definition of “crime of violence” without residual clause

Johnson Applied to § 16

- *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015)
- *US v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015)
- *US v. Gonzalez-Longoria*, 2016 WL 537612 (5th Cir.), *reh'g en banc granted*, 2016 WL 766980 (5th Cir. 2016)

WHAT'S LEFT?

- **Enumerated Offenses**

ACCA: burglary, arson, extortion, involves explosives

Career Offender: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, sawed off shotgun or involves explosives (pending amendment)

(None in § 924(c) or § 16)

- **Force Clause**

“has as an element the use, attempted use, or threatened use of physical force against the person”

(ACCA & Career Offender: not property)

Fighting the Enumerated Offenses

- Focus is on Elements of the Generic Crime
- *e.g.*, Generic Burglary
 - (1) unlawful or unprivileged entry into or remaining in
 - (2) a building or structure
 - (3) with intent to commit a crime

(*Taylor*, 495 U.S. at 599)

Fighting the Enumerated Offense

Step 1: Find Generic Offense

Step 2: Compare the Elements

Step 3: Is Statute Indivisible or Divisible?

If statute is overbroad or indivisible, inquiry stops. If statute is divisible, make sure one of the alternative elements meets the generic offense. Then look to *Shepard* documents to determine if that particular offense was the basis for the conviction. (*Descamps*)

Burglary Wins

- *US v. Evans*, 2015 WL 9480007 (W.D. Pa.)(1992 PA burglary not COV following *Descamps*)
- *US v. Bayya*, 2015 WL 8751795 (D. Oregon)(first degree burglary in Oregon not ACCA predicate)
- *US v. Cornejo-Lopez*, 2015 WL 7274060 (D. Neb.)(attempted burglary in Nebraska not ACCA predicate)
- *US v. Welch*, 2016 WL 536656 (2d Cir. 2016)(NY attempted burglary in second degree not COV)
- *US v. Maldonado*, 2016 WL 229833 (2d Cir. 2016)(NY attempted burglary third degree not COV)

Fighting the Force Clause

Johnson v. United States, 599 U.S. 133 (2010)

- “physical force” not defined so give it ordinary meaning
- “*violent* force—that is, force capable of causing physical pain or injury to another person”
- connotes a substantial degree of force
- when the adjective “violent” is attached to the noun “felony,” its connotation of “strong physical force” is even clearer
- force strong enough to constitute “power”

Fighting the Force Clause

Step 1:

Does the Statute have as an element the use, attempted use or threatened use of physical force?

Step 2:

Is Statute Indivisible or Divisible?

If statute is overbroad or indivisible, inquiry stops. If statute is divisible, make sure one of the alternative elements meets the generic offense. Then look to *Shepard* documents to determine if that particular offense was the basis for the conviction

Key Issues to Remember

- Requires “violent force” not “unwanted touching”
- Force must be directed against a person, not property (ACCA & CO)
- Requires the use of force, not merely the causation of physical injury
- Force must be used intentionally, not recklessly or negligently
- Just because the word “force” is in the statute may not be “violent”
- “physical restraint” may not be enough
- offenses based on absence of legally valid consent don’t qualify

CHALLENGE AND PRESERVE!!

The Third Circuit gets it wrong and they admit it.

US v. Jones, 740 F.3d 127, 134 (3d Cir. 2014) (“While it may be tempting to examine the conduct underlying a given conviction, as the District Court did, the Supreme Court now says we cannot.”)

PA Statutes

- Resisting Arrest

US v. Stinson, 592 F.3d 460 (3d Cir. 2010)(COV under residual)

- Fleeing or Attempting to Elude

US v. Townsend, 2015 WL 9311394 (3d Cir. 2015)(not COV following *Johnson*)

US v. Jones, 740 F.3d 127 (3d Cir. 2014)(no element under force clause and not enumerated, COV under residual)

PA Statutes

- Aggravated Assault

Commonwealth v. Thomas, 867 A.2d 594, 597 (Pa. Super. 2005) (“evidence of the use of force or the threat of force is not an element of the crime of aggravated assault.”)

US v. Knight, 2016 WL 223701 (D.N.J. 2016)(NJ statute not COV)

PA Statutes

- Simple Assault

US v. Dorsey, 174 F.3d 331 (3d Cir. 1999)(COV under residual)

US v. Johnson, 587 F.3d 203 (3d Cir. 2009)(intentional or knowing violation of (a)(1) is COV under residual)

US v. Marrero, 743 F.3d 389 (3d Cir. 2014)(finds (a)(1) divisible)

But see Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006)(“physical menace” in subsection (a)(3) COV under force clause of §16)

PA Statutes

- Robbery

US v. Blair, 734 F.3d 218 (3d Cir. 2013)(divisible after *Descamps*)

US v. Hollins, 514 Fed. Appx. 264 (3d Cir. 2013)(robbery by force however slight not force clause but COV under residual)

US v. Dobbin, 2015 WL 7873596 (3d Cir. 2015)(threat immediate serious bodily injury satisfies force clause)

US v. Dixon, 805 F.3d 1193 (9th Cir. 2015)(CA robbery not ACCA violent felony)

PA Statutes

- Recklessly Endangering

US v. Lee, 612 F.3d 170 (3d Cir. 2010)(after *Begay* mere recklessness cannot constitute COV)

- Terroristic Threats

US v. Brown, 765 F.3d 185 (3d Cir. 2014)(after *Descamps* not COV)

Federal Offenses Commonly Paired With 924(c)

- Hobbs Act Robbery – 18 U.S.C. § 1951(a)
US v. Standberry, 2015 WL 5920008 (E.D. Va.)(is COV)
- Carjacking – 18 U.S.C. § 2119
US v. Sandoval, 2016 WL 632212 (D. Nev.)(is COV)
US v. Tsarnaev, 2016 WL 184389 (D. Mass.)(is COV)
- Bank Robbery – 18 U.S.C. § 2113
US v. Green, 2016 WL 277982 (D. Md.)(is COV)

Some Success

- *US v. Edmundson*, 2015 WL 9311983 (D. Md.) (conspiracy to commit Hobbs Act robbery not COV)
- *US v. Fuertes*, 805 F.3d 485 (4th Cir. 2015) (sex trafficking by fraud, force or coercion not COV)
- *US v. Litzy*, 2015 WL 5895199 (S.D.W. Va. 2015) (OH robbery third degree not COV)
- *US v. Jordan*, 2016 WL 556729 (8th Cir. 2016) (Arkansas aggravated assault not ACCA predicate)

More Success

- *US v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)(TX aggravated sexual assault not COV)
- *US v. Maldonado*, 2016 WL 229833 (2d Cir. 2016)(NY attempted burglary third degree not COV; also federal phone count no longer qualifies)
- *US v. Bell*, 2016 WL 344749 (N.D. Ca. 2016)(robbery of govt property not COV but assault of federal officer is COV)