



Advanced Guideline Issues

Annual National Seminar

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2:30 – 4:00 pm; 4:15 – 5:45 pm



Office of Education and Sentencing Practice

Alan Dorhoffer
Deputy Director

Krista Rubin
Senior Education and Sentencing Practice Specialist



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Beyond Basics:

Got It?

or

Gotcha?



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After the Supreme Court's Recent Decision in *Johnson*,⁵ is the Career Offender Guideline Unconstitutional?

- A. Yes
- B. No



ACCA

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

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



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....





Impact of *Johnson* for a Defendant on Direct Appeal Regarding Residual Clause and the ACCA



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Johnson and the Residual Clause

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

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



Johnson and the Residual Clause

U.S. v. Holder, 2015 WL 5091208 (6th Cir. 2015)

- “The erroneous application of the ACCA's mandatory minimum sentence to Holder affected Holder's substantial rights and was an error that seriously affects the fairness, integrity, and public reputation of judicial proceedings. Accordingly, we vacate Holder's sentence and remand his case for resentencing.”



Johnson and the Residual Clause

U.S. v. Peoples, 2015 WL 4932217 (5th Cir. 2015)

- “The defendant has been sentenced to the mandatory minimum sentence pursuant to the Armed Career Criminal Act because of three prior convictions for violent felonies. Because the Supreme Court has held that the residual clause of the statute is unconstitutional in *Johnson v. United States*, defendant's sentence must be vacated and a new sentence imposed.”





Impact of *Johnson* Regarding ACCA's Elements and Enumerated Sections



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Johnson and Other Sections of the ACCA

U.S. v. Hill, 2015 WL 5023791 (11th Cir. 2015)

- “... in *Johnson* the Supreme Court expressly limited its holding to the ACCA's residual clause, leaving undisturbed “the remainder of the [ACCA's] definitions of a violent felony,” which would include the ACCA's definition of a violent felony under its elements clause. *Id.* Section 924(e)(2)(B)(i) of the ACCA is often referred to as the “elements clause.”



Johnson and Other Sections of the ACCA

U.S. v. Tinker, 2015 WL 4430678 (11th Cir. 2015)

- “We note that Tinker has never disputed that his prior Florida convictions—1999 convictions for robbery while using a deadly weapon and aggravated assault with a firearm, a 2010 conviction for resisting an officer with violence, and a 2013 conviction for aggravated battery—constitute “violent felonies” under the ACCA. Moreover, Tinker's predicate offenses appear to qualify as violent felonies under the “elements” clause in § 924(e)(2)(B)(1), rather than the “residual” clause in § 924(e)(2)(B)(ii),



“*Johnson* Language”

U.S. v. Ker Yang, 2015 WL 4978999
(7th Cir. 2015)

- “The Supreme Court recently invalidated as unconstitutionally vague ACCA’s so-called “residual clause” that had extended the definition of “violent felony” to include any felony that “otherwise involves conduct that presents a serious *potential risk of physical injury to another*.” *Johnson v. United States*, 135 S.Ct. 2551, 18 U.S.C. § 924(e)(2)(B)(ii). Yang’s case does not involve the residual clause, so *Johnson* does not affect him.”



Johnson and Other Sections of the ACCA

U.S. v. Bailey, 2015 WL 4257103 (6th Cir. 2015)

- “The United States met that burden here because Bailey's prior convictions for aggravated burglary in 1994, for robbery in 1994, and for aggravated robbery in 1996 categorically are violent felonies that do not implicate the ACCA's unconstitutional residual clause. Binding precedent from this Court holds that Bailey's aggravated burglary conviction constitutes a violent felony under the enumerated-offense prong and that his robbery and aggravated robbery convictions constitute violent felonies under the use-of-force clause.”



Johnson and Other Sections of the ACCA

U.S. v. Taylor, 2015 WL 5011012 (6th Cir. 2015)

- “Now that the Supreme Court has indeed found the residual clause to be unconstitutionally vague, we must consider what effect, if any, that change in the law has on Taylor's upward enhancement pursuant to the ACCA.
- The crime need only qualify as a violent felony under one of the clauses. Accordingly, the Supreme Court's holding in *Johnson* leaves unaffected this Court's determination that simple robbery in Tennessee is a predicate offense under “the use of physical force” clause.”



Johnson and Other Sections of the ACCA

U.S. v. Murray, 2015 WL 5165998 (11th Cir. 2015)

- “The error here was harmless even without the battery on a law enforcement officer offense counting against Murray because he qualified for ACCA enhancement based on his three serious drug offenses.”



Johnson and Other Sections of the ACCA

U.S. v. Turner, 2015 WL 4978692
(10th Cir. 2015)

- “Turner was convicted under § 924(e)(1) based on three earlier convictions for “serious drug offense[s]” under § 924(e)(2)(A). The district court was correct that the Supreme Court's decision in *Johnson* addressed an issue not relevant to Turner's conviction. Thus, Turner has failed to make a substantial showing that he was denied a constitutional right and we deny him a COA on this claim.”





Impact of *Johnson* on Sentencing Guideline Provisions



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Guidelines that might be impacted by *Johnson*

- §4B1.2 (Career Offender)
- §2K2.1 (Firearm offenses)
- §2L1.2 (Illegal Reentry)
- §2S1.1 (Money Laundering)
- §7B1.1 (Revocation for Grade A Violation)



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



Johnson and Career Offender

- *U.S. v. Castro-Vazquez*, 2015 WL 5172839 (5th Cir. 2015)
 - “We do not decide whether the residual clause of the guidelines fails under *Johnson*. See *United States v. Tichenor*, 683 F.3d 358, 363–65 (7th Cir.2012) (rejecting vagueness challenge to the “crime of violence” definition because the guidelines are merely advisory). We hold only that if on remand the government relies on the residual clause (it has disclaimed such reliance on appeal), the constitutional issue must be addressed.”



Johnson and Career Offender

- *U.S. v. Wilson*, 2015 WL 4760494 (5th Cir. 2015)
 - “The Supreme Court recently struck down the ACCA's residual clause in *Johnson v. United States*, holding that “imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process.” The court struck down the ACCA's residual clause for unconstitutional vagueness. Our case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline because a defendant is not entitled to notice of where within the statutory range the guideline sentence will fall. *United States v. Pearson*, 910 F.2d 221, (5th Cir.1990).”



Johnson and Career Offender

- *U.S. v. Willis*, 2015 WL 4547542 (9th Cir. 2015)
 - “Like “violent felony” in ACCA, “crime of violence” in § 4B1.2(a)(2) of the Sentencing Guidelines is defined as including an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” We make no distinction between “violent felony” in ACCA and “crime of violence” in § 4B1.2(a)(2) for purposes of interpreting the residual clauses. See *United States v. Spencer*, 724 F.3d 1133 (9th Cir. 2013). But we have not yet considered whether the due process concerns that led *Johnson* to invalidate the ACCA residual clause as void for vagueness are equally applicable to the Sentencing Guidelines.



Johnson and Career Offender

U.S. v. Harbin, 2015 WL 4393889 (6th Cir. 2015)

- “Following *Johnson*, the Supreme Court has vacated the sentences of offenders who were sentenced under the residual clause of the Sentencing Guidelines. *See United States v. Maldonado*, 581 F. App'x 19, 22–23 (2d Cir.2014), vacated, No. 14–7445, 2015 WL 2473524, at *1 (U.S. June 30, 2015); *Beckles v. United States*, 579 F. App'x 833, 833–34 (11th Cir.2014), vacated, No. 14–7390, 2015 WL 2473527, at *1 (U.S. June 30, 2015. 6, 2015) (per curiam)



Johnson and Career Offender

U.S. v. Harbin, 2015 WL 4393889 (6th Cir. 2015)

- “see also *Wynn v. United States*, No 14–9634, 2015 WL 2095652, at *1 (U.S. June 30, 2015) (vacating a Sixth Circuit order, which denied habeas relief based on a predicate offense qualifying under the residual clause of the career offender enhancement). Accordingly, Harbin is entitled to the same relief as offenders sentenced under the residual clause of the ACCA. See *United States v. Darden*, No. 14–5537 (6th Cir. Jul. 6, 2015) (per curiam).”



Johnson and Other Guidelines

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

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





Impact of *Johnson* on Habeas



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“Habeas Split”

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



Proposed Amendment

- Commission seeking comment
- Elimination of Residual Clause from Crime of Violence definition in §4B1.2 (Career Offender)
- Definitions for several enumerated offenses
- Other possible changes
 - Felony classification
 - Other guidelines (*e.g.*, §2L1.2)





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- Defendant is a home health care nurse who pled guilty to healthcare fraud
- Indictment states that the defendant submitted \$85,000 in fraudulent bills from May 2013 – June 2014
- Defendant has records to show that \$30,000 of the \$85,000 billed were for legitimate services.
- PSI reveals that the defendant, in 2011 and 2012, submitted \$40,000 in fraudulent healthcare bills



What is the loss amount at §2B1.1?

- A. \$55,000
- B. \$85,000
- C. \$95,000
- D. \$125,000



Loss Table

§2B1.1(b)(1)

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



“Loss”

Application Note 3(A)

Use greater of:

“actual” or “intended” loss



“Actual Loss”

Application Note 3(A)(i)

Reasonably foreseeable pecuniary harm
that resulted from the offense

Causation standard:
“but for” and “reasonably foreseeable”



“Intended Loss”

Application Note 3(A)(ii)

- The pecuniary harm that was intended to result from the offense
- Includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, government sting)



Special Rules in the Determination of Loss

Application Note 3(F)(viii)

- Federal Health Care Offenses Involving Government Health Care Programs:
 - The aggregate amount of fraudulent bills submitted to the government health care program is prima facie evidence of the amount of intended loss, if not rebutted



Analysis of §1B1.3(a)(2)

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

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

WHEN:

Offense of Conviction

(a)(2):

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



“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



What is the amount of restitution?

- A. \$55,000
- B. \$85,000
- C. \$95,000
- D. \$125,000





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- Defendant pleaded guilty to wire fraud and making a false statement on a loan application
- Entire value of the principal of the fraudulent loans is \$1 million
- Creditors, due to market downturn, were only able to recover \$700,000 from the sale of the collateral



What is the loss amount at §2B1.1?

- A. \$100,000
- B. \$300,000
- C. \$1 million



Credits Against Loss

Application Note 3(E)

Loss may be reduced by:

- certain benefits transferred
- collateral pledged

to the victim prior to the detection of the offense



Valuation and Timing of Credits

Application Note 3(E)

- Transferred benefits:
 - *Fair market value* of services or property returned as of date of detection of offense
- Pledged collateral:
 - *Amount recovered* upon disposition;
 - If not disposed, *fair market value* as of date of sentencing



What is the amount of restitution?

- A. \$100,000
- B. \$300,000
- C. \$1 million





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- Defendant is convicted of interstate theft
- Defendant stole a total of \$110,000 from 50 Walgreen stores



Which enhancement at §2B1.1(b)(2) will apply? ⁵²

- A. +2 (10 or more victims)
- B. +4 (50 or more victims)
- C. +6 (250 or more victims)
- D. No enhancement



Number of Victims or Mass Marketing Specific Offense Characteristic

§2B1.1(b)(2)

- 10 or more victims or mass-marketing +2
- 50 or more victims +4
- 250 or more victims +6



General Definition of “Victim” for §2B1.1

§2B1.1, App. Note 1

- Any person who sustained any part of the *actual loss* determined under subsection (b)(1)
- Any individual who sustained bodily injury as a result of the offense



Proposed 2015 Amendment to §2B1.1

Victims Table

§2B1.1(b)(2)

- Revises the table to incorporate substantial financial hardship to victims
 - As revised, enhancement will apply if even one victim suffers a financial hardship
- Less emphasis on the number of victims
 - Eliminated 4- and 6- level enhancements based solely on the number of victims; now based on financial hardship



Proposed 2015 Amendment to §2B1.1

Victims Table

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



Proposed 2015 Amendment to §2B1.1

“Substantial Financial Hardship”

Application Note 4(F)

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





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- Defendant is convicted of receipt of child pornography
- Thirty years ago, the defendant was convicted of sexual assault of his niece on three occasions
- The defendant did not receive any criminal history points for the conviction because it was too remote



Can §2G2.2(b)(5) -- engaging in a “pattern of activity” involving the sexual abuse or exploitation of a minor apply in the case?

- A. Yes
- B. No, because the offense did not receive any criminal history points



§2G2.2(b)(5): Pattern of Activity SOC

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels



§2G2.2(b)(5): Pattern of Activity (cont.)

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- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred
 - during the course of offense
 - involved the same minor, or
 - resulted in a conviction for such conduct



§2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct
 - *U.S. v. Clark*, 685 F.3d 72 (1st Cir. 2012) (24 yrs)
 - *U.S. v. Woodward*, 277 F.3d 87 (1st Cir. 2002) (27 yrs)
 - *U.S. v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (16 yrs)
 - *U.S. v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (30 yrs)
 - *U.S. v. Quinn*, 257 F. App'x 864 (6th Cir. 2007) (30 yrs)



§2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct (cont.)
 - *U.S. v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
 - *U.S. v. Woodard*, 694 F.3d 950 (8th Cir. 2012) (19 yrs)
 - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007) (35 yrs)
 - *U.S. v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (35 yrs)
 - *U.S. v. Turner*, 626 F.3d 566 (11th Cir. 2010) (20 yrs)



§2G2.2(b)(5): Pattern of Activity (cont.)

- Can include attempts
 - *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012)
- Can include conduct when defendant was a minor
 - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013)





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- Defendant pled to unlawfully reentering the United States after a conviction for an aggravated felony
- 20 years ago, the defendant was convicted in state court of attempted murder and received a sentence of 3 years in prison
- The prior conviction for attempted murder is too old to count for criminal history points.



Will the defendant receive an increase at §2L1.2(b)(1) for⁶⁸ being previously deported after a conviction for a crime of violence ?

- A. Yes, +16 levels
- B. Yes, +12 levels
- C. Yes, +8 levels
- D. Yes, +4 levels
- E. No, the prior conviction does not receive criminal history points.



Relationship of §2L1.2 and Chapter Four (Criminal History)

§2L1.2, App. Notes 1(A)(vii) & 6

- Prior convictions considered under §2L1.2 may also receive criminal history points under §4A1.1
- Juvenile adjudications cannot be used at §2L1.2 but can be used at Chapter Four



§2K2.1 (Felon in Possession)

- For the priors to be used in the BOLs, they must also be counted separately for Criminal History at §4A1.1(a), (b), or (c)
 - Per §2K2.1, App. Note 10
 - Note: This results in time limits on priors





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- Defendant pled guilty to money laundering (§2S1.1 – 18 U.S.C. § 1956 – statutory maximum penalty 20 years)
- Defendant was an organizer and leader of several participants in an extensive healthcare fraud scheme from which the laundered funds were derived
- §2S1.1(Money Laundering) directs application of the guideline for the underlying offense from which the funds were derived



Alternative Base Offense Levels

§2B1.1(a)

BOL 7, if

- Stat. max. of 20 years or more
- AND**
- Referenced by Appendix A or §2X1.1

BOL 6, otherwise



The BOL at §2B1.1 for this defendant is:

A. 7

B. 6



Will the defendant receive an aggravating role enhancement at §3B1.1 after application of §2S1.1?

- A. Yes
- B. No



Application of Chapter Three Adjustments

§2S1.1, App. Note 2(A)

- Notwithstanding §1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (*i.e.*, the laundering of the criminally derived funds) and not on the underlying offense from which the laundered funds were derived





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- Defendant is convicted of PWID Methamphetamine (statutory penalty 0 – 20 years)
- Defendant was a passenger in a vehicle in which he and the driver were transporting methamphetamine
- When police tried to make contact with the vehicle, the driver threw a firearm out of the window
- Defendant was unaware driver possessed a firearm



**Should the defendant receive a two-level enhancement at⁷⁹
§2D1.1(b)(1) for possession of a weapon?**

A. Yes

B. No



“Firearm” SOC

§2D1.1(b)(1) & App. Note 11

“...should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”

Note: Under relevant conduct a defendant can be held accountable for a co-participant's firearm



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

WHO:

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

WHEN:

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

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan



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



Can the defendant still qualify for a reduction under
§2D1.1(b)(17) (“Safety Valve”)?

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A. Yes

B. No



SOC (b)(17) at §2D1.1: “The Safety Valve SOC”

2-Level Decrease

- The defendant must only meet the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (“The Safety Valve”)



“Safety Valve”

§5C1.2(a)

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 below:



§5C1.2(a)

Subdivisions (1) – (5)

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



4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE
5. Not later than the time of the sentencing hearing, defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.





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- Defendant is convicted of being a felon in possession
- Defendant was pulled over for DUI. Upon search of the vehicle, police found 50 kilos of marijuana in the front seat and seven AK-style weapons in a duffel bag in the trunk of the vehicle



Can an enhancement for possessing a firearm “in connection with” another felony offense at §2K2.1(b)(6)(B) apply?

- A. Yes
- B. No



“Use/Possession” SOC

§2K2.1(b)(6)(B)

- If the defendant:
 - Used or possessed any firearm or ammunition in connection with another felony offense
- OR**
- Possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense

Increase by 4 levels, with floor of 18



“Another Felony Offense”

§2K2.1(b)(6)(B) & App. Note 14(C)

- Means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought or a conviction obtained



General Standard for “In Connection With”

§2K2.1(b)(6)(B) & (c)(1), App. Note 14(A)

- If the firearm facilitated, or had the potential of facilitating, another felony offense or another offense
- Adopted language from *Smith v. United States*, 508 U.S. 223 (1993)



Standard for “In Connection With” in a Drug Trafficking Offense

§2K2.1(b)(6)(B) & (c)(1), App. Note 14(B)

- SOC and cross reference apply when a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia





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- May 1, 2004 – Defendant sentenced to 2 years probation for DUI
- August 13, 2004 – probation violation warrant issued for the defendant's arrest
- Violation warrant is still outstanding when defendant is arrested for the instant federal offense on August 13, 2015
- Instant offense was committed August 1, 2015



Will the defendant receive 2 criminal history points under⁹⁷ §4A1.1(d) for being under a criminal justice sentence at the time of the instant offense?

- A. Yes, because the warrant was outstanding at the time of the instant offense
- B. No, because the probation sentence would have expired
- C. No, because the sentence is not otherwise countable



“Status”

§4A1.1(d)

- Add two points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status



§4A1.1(d) “Status”

Application Note 4

- For purposes of this subsection, a “criminal justice sentence” means a sentence countable under §4A1.2...
- A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.



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





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- August 1, 2014 – Defendant was convicted of driving with a suspended license and was sentenced to 29 days incarceration



How many criminal history points should be assigned for this conviction?

- A. Zero
- B. One



Excluded Offenses

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(1) - List of misdemeanors and petty offenses that are only counted when:
 - The sentence was probation of more than one year
 - The sentence was imprisonment of at least thirty days
 - The prior offense was similar to an instant offense
 - *E.g.*, driving without license or with suspended license



Excluded Offenses (cont.)

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(2) - List of misdemeanor and petty offenses that are never counted
 - *E.g.*, minor traffic infractions (*e.g.*, speeding)
- “Misdemeanor” means having a maximum statutory penalty of one year or less
 - Note: All such offenses are counted if a “felony offense” (*i.e.*, maximum of over 1 yr.)



- August 1, 2014 – Defendant was convicted of misdemeanor DUI and was sentenced to 29 days incarceration



How many criminal history points should be assigned¹⁰⁷
for this conviction?

- A. Zero
- B. One



DUI Offenses

- §4A1.2 Application Note 5: Sentences for Driving While Intoxicated or Under the Influence
 - Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified.





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- Defendant is convicted of criminal sexual abuse of a minor
- Applicable guideline is §2A3.1
- In applying §2A3.1, the defendant will receive an increase of two levels at SOC (b)(3) because the victim was “in the custody, care, or control of the defendant”



Will an enhancement for Abuse of a Position of Trust §3B1.3 also apply?

- A. Yes
- B. No



Application of Abuse of Trust Adjustment

§2A3.1, App. Note 3(B)

- If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill)



- Defendant pled guilty to a violation of 18 U.S.C. § 111(b), aggravated assault on a law enforcement officer
- Applicable guideline is §2A2.2
- In applying §2A2.2, the defendant will receive an increase of two levels at SOC (b)(7) because he was “convicted under 18 U.S.C. § 111(b)”



**Will an enhancement for Official Victim at §3A1.2
also apply?**

A. Yes

B. No



Application of Official Victim Adjustment

§2A2.2, App. Note 4

- If subsection (b)(7) applies, §3A1.2 (Official Victim) also shall apply.





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- Conviction: PWID Cocaine (Jan. 2015 – May 2015)
- Prior Record:
 - Robbery 1: June 14, 2008 arrested August 3, 2008 for the offense
 - DUI: arrested July 1, 2008 for the offense, ultimately dismissed
 - Robbery 2: July 7, 2008 arrested Sept. 12, 2008 for the offense
 - Separate indictments for the 2 robberies
 - Sentenced for both robberies on January 2, 2009 to:
5 years for Robbery 1 and 5 years consecutive for Robbery 2



How many criminal history points will the defendant receive?

- A. 0
- B. 3
- C. 4
- D. 6



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



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



Point Assignments and “Single” Sentences

Example **Consecutive** Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. consec.		2 pts.
9 mos. consec.		<u>2 pts.</u>
<u>14 mos.</u>	3 pts.	5 pts.



Point Assignments and “Single” Sentences

Example **Concurrent** Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. concur.		2 pts.
9 mos. concur.		<u>2 pts.</u>
<u>9 mos.</u>	2 pts.	5 pts.



A “Single Sentence” That Includes Crimes of Violence

§4A1.1(e)

- When multiple prior sentences are treated as a “single sentence,” §4A1.1(e) adds 1 point for each crime of violence that did not result in additional points under §4A1.1(a), (b), or (c)





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- Defendant is convicted two counts of bank robbery and one count of 18 U.S.C. § 924(c)
- The gun in the 924(c) count was used in the robbery of Bank A.
- Defendant was also in possession of a firearm during the robbery of Bank B.



The SOC for possession of a firearm at §2B3.1¹³¹ (Robbery) will apply in...

- A. Both robbery calculations
- B. Neither robbery calculation
- C. The robbery not associated with the 924(c)



- Defendant is convicted one count of PWID cocaine and one count of 18 U.S.C. § 924(c)
- The gun in the 924(c) count is a sawed-off shotgun
- Defendant also possessed an AK-47 in connection with the drug trafficking offense



**The SOC for possession of a firearm at §2D1.1
(Drugs) will apply...**

A. Based on the sawed-off shotgun

B. Based on the AK-47

C. The SOC will not apply at all

D. None of the above



§2K2.4, Application Note 4

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.



§2K2.4, Application Note 4

A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).





Thank You!



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