

ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING (2015)

Defendant Peter Meyers

Defense Counsel Paul Jones

AUSA Mary Brown

I.

Peter Meyers, a 19 year-old with no criminal record, was arrested by the DEA in Los Angeles as he was driving his car away from a suspected drug dealer’s house. Meyers had 54 grams of crystal meth in a baggie in his jacket pocket. In the glove compartment of his car was a loaded 9-millimeter pistol. The agents seized both the drugs and gun, and Meyers was arrested. He was taken into federal custody and charged by a criminal complaint with possession of more than 50 grams of methamphetamine with intent to distribute it. The criminal complaint did not mention the pistol. At Meyers’s initial appearance in federal court, **AFPD Paul Jones** was appointed to represent Meyers. The prosecutor, **AUSA Mary Brown**, approached Jones and said: “The agents seized a loaded 9 millimeter pistol in the glove compartment. If your client pleads guilty to the dope and cooperates (whether or not he can provide substantial assistance), I’ll not charge him with a section 924 count.” Jones conferred with Meyers, determined that no suppression issues existed, and responded to AUSA Jones as follows: “He’ll take the deal, but I would like to avoid mentioning the fact that a loaded gun was in the car. Can your factual basis in the plea agreement omit that fact and also can you and your agent not provide the probation officer information about the gun being in the car? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify for the safety valve.”

1. Assume that AUSA Brown is willing to consider Jones’s proposal. Could Brown ethically enter into such an agreement to withhold evidence of the loaded pistol from the probation office and court?
2. Assume Brown and Jones ultimately entered into the agreement. At sentencing, the court specifically asks both attorneys: “The PSR doesn’t say anything about it, but I just want to make sure that the defendant wasn’t armed during the drug deal in this case. It’s my understanding guns are tools of the trade for meth dealers.” How should AFPD Jones respond? How should AUSA Brown respond?

II.

Defendant **Peter Meyers**, who has a prior felony drug conviction, is facing a potential 10-year mandatory minimum sentence for possession with intent to distribute over 5 kilos of cocaine. He has been charged in a criminal complaint; no indictment has been returned yet. **AUSA Mary Brown** wants Meyers to cooperate and advises **AFPD Paul Jones** that, *if* Meyers cooperates and provides substantial assistance, Brown will not file a § 851 notice of enhancement (that, if filed, would raise the mandatory minimum to 20 years) and also will file a motion for a substantial assistance departure under both § 3553(e) and § 5K1.1. Thus, the potential swing in Meyers’s sentence is 15 years – as a 5-year sentence is not unrealistic should the cooperation prove to be fruitful.

During subsequent debriefings, Meyers fails to provide substantial assistance. The proffer sessions lead to nothing because Meyers simply appears not to know what AUSA Brown thought he did about certain other drug dealers. Brown then states that, as a matter of “office policy,” she must file the § 851 notice.

Sensing that Meyers might have been holding something back, Jones stresses to Meyers that he will get a minimum 20-year sentence unless he provides truthful incriminating information about other drug dealers. Meyers responds that, two years ago, when he was receiving drugs from his supplier, a rival dealer approached them, pulled out a firearm, and attempted to rob the supplier. Meyers claimed that the supplier responded by grabbing the rival’s gun and then fatally shooting the rival. Meyers said that he (Meyers) took the gun from the supplier and threw it in a nearby river. Meyers swears there were no eyewitnesses and wants to cooperate about the shooting – but only under the condition that he can withhold information about his role with respect to discarding the firearm (as that will make him appear to have aided and abetted the supplier).

Meyers tells Jones that he is prepared to proffer this information about the shooting of the rival drug dealer to the AUSA, the DEA case agent, and local homicide detectives.

1. Should Jones set up the proffer session?
2. What should Jones advise Meyers to say during the debriefing?

3. Assume that Meyers goes to the proffer session intending to tell the truth but, during the debriefing, changes his story and says that the supplier (rather than Meyers) threw the gun in the river after killing the rival drug dealer. Now what should Jones do?
4. Assume that, before the debriefing, Jones told Meyers that he may not lie to or mislead the authorities about his role with regard to the gun, and Meyers then changes his story (to Jones) before the debriefing and tells Jones that he never touched the firearm. How should Jones proceed?
5. Assume that, during the debriefing, Jones learns that the supplier turns out to be one of Jones's former clients? How should Jones proceed?

III.

Peter Meyers was convicted of receiving child pornography via a peer-to-peer file-sharing network. During the FBI agents' investigation of Meyers – after he had been arrested but before he was indicted – the agents interviewed Meyers' 15-year old step-daughter (Meyers's wife's daughter from an earlier relationship) in the presence of her mother. When asked whether Meyers had ever engaged in inappropriate behavior of sexual nature toward her, the step-daughter said, "No. He's always been good to me. I never felt comfortable around him." She added: "He's a good guy – better than my own dad." Thereafter, during the presentence investigation, the federal probation officer interviewed Meyers' wife (who had recently filed for divorce from Meyers), who told the probation officer that her daughter had confided in her, after Meyers had been charged with receipt of child pornography, that Meyers had sexually abused her repeatedly over the years, beginning when she was 8 years old. The mother provided very detailed information about the sexual acts that Meyers allegedly had done to her daughter (based on what the daughter had told her). The mother refused to allow the probation officer to interview her daughter, claiming that "she's been traumatized enough already." The mother also refused to press separate criminal charges for the alleged sexual abuse.

The probation officer's presentence report (PSR) mentioned Meyer's wife's allegations claiming that he had sexually abused his step-daughter and, in applying the guideline for child pornography (USSG section 2G2.2), included a 5-level enhancement for a "pattern of activity" of sexual abuse of a minor based solely on the mother's statements to the probation officer. **AFPD Paul Jones**, Meyers's

court-appointed counsel, filed a response to the PSR that disputed the facts concerning the alleged sexual abuse and, on that ground, objected to the 5-level enhancement.

Assume that AFPD Jones was unaware of the step-daughter's original statement to the FBI agents denying that any sexual abuse had occurred. Does the prosecutor, **AUSA Mary Brown**, have any ethical (and/or constitutional) obligations to disclose the information about the step-daughter's original statement? What if AUSA Brown was subjectively unaware of the statement because the FBI case agent had not turned it over or mentioned it to Brown?

IV.

Peter Meyers, a citizen of England, was arrested for possession with intent to distribute 150 grams of crack cocaine and brought to federal court for his initial appearance. At the time of his arrest, the DEA agents did not know Meyers's identity and assumed his name was **Doug Pierce** (based on a fake ID that Meyers was carrying). During his uncounseled interview with a pretrial services officer, Meyers lied and told the officer that his name was Doug Pierce. **AFPD Paul Jones** was appointed to represent Meyers and also initially believed his client is named Doug Pierce. Only after Meyers had pleaded guilty and was scheduled to have a presentence interview did Jones learn from his client (during a private attorney-client meeting at the local detention center) that his real name is Peter Meyers.

Ethically, how should Jones proceed in light of the information that he has learned?

V.

Peter Meyers was charged with conspiracy to distribute 30 grams of crack cocaine in federal court in St. Louis, which is located in the Eighth Circuit. He pleaded guilty. Meyers had two unrelated prior felony convictions in New York for third-degree burglary (both burglaries of a commercial building). The PSR treated Meyers as a career offender under the guidelines because the two prior New York burglary convictions were deemed "crimes of violence." Under binding Eighth Circuit precedent, burglary of a building is categorically a "crime of violence" under the career offender provision in the guidelines. *See United States v. Synder*, 511 F.3d 813, 818 (8th Cir. 2008) (noting that the Eighth Circuit has repeatedly ruled in this manner for over a decade). Conversely, some other circuits have held that burglary of a building is not categorically a "crime of violence." *See, e.g., United States v. Matthews*, 374 F.3d 872, 880 (9th Cir.2004).

After receiving the PSR, **AFPD Paul Jones** goes to the local detention center to review the PSR with his client Meyers. Meyers informs Jones that “another inmate went to the law library” at the detention center and researched the legal issue of whether burglary of a commercial building qualifies as a “crime of violence” under the career offender provision. According to Meyers, the other inmate told him that he should “demand that [his] attorney object to the PSR” on the ground that Meyers’s two New York burglary convictions are not “crimes of violence” and, thus, that Meyers is not a career offender. Meyers makes such a “demand” of Jones.

1. What should (must) Jones do, if anything, in response to Meyers’s “demand”?
2. Further assume that Meyers raised a pro se objection about his career offender status, which was overruled by the district court at sentencing, but that no other legal issues were raised concerning the validity of Meyers’s conviction or sentence. After sentencing, what obligation, if any, does Jones have to consult with Meyers about a possible appeal?
3. Assume that Meyers chooses to appeal and that a new defense counsel, CJA Attorney Maria Gonzalez, is appointed on appeal. Assume the only legal issue in Meyers’s case is the “career offender” issue discussed above. What should Gonzalez do? Can (should) she file an *Anders* brief?