

Introduction to the Sentencing Guidelines

United States Sentencing Commission
Regional Training Seminar
Washington, DC
August 1, 2013

Discussion Topics

- Sentencing in the federal system
- Basic guideline application
- Relevant conduct

U.S.S.C.

Website

www.usssc.gov

HelpLine

202-502-4545

The Nature of a Federal Sentence

The Sentencing Reform Act of 1984

- Determinate sentences; no parole
- Supervised release
 - Available for all felonies and Class A misdemeanors
 - See 18 USC § 3559(a) and § 3583(b)&(e)(3)

The Nature of a Federal Sentence

The Sentencing Reform Act of 1984

- Good time
 - Maximum of 54 days per year
 - Not available for sentences of one year or less, or for a life sentence
 - See 18 USC § 3624(b)(1)

Sentencing In the Guidelines System

- Sentences are to be based on the factors at 18 USC § 3553(a)(1)-(7)
- Correct guideline application is the required starting point in sentencing
- Sentences are reviewed for “reasonableness”

§ 3553(a)(1) - (7) Factors

The court is to impose a sentence *sufficient but not greater than necessary* to comply with the “purposes of sentencing”

The court shall consider:

- (1) Nature & circumstances of offense; history & characteristics of defendant

§ 3553(a)(1) - (7) Factors (cont.)

(2) “Purposes of sentencing”

Punishment, deterrence,
incapacitation, & rehabilitation

(3) Kinds of sentences available

(4) The sentencing guidelines

§ 3553(a)(1) - (7) Factors (cont.)

(5) The guideline policy statements

(6) Avoiding unwarranted
sentencing disparities

(7) Need to provide restitution

Guidelines Manual

Policy Statements

Include Departure Considerations

- Chapter One, Part A
- Chapter Five, Part K
 - §5K1.1 Substantial Assistance
 - §5K2.0 Grounds for Departure
 - §5K2.1 – 2.23 Various departure provisions
 - §5K3.1 Early Disposition Programs

Guidelines Manual

Policy Statements (cont.)

Include Departure Considerations

- Chapter Five, Part H - Specific Offender Characteristics
- §4A1.3 - Inadequacy of Criminal History Category

Guidelines Manual

Policy Statements (cont.)

Include Departure Considerations

- Other specific commentary
- Note: comprehensive List of Departure Provisions in back of *Guidelines Manual*

3-Step Approach to Federal Sentencing

1. Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines (pursuant to § 3553(a)(4))

3-Step Approach to Federal Sentencing (cont.)

2. Consider the guidelines policy statements, including those addressing departures, that might warrant consideration in imposing sentence (pursuant to § 3553(a)(5))

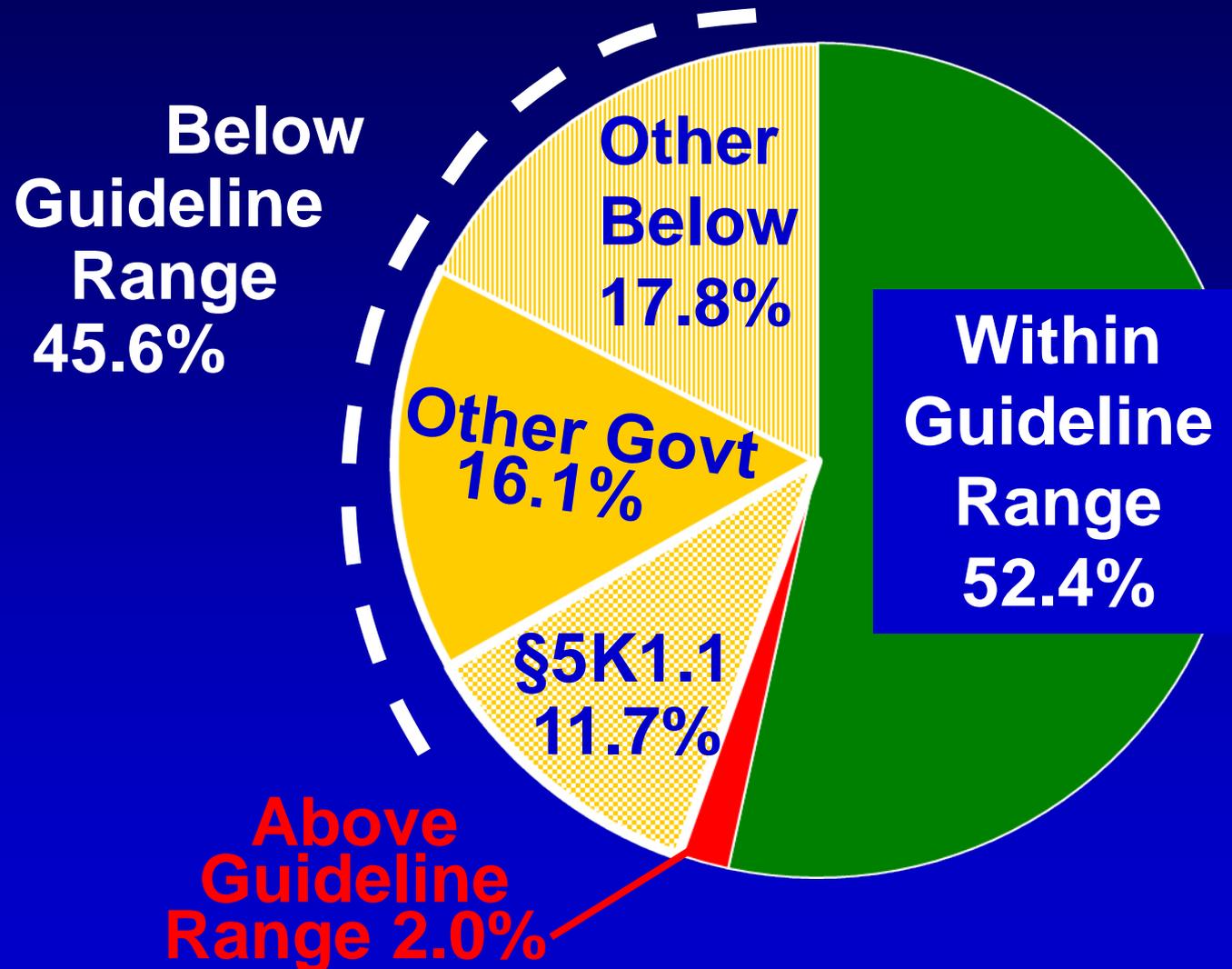
3-Step Approach to Federal Sentencing (cont.)

3. Consider § 3553(a) as a whole, and determine if the appropriate sentence is:
 - Within the advisory guideline system:
 - a sentence within the guideline range, or
 - a “*departure*”

OR

 - Outside the advisory guideline system:
 - a “*variance*”

Position of Sentences in Relation to Guideline Range National - FY 2012



Overview of the Sentencing Process

- Plea/verdict of guilty
- U.S. probation officer (USPO) does a presentence investigation (PSI) & presentence report (PSR)
 - Gathers facts
 - Applies guidelines
 - Provides PSR to parties

Overview of the Sentencing Process (cont.)

- Parties review PSR; advise USPO of any disputes
- USPO resolves disputes as possible; submits amended PSR & addendum of unresolved disputes to parties and judge
- At sentencing hearing, judge will resolve disputes as necessary

Pointers for the Application of the Guidelines

- The sentencing judge still resolves disputed issues (§6A1.3)
- Standard of proof: preponderance (§6A1.3)
- Burden of persuasion: falls on party seeking the adjustment

Pointers for the Application of the Guidelines (cont.)

- Rules of evidence do not apply (Fed. R. Evid. 1101(d)(3))
- Evidence must have sufficient indicia of reliability to support probable accuracy (§6A1.3(a))

Basic Guideline Application

Ex Post Facto

- 18 U.S.C. § 3553(a)(4)
 - Use guidelines in effect at sentencing
- *U.S. v. Peugh*, 133 S. Ct. 2072 (2013)
 - *Ex post facto* applies to the federal sentencing guidelines
- §1B1.11
 - “One Book Rule”
 - Historical notes

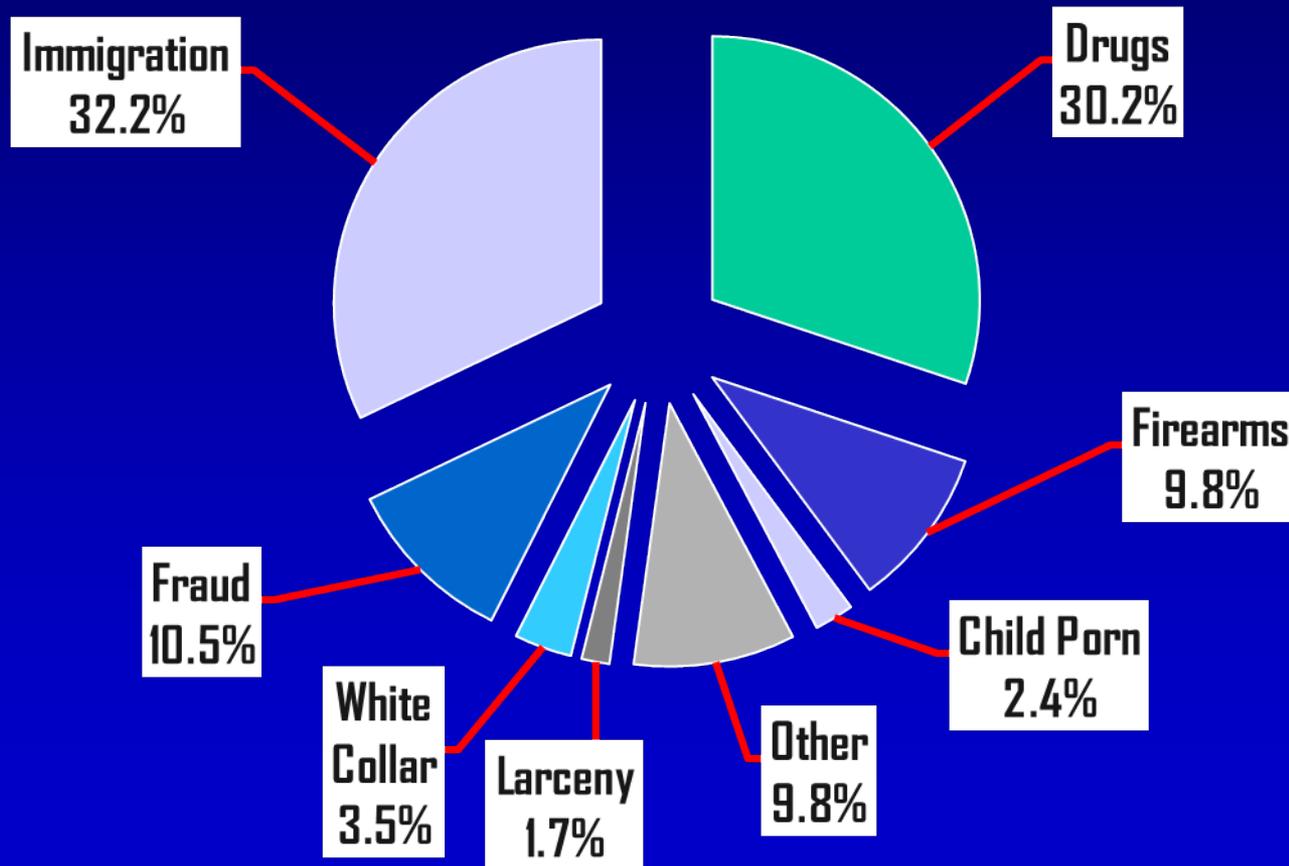
Guidelines Manual

- Ch. One Introduction, definitions, application principles
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- Ch. Four Criminal history

- Ch. Five Determining the guideline range
- Ch. Six Sentencing procedures & pleas
- Ch. Seven Violations of probation & supervised release
- Ch. Eight Sentencing of organizations

Primary Offense Types

National - FY 2012



Robbery Scenario

Robbery Scenario Facts

- Defendant A convicted of 18 USC § 2113(a)&(d)
- Defendant A and co-participant robbed federally insured bank
- Robbery planned by Defendant A who directed co-participant

Robbery Scenario Facts (cont.)

- Defendant A carried pistol; co-participant carried knife
- Defendant A pushed teller, resulting in cut, bruises & contusions

Robbery Scenario Facts (cont.)

- Co-participant restrained customer – bound him with tape & forced him into closet
 - Not part of plan, nor directed by Defendant A
- \$15K in bank loot taken;
 - \$9K for Defendant A
 - \$6K for co-participant
 - \$5K recovered from Defendant A

Robbery Scenario Facts (cont.)

- Within days of apprehension, Defendant A provided full information to the government, and announced intentions to plead guilty
- Government will make a motion for “full” acceptance of responsibility

Robbery Scenario Facts (cont.)

- Defendant A's prior record:
 - 6 yrs. prior to instant robbery; auto theft:
2 yrs. probation
 - 3 yrs. prior to instant robbery; grand larceny:
6 mos. jail & 3 yrs. probation
 - On the probation at the time of the instant offense

General Approach of the Federal Sentencing Guidelines

- Begins as an offense of conviction system
- Then considers many real offense characteristics

The Statutes “Trump” the Guidelines

Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

(*e.g.*, statutory maximums and mandatory minimums)

-See §§5G1.1 & 5G1.2

SENTENCING TABLE
(in months of imprisonment)

| Offense Level | Criminal History Category (Criminal History Points) | | | | | |
|---------------|---|-------------|---------------|--------------|----------------|-----------------|
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | life | life | life | life | life | life |

Single Count Application

Chapter Two

- Base Offense Level
- Specific Offense Characteristics
- Cross References

Chapter Three

- Victim
- Role
- Obstruction
- Multiple Counts
- Acceptance

Determining the Applicable Chapter Two Guideline

§1B1.2(a)

- Use the Chapter Two guideline applicable to the offense of conviction
- Refer to the Statutory Index (Appendix A) in this determination

Determining the Applicable Chapter Two Guideline (cont.)

§1B1.2(a)

- If no guideline is listed,
 - Use §2X5.1 for finding an analogous guideline for a felony (stat. max. over 1 yr.), or
 - Use §2X5.2 for a Class A misdemeanor

Appendix A

Statute

Guideline

18 U.S.C. § 2111

2B3.1

18 U.S.C. § 2112

2B3.1

18 U.S.C. § 2113(a)

2B1.1,

2B2.1,

2B3.1,

2B3.2

18 U.S.C. § 2113(b)

2B1.1

18 U.S.C. § 2113(c)

2B1.1

18 U.S.C. § 2113(d)

2B3.1

- §2B1.1 Larceny, Embezzlement, Fraud and Forgery
- §2B2.1 Burglary
- **§2B3.1 Robbery**
- §2B3.2 Extortion by Force or Threat of Injury or Serious Damage

§2B3.1 Robbery

(a) Base Offense Level: 20

(b) Specific Offense Characteristics Levels

(1) financial institution or post office +2

(2) firearm, weapon, death threat +2 to +7

(3) victim injury +2 to +6

(max. of 11 offense levels from (b)(2) & (b)(3))

(b) SOC's (cont.)

Levels

(4) abduction

+4

restraint

+2

(5) carjacking

+2

(6) taking of a firearm,
destructive device,
or controlled substance

+1

(7) loss of \$10,000+ to \$5 million+

+1 to +7

(c) Cross Reference

(1) if victim murdered, apply the guideline
for First Degree Murder (§2A1.1)

Chapter Three Adjustments

- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

Victim Related Adjustments

Chapter Three, Part A

| | <u>Levels</u> |
|--|--------------------------------------|
| • §3A1.1 Hate Crime Motivation or Vulnerable Victim W/Large Number | +3 +2 +2 |
| • §3A1.2 Official Victim | +3, +6 or +6 |
| • §3A1.3 Restraint of Victim | +2 |
| • §3A1.4 Terrorism | +12 (floor 32, CHC ⁴³ VI) |

Role in the Offense

Chapter Three, Part B

Levels

- **§3B1.1 Aggravating Role** +4,+3, or +2
- §3B1.2 Mitigating Role -4 (minimal), -3, or -2 (minor)

Acceptance of Responsibility

Chapter Three, Part E

- **2-Level Reduction:**
If defendant clearly demonstrates affirmative acceptance of responsibility for the offense
- **1-Level *Additional* Reduction Possible:**
If offense level 16 or greater, and government motion based on timely notification of guilty plea

Pointers about Chapters Two and Three Application

- Offense levels are cumulative
 - §1B1.1, App. Note 4
- Within sections, use greatest
 - §1B1.1, App. Notes 4(A) & 5

Pointers about Chapters Two and Three Application (cont.)

- No issue of “double counting” unless directed by guidelines
 - §1B1.1, App. Note 4(B)
- “Adjustments” are distinct from “departures” and “variances”
 - Chapter Three & §5K2.0 & § 3553(a)

Chapter Four

Criminal History and “Overrides”

Sentencing Table

Criminal History Category

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 27-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |

Criminal History

§4A1.1(a) – (d)

- ✓ “Prior Sentences”
(1, 2, or 3 points each)
- ✓ “Status”
(2 points)

Criminal History Points

Prior Offense Committed at 18 or Older

| Points* | Sentence | Time Frame (Earliest Date of Relevant Conduct) |
|-----------------|--------------|--|
| 3 | >13 months | Within 15 yrs. of prior sentence imposition or release |
| 2 | ≥60 days | Within 10 yrs. of prior sentence imposition |
| 1 (max of 4) | All others** | Within 10 yrs. of prior sentence imposition |

* If otherwise countable

** Exceptions may apply

Criminal History Points

Prior Offense Committed Before 18

| Points* | Sentence | Time Frame (Earliest Date of Relevant Conduct) |
|-----------------|---|--|
| 3 | Only if convicted as adult and >13 months | Within 15 yrs. of prior sentence imposition or release |
| 2 | ≥60 days | Within 5 yrs. of prior sentence imposition or release |
| 1 (max of 4) | All others** | Within 5 yrs. of prior sentence imposition |

* If otherwise countable

** Exceptions may apply

Length of Prior Sentences

§4A1.2(a) and App. Note 2

- Set by maximum sentence imposed
 - If sentence or any portion is suspended, the maximum is established by the unsuspended portion
- Unaffected by release
 - *E.g.*, release to parole or for “good time”

Other Determinations Regarding Prior Sentences - §4A1.2

- Relationship of prior sentences and relevant conduct (§4A1.2(a)(1) & App. Note 1)
- Types of sentences never counted, e.g.,
 - Foreign sentences (§4A1.2(h))
 - Tribal sentences (§4A1.2(i))
 - Certain misdemeanors (§4A1.2(c))

Other Determinations Regarding Prior Sentences - §4A1.2 (cont.)

- Treatment of multiple prior sentences (§4A1.2(a)(2))
 - Counted separately or as a single prior sentence
 - Additional points for multiple crimes of violence when sentences not counted separately (§4A1.1(e))

Other Determinations Regarding Prior Sentences - §4A1.2 (cont.)

- Prior revocations of supervision
(§4A1.2(k) & App. Note 11)
- Pardons, set asides, expunged convictions,
and diversionary dispositions
(§4A1.2(f)&(j) & App. Notes 9 & 10)

Chapter Three and Chapter Four “Overrides”

§3A1.4

Terrorism

§§4B1.1 - 4B1.2

Career Offender

§4B1.3

Criminal Livelihood

§4B1.4

Armed Career Criminal

§4B1.5

Repeat and Dangerous
Sex Offender Against
Minors

Career Offender Criteria

§§4B1.1 & 4B1.2

- Defendant at least age 18
- Instant conviction a felony crime of violence or controlled substance offense
- Two predicate felony convictions for crimes of violence or controlled substance offenses

Career Offender “Override”

§4B1.1

- Criminal History Category is **VI**
- Offense level determined by a table based on statutory maximum
 - Unless the offense level from Chapters Two and Three is greater

**Statutory
Maximum**

**Offense
Level***

| | |
|------------------|----|
| Life | 37 |
| 25 years + | 34 |
| 20 years + | 32 |
| 15 years + | 29 |
| 10 years + | 24 |
| 5 years + | 17 |
| More than 1 year | 12 |

*Decrease by number of levels (0 or -2 or -3)
at §3E1.1 (Acceptance of Responsibility)

Chapter Five

Sentencing Table and Zones

SENTENCING TABLE
(in months of imprisonment)

| Offense Level | Criminal History Category (Criminal History Points) | | | | | |
|---------------|---|----------------|------------------|-----------------|-------------------|--------------------|
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| Zone A | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| Zone B | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| Zone C | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |
| | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| Zone D | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| | life | life | life | life | life | life |

Sentencing Table

Criminal History Category

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | Zone A | | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | Zone B | | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | Zone C | | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 15-21 | 27-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | Zone D | |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |

Zone A Options

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | | |
| 4 | 0-6 | 0-6 | 0-6 | | | |
| 5 | 0-6 | 0-6 | | | | |
| 6 | 0-6 | | | | | |
| 7 | 0-6 | | | | | |
| 8 | 0-6 | | | | | |

- Fine
- Straight Probation
- Imprisonment

Zone B Options

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
| 1 | | | | | | |
| 2 | | | | | | 1-7 |
| 3 | | | | | 2-8 | 3-9 |
| 4 | | | | 2-8 | 4-10 | 6-12 |
| 5 | | | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | | 1-7 | 2-8 | 6-12 | 9-15 | |
| 7 | | 2-8 | 4-10 | 8-14 | | |
| 8 | | 4-10 | 6-12 | | | |
| 9 | 4-10 | 6-12 | 8-14 | | | |
| 10 | 6-12 | 8-14 | | | | |
| 11 | 8-14 | | | | | |

- Probation plus a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment.
- At least one month Imprisonment **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.
- Imprisonment

Zone C Options

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
| 1 | | | | | | |
| 2 | | | | | | |
| 3 | | | | | | |
| 4 | | | | | | |
| 5 | | | | | | |
| 6 | | | | | | 12-18 |
| 7 | | | | | 12-18 | |
| 8 | | | | 10-16 | | |
| 9 | | | | 12-18 | | |
| 10 | | | 10-16 | | | |
| 11 | | 10-16 | 12-18 | | | |
| 12 | 10-16 | 12-18 | | | | |
| 13 | 12-18 | | | | | |

- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.

- Imprisonment

Zone D

| Offense Level | I (0 or 1) | II (2 or 3) | III (4,5,6) | IV (7,8,9) | V (10,11,12) | VI (13 or more) |
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|
|---------------|---------------|----------------|----------------|---------------|-----------------|--------------------|

| | | | | | | |
|----|-------|-------|-------|-------|-------|-------|
| 6 | | | | | | |
| 7 | | | | | | 15-21 |
| 8 | | | | | 15-21 | 18-24 |
| 9 | | | | | 18-24 | 21-27 |
| 10 | | | | 15-21 | 21-27 | 24-30 |
| 11 | | | | 18-24 | 24-30 | 27-33 |
| 12 | | | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |



• Imprisonment

Other Aspects of Sentence

Chapter Five

- Probation (§5B)
- Supervised release (§5D)
- Restitution, fines, assessments, forfeitures (§5E)
- Sentencing options (§5F)
- Undischarged terms (consecutive/concurrent) (§5G1.3)

Relevant Conduct

§1B1.3

Conduct that Is Relevant for Guideline Application

§1B1.3: Relevant Conduct

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction

Conduct that Is Relevant for Guideline Application (cont.)

§1B1.3

- For certain offenses defendant accountable for certain acts beyond the offense of conviction, to include course of conduct or common scheme or plan
 - Determination made by use of lists of “included” and “excluded” offense guidelines at §3D1.2(d)

Examples of Chapter Two Offense Guidelines in Lists at §3D1.2(d)

Included: (examples)

- Drug trafficking
- Fraud, theft, embezzlement
- Money laundering
- Firearms

Excluded: (examples)

- Robbery
- Murder
- Assault
- Kidnapping

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others (3-part analysis)

Offense of Conviction

WHEN:

(a)(1):

In preparation

During

Avoiding detection

(a)(2):

Same course of conduct/
Common scheme or plan

Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct

§1B1.3(a)(1)(B)

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and

3-Part Analysis of (a)(1)(B) (cont.)

Determinations required for acts of others to be relevant conduct

3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others

Standard for “Reasonable Foreseeability”

§1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
 - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?

Determining Scope in a Broad Conspiracy

§1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

Determining Scope in a Conspiracy (cont.)

“Bright Line Rule” of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

Example: Holding Defendant Accountable for the Acts of Others

§1B1.3(a)(1)(B)

- Def. convicted of drug conspiracy: §2D1.1
- Conspiracy involved multiple importations; Def. was involved in two of those
- If Def.'s undertaking was two importations, Def. will only be accountable for acts of others within those two importations

“Reasonably Foreseeable”

§1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant not accountable for acts of others that were reasonably foreseeable (or known) if those acts were not within the scope of defendant’s undertaking

“Expanded Relevant Conduct”

(a)(2) of §1B1.3

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

Offense of Conviction

WHEN:

(a)(1):

In preparation

During

Avoiding
detection

(a)(2)

**Same course of conduct/
Common scheme or plan**

:

Offenses for Which “Expanded” Relevant Conduct Applies

§1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included for grouping at §3D1.2(d)
- Multiple counts of conviction are not necessary to have “expanded” relevant conduct

Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*

See *U.S. v. Hodge*, 354 F.3d 305 (4th Cir. 2004)

“Same Course of Conduct”

§1B1.3(a)(2); App. Note 9(B)

- Similarity
- Regularity (repetitions)
- Temporal proximity

Example 1: Relevant Conduct Includes Same Course of Conduct / Common Scheme or Plan

§1B1.3(a)(2)

- Def. convicted of sale of 1 kg on a single occasion; applicable guideline §2D1.1 which is on the “included list” at §3D1.2(d)

Example 1: (cont.)

§1B1.3(a)(2)

- If determined that Def. also sold 1 kg per week for 99 weeks, and those acts were in same course of conduct as offense of conviction, that will be relevant conduct
- Application will be based on 100 kg

**Impact of Terms
“Offense” and “Defendant”
Upon the Relevant Conduct
Used in Application**

“Offense” & “Defendant”

§1B1.1, App. Note 1(H) & §1B1.3

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3)
 - Note that use of the passive voice infers “offense” (e.g., if a firearm was possessed)

“Offense” & “Defendant” (cont.)

§1B1.1, App. Note 1(H) & §1B1.3

- “Defendant” limits application from including the use of relevant conduct based on the acts of others under §1B1.3(a)(1)(B)

§2D1.1 (The Drug Trafficking Guideline)

(b) Specific Offense Characteristics

Level

(1) firearm/dangerous weapon
was possessed

+2

(16) if defendant meets the subdivision
criteria(1)-(5) of §5C1.2(a)
("the safety valve")

-2

§2D1.1(b)(16) SOC Criteria

Subdivisions (1) – (5) of §5C1.2(a)

2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense

Sentencing Below a Mandatory Minimum

“The Safety Valve”

&

Substantial Assistance

“Safety Valve”

18 U.S.C. § 3553(f) & §5C1.2

- Court makes determination; no government motion required
- Sentence *without regard to* mandatory minimums for violations of select drug statutes
 - 21 U.S.C. §§ 841, 844, 846, 960, and 963
- Downward departures or variances for mitigating factors possible

§5C1.2 and 18 U.S.C. 3553(f)

Subdivisions (1) – (5) of §5C1.2(a)

1. Defendant does not have more than 1 Criminal History Point
2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense

§5C1.2 and 18 U.S.C. 3553(f) (cont.)

Subdivisions (1) – (5) of §5C1.2(a)

3. Offense did not result in death or serious bodily injury
4. Defendant was not an organizer/leader/manager/supervisor in the offense; was not engaged in a CCE

§2D1.1(b)(16) SOC Criteria (cont.)

Subdivisions (1) – (5) of §5C1.2(a)

5. Not later than the time of the sentencing hearing, Defendant has truthfully provided to the Government all information and evidence defendant has concerning the offense that was part of the same course of conduct or common scheme or plan

Substantial Assistance

§5K1.1

Permits a sentence *below*
the minimum of the guideline range

18 USC § 3553(e)

Permits a sentence *below*
a mandatory minimum

Substantial Assistance (cont.)

§5K1.1 & 18 USC § 3553(e)

- Each requires a government motion
 - *Wade v. U.S.*, 504 U.S. 181 (1992)
- A separate government motion under 18 USC § 3553(e) is required to go below a mandatory minimum
 - *Melendez v. U.S.*, 518 U.S. 120 (1996)

Substantial Assistance (cont.)

§5K1.1 & 18 USC § 3553(e)

- A sentence below mandatory minimum is to be based only on substantial assistance

END

The Categorical Approach: *Taylor v. U.S., Et Al*

The Approach for Determining If a Conviction Meets the Criteria for a Certain Category of Offense

Discussion Outline

- Key Supreme Court cases establishing the categorical approach
- What is the categorical approach?
- Statutes and guidelines most commonly requiring use of the categorical approach

Discussion Outline (cont.)

- Step-by-step process for using the categorical approach
- Scenario demonstrating the analysis in the categorical approach

Key Supreme Court Cases Establishing the Categorical Approach

- *Taylor v. United States*, 495 U.S. 575 (1990)
- *Shepard v. United States*, 544 U.S. 13 (2005)
- *James v. United States*, 550 U.S. 192 (2007)
- *Begay v. United States*, 128 S. Ct. 1581 (2008)

Key Supreme Court Cases Establishing the Categorical Approach (cont.)

- *United States v. Chambers*, 129 S. Ct. 687 (2009)
- *Johnson v. United States*, 130 S. Ct. 1265 (2010)
- *Sykes v. United States*, 131 S. Ct. 2267 (2011)
- *Descamps v. United States*, 133 S. Ct. 2276 (2013)

The Categorical Approach

The determination of whether a prior ***conviction*** (or possibly the instant offense of conviction) meets the criteria of a certain category of offense

The Categorical Approach (cont.)

- In this determination, ***only the elements of the offense of conviction can be considered***
 - **Do not** rely on the title of the statute
 - **Do not** use relevant conduct
 - **Do not** look to the facts of the specific case

Examples of Statutes Where the Categorical Approach Is Used

- 18 USC § 924(e) (Armed Career Criminal Act: ACCA)
- 18 USC § 924(c) (use, carry, possession of firearm in crime of violence or drug trafficking)
- 18 USC § 16 (used for “aggravated felony” determination for illegal entry)

Examples of Guidelines Where the Categorical Approach Is Used

- §2K2.1 (Firearms)
- §2L1.2 (Immigration - Illegal Entry)
- §§4B1.1 & 4B1.2 (Career Offender)

Example: Immigration Guideline

- Defendant's offense of conviction is illegal reentry (8 USC § 1326(b))
- The court must determine whether a 16-level increase at §2L1.2(b)(1)(A)(ii) applies
- Issue: Does prior 2009 Texas state conviction for Sexual Assault of a Child meets the definition of a "crime of violence"

Example: Career Offender Guideline

- Defendant's offense of conviction is armed bank robbery (18 USC § 2113(a)&(d))
- The court must determine whether Career Offender (§§4B1.1 & 4B1.2) applies

Example: Career Offender Guideline (cont.)

- Issue: Do the Defendant's prior state convictions meet the definition of "crime of violence":
 - Assault on a law enforcement officer
 - Causing injury to a child
 - Failure to stop for blue light

The Categorical Approach

Step-by-Step

Steps in the Categorical Approach

1. Examine the definition under consideration
2. Establish the offense of conviction
 - Examine the statute of conviction: “the Categorical Approach”
 - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”

Steps in the Categorical Approach (cont.)

3. Analyze the offense of conviction to determine if it meets the category of offense

Step 1

Examine the
definition under
consideration

Definitions Frequently Considered in the Categorical Approach

- “Violent felony”
 - Armed Career Criminal Act (ACCA)
(18 USC § 924(e))
- “Crime of violence”
 - Career Offender (§4B1.2)
- “Crime of violence”
 - Illegal Entry (§2L1.2)

The Structure of a Definition of a Category of Offense

Three Potential Sections

- Elements section
 - List of the elements that will include an offense in the category
- Enumerated section
 - List of offenses included in the category

The Structure of a Definition of a Category of Offense (cont.)

Three Potential Sections

- Residual clause section
 - “Otherwise involves conduct” section
 - Describes conduct of an offense that will be included in the category

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

EXAMPLE: ACCA

Definition for “Violent Felony” (cont.)

18 USC § 924(e)(2)(B)

- ***otherwise involves conduct*** that presents a serious potential risk of physical injury to another....

EXAMPLE: Career Offender Guideline Definition for “Crime of Violence”

§4B1.2(a)

- ***has as an element*** the use, attempted use, or threatened use of physical force against the person of another, or

EXAMPLE: Career Offender Guideline Definition for “Crime of Violence” (cont.)

§4B1.2(a)

- ***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

EXAMPLE: Career Offender Guideline Definition for “Crime of Violence” (cont.)

§4B1.2(a)(2), App. Note 1

- Note that the application note enumerates offenses in addition to those in §4B1.2(a)(2)

EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

§2L1.2, App. Note 1(B)(iii)

- **means** murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or

EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence” (cont.)

§2L1.2, App. Note 1(B)(iii)

- any other offensethat ***has as an element*** the use, attempted use, or threatened use of physical force against the person of another

Step 2

Establish the offense of conviction

- **Examine the statute of conviction: “the Categorical Approach”**
- Only if necessary, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”

Examine the Statute of Conviction: The Categorical Approach

- When the judgment cites only the statute of conviction, examine **only** the statute of conviction
 - Example: Defendant has prior conviction of State Statute § 301, Burglary: 1st Degree
 - Determine if the elements of the statute meet the categorical definition

Example 1

State Statute § 301: Burglary – 1st Degree

Burglary is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a felony

Examine the Statute of Conviction: The Categorical Approach (cont.)

- When the judgment cites the *subsection* of the statute of conviction, examine **only** the subsection
 - Example: Defendant has prior conviction of State Statute § 500(b): Burglary
 - Determine if the elements of the subsection meet the categorical definition

Example 2

State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony

- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony**

Example 2

State Statute § 500: Burglary

- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal

- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal

Examine the Statute of Conviction: The Categorical Approach (cont.)

- If the statute has subsections, but the judgment only cites the statute and not the specific subsection of conviction, determine if ALL the subsections meet the categorical definition or if NONE of the subsections meet the categorical definition

Example 3

State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony

- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony

Example 3

State Statute § 500: Burglary

- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal

- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal

Step 2 (cont.)

Establish the offense of conviction

- Examine the statute of conviction: “the Categorical Approach”
- **Only if necessary, use limited documents beyond the statute of conviction: “the *Modified* Categorical Approach”**

The Modified Categorical Approach

- If the judgment cites only to the statute of conviction and that statute can be violated in multiple ways, some of which satisfy the definition and some do not, use ***the modified categorical approach*** to determine if the additional documents clarify the defendant's specific offense of conviction

The Use of Documents Beyond the Statute of Conviction

- Documents can be used only if the statute for the offense of conviction alone does not establish whether the offense of conviction falls within the category in question
- When documents are used, only limited documents are allowed

Examples of Documents Allowed in the Modified Categorical Approach

- Charging document (e.g., indictment)
- Plea agreement
- Plea colloquy in which the defendant confirmed the elements of the offense of conviction
- Jury instructions
- Comparable judicial record
- Judicially-ruled documents

Examples of Documents Generally NOT Allowed in the Modified Categorical Approach

- Police reports
- Presentence reports
- Rap sheets
- Complaints

Documents Not Allowed in the Modified Categorical Approach

- **NOTE:** The fact a document may not be allowed in the modified categorical approach does not necessarily preclude the use of that document in other aspects of guideline application or sentencing

Documents Not Allowed in the Modified Categorical Approach (cont.)

- Example: The court can use a “rap sheet” to determine the length of a prior sentence for purposes of determining criminal history points

Step 3

Analyze the offense of conviction to determine if it meets the category of offense

NOTE

- In the determination as to whether a prior conviction for a state statute falls within the definition under consideration, the state court interpretation of their own statute can be critical

Analysis:
Whether a Conviction Meets
the *Elements Section*
of a Categorical Definition

The Structure of a Definition of a Category of Offense

Three Potential Sections

- **Elements section**
 - List of the elements that will include an offense in the category
- Enumerated section
 - List of offenses included in the category
- Residual clause section
 - “Otherwise involves conduct” section
 - Describes conduct of an offense that will be included in the category

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....*

Supreme Court Case Involving *Elements Section* of “Violent Felony”

Johnson v. U.S., 130 S. Ct. 1265 (2010)

- Florida’s battery conviction **is not** a violent felony under the “force” component because the statute did not require physical force of a violent nature

Supreme Court Case Involving *Elements Section* of “Violent Felony” (cont.)

Johnson v. U.S., 130 S. Ct. 1265 (2010)

- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another

Analysis:
Whether a Conviction Meets
the *Enumerated Section*
of a Categorical Definition

The Structure of a Definition of a Category of Offense

Three Potential Sections

- Elements section
 - List of the elements that will include an offense in the category
- **Enumerated section**
 - **List of offenses included in the category**
- Residual clause section
 - “Otherwise involves conduct” section
 - Describes conduct of an offense that will be included in the category

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EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

§2L1.2, App. Note 1(B)(iii)

- ***means* murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or**
- any other offense

Analysis: *Enumerated Section* (cont.)

- Requires a determination of whether the elements of the offense of conviction meet the definition for the enumerated offense

Analysis: *Enumerated Section* (cont.)

- The elements of the offense of conviction must meet the elements of the enumerated offense in its generic, contemporary definition
 - It is not sufficient that the offense of conviction has the same title as an enumerated offense

Analysis: *Enumerated Section* (cont.)

- Generic form of burglary
(based on *Taylor*):
 - Unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime

Analysis: *Enumerated Section* (cont.)

- Illinois burglary:
 - Unlawfully enters without authority and remains within a building, house-trailer, watercraft, aircraft, motor vehicle, railroad car with intent to commit a felony or theft

Analysis: *Enumerated Section* (cont.)

- Generic form of robbery:
 - Property to be taken from a person or person's presence by means of force or putting in fear

Analysis: *Enumerated Section* (cont.)

- DC robbery:
 - Whoever by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value

Analysis:
**Whether a Conviction Meets
the *Residual Clause Section*
of a Categorical Definition**

The Structure of a Definition of a Category of Offense

Three Potential Sections

- Elements section
 - List of the elements that will include an offense in the category
- Enumerated section
 - List of offenses included in the category
- **Residual clause section**
 - **“Otherwise involves conduct” section**
 - **Describes conduct of an offense that will be included in the category**

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- *....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....***

Pointer Regarding the *Residual Clause Section*

- Requires a determination of whether the *elements of the offense of conviction* meet the conduct requirement

**Recent Supreme Court Cases
Involving the *Residual Clause Section*
of the
Armed Career Criminal Act (ACCA)
Definition of “Violent Felony”**

Begay v. U.S., 128 S. Ct. 1581 (2008)

Sykes v. U.S. 131 S. Ct. 2267 (2011)

Conducting an Analysis Under the Residual Clause

Threshold Question: *Mens Rea* Requirement

The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- Must first determine if the statute is one that is strict liability, negligent, reckless, or intentional conduct, because there are different tests based on whether the statute requires intentional conduct

Threshold Question: *Mens Rea* Requirement (cont.)

The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- If a statute has various sections, some for intentional conduct, some for non-intentional (such as negligent), the categorical approach must be used to determine which section of a statute the defendant was convicted of

Intentional Crimes

- If the offense the offense of conviction has a mens rea requirement of intentional conduct, the court must determine **only**
 - Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another

Intentional Crimes (cont.)

- To decide if the crime has a serious potential risk of physical injury to another, the court must determine if in the typical case the crime is roughly similar in kind and similar in degree of risk to the enumerated
- Statistical information might be helpful (*Chambers and Sykes*)

Reckless, Negligent, or Strict Liability Crimes

- If the offense has a mens rea requirement of reckless, negligent, or strict liability conduct, the court must determine **both**:

Reckless, Negligent, or Strict Liability Crimes

1. Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another
- AND**
2. Whether the conduct was purposeful, violent, and aggressive conduct (per *Begay*)

Reckless, Negligent, or Strict Liability Crimes (cont.)

- Under the requirement of purposeful, violent, and aggressive conduct
 - It is unlikely that a strict liability crime or a negligent crime will meet the “purposeful” requirement
 - It is questionable whether a reckless crime will meet the “purposeful” requirement

Examples Involving the *Residual Clause Section* of “Violent Felony”

- Indiana felony vehicle flight which involved intentional fleeing is a “violent felony” (*Sykes*)
- New Mexico DUI, which is not intentional, and is not purposeful, violent **and** aggressive is not a “violent felony” (*Begay*)

Pointers Regarding the Analysis Used for the Residual Clause Section (Pursuant to *Sykes* and *Begay*)

- The analysis in the determination of a violent offense under the *residual clause section*
 - Does NOT apply if the violent offense falls under the *elements section* (the “use of physical force” part of the definition)
 - Does NOT apply if the violent offense falls under the *enumerated section*

Scenario

Demonstrating the Step-by-Step
Process of the Categorical
Approach

Steps in the Categorical Approach

1. Examine the definition under consideration
2. Establish the offense of conviction
 - Examine the statute of conviction: “the Categorical Approach”
 - Only if necessary, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”

Steps in the Categorical Approach (cont.)

3. Analyze the offense of conviction to determine if it meets the category of offense

Example: Career Offender Guideline

- Defendant's offense of conviction is armed bank robbery (18 USC § 2113(a)&(d))
- The court must determine whether Career Offender (§§4B1.1 & 4B1.2) applies

Example: Career Offender Guideline (cont.)

- Issue: Do the Defendant's prior state convictions meet the definition of "crime of violence":
 - Assault on a law enforcement officer
 - Causing injury to a child
 - Failure to stop for blue light

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 - Describes conduct of an offense that will be included in the category

Career Offender Guideline Definition for “Crime of Violence”

§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

Judgments

- The judgment for each of the three convictions only provides the name and code section of the statute of conviction:
 - Assault on a law enforcement officer; Violation § 999
 - Causing injury to a child; Violation § 204
 - Failure to stop for blue light; Violation § 714

Assault on a Law Enforcement Officer

State Statute § 999

- Whoever uses physical force in a manner that causes bodily injury to an individual known to be a law enforcement officer is guilty of a felony third degree.

Assault on a Law Enforcement Officer (cont.)

- Would it matter if the indictment and the written plea agreement both state that the defendant discharged a firearm, shooting the victim and causing bodily injury, when the victim identified himself as a law enforcement officer?

Causing Injury to a Child

State Statute § 204

- Whoever
 - a. uses physical force against a child with intent to cause bodily injury, or
 - b. negligently places a child in an unsafe environment which results in the child suffering bodily injury
- is guilty of a felony third degree.

Causing Injury to a Child (cont.)

- Would it matter if the indictment only cites:
 - the language of the statutory code (including both ways in which the statute can be violated),
 - the date and location of the offense, and
 - that the defendant's three year old child suffered bodily injury in a fall down an open stairwell?

Causing Injury to a Child (cont.)

- Would it matter if neither the plea agreement nor the plea colloquy confirm that the plea was to the offense of using physical force against the child?

Causing Injury to a Child (cont.)

- Would it matter if the police report in the case states that the defendant's wife called the police when her husband in a fit of rage kicked the child down the open stairwell?

Failure to Stop for Blue Light

State Statute § 714

- A driver of a motor vehicle who willfully fails to stop the vehicle upon notification by a blue light operated by an authorized law enforcement officer is guilty of a felony fourth degree.

Failure to Stop for Blue Light (cont.)

- Would it matter if the indictment only cites the language of the statutory code, and the date, highway and duration of the defendant failing to stop?
- Would it matter if the plea agreement and the plea colloquy provide no more than the indictment?

Failure to Stop for Blue Light (cont.)

- Would it matter if the police report in the case states that:
 - officer with blue light in operation pursued car driven by the defendant for 15 miles, at speeds up to 100 miles per hour, and
 - the defendant swerved his car into the officer's car in an attempt to force the officer's car into a bridge abutment?

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