

Relevant Conduct Breakouts
2014 USSC National Seminar
New Orleans, LA
Friday, September 19, 2014
10:00 a.m. – 11:30 a.m. and 1:00 p.m. – 2:30 p.m.
Presenter: Kealin M. Culbreath, Esq.

#1

- Defendant convicted of bank robbery; §2B3.1
- Defendant did not have a weapon
- Defendant's co-participant held a machete to teller's throat to threaten her
- While the robbery was in progress, a police officer arrived on the scene armed with a shotgun which he fired at Defendant

Is Defendant accountable for the machete?

Is Defendant accountable for the discharge of the shotgun?

#2

- Defendant convicted of one count of embezzlement; §2B1.1
- The count of conviction cites one embezzlement of \$10,000 from his employer on a given occasion
- Defendant had also embezzled \$10,000 from the same employer on each of nine other occasions during the ten month period of Defendant's embezzlement activity
- Defendant's position of trust significantly facilitated the commission and concealment of the embezzlements

Is Defendant accountable for the \$10,000 loss cited in the count of conviction?

Is Defendant accountable for the additional \$90,000 loss that occurred during that time?

Will the 2-level Chapter Three Adjustment for Abuse of Position of Trust (§3B1.3) apply for Defendant?

#2-Variation A

- Facts from #2 unchanged
- Three years prior to Defendant's embezzlement activity, Defendant was living in a distant state and was involved in interstate auto thefts over a period of seven months
- The thefts were committed in Defendant's undertaking in an interstate auto theft ring for which he "filled orders" for specific luxury cars
- Defendant's activities involved him stealing seven cars valued at \$50,000 each for which he was paid \$5,000 each
- Defendant never charged or convicted for any acts related to the auto theft activity

Is Defendant accountable for the \$350,000 of loss from the auto thefts?

Will the §2B1.1(b)(14) specific offense characteristic (2-level increase; floor of 14), "if the offense involved an organized scheme to steal or to receive stolen (A) vehicles..." apply for Defendant A?

#2-Variation B

- Facts from #2 & #2-Variation A unchanged, except as follows:
- In addition to the count of conviction for the embezzlement, Defendant A has also pleaded guilty under Rule 20 to one count of interstate theft of

auto, citing one of the vehicles Defendant stole during his involvement with the auto theft ring

- Defendant to be sentenced for the embezzlement count and the Rule 20 interstate auto theft count at a single sentencing

Is Defendant accountable for the \$50,000 of loss from the auto theft cited in the Rule 20 count of conviction?

Is Defendant accountable for the \$300,000 of loss from the other six auto thefts?

Will the §2B1.1(b)(14) SOC (+2-levels, floor of 14), “if the offense involved an organized scheme to steal or to receive stolen (A) vehicles...” apply for Defendant A?

#3

- Defendant is convicted of one count of felon-in-possession of a firearm; §2K2.1
- Six months after the offense cited in the count of conviction, when the federal arrest warrant was being served on Defendant in his apartment where he lived alone, Defendant was in possession of seven additional firearms

Is Defendant accountable for the firearm cited in the count of conviction?

Is Defendant accountable for the seven additional firearms he possessed at the time of his arrest?

#3-Variation A

- Facts from #3 unchanged

- Established that one of the seven firearms possessed by Defendant at his arrest had been used by Defendant in an armed robbery a year prior to his arrest

Assuming in this case that the armed robbery guideline (§2B3.1) results in a greater offense level than the felon-in-possession guideline (§2K2.1), will the cross reference from the firearm guideline based on the firearm being used in the commission of another offense, §2K2.1(c)(1)(A), apply based on the armed robbery?

#3-Variation B

- Facts from #3 and #3-Variation A unchanged
- Defendant had no “role” (Chapter Three, Part B) in the felon-in-possession offense, but organized/led/managed/supervised two co-participants in the armed robbery

Will there be a Chapter Three Adjustment for Role for Defendant if the cross reference under §2K2.1(c)(1)(A) applies?

Will there be a Chapter Three Adjustment for Role for Defendant if the cross reference under §2K2.1(c)(1)(A) does not apply?

#4

- Defendant is convicted of one count of distribution of 3.5 gm cocaine (“an 8-ball” – one-eighth ounce) on a given occasion; §2D1.1
- This distribution was one of 100 distributions, each in the same amount, by Defendant during a two-month period

- While the drug distribution in the offense of conviction was not made in the protected location of a school zone, half of the 100 distributions were made in the protected location

Is Defendant accountable for the 3.5 gm of cocaine distributed in the offense of conviction?

Is Defendant accountable for the other 49 cocaine distributions outside the protected location?

Is Defendant accountable for the 50 cocaine distributions that were made in the protected location?

#5

- Defendant is convicted of one count of conspiracy to traffic in cocaine of 5 or more KG
- Defendant was one of 20 people involved in a 4-year conspiracy that distributed a total of 500 KG cocaine
- Defendant entered the conspiracy at its start, distributing 1.5 KG cocaine per month provided to him by a mid-level manager; Defendant was paid a percent of his gross sales amount
- Defendant knew his manager/source had similar arrangements with other “salesmen,” but Defendant was not involved in those activities
- Defendant was active in the conspiracy for two months, during which he trafficked 3 KG of the 30 KG distributed overall by the conspiracy during that time
- Defendant was arrested by local police based on Defendant making a sale of 1.5 KG (part of the 3 KG Defendant sold in the conspiracy during the two-month period)

- The arrest resulted in Defendant being sentenced in state court to a one-year prison term which Defendant served in full
- During incarceration Defendant had no participation in the drug activities or profits
- Upon Defendant's release the facts essentially repeated themselves:
 - Defendant was active for two months, with sales of 3 KG of the 30 KG distributed overall by the conspiracy during that time
 - Defendant was arrested by local police based on Defendant's sale of 1.5 KG (part of the 3 KG Defendant sold in the conspiracy during the two-month period)
 - The arrest resulted in Defendant being sentenced to a one-year state sentence
 - During incarceration Defendant had no participation in the drug activities or profits
- Upon Defendant's release, he did not resume activities in the conspiracy or drug trafficking

Is Defendant accountable for the full 500 KG distributed by the conspiracy during its four years of operation?

Is Defendant accountable for the 60 KG distributed by the conspiracy during the time he was active in the conspiracy?

Is Defendant accountable for the KGs distributed by the various "salesmen" managed by Defendant's source/manager during the period Defendant was active in the conspiracy?

Is Defendant accountable for the quantities of cocaine that were distributed by the conspiracy during the two 1-year periods Defendant was incarcerated?

Is the quantity for cocaine for which Defendant is accountable reduced by the three KG (one and one-half KG on each of two occasions) for which Defendant was arrested, convicted, and imprisoned?

What is the quantity of cocaine for which Defendant is accountable?

#6

- Defendant is convicted of one count of transporting an adult prostitute across state lines on a given occasion; §2G1.1
- During that transportation Defendant also transported two other adult prostitutes
- The Special Instruction at §2G1.1(d)(1) states: If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.
- §2G1.1(d)(1), App. Note 5 states, in part: ...subsection (d)(1) directs that ***if the relevant conduct of an offense of conviction includes*** the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

Will the Special Instruction at §2G1.1(d)(1) result in guideline application as if there had been two additional counts of conviction?

#6-Variation A

- Facts from #6 unchanged
- It is determined that in addition to the transportation in the count of conviction, Defendant also transported four additional adult prostitutes on

occasions within weeks of the offense of conviction, and by use of the same methods

Will the Special Instruction at §2G1.1(d)(1) apply for the four additional adult prostitutes?