

Advanced Guideline Application Issues

USSC National Seminar

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Beyond Basics

Got It? or Gotcha?

#1

(b) §2D1.1 - Specific Offense Characteristics

	<u>Level</u>
(1) firearm, dangerous weapon possessed	+2

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

Application of the “Safety Valve SOC”

2D1.1(b)(16) vs. 18 USC 3553(f)

- *Any defendant* for whom §2D1.1 is applied can get the 2-level reduction at the SOC at (b)(16) if he/she meets the criteria of **subdivisions (1)-(5)** of §5C1.2(a), including:

Application of the “Safety Valve SOC” (cont.)

2D1.1(b)(16) vs. 18 USC 3553(f)

- A defendant who is not subject to a mandatory minimum (making the statutory “safety valve” at 18 USC § 3553(f) unnecessary)
- A defendant subject to a mandatory minimum but convicted under a statute for which the *statutory* “safety valve” cannot apply

#2

Supervised Release

§5D1.1(c) & App. Note 5

- New subsection effective November 1, 2011 at §5D1.1(c) provides that, *unless required by statute*, supervised release ordinarily should not be imposed if the defendant is a deportable alien who will likely be deported after imprisonment

Statutory “Safety Valve”

18 USC § 3553(f) & §5C1.2

In the case of an offense subject to a mandatory minimum sentence under 21 U.S.C. 841, 844, 846, 960, or 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds the defendant meets the criteria set forth

Statutory “Safety Valve” (cont.)

18 USC § 3553(f) & §5C1.2, App. Note 9

A defendant who meets the criteria under this section is **exempt from any otherwise applicable** statutory minimum sentence of imprisonment and **statutory minimum term of supervised release**

#3

(b) §2D1.1 - Specific Offense Characteristics

Level

(1) firearm, dangerous weapon possessed +2

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

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. If acts of others were reasonably foreseeable in connection with the defendant's undertaking ¹³

#4

2D1.1(b)(16) SOC Criteria

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**
3. Offense did not result in death or serious bodily injury

Use of Term “Defendant”

1B1.3

- The use of the term “defendant” limits application from including the use of relevant conduct based on the acts of others under §1B1.3(a)(1)(B)
- Pursuant to §1B1.3(a)(1)(A), the “defendant” is accountable for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused

NOTE:

Application of the “Firearm” SOC AND the “Safety Valve” SOC

§2D1.1(b)(1) and (b)(16)

A defendant may be accountable for
the firearm SOC *based on the act of another*

BUT

The safety valve SOC (as well as the actual
safety valve) only requires that
“*the defendant did not ...possess a firearm...
in connection with the offense*”

#5

“Grouping Rules”

§3D1.2

- (a) Same Victim, Same Act
- (b) Same Victim, Two or More Acts
- (c) Conduct Treated by Characteristic**
- (d) Based on an Aggregate

“Rule (c)”

“When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.”

Application of Multiple Counts that Group Under “Rule (c)”

Count 1

Chapter Two

Chapter Three

- Victim
- Role
- **Obstruction**

= adjusted offense level

Count 2

Chapter Two

Chapter Three

- Victim
- Role
- Obstruction

= adjusted offense level

• **Multiple Counts Adjustment**

(Process of Grouping and Assignment of Units)

= **Combined Adjusted Offense Level**

- Acceptance

= **Offense Level Total**

#6

(no slides)

#7

Guidelines Manual

- Ch. One Introduction, definitions, application principles, *including* **Relevant Conduct**
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- Ch. Four **Criminal history**
- Ch. Five Determining the guideline range

§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)

WHEN:

Offense of Conviction

(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) (or be of that type)
- Multiple counts of conviction are not necessary to have “expanded” relevant conduct

Offenses **Included** at §3D1.2(d):

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

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*

“Same Course of Conduct”

1B1.3(a)(2); App. Note 9(B);
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

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

#8

Sentencing a Defendant Currently Serving a Term of Imprisonment








5G1.3(b)

- If the defendant is currently serving a term of imprisonment, and the Chapter Two or Three offense level for the instant federal offense was increased because of relevant conduct (§1B1.3(a)(1)-(3)) that was the basis of the imprisonment:
 - The instant sentence is to be adjusted for any time already served, and
 - The instant sentence is to be concurrent

Drug Quantity Table

Base Offense Levels for Cocaine

150	KG	↑	Level 38
50	KG	↑	Level 36
15	KG	↑	Level 34
5	KG	↑	Level 32
3.5	KG	↑	Level 30
2	KG	↑	Level 28
500	G	↑	Level 26

400	G		Level 24
300	G		Level 22
200	G		Level 20
100	G		Level 18
50	G		Level 16
25	G		Level 14
Less than 25	G		Level 12

#9

Treatment of Multiple Prior Sentences

4A1.2(a)(2)

Multiple Prior Sentences

§4A1.2(a)(2)

- Requires a determination of whether multiple prior sentences are counted “separately” or as a “single sentence”

Threshold Determination: Intervening Arrest

§4A1.2(a)(2)

Multiple prior sentences for offenses
separated by an intervening arrest
are counted separately

“Intervening Arrest”

§4A1.2(a)(2)

“i.e., the defendant is arrested for the first offense prior to committing the second offense”

Examples: Separated by Intervening Arrest

offense
arrested
offense
arrested

**Intervening
Arrest**

offense
offense
offense
arrested

**Not an
Intervening
Arrest**

offense
offense
offense
arrested
arrested
arrested

**Not an
Intervening
Arrest**

Single Sentence Criteria

§4A1.2(a)(2)

Multiple prior sentences will be treated as a “single sentence” *if*

1. Prior sentences are for offenses **NOT** separated by an intervening arrest

AND

2. The offenses *either*

- Were named in the same charging document, *or*
- Resulted in sentences imposed on the same day

#10

Impact of a “Single Sentence”

§4A1.2(a)(2)

Rather than add points for each prior sentence:

- If concurrent sentences
 - Use the longest sentence
- If consecutive sentences
 - Use the aggregate length of the sentences

Example:

Point Assignments and “Single” Sentences

Length

Point Assignments

“Single
Sentence”

Counted
Separately

5 yrs.
2 yrs. consec. }

3 pts.
3 pts.

7 yrs.

3 pts.

6 pts.

Example:

Point Assignments and “Single” Sentences

Length

Point Assignments

“Single
Sentence”

Counted
Separately

5 yrs.

2 yrs. concur.

}

3 pts.

3 pts.

5 yrs.

3 pts.

6 pts.

#11

Criminal History Points Under §4A1.1(c)

1/10	felony dist. drugs	30 days jail	? pt.
2/09	poss. stolen prop.	\$500 fine	? pt.
3/08	DUI	10 days jail	? pt.
4/07	theft	\$200 fine	? pt.
5/06	fraud	30 days jail	? pt.
6/05	auto theft	6 mos. prob.	? pt.
7/04	felony dom. asslt.	10 days jail	? pt.

#12

Criminal History Points Under §4A1.1(c)

1/10	felony dist. drugs	30 days jail	1 pt.
2/09	poss. stolen prop.	\$500 fine	1 pt.
3/08	DUI	10 days jail	1 pt.
4/07	theft	\$200 fine	1 pt.
5/06	fraud	30 days jail	0 pt.
6/05	auto theft	6 mos. prob.	0 pt.
7/04	felony dom. asslt.	10 days jail	0 pt.



X

Criminal History Points Under §4A1.1(c)

1/10	felony dist. drugs	30 days jail	1 pt.
2/09	poss. stolen prop.	\$500 fine	1 pt.
3/08	DUI	10 days jail	1 pt.
4/07	theft	\$200 fine	1 pt.
5/06	fraud	30 days jail	1 pt.
6/05	auto theft	6 mos. prob.	1 pt.
7/04	felony dom. asslt.	10 days jail	1 pt.

4 pts.

#13

References to Other Offense Guidelines

§1B1.5(b)(1) & App. Note 1

An instruction to use the offense level from another Chapter Two guideline means the offense level from the *entire* offense guideline

- Base offense level
- Specific offense characteristics
- Cross references
- Special instructions

Unless there is a direction to use only a specific subsection, *e.g.*, use of a table

#14

References to Other Offense Guidelines

§1B1.5, App. Note 3

When a reference directs that if the conduct involved another offense, the guideline for the other offense is to be applied

AND

If there is more than one such other offense, the most serious is to be used

#15

#16

#17

#18

END