

Criminal History Exercise #1

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
02/07/03 (Age 18)	Burglary, Montgomery County District Ct. Dayton, OH, Case#2003- CR-411	04/07/03: 4 to 15 yrs. imprisonment consecutive to Case#2003-CR-805
02/07/03 (Age 18)	Burglary, Montgomery County District Ct. Dayton, OH, Case#2003- CR-805	04/07/03: 4 to 15 yrs. imprisonment consecutive to Case# 2003-CR-411

Are these sentences scored separately or as a single sentence?

Single sentence. There is no intervening arrest between the offenses (the threshold question) and the sentences were imposed on the same day. (It is unclear whether the different case numbers mean that the offenses were not contained in the same indictment ("charging instrument"), but with the same date of sentencing that does not matter.) (See 4A1.2(a)(2).)

The length of an indeterminate sentence of 4 to 15 years is the stated maximum of 15 years. (See 4A1.2, App. Note 2.)

The sentence of 15 years of imprisonment concurrently on each sentence results in this being treated as a single sentence of 15 years. (See 4A1.2(a)(2).)

How many criminal history points?

3 points under 4A1.1(a). Burglary is not a crime of violence (see 4B1.2(a) & App. Note 4), so the fact that one of the burglaries did not contribute to the criminal history points does not lead to an additional criminal history point under 4A1.1(e).

Criminal History Exercise #2

<u>Arrest Date*</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
01/19/10 (Age 24)	Felon in possession of firearm, Miami FL, U.S. District Ct. (SD/FL)	08/20/10: 14 months BOP custody, 2 yrs. SR
11/25/11 (Age 24)	Felon in possession of firearm, Miami Dade County District Court, Miami Florida	01/14/12: 6 months custody DOC
*Warrant issued by the state for attempted murder and possession of gun by felon on 12/20/09		

Are these sentences scored separately or as a single sentence?

Counted separately. While the available facts would suggest that there was not an intervening arrest between the offenses, the fact that the sentences were not charged in the same indictment (here one was federal and one was state) and were not sentenced on the same day precludes these sentences from being treated as a single sentence. (See 4A1.2(a)(2).)

How many criminal history points?

The 14-month sentence of imprisonment is 3 points under 4A1.1(a).
The 6-month sentence of imprisonment is 2 points under 4A1.1(b).

Criminal History Exercise #3

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
05/06/09 (Age 20)	Aggravated Robbery; Rutherford County Criminal Court, Murfreesboro, TN	06/26/09: 2 years' custody, concurrent with all other convictions
05/06/09 (Age 20)	Aggravated Robbery; Rutherford County Criminal Court, Murfreesboro, TN	06/26/09: 1 year's custody, concurrent with all other convictions

Are these sentences counted separately or as a single sentence?

Single sentence. With the arrests on the same date it seems certain that there was no intervening arrest between the offenses, so the threshold requirement for a single sentence is met, and the sentences were imposed on the same day. (There is no information as to whether these offenses were charged in the same indictment (charging instrument), but with the sentences imposed on the same day, that does not matter.) (See 4A1.2(a)(2).)

The sentence of 2 years of imprisonment concurrently with 1 year of imprisonment results in this being treated as a single sentence of 2 years. (See 4A1.2(a)(2).)

How many criminal history points?

4 points, as follows:

The single sentence of 2 years is 3 points under 4A1.1(a).

Assuming the robbery is found to be a crime of violence, after the application of the categorical approach (see 4B1.2(a)(2)), the fact that one of the robbery sentences did not contribute to the criminal history points (the 2 year sentence for one of the robberies would have gotten 3 criminal history points by itself) would result in 1 criminal history point under 4A1.1(e) (see 4A1.1, App. Note 5.).

Criminal History Exercise #4

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
12/05/11 (Age 21)	Consp. to commit possession of CDS (Cocaine) Second Judicial District Court Albuquerque, New Mexico	11/07/11: Guilty 2 years deferred adjudication, probation with drug treatment 09/06/12: probation revoked; guilty and resentenced to 180 days custody

How many criminal history points?

2 points under 4A1.1(b). The original sentence did not include any term of imprisonment. The 180 days' imprisonment imposed on the revocation results in the sentence being a 180-day sentence of imprisonment. (See 4A1.2(k)(1) & App. Note 11.)

Criminal History Exercise #5

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
03/05/04 (Age 22)	21 U.S.C. § 952 and 960, Importation of Marijuana (felony) USBP (Calexico, CA) U.S. District Court (SD/CA)	06/28/04: 4 months BOP, 2 years SR 11/10/04: SR violation, warrant issued 05/29/05: SR revoked, 4 months BOP, 2 years SR reimposed

How many criminal history points?

No criminal history points. The original term of imprisonment of 4 months is added to the 4-month term of imprisonment imposed upon revocation. As a result this is counted as if it were a single sentence of 8 months' imprisonment. While the earliest date of relevant conduct is not provided, if it is assumed that the original sentence was imposed more than 10 years prior to the instant federal offense, the sentence is outside the applicable time period to be counted. (See 4A1.2(k) & App. Note 11, and 4A1.2(e)(2) & App. Note 8.)

Criminal History Exercise #6

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
03/05/04 (Age 22)	21 U.S.C. § 952 and 960, Importation of Marijuana (felony) US Border Patrol (Calexico, CA) U.S. District Court (SD/CA)	06/28/04: 4 months BOP, 2 years SR 11/10/04: SR violation, warrant issued 05/29/05: SR revoked, 4 months BOP, 2 years SR reimposed

How many criminal history points?

This exercise is similar to Exercise #5, with the same results and analysis.

Career Offense Exercise

- Count One: Possession with Intent to Distribute Heroin, 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A)(i) – 10 years to life imprisonment
- Count Two: Possession of a Firearm in Furtherance of a Drug Trafficking Crime – 8 U.S.C. § 924(c)(1)(A)- 5 years to life imprisonment

Count One: §2D1.1

Count Two: §2K2.4

BOL: (10-30 KG Heroin) 34

Mandatory Consecutive 60 months

OL: 34-3 for Acceptance = 31 (before application of Career Offender Override)

Step One

Do you have a count, other than the 18 U.S.C. § 924(c) count, that qualifies the defendant as a Career Offender?

Yes, Count One, Possession with Intent to Distribute Heroin.

If NOT: use the following table to determine your guideline:

<u>§3E1.1 Reduction</u>	<u>Guideline range for the 18 U.S.C. § 924(c) count</u>
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327

STEP TWO

Determine the guideline range for the non 924(c) count(s) of conviction. This is the “otherwise applicable guideline range”.

What is the defendant’s final offense level and corresponding “otherwise applicable guideline range”?

Because the drug count also qualifies the defendant as a Career Offender, the Career Offender table at 4B1.1(b)(1) is applied, which gives an Offense Level 37 if the offense has a statutory maximum of life (as is the case with the drug count), but because the defendant received a 3-level reduction for Acceptance of Responsibility, the Offense Level 37 is reduced to Offense Level 34. At Criminal History Category VI, the guideline range is 262-327.

STEP THREE

Add the mandatory minimum required by the 924(c) count(s) to the minimum and maximum of the guideline range for the non 924(c) count(s).

What is the resulting guideline range?

322-387 months. This results from the 5-year mandatory minimum for the 924(c) count (60 months) being added to the minimum and maximum of the otherwise applicable guideline range of the drug offense (262-327).

STEP FOUR

Compare the minimums of the two ranges and choose the higher. 322-387

§3E1.1 Reduction

Guideline range for the 18 U.S.C. § 924(c) count

No reduction

360-life

2-level reduction

292-365

3-level reduction

262-327

What is the defendant’s guideline range pursuant to §4B1.1?

322-387 months. The 924(c) mandatory minimum of 5 years (60 months) added to the 262-month minimum of guideline range for the otherwise applicable guideline range for the drug career offender (322 months) is greater than the minimum of the Career Offender Table for 924(c) at 4B1.1(c)(3) (262 months).

This is a basic introduction the guidelines training session. The scenarios were written for those with little to no guideline knowledge.

1. The Grand Jury charges that: On or about December 16, 2015, in the Southern District of Minnesota, the defendants,

Nelson Hugo and Ken Savage,

Each aiding and abetting the other, did, by force, violence, and intimidation, take from the victim teller approximately \$17,078.51 in United States currency belonging to Affinity Plus Federal Credit Union in Mankato, Minnesota. The deposits were insured by the National Credit Union Administration, and in committing such offense, did assault and put in jeopardy, the life of another person by the use of a dangerous weapon, a handgun, in violation of Title 18, United States Code, Sections 2113(a) and 2113(d).

What is the Chapter Two Guideline?

§2B3.1 – look to the offense of conviction in Appendix A.

2. What is the amount of loss for Hugo?

§17,078.51 – His relevant conduct is easy – he's the one who stole the money. §1B1.3(a)(1)(A).

3. What is the amount of loss for Savage?

§17,078.51 – What is his relevant conduct? Need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? It would seem they agreed to rob the bank together and are; therefore, each responsible for the loss.

4. Is defendant Hugo responsible for the firearm? Why or Why not?

Yes - His relevant conduct is easy – he's the one who had the gun in the bank robbery. §1B1.3(a)(1)(A).

5. Is defendant Savage responsible for the firearm? Why or Why not?

Yes – What is his relevant conduct? See answer #3 as well.

INTRODUCTION TO THE GUIDELINES - TEACHER'S EDITION

6. How many criminal history points?

<u>Arrest Date</u>	<u>Charge/Docket#</u>	<u>Date/Sent. Imposed</u>
08/10/2011 (Age 23)	Possession of Heroin Hennepin County District Court Minneapolis, MN	10/25/11: Pled guilty 1 year DOC Sentence suspended, serve 60 days jail and 2 years probation

+2 §4A1.1(b) – the sentence was equal to or greater than 60 days

7. How many criminal history points?

<u>Arrest Date</u>	<u>Charge/Docket#</u>	<u>Date/Sent. Imposed</u>
04/06/11 (Age 47)	Possession of Firearm in the Commission of a Felony Ramsey County District Court St. Paul, MN	09/21/11: Pled guilty, 1 day jail time served followed by 24 months probation

+1 §4A1.1(c) – all felony convictions score as at least 1 point. §4A1.2(c).

8. How many criminal history points?

<u>Arrest Date</u>	<u>Charge/Docket#</u>	<u>Date/Sent. Imposed</u>
01/27/03 (Age 16)	Assault Causing Bodily Injury to a Family Member Wichita Falls County Court, Wichita Falls, TX	02/26/03: 6 months probation

0 §4A1.2(d) and (e) - the offense is too old to count – it has to be within a 5 year window in this case.

9. How many criminal history points?

<u>Arrest Date</u>	<u>Charge/Docket#</u>	<u>Date/Sent. Imposed</u>
12/30/08 (Age 27),	Arson Scott County District Court, Shakopee, MN	08/18/09: Pled guilty, 12 months to five years custody

+3 §4A1.1(a) and §4A1.2, App. Note 2 (indeterminate sentence) – the sentence was greater than 13 months so it receives 3 points.

1. Defendant owns a medical supply company. Defendant was indicted for healthcare fraud for submitting \$200,000 in fraudulent bills from January 2015 through June 2015. Defendant has records to show that \$75,000 of the bills were for legitimate medical supplies. The PSR reveals that defendant also submitted \$100,000 in fraudulent bills in 2014.

What is the loss amount under 2B1.1?

The loss amount is \$225,000. The defendant will be held accountable for the \$200,000 in fraudulent bills because the submission of the bills are acts the defendant committed during the offense of conviction (§1B1.3(a)(1)(A)). The defendant will also be held accountable for the \$100,000 in fraudulent bills submitted in 2014 because §2B1.1 is a guideline subject to “expanded” relevant conduct (§1B1.3(a)(2)). The total amount of fraudulent bills submitted is \$300,000. There is a special rule, however, in §2B1.1 Application note 3(F) regarding health care fraud, which states that 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. This defendant has records to show that \$75,000 of the bills were for legitimate medical supplies. Therefore, the total amount of fraudulent bills submitted (\$300,000) will be reduced by the \$75,000 reimbursed for legitimate medical purposes.

What is the amount of restitution?

- The restitution amount is \$125,000. Generally, the court is not permitted to award restitution beyond the offense of conviction. In this scenario, the offense of conviction is limited to the \$200,000 in fraudulent bills submitted from January 2015 through June 2015. The \$100,000 of fraudulent bills submitted in 2014 must be excluded from the restitution analysis. See *U.S. v. Alisuretove*, 788 F.3d 1247 (5th Cir. 2015), *U.S. v. Chaika*, 695 F.3d 741 (8th Cir. 2012), *U.S. v. Camick*, 796 F.3d 1206 (10th Cir. 2015), and *U.S. v. Foley*, 783 F.3d 7 (10th Cir. 2015). Additionally, the court must exclude the value of the bills that were for legitimate services. The defendant’s records show that \$75,000 was submitted for legitimate medical supplies. See *U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016).

2. Between August 2015 and February 2016, the defendant fraudulently obtained money from Federal Credit Union (FCU) by submitting fraudulent automobile and personal loan applications in the names of third parties, some of them deceased. As a result of this scheme, the defendant obtained a total of \$500,000 from FCU. FCU discovered the fraud and filed a civil suit against the defendant. The defendant settled the suit and agreed to pay FCU \$300,000. The defendant was then indicted for the fraudulent loans shortly after the settlement.

What is the loss amount under 2B1.1?

The loss amount is \$500,000 – the total amount the defendant obtained from the fraudulent loans during the offense. Although the defendant returned \$300,000 to the federal credit union, the money was returned after the offense was discovered. Application Note 3(E) at §2B1.1 states that credit for the money or property returned can only be given if the money or property was returned to the victim before the offense was detected.

What is the amount of restitution?

Restitution is \$200,000, the total amount of the fraudulent loans (\$500,000), minus the settlement amount of \$300,000.

3. Defendant received a mortgage note for \$500,000 from Wells Fargo in 2014. In 2015, Wells Fargo sold the note to First Union for \$200,000. The defendant made no payments on the note; and foreclosure on the property netted \$100,000.

What is the amount of restitution?

Restitution is \$100,000. A successor lender's restitution award is determined by how much the "victim" paid to acquire the mortgage. See *U.S. v. Martin*, 803 F.3d 581 (11th Cir. 2016); *U.S. v. Howard*, 784 F.3d 745 (10th Cir. 2015); *U.S. v. Beacham*, 774 F.3d 267 (5th Cir. 2014) and *U.S. v. Chaika*, 695 F.3d 741 (8th Cir. 2012). Because First Union bought it for \$200,000, and sold it for \$100,000, the restitution amount is \$100,000.

What is the loss amount under 2B1.1?

The loss amount is \$400,000. Per Application Note 3 at §2B1.1, the defendant receives \$100,000 credit against the loss amount for the amount the victim recovered from disposition of the pledged collateral (the property).

4. Defendant pled guilty to one count of armed bank robbery of the First National Bank on April 29, 2016. In exchange for the defendant's plea of guilty to the robbery, the government agreed to drop the other two robberies the defendant committed. The defendant also robbed the First Mariner Bank on March 20, 2016 and the State Credit Union on April 6, 2016.

How many times should the robbery guideline be applied?

One time. There is no stipulation in the plea agreement nor is there a conspiracy charge that would authorize more than one application of the robbery guideline. (See §1B1.2). Additionally, the other two robberies are not relevant conduct to the count of conviction. See §3B1.3(a)(2) and §3D1.2(d) - (excluding robbery from rule (d) grouping rules).

5. Defendant pled guilty to one count of conspiracy to commit three robberies. The charging document listed 3 robberies which occurred on March 1, March 3, and March

How many times should the robbery guideline be applied?

Three times. §1B1.2(d) states that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

6. Defendant is convicted of a drug conspiracy. The conspiracy lasted from December 2015 through April 2016. The indictment cites three deliveries of cocaine: 500 grams on December 28, 2015, 200 grams on February 8, 2016, and 100 grams on March 22, 2016. On November 27, 2015, the defendant was sentenced in state court for distribution of 50 grams of cocaine. This distribution occurred on October 15, 2015.

For what amount of drugs will the defendant be held accountable?

The defendant will be held accountable for 800 grams, the amounts cited in the indictment. The 50 grams distributed on October 15, 2015 cannot be considered to be the same course of conduct or common scheme or plan as the offense of conviction. Application Note 5(C) at §1B1.3 states that conduct associated with a sentence imposed prior to the commission of the instant offense of conviction cannot be included for the purposes of §1B1.3(a)(2).

7. Defendant is convicted of a drug conspiracy. The conspiracy lasted from December 2015 through April 2016. The indictment cites three deliveries of cocaine: 500 grams on December 28, 2015, 200 grams on February 8, 2016, and 100 grams on March 22, 2016. On August 1, 2016, the defendant was sentenced in state court for distribution of 50 grams of cocaine. This distribution occurred on July 15, 2016.

For what amount of drugs will the defendant be held accountable?

The defendant will be held accountable for 850 grams of cocaine – the amounts included in the indictment and the amount distributed in July, 2016 for which he was sentenced in state court. The 50 grams distributed in July is the same course of conduct as the instant offense. It will be included in the drug quantity calculation at §2D1.1 and criminal history points will not be assigned.

8. Defendant pled guilty to one count of possession of child pornography. During the course of the presentence investigation, the defendant's 35-year old daughter came forward and revealed that she was sexually abused by her father beginning at age 10 and continuing until she approximately the age of 15. She had never reported the abuse to authorities, and the defendant was never charged or convicted of the sexual abuse.

Can the five-level increase for "pattern of activity" at §2G2.2 apply?

Yes. 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. Nine circuits have held that there is no time limit on the conduct considered for this SOC.

9. Defendant is convicted of two counts of bank robbery (§2B3.1) and one count of 18 U.S.C. § 924(c) (Possession of a Firearm During a Crime of Violence). The gun cited in the § 924(c) count was the gun possessed during the first count of robbery. The defendant also possessed a gun during the second robbery.

Will the SOC for possession of a firearm at §2B3.1 apply?

The SOC for possession of a firearm will apply in the robbery calculation that is not associated with the § 924(c) count. As to the robbery that is the underlying offense for the § 924(c), the increase for possession of a firearm will not apply. See §2K2.4, App. Note 4.

10. The defendant is convicted of one count of possession with intent to distribute methamphetamine and one count of 18 U.S.C. § 924(c) (Possession of a Firearm During a Drug Trafficking Offense). The weapon cited in the § 924(c) count is a sawed-off shotgun, which he possessed during a sale to an undercover agent. The defendant also possessed an AK-47 in connection with the drug offense.

Will the SOC for possession of a weapon at §2D1.1 apply?

The SOC for possession of a weapon will not apply. Application Note 4 at §2K2.4 states that 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).

11. Defendant has a prior conviction for burglary. Eleven years ago, he received a sentence of 2 years' probation. Nine years ago, his probation was revoked and he received a sentence of one year in jail.

How many criminal history points will be assigned to this conviction?

Zero. The sentence is too old to count. Although the general approach to revocation sentences is to add the term imposed upon revocation to the original term, the applicable time frame is only affected (*i.e.*, the court can look at the date of last release from incarceration) when the total term of imprisonment is greater than 13 months. In any other case, the court must look to the date of the original sentence, which in this scenario is outside the applicable 10 year time frame. See §4A1.2(k).

12. Defendant has three prior convictions that are counted separately. For the first conviction, he was sentenced to 45 days followed by 2 years' probation. On the second conviction, he received a sentence of 3 years' probation. On the third conviction, he

was sentenced to a term of 2 years' probation. Due to the defendant's instant federal offense, the defendant's probation terms were revoked. The judge imposed one year of imprisonment for the revocation.

How many criminal history points will be assigned to these prior convictions?

Seven. When a revocation applies to multiple sentences, and such sentences are counted separately, the court will add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points – in this scenario, the 45 day sentence. Three criminal history points are assigned to the 45 day sentence. The other two priors each receive one point, and the defendant will also receive two points for status at §4A1.1(d) for being on probation when committing the instant offense.

13. The defendant committed 3 robberies: one on 1/5/10, one on 1/8/10, and one on 1/9/10. He was arrested on January 9 in the parking lot of the third bank. On June 25, 2010, he was sentenced for the three robberies at the same time and received a sentence of 5 years' imprisonment on each count to run concurrently.

On March 15, 2016, the defendant was arrested for possession of a short barrel rifle and charged with violating 18 U.S.C. § 922(g).

How many criminal history points apply for the three robberies?

Five. The three robberies are to be treated as a single sentence because they were not separated by an intervening arrest and were sentenced on the same day for a total of 3 criminal history points. Two additional points will be assigned for the two robberies that did not independently receive points assuming they are crimes of violence. See §4A1.1(e).

Assuming these robbery offenses which were sentenced on the same day would qualify as violent felonies because they have an element of force, does the defendant qualify as an Armed Career Criminal based on these convictions?

Yes. Although they are treated as a single sentence under the guidelines, for the purpose of ACCA, the three prior violent felonies or serious drug offenses must have

only been committed on occasions different from one another. Because the robberies occurred on three separate days, they would be considered to be on occasions different from one another. *See, U.S. v. McCloud*, 818 F.3d 591 (11th Cir. 2016) (distinctions in the timing and location of the events in question are central to the determination that they are “separate and distinct criminal episodes”).

14. Defendant’s instant offense of conviction is conspiracy to distribute heroin (§2D1.1).

The defendant has a prior conviction for distribution of heroin for which he will receive three criminal history points. After pleading guilty to the instant offense, the defendant was charged and convicted in state court of aggravated assault which has an element of force. He will receive two criminal history points for the assault.

Is this defendant a career offender?

No. The defendant must have committed the instant offense *after* sustaining the two prior felony convictions. The assault conviction occurred after the defendant committed the instant offense. *See* §4B1.2(c).

15. Defendant’s instant federal offense is possession with intent to distribute cocaine (guideline range 51 – 63 months). On three occasions, he sold 500 grams to an undercover agent. The defendant possessed a handgun on one of those occasions. During a routine traffic stop, the handgun was found and the defendant was arrested by the state for unlawful possession of a weapon. He was convicted by the state for the unlawful weapon charge and was sentenced to one year of imprisonment. The defendant is currently serving time on this state charge and has already served 6 months.

Which section of §5G1.3 is applicable?

Section 5G1.3(b) is applicable. The undischarged state term for possession of the weapon is relevant conduct to the instant offense of PWID cocaine. Therefore, the sentence for the instant offense will run concurrently to the state term and the defendant’s sentence for the instant offense will be adjusted (reduced) by the 6 months that he has already served in state custody on the undischarged term.

16. Defendant's instant federal offense is possession of child pornography (guideline range 151 – 188 months). Defendant is currently serving a 10-year prison sentence for a prior state conviction for sexual abuse of a minor. The defendant sexually abused the victim on more than one occasion, which triggers the pattern of activity enhancement at §2G2.2(b)(5). The defendant has already served 12 months on his state sentence.

Which section of §5G1.3 is applicable?

§5G1.3(d). The court has the discretion to run the sentence for the instant offense concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. Although the conduct associated with the undischarged term of imprisonment is relevant conduct to the instant offense (he received an increase for pattern of activity), it is relevant conduct per §1B1.3(a)(4), which does not authorize application of §5G1.3(b). So, no credit for the time served on the undischarged term.

17. Defendant pled guilty to one count of money laundering (§2S1.1), a violation of 18U.S.C. § 1956. The defendant was the owner of a mortgage company. His business employed a real estate agent, a home inspector, two loan officers, an underwriter, and an administrative assistant. The defendant's business was engaged in a scheme to obtain inflated mortgage loans and resell them to other mortgage companies. The total loss involved in the mortgage fraud exceeded \$1.5 million. Defendant was the organizer/leader of the fraud. The defendant alone laundered the money.

When applying §2B1.1 to determine the BOL for the underlying offense from which the laundered funds are derived, is the BOL 6 or 7?

The BOL is 6. The BOL of 7 only applies when the statutory maximum is 20 years or more AND the §2B1.1 guideline is being applied because of a direct reference from Appendix A or a cross reference from §2X1.1. In this case, §2B1.1 is applied because of reference from §2S1.1, not a direct reference from Appendix A. See §2B1.1 Application Note 2.

Will the defendant receive an increase for aggravating role (§3B1.1)?

No. Application of any Chapter Three Adjustment shall be determined based on the offense covered by the money laundering guideline, NOT on the underlying offense from which the laundered funds are derived. The defendant did not have an aggravating role in the money laundering offense. See Application Note 2(C) at §2S1.1.

18. Defendant is a former corrections officer who was convicted of one count of false statements. The defendant was interviewed by FBI agents regarding an assault of an inmate. The defendant did not participate in the assault, but he did witness two corrections officers assault the inmate. The assault of the inmate was unprovoked. The indictment states that the defendant lied to the FBI by stating that the inmate was unruly and attacked the officers first.

Will the cross reference at §2B1.1(c)(3) apply?

No. The conduct set forth in the count of conviction (the false statements count) does not establish an offense specifically covered by another offense guideline in Chapter Two. The count of conviction only establishes a false statement, which is covered by §2B1.1.

19. Defendant was convicted of 922(g), felon in possession. He has a prior offense of Massachusetts Armed Robbery. Section 2K2.1 provides for a base offense level of 20 if the defendant has a prior crime of violence which is defined at §4B1.2. Robbery is listed as a crime of violence at §4B1.2.

Does the base offense level 20 apply in this case?

Maybe. If, under the categorical approach analysis, the prior robbery conviction has an element the use, attempted use, or threatened use of force, the increased BOL will apply. Or, if, under the categorical approach analysis, the prior robbery conviction meets the test for an enumerated offense, the increased BOL may apply.

The scenarios presume a working knowledge of the application of the relevant conduct guideline, §1B1.3. These scenarios are based upon actual cases, and involve not only the analysis required under §1B1.3, but also how the relevant conduct analysis impacts other provisions of the guidelines.

1. Defendant is convicted of one count of wire fraud (18 U.S.C. § 1343), which has a statute of limitations of five years. The applicable guideline is §2B1.1. When calculating the loss amount attributable to the defendant, can loss amounts that occurred outside of the statute of limitations be included as relevant conduct? Why or why not?

Yes, you can use loss from outside the statute of limitations. You are looking at expanded relevant conduct because fraud offenses (§2B1.1) are among those listed at §3D1.2(d). You can look to same course of conduct, common scheme or plan. Nothing in §1B1.3 advises against using loss outside the statute of limitations. Multiple circuits have also upheld this.

2. Defendant is convicted of one count of felon in possession (18 U.S.C. § 922(g). Over the course of several months, the defendant asked his straw purchaser to purchase seven firearms for him. Three of the firearms transactions occurred while the defendant was a juvenile. At §2K2.1, when calculating the number of firearms attributable to the defendant, can the firearms the defendant asked for while under the age of 18 be included as relevant conduct? Why or why not?

Yes, again, the analysis is subject to expanded relevant conduct because firearms offenses (§2K2.1) are listed at §3D1.2(d). You can look to same course of conduct, common scheme or plan. Nothing in §1B1.3 advises against using juvenile conduct when determining relevant conduct. See *U.S. v. Thomas* 114 F.3d 228 (DC Cir.) and *U.S. v. Gibbs* 182 F.3d 408 (6th Cir.).

3. Defendant is convicted of two counts of wire fraud (18 U.S.C. § 1343) each contained in a separate indictment. The cases have been consolidated for sentencing. The first case, a mortgage fraud case, went to trial, and included a loss amount of \$150,000. The defendant pled guilty in the second case, a bank fraud case, which included a loss amount of \$175,000. The cases involve different victims and different schemes. The parties, in a non-binding plea agreement, have calculated two separate counts of §2B1.1 – one for each count, and have assigned units at §3D1.4 to determine the combined offense level. Is this correct? Why or why not?

No. When the Guidelines direct you to group under a rule, in this case §3D1.2(d), then you need to group under that rule. §2B1.1 is a listed offense under rule (d), therefore, regardless of what the parties agree to, you must group them correctly. You don't get to choose.

4. Defendant is convicted of 18 U.S.C. § 1594 (Conspiracy to Engage in the Sex Trafficking of Children). The indictment states, that from March 2015 through November 2015, the defendant, on five occasions, with five different minor victims, solicited them for sex with adult males by means of fraud, force, and coercion, in violation of 18 U.S.C. § 1591(a) and (b)(1). 18 U.S.C. § 1591(b)(1) is the penalty provision and provides an imprisonment term of 15 years to life.

The applicable guideline is §2G1.3, which provides four alternative base offense levels:

- (a) Base Offense Level:
- (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
 - (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
 - (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
 - (4) **24**, otherwise.

Which base offense level is applicable? Why?

34. §1B1.3, App. Note 7 says, “An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute.” He was convicted of Conspiracy to Engage in the Sex Trafficking of Children, in violation of 18 U.S.C. § 1591(a).

The guideline applicable in this case also provides the following special instruction:

- (d) Special Instruction
- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Is this special instruction applicable? Why or why not?

Yes. It was a conspiracy and the offense of conviction involves 5 victims – also noted in the Indictment.

5. The defendant was convicted of 18 U.S.C. § 1956, Money Laundering. The defendant's husband was convicted of Conspiracy to Distribute a Controlled Substance (21 U.S.C. § 846), and Money Laundering (18 U.S.C. § 1956).

The defendant did not directly participate in the distribution of the controlled substances. She was primarily the "accountant" who was responsible for the money. She deposited the drug proceeds, purchased goods, and withdrew the money for her husband when he needed to purchase another shipment of drugs. The defendant laundered over \$800,000.

The applicable guideline is §2S1.1. It provides two alternative base offense levels:

(a) Base Offense Level:

- (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
- (2) 8 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

Which base offense level applies? Why?

(a)(1), pursuant to §2S1.1, App. Note 2(B), Defendants Accountable for Underlying Offense. In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). §1B1.3(a)(1)(A) notes - all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant. In this case, the defendant aided and abetted her husband's drug crimes as his accountant, depositing drug proceeds, purchasing goods, and withdrawing money when her husband needed it to purchase additional drugs.

6. The defendant is convicted of Conspiracy to Distribute Cocaine Base, in violation of 21 U.S.C. §846. The indictment states that from December 2015 until April 2016, the defendant, on three separate occasions, distributed 50 grams of crack, for a total of 150 grams. The presentence investigation reveals that on November 15, 2015, the defendant was sentenced in state court for distribution of 25 grams of crack cocaine that occurred in October 2015.

For what amount of drugs should the defendant be held accountable?

150 grams. Pursuant to §1B1.3, App. Note 5(C), in determination of "expanded" relevant conduct, the course of conduct or common scheme or plan does not include conduct "associated" with a sentence imposed prior to the commission of the instant offense of conviction. In this case, the defendant was sentenced for another drug crime before the instant offense began.

7. Defendant is convicted of Theft of Mail, a violation of 18 U.S.C. § 1708. The defendant, a mail carrier, stole several bags of mail from his mail truck. When police contacted the defendant regarding the mail theft, he fled from officers. The defendant was charged and convicted by the state for fleeing officers and false statements to police officers. As a result, the defendant is currently serving a 6 month sentence in county jail.

The court applied §2B1.1 for the theft of mail. The court did not apply an enhancement for obstruction at §3C1.1. Application Note 5(B) and (D) indicates that fleeing arrest and false statements to law enforcement are examples of conduct ordinarily not covered.

Since §3C1.1 is not applicable, should this prior conviction receive criminal history points?

No. It is still relevant conduct, even though there is no enhancement or SOC increase. The defendant is still held accountable for what he did in preparation for the offense of conviction, for what he did during offense of conviction, and for what he did to avoid detection - §1B1.3.

The question sometimes is – is it relevant conduct even if the defendant does not receive an increase for it? Yes, the behavior still meets the definition of relevant conduct.

The court now needs to determine whether to run the theft of mail sentence concurrently or consecutively to the undischarged state term under §5G1.3.

- a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
 - 1. the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
 - 2. the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

* * *
- d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense

Which provision of §5G1.3 applies?

§5G1.3(b) – it will run concurrently and he will also receive credit for time already served for that offense. It is still relevant conduct- even though he is not being penalized for it.

Amendment 787 from 2014 changed the requirement that the conduct result in a Chapter Two or Three increase.

8. Defendant pled guilty to two counts of Coercion and Enticement (18 U.S.C. § 2422). The counts involve separate victims. The first count involving victim 1 was committed on February 16, 2016. The second count involving victim 2 was committed on March 28, 2016.

Further investigation has revealed that there were seven additional minors victimized on different occasions from the dates of the counts of conviction.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

When applying §2G1.3, will the special instruction apply? Why or why not?

No. You can only look to the offense of conviction. In this case, the offense of conviction involved two counts of Coercion and Enticement involving 2 victims. You can't use expanded relevant conduct – although not specifically listed at §3D1.2(d), §2G1.3 is very similar to §2G1.1, which is listed at §3D1.2(d). The additional minor victims will not be counted through the use of the special instruction.

9. The defendant pled guilty to Sexual Exploitation of a Child (18 U.S.C. § 2251) and Distribution of Child Pornography (18 U.S.C § 2252).

The defendant has two prior state convictions for rape of a minor. The first prior conviction involves the victim named in the count of sexual exploitation. The other prior conviction involves the victim's brother. The defendant distributed images of both the victim and the victim's brother as part of the instant offense.

The guideline applicable to the first count is §2G2.1. The offense level for this count is 38, and includes application of specific offense characteristics for: age of the victim, the commission of a sexual act, and distribution. The guideline applicable to the second count is §2G2.2. The offense level for this count is 42, and includes application of specific offense characteristics for: prepubescent minor, distribution, sadistic conduct, pattern of activity involving sexual abuse of a minor, use of computer, and number of images.

Are the two prior convictions for rape of a minor relevant conduct to the instant offense or are they part of the defendant's criminal history calculations?

It appears one will be relevant conduct and one will be assessed criminal history points.

Ct. 1 – Sexual Exploitation of a Child – 18 USC 2251 – 2G2.1. Total Offense level 38. Base 32, +2+2+2. Produced image in June.

Ct. 2 – Distribution of Child Pornography – 18 USC 2252 – 2G2.2. Total Offense Level 42. Base 18, +2+6+4+5+2+5. Distributed images over period of months.

Defendant has 2 prior state convictions for rape of a minor (actual abuse). The first state conviction involves victim in Federal Ct. 1 and the second state conviction involves the victim's brother. In Federal Ct. 2 - Defendant distributed images of both the victim and the victim's brother in the instant offense.

In order to apply +5 for Pattern of Activity – we need 2 or more instances. First is the instant offense – Federal Count 1 (victim) – and the other is Count 2 State conviction (victim's brother). Two victims, two different instances of sexual abuse or sexual exploitation, pursuant to §2G2.2 App. Note 3. Even though we are taking a prior state conviction into account under (b)(5) – Pattern of Activity - for Federal Count 2 – it is NOT EXCLUDED from consideration for criminal history points. So defendant will get criminal history points for State Conviction 2 (victim's brother).

The first State Conviction involves the victim – the actual sexual abuse or rape of the victim – whereas the Federal Count 1 involved production of the images from the victim – taken at different times. It is relevant conduct so it will not receive criminal history points.

10. Defendants A and B are convicted of wire fraud (18 U.S.C. § 1343). Defendant A fraudulently obtained \$810,000 from Victim 1 (his mother). The defendant told his mother he was terminally ill and was accepted to undergo a clinical trial to treat his illness. He created fraudulent documents to support the scheme, which he used to solicit his mother's financial support. Over a period of time, on several occasions, his mother wired money to her son's bank account, totaling \$810,000 from her trust account, rendering it insolvent.

Distraught for her son, the victim then contacted her sister (Victim 2) who began wiring money to her nephew from her trust account. Victim 2's bank became suspicious, and stopped all wire transfers. To continue with the payments, Victim 2 agreed to send payments to Defendant A via Western Union.

Defendant B (a friend of the defendant) agreed to receive every Western Union payment. On 22 occasions, Defendant B received the payments from Victim 2 totaling just over \$22,000. Victim 2, however, transferred a total amount of \$310,000 (including the Western Union transfers).

When calculating the guidelines for Defendant B, at §2B1.1, what is the amount of loss?

\$22,000. You need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? On these facts, the answer appears to be no, as no facts indicate Defendant B agreed to Defendant A's scheme or even knew about it.

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass- marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

- i. *becoming insolvent;*
- ii. *filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);*
- iii. *suffering substantial loss of a retirement, education, or other savings or investment fund;*
- iv. *making substantial changes to his or her employment, such as postponing his or her retirement plans;*
- v. *making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and*
- vi. *suffering substantial harm to his or her ability to obtain credit.*

Would this SOC apply to Defendant B? Why or why not?

No. She only received \$22,000 from Victim 2 and the facts provided do not establish that victim 2 experienced a substantial financial hardship as a result of Defendant's B's conduct.

Example #1

Defendant was convicted in federal court of 5 Counts of Distribution of Heroin, each occurring on a separate date. The defendant was convicted by the State of MN on the first sale. The defendant served a sentence of 1 year in jail. Upon his release, he continued to sell heroin and was subsequently arrested by the DEA. Will the state conviction receive criminal history points?

No - §4A1.2(a)(1) and App. Note 1. Because it is relevant conduct, it will not be assessed any criminal history points.

Example #2

Defendant has two prior convictions for crimes of violence. He was arrested with a sawed off-shotgun.

What is the base offense level?

26 - §2K2.1 because he has 2 prior convictions for a crime of violence and the sawed-off shotgun is an 18 U.S.C. § 5845(a) firearm.

Example #3

The defendant was convicted of Conspiracy to Distribute Cocaine from March 1, 2014 through March 1, 2015.

<u>Arrest Date</u>	<u>Charge/Docket#</u>	<u>Date/Sent. Imposed</u>
05/14/2014 (Age 47)	Possession of a Firearm St. Louis County District Court Duluth, MN	01/11/15: Pled guilty, 1 day jail time served followed by 24 months' probation

Will the defendant be assessed 2 additional criminal history points pursuant to 4A1.1(d)?

Yes. In order to assess additional criminal points, you must determine if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. He was on probation during the instant offense.

For the following exercises, assume that the instant federal offense is being sentenced today (September, 2016), and that the earliest date of relevant conduct is January 1st 2016. Determine the number of criminal history points assessed.

Criminal History Exercise #1

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
7/13/10 (Age 23) +1 - §4A1.1(c)	Possession of Class D Substance/Marijuana District Court Worcester, MA	10/25/10: Guilty 1 year DOC Sentence Suspended with probation to 10/27/12

Criminal History Exercise #2

<u>Arrest Date*</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
04/06/11 (Age 47) +1 - §4A1.1(c)	Possession of Firearm in the Commission of a Felony, Orange County Circuit Court Orlando, Florida	09/21/11: Pled nolo contendere, 1 day jail time served followed by 24 months' probation

Criminal History Exercise #3

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
01/27/03 (Age 16) 0 - §4A1.2(e)	Assault Causing Bodily Injury to a Family Member Wichita Falls County Court, Wichita Falls, TX	02/26/03: 6 months' probation

Criminal History Exercise #4

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
12/30/08 (Age 27) +3 - §4A1.1(a)	Attempt Burning Other Real Property 3 rd Cir. Court Detroit, MI	08/18/09: 18 months to five years' custody

Criminal History Exercise #5

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
01/19/12 (Age 21) +2 - §4A1.1(b)	Criminal Possession of Firearm Shawnee County District Court, Topeka KS	06/07/12: 10 months' custody

Criminal History Exercise #6

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
03/24/11 (Age 36) +1 - §4A1.2(c)(1)	Obstructing Legal Process Topeka Municipal Court, Topeka KS	02/23/12: 179 days' custody, suspended; 24 months' probation

Criminal History Exercise #7

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
07/30/06 (Age 15) +3 - §4A1.1(a) and (e)	Manslaughter I Lincoln Co. Cir. Court Lincoln City, OR	04/20/07: 10 years imprisonment, w/3 years post-prison supervision Juvenile convicted in adult court

Criminal History Exercise #8

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
10/05/11 (Age 29) +2 - §4A1.1(b)	Possession of Cocaine Volusia Co. Cir. Court Deland, FL	02/28/12: Guilty, time served (338 days' county jail)

Criminal History Exercise #9

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
08/10/12 (Age 22) 0 - §4A1.2(c)(1)	Unlicensed Driver Los Angeles Co. Municipal Court Los Angeles, CA	12/22/12: Fine imposed

Criminal History Exercise #10

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
11/21/13 (Age 21) +1 - §4A1.1(c) and §4A1.2 App. Note 5	Driving While Intoxicated Wichita County 30 th Judicial District Court Wichita Falls, TX	07/20/14: 1 day's imprisonment

Criminal History Exercise #11

<u>Arrest Date</u>	<u>Charge/Docket #</u>	<u>Date/Sent. Imposed</u>
12/22/11 (Age 36) 0 - §4A1.2(h)	Possession of a Prohibited Weapon: Bear Spray Winnipeg Provincial Court Winnipeg, Manitoba, Canada	02/10/12: 30 months' imprisonment

BASIC RELEVANT CONDUCT - TEACHER'S EDITION

1. Def. convicted of one count of Bank Robbery, citing a specific date in which the defendant stole \$1,700. Applicable guideline is §2B3.1 (Robbery). If it is determined that the defendant also possessed and brandished a gun during the robbery. Should the defendant also be subject to the gun enhancement?

Yes. It was an act committed by the defendant during the offense of conviction. Defendant possessed the firearm during the robbery.

2. Def. convicted of one count of Bank Robbery, citing a specific date in which the defendant stole \$1,700. Applicable guideline is §2B3.1 (Robbery). If it were determined that Def. did not possess a gun in the bank, but after the bank robbery used a gun to carjack a vehicle in order to aid the getaway, would the §2B3.1 firearm SOC apply?

Yes. It was an act committed by the defendant in order to avoid detection or responsibility for the offense of conviction. The defendant carjacked the victim to obtain a vehicle to use to aid in the getaway from the robbery.

3. Def. is convicted of a drug conspiracy involving at least 300kg of cocaine. Applicable guideline is §2D1.1 (Drugs). Conspiracy involved multiple importations; however, Def. was only involved in two importations of 5kg each. It is determined that the defendant's undertaking only includes the two importations of 5kg each. What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

5kg each for a total of 10 kg. Defendant is not responsible for the drugs in the entire conspiracy simply because he is convicted of a conspiracy involving 300kg. Relevant conduct is an individualized determination and this defendant's undertaking only involves 10kg of cocaine.

4. Def. convicted of bank robbery. Applicable guideline is §2B3.1. Co-participant carried a gun in the robbery, a fact unknown to Def. until the commission of the robbery. Will the §2B3.1 SOC for "if a firearm was brandished or possessed" apply?

Yes. Defendant and co-defendant agreed to commit a bank robbery. The act of the co-defendant carrying a gun during the robbery was in furtherance of their agreement to rob the bank and it is certainly foreseeable that a gun would be used while committing a robbery. The fact that the defendant did not "know" about the gun is not relevant as the relevant conduct analysis is not determined on the basis of knowledge but rather the 3-part analysis to determine jointly undertake criminal activity.

BASIC RELEVANT CONDUCT - TEACHER'S EDITION

5. Three defendants convicted of a Drug Conspiracy involving 10,000 kg of Marijuana- §2D1.1. Defendant 1 lives in Minnesota, but owns a grow operation in CA. Defendant 2 lives in CA at the grow operation and is responsible for taking care of the plants, watering them, harvesting, etc. Defendant 3 lives in CO and has access to an airplane. He flew to CA on several occasions to pick-up the marijuana (total of 5, 000kg) and took it back to CO to distribute to his people. What amounts are attributable to each defendant?

Defendant 1 is responsible for the entire 10,000kg as he is the “king pin” in charge of the entire operation. Defendant 2 is also responsible for the entire 10,000kg kg as he lives at the grow operation and is responsible for caring for all the plants. Defendant 3 is only responsible for 5,000kg as that is his agreement with defendant 1 who runs the entire operation.

6. Defendants were convicted of Filing False Tax Returns - §2T1.1. Defendant 1 steals personal identifying information from a local business. Defendant 2 files the vast majority of the false tax returns. Defendant 1 only files a handful of returns, but they share the return money which exceeds \$100,000. Is each defendant accountable for the total loss amount?

Yes. They have agreed to participate in a fraudulent tax return scheme together. The acts of defendant 1 stealing personal identifying information is in furtherance of the agreement to participate in a fraudulent tax scheme and certainly reasonably foreseeable in connection with the agreement to participate in the fraudulent tax scheme. Finally, both defendants shared the proceeds of the illegal activity.

7. Def. convicted of sale of 1kg of cocaine on a single occasion. Applicable guideline is §2D1.1. It is determined that Def. additionally sold 1kg of cocaine to the same gang member each week for 40 weeks. What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

41 kg. The defendant is only convicted of the single distribution on the single occasion, however the additional 40 kilos will be included through expanded relevant conduct as they are part of the same course of conduct, common scheme or plan. They involve common accomplices, similar MO, regularity, similarity, etc.

8. Defendant convicted of Felon in Possession of a Firearm-§2K2.1. Several months after the offense cited in the Indictment, during the execution of a search warrant, officers located seven additional firearms, including two that were stolen and four that had the serial numbers scratched off. Is the defendant accountable for the firearm in the count of conviction as well as the seven firearms located at his residence?

BASIC RELEVANT CONDUCT - TEACHER'S EDITION

Yes. Although the defendant was not convicted of the additional firearms that were found during the execution of search warrant, they will be included through expanded relevant conduct as they will meet the definition of same course of conduct, common scheme or plan. Also, note: as two were stolen and four had obliterated serial numbers, that will also impact GL application as the SOC at §2K2.1(b)(4)(B) will apply. Finally, there will only be a 4-level increase at this SOC.

9. Defendant was indicted for 21 bank robberies. Defendant pleads guilty to five of them. Can you include the additional 16 for relevant conduct purposes?

No. The GL for bank robbery (§2B3.1) is not listed as groupable under §3D1.2 and therefore not subjected to “expanded relevant conduct.” Therefore, you cannot look to this conduct as same course of conduct, common scheme or plan.

You are tasked with drafting a Presentence Report for a defendant named Mark Jones. He has pleaded guilty to one count of bank robbery in violation of 18 U.S.C. § 2113(a) and (d). You have gathered records from his prior convictions as well the relevant statutes.

Based on the information below, you have to decide whether Mr. Jones' prior convictions are crimes of violence under U.S.S.G. §4B1.2 and, if so, whether Mr. Jones is a career offender.

Crime of Violence Definition §4B1.2

- *has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5949 (a) or explosive material as defined in 18 U.S.C § 841 (c).

For each conviction you have to decide:

- Whether the statute divisible?
- If the offense serves as a predicate for career offender under §4B1.2?

Conviction #1: Causing Injury to a Child

Statute § 351.512: Causing Injury to a Child

- (A) Whoever uses physical force against a child with intent to cause bodily injury is guilty of a felony in the third degree. Maximum penalty shall not be more than 5 years of imprisonment.
- (B) Whoever negligently places a child in an unsafe environment which results in the child suffering bodily injury is guilty of a felony in the fourth degree. Maximum penalty shall not be more than 2 years of imprisonment

Documents Gathered:

- A **judgment** stating that Mr. Jones has been convicted of State Statute § 351.512 but does not specify which section of the statute he pleaded guilty to.
- The **indictment** citing the language from both sections of the statute and stating that Mr. Jones' three-year-old child suffered bodily injury in a fall down an open stairwell.
- The **police report** in the case states that Mr. Jones' wife called the police when her husband in a fit of rage kicked the child down the open stairwell.

ANSWER:

The statute is divisible because it lists two different crimes with different elements. Section A requires physical force with the intent to commit bodily injury while Section B only requires negligence without any specific intent. Another way to tell that the statute is divisible is that the two sections have different statutory maximum sentences.

Because the statute is divisible, and one section lists a crime that could be a predicate under the force clause, you are permitted to look at the *Shepard* documents, for the sole purpose of determining which section the defendant was convicted of. In this case the *Shepard* documents are the Judgment and Indictment; however, neither document specifies which section the defendant was convicted of. The police report is not a *Shepard*-approved document, even though it lists facts. Therefore, this conviction cannot be a predicate.

Conviction #2 Rioting**State Statute 164.225: Rioting**

A person is guilty of the crime of riot, if, acting with three or more other persons, he or she knowingly and unlawfully uses or threatens to use force against any person or property.

Documents Gathered:

- A **Judgment** showing that Mr. Jones has been convicted of riot and citing the statute.
- A **transcript of a plea colloquy** where Mr. Jones admits that after a night of drinking, he, along with three friends, attempted to rob Victim A and punched Victim A in the face when he resisted.

ANSWER: The statute is not divisible because it is one statute that can be violated in two ways (or MEANS): (1) force against any person; and (2) force against property. Because it is not divisible, we have to look at the statute as a whole and determine if it fits into the force clause. Because force against property can never qualify under *Johnson I*, this statute is indivisible and over-inclusive and cannot be a predicate.

Statute § 450.233 Failure to Stop for a Blue Light

Whoever 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

Documents Gathered:

- A **Judgment** stating that Mr. Jones was convicted of failure to stop for a blue light.
- A **statement of facts in the plea agreement** stating that the law enforcement officer pursued the car driven by the defendant for 15 miles, at speeds up to 100 miles per hour, and that the defendant swerved his car into the law enforcement officer's car in an attempt to force the officer's car into a bridge abutment.

ANSWER: The statute is indivisible because it lists one crime that can be committed one way. The statute cannot be a predicate because it does not fit under the force clause and is not an enumerated offense.

DRUG SCENARIOS - TEACHER'S EDITION

1. Defendant is convicted under 21 U.S.C. § 841(a)(1) and (b)(1)(A) for distributing at least 10kg of heroin from January 2014-December 2015. Defendant has two prior convictions for distribution of heroin that resulted in the death of two individuals. The factual statement in the instant offense states that multiple individuals died as a result of the heroin that the defendant distributed. What is the defendant's base offense level at §2D1.1?

34. The enhanced BOLs at §2D1.1(a)(1) or (a)(2) 43 and 38 respectively do NOT apply in this case because the death or seriously bodily injury has not been made part of the "offense of conviction" as defined at §1B1.2(a).

2. Defendant was charged with Conspiracy to Distribute at least 2kg of Methamphetamine in violation of 21 U.S.C. §841(a)(1) and (b)(1)(A). When the defendant was arrested, officers also found marijuana (1lb) and 2 bricks of heroin (2kg). Police have wire taps indicating that the defendant was selling marijuana and heroin (defendant also admits to selling marijuana and heroin). Will the marijuana and heroin found at the time of the defendant's arrest be included in the drug quantity calculation at §2D1.1?

Yes. These drug amounts will come in under "expanded relevant conduct" and with the wiretaps this likely meets the preponderance of evidence standard required for GL application.

3. Three defendants convicted of a drug conspiracy involving 10,000kg of marijuana- §2D1.1. Defendant 1 lives in Minnesota, but owns a grow operation in California. Defendant 2 lives in California at the grow operation and is responsible for taking care of the plants, watering them, harvesting, etc. Defendant 3 lives in Colorado and has access to an airplane. He flew to California on several occasions to pick-up the marijuana (total of 5,000kg) and took it back to Colorado to distribute to his people. What amounts are attributable to each defendant?

Defendant 1 is responsible for the entire 10,000kg as he is the "king pin" in charge of the entire operation. Defendant 2 is also responsible for the entire 10,000kg as he lives at the grow operation and is responsible for caring for all the plants. Defendant 3 is only responsible for 5,000kg as that is the scope of his agreement with defendant 1 who runs the entire operation.

DRUG SCENARIOS - TEACHER'S EDITION

4. Defendant convicted of Conspiracy to Distribute Alpha-pyrrolidinopentiophenone (a-PVP) in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C). Defendant and her husband were selling large quantities of heroin, marijuana and “a-PVP”, a Schedule I substance commonly referred to as “bath salts”, from their home. Defendant purchased the “a-PVP” from China through the internet. Is “a-PVP” referenced in the guideline at §2D1.1? Which is not a factor that the court can consider when determining the “most closely related substance”?

No. a-PVP is not referenced in the GL. The court will need to find most closely related controlled substance using factors at §2D1.1 Note 6. “a-PVP is packaged as “bath salts” is the factor that is relevant to the court when determining the most closely related substance. The other factors focus on the chemical structure, the effect on the central nervous system and the amount needed to produce the same effect, all factors listed in Application Note 6.

5. Defendant is convicted of Conspiracy to Possess with Intent to Distribute and Distribution of “UR-144” and “XLR-II”, each a Schedule I Controlled Substance Analogue, in violation of 21 U.S.C. §§ 846 and 802(32). Defendant was the owner of a smoke shop called Twisted Headz and sold packages of synthetic cannabinoids called “Extreme Rampage” commonly known as “spice”. Is “UR-144” or “XLR-II” referenced in the guideline at §2D1.1? Must the court determine the “most closely related controlled substance”?

Neither substance is referenced in the GL. The court will need to determine the most closely related controlled substance using factors at §2D1.1 App. Note 6. This question is designed to generate discussion regarding what the most closely related controlled substance is and the process to determine it. Some courts have used the marijuana equivalency, while others have used the synthetic marijuana equivalency of 1:167.

6. Defendant in a drug conspiracy regularly picked up his drugs to sell from a storage unit at a storage facility. When the storage unit was searched, agents found drug proceeds, ledgers regarding the conspiracy and refrigerators containing marijuana. Would you apply §2D1.1(b)(12) for “maintaining a premises”? Variation: Further investigation revealed that the defendant rented the storage unit in his name. Would you apply §2D1.1(b)(12)?

In the first set of facts, there does not appear to be enough information to say that “maintaining a premises” would apply. The variation introduces the ownership aspect, which may justify application of the enhancement. This question also highlights the GL’s definition of “premises” to include a building, room or enclosure.

DRUG SCENARIOS - TEACHER'S EDITION

7. Defendant's boyfriend was a drug dealer who had a house that was used solely to receive shipments of drugs. There was no distribution of drugs from the house. Neither the defendant nor her boyfriend lived in the house. Would you apply §2D1.1(b)(12) for "maintaining a premises"? Variation: Further investigation revealed that the defendant and her boyfriend were named on the lease as renters. Would you apply §2D1.1(b)(12)?

The first part of the question raises "possessory interest" issues. There does not seem to be enough information to make the determination. The variation introduces the fact that there is a "possessory interest" as the defendant and her boyfriend are both renters on the lease. This question is designed to highlight the fact that "stash houses" can be considered to apply the "maintaining a premises" enhancement. These facts indicate that the house was a stash house and that the defendant was involved in the distribution of the drugs.

8. Defendant convicted of Distribution of 20gm of Heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) with a penalty range of 0-20 years imprisonment. Defendant has no prior criminal history. Defendant did not carry a gun. Defendant was arrested after being pulled over for a traffic stop at which point he told authorities that he was paid \$500.00 to deliver the Heroin to a man named "Joe". Defendant cooperated fully with the authorities and the government. Does the defendant receive the 2-level reduction at §2D1.1(b)(17)?

Yes. The offense does not carry a man/min penalty but it doesn't have to in order for the defendant to receive the 2-level reduction at §2D1.1(b)(17). Defendant simply needs to meet the criteria of the subdivisions of §5C1.2.

9. Defendant is convicted of Conspiracy to distribute 500 grams of Cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) with a penalty range of 5-40 years imprisonment. Defendant made several deliveries with a co-defendant who was armed during the transactions (co-defendant was responsible for the bulk of the deliveries on his own). Defendant has no prior criminal history. Defendant waited until the day of sentencing to debrief with the government, but otherwise truthfully provided all information. Does the defendant qualify for relief from the mandatory minimum pursuant to 18 U.S.C. § 3553(f)?

In this case, there is a man/min, so the court is looking at possible application of the statutory safety valve. This question is intended to highlight the fact that even if the defendant waits until the last minute he/she can still qualify for safety valve. Requirement is no later than at the time of the sentencing hearing.

1. Defendant and two others robbed a gun store. Defendant served as a lookout while the other two entered the store and stole 37 firearms. Defendant received 3 of the stolen weapons. Defendant is convicted of one count of 18 U.S.C. § 922(g). What enhancement should the court impose at (b)(1)? (number of firearms)

- A. A 2-level enhancement because the defendant only took 3 guns.
- B. A 6-level enhancement because the offense involved 37 weapons.

ANSWER: B, because all 37 weapons are part of the defendant's relevant conduct. They were stolen at the same time, during the offense of conviction.

2. Defendant, who has a prior felony conviction, was caught with a firearm in his car. It was discovered that the firearm was stolen and that the serial number was scratched off. He is convicted of one count of 18 U.S.C. § 922(g). Defendant maintains he did not know that the gun was stolen nor that the serial number had been scratched off. What enhancement should the court apply under 2K2.1(b)(4)?

- A. 2-level enhancement because the weapon was stolen.
- B. 4-level enhancement because the serial number was obliterated.
- C. 6-level enhancement because the weapon was stolen and the serial number was obliterated.
- D. No enhancement because the defendant did not know the gun was stolen or altered.

ANSWER: B. 4-level enhancement because the firearm had an altered serial number. Only one enhancement (the greatest) can apply under (b)(4). And because this is a strict liability enhancement, it does not matter that the defendant did not know the weapon was stolen or had an altered serial number.

3. As a favor to his friend Bob, Defendant agrees to buy two guns that he will transfer back to Bob. When the men meet to exchange weapons, Bob tells the defendant that the weapons are really meant for Bob's cousin, who just got out of jail on a drug trafficking offense. The defendant is charged 18 U.S.C. § 922(a)(6). Should the sentencing court apply the trafficking enhancement under 2K2.1(b)(5)?

- A. Yes, the intended recipient has a conviction for a drug trafficking offense.
- B. No, the defendant sold the guns to Bob, who has no priors.

ANSWER: A. Even though the defendant sold the weapons to Bob, he knew that Bob intended to give the weapons to his nephew, whose possession would be unlawful.

4. Defendant A, who is a prohibited person, robbed a gun store with co-defendant Defendant B. As a result of the robbery, Defendant A got 4 guns, which he kept in his house and used for shooting practice. Defendant B got 10 guns from the robbery and sold 5 of them to his drug dealer. Both Defendants are prosecuted under 18 U.S.C. § 922(g). Should the district court impose the trafficking enhancement for Defendant A?

- A. Yes, because the offense involved trafficking weapons.
- B. No, because Defendant A never personally trafficked weapons.

ANSWER: B, because the trafficking enhancement is defendant-specific. In this case, defendant A never trafficked weapons.

5. Defendant, who is a prohibited person, inherited 4 guns from his grandfather. Knowing that he was a prohibited person, he decided to give away the weapons as gifts, one gun to each of his four friends, whom he knew were going to use the guns to rob a bank. The defendant is charged with one count of 18 U.S.C. §922(g). Should the Court apply the trafficking enhancement under 2K2.1(b)(5)?

- A. No, the defendant did not traffic more than one weapon to each person.
- B. Yes, the defendant trafficked more than one gun to individuals he knew would use the weapons unlawfully.

ANSWER: B, because the defendant trafficked more than two weapons, even if not to the same person, and he knew the individuals would use the weapons unlawfully. But see U.S. v. Henry, 819 F.3d 856 (6th Circuit) (defendant must traffic two or more firearms to another person for the enhancement to apply).

6. Defendant is charged in one count of felon in possession. When the police searched his home, they found the gun under the defendant's bed along with 10 grams of heroin in the kitchen, and \$5000 in cash in the closet next to the front door. At sentencing, should the court apply the 4-level enhancement under 2K2.1(b)(6)?

- A. Yes, because the drugs and the gun were found in the same house.
- B. No, the drugs were not in close proximity to the gun.

ANSWER: B, because this gun was not found in proximity to the drugs. This is a fact-intensive analysis and the answer could change with more facts. Also refer to your circuit as some courts have held that these facts may warrant the 4-level increase as close enough for proximity purposes.

7. Defendant was a passenger in a car that was stopped for speeding. During a search of the defendant's person, the officer found a weapon in the defendant's waistband and a "joint" in his pocket. He is charged with unlawful possession of a handgun. At sentencing, should the court apply the 4-level enhancement under 2K2.1(b)(6)?

- A. Yes, because the drugs and guns were found in close proximity to each other
- B. No, because the drugs were only for personal use

ANSWER: B, because this enhancement does not apply to drugs that are for personal use. On these facts, there is no evidence of drug trafficking, such as money or paraphernalia.

8. Defendant is convicted of one count of felon in possession of a handgun. The Indictment specifically lists a semi-automatic handgun; however, the police also found a short-barreled shotgun at the defendant's home. That shotgun was later found to have been used in a bank robbery.

- Should the district court apply the cross reference in (c)(1) and use the guidelines for robbery?

ANSWER: No, because it was not the weapon cited in the Indictment

- Should the district court apply the 4-level enhancement under (b)(6) because the shotgun was used in connection with another felony?

ANSWER: Yes, that enhancement is appropriate because unlike the cross reference, (b)(6) applies to any firearm that is part of relevant conduct.

9. Defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), one count of unlawful possession of a firearm (18 U.S.C. § 922(g)), and one count of 18 U.S.C. § 924 (c). During the robbery, the defendant brandished the weapon and threatened to kill the teller.

- At sentencing, should the court apply the 5-level enhancement under the robbery guidelines for brandishing a weapon under §2B3.1 (b)(2)(C)?
- A. Yes, because the defendant used a weapon during the robbery.
 - B. No, because the defendant already pleaded guilty to § 924(c).

ANSWER: B, because §924(c) covers the conduct in §2B3.1 (b)(2)(C), another firearms enhancement is not appropriate

- At sentencing, should the court apply the 2-level enhancement under the robbery guidelines for threat of death under § 2B3.1 (b)(2)(F)?
 - A. Yes, because the defendant threatened to kill the teller.
 - B. No, because the defendant was convicted of § 924(c).

ANSWER: B. Even though §2B3.1 (b)(2)(F) relates to threats, §2B3.1(b)(2) as a whole is considered a firearm enhancement and § 924(c) covers all firearms enhancements.

- At sentencing, should the court apply the 4-level enhancement under § 2K2.1 (b)(6) because the weapon was used in connection with another felony?
 - A. No, because the defendant was convicted of a § 924(c).
 - B. Yes, because the defendant used a weapon during the robbery and the felon in possession is not the underlying offense.

ANSWER: A. Application Note 4 to §2K2.4 states that an enhancement under §2K2.1 (b)(6) is not appropriate if someone has also been convicted of § 924(c) because the conduct under § 924(c) is related to the conduct at issue at §2K2.1 (b)(6).

§2L1.2 Worksheet – 2016 Amendment

Scenario No: **1**

Date the defendant was ordered deported or removed for the FIRST TIME: **08/28/1999**

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): 0 – no criminal history points

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): 0 – no priors besides illegal reentries

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): 0 – no priors other than illegal reentries

§2L1.2 Offense Level Sum: **8**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 2

Date the defendant was ordered deported or removed for the FIRST TIME: 10/15/2008

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): +2 – 3 prior misdemeanors with criminal history points

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): +4 – Felony possession of controlled substance, 1 year probation, received criminal history points.

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): +10 – Aggravated sexual assault of a child – 5 years, received criminal history points

§2L1.2 Offense Level Sum: **24**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 3

Date the defendant was ordered deported or removed for the FIRST TIME: 12/09/1993

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): 0 – no prior illegal entries/reentries

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): 0 – Smuggling aliens did not receive criminal history points although it predated first deportation order

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): 0 – no convictions post first order of deportation

§2L1.2 Offense Level Sum: **8**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 4

Date the defendant was ordered deported or removed for the FIRST TIME: 06/01/2010

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): 0 – no prior illegal entries/reentries

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): +4 – Sale of heroin received criminal history points. Sex assault conviction was not sustained before defendant was ordered deported

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): 0 – no prior convictions after defendant was ordered deported

§2L1.2 Offense Level Sum: **12**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 5

Date the defendant was ordered deported or removed for the
FIRST TIME: 02/09/2011

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense
after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): +4 – prior illegal reentry received criminal history points

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/
removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): +8 – Assault/robbery, single sentence received criminal history points for 2 yr sentence imposed.

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): 0 – DUI is a misdemeanor, does not trigger SOC

§2L1.2 Offense Level Sum: **20**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 6

Date the defendant was ordered deported or removed for the FIRST TIME: 07/01/2011

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): 0 – no prior illegal entry/reentries

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): +4 – Felony burglary received criminal history points – sentence length 1yr – follows criminal history rules

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): +4 – Felony theft received criminal history points

§2L1.2 Offense Level Sum: **16**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 7

Date the defendant was ordered deported or removed for the FIRST TIME: 10/15/2008

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): 0 – Only 1 prior misdemeanor entry

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): +6 – Possession of a controlled substance = 14 months – receives criminal history points – add in revocation time. Does not matter that revocation occurred after deportation.

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): +8 – Felony aggravated assault, 2 years, counted for criminal history

§2L1.2 Offense Level Sum: **22**

§2L1.2 Worksheet – 2016 Amendment

Scenario No: 8

Date the defendant was ordered deported or removed for the FIRST TIME: 12/15/2002

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

(b)(1) - (Apply the Greater) If the defendant committed the instant offense after sustaining –

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): +4 – Prior illegal reentry received criminal history points

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/ removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): 0 – Prior possession of a controlled substance too old to count

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): +8 – PWID cocaine 41 months, counted for criminal history points. When you have a single sentence for an illegal reentry offense and another felony offense, use both priors at (b)(1) and (b)(3).

§2L1.2 Offense Level Sum: **20**

MULTIPLE COUNT SCENARIOS - TEACHER'S EDITION

USING THE DECISION TREE, PLEASE ANALYZE THE APPROPRIATE GROUPING DECISION FOR EACH SCENARIO.

1. Defendant is convicted of one count of felon in possession (§2K2.1). The defendant, during a routine traffic stop, was found to be unlawfully in possession of a firearm. A few weeks later, a search warrant was issued. During the search of the defendant's residence, seven additional firearms were located. Three of the firearms were stolen. The defendant subsequently was charged with and pled guilty to one count of possession of stolen firearms (§2K2.1).

Do these counts group?

Yes, the counts group under §3D1.2(d). Guideline §2K2.1 is listed as included for grouping under rule (d) and the counts of conviction involve the same guideline. Guideline §2K2.1 should be applied one time based upon the aggregate relevant conduct for all counts of conviction.

2. Defendant is convicted in the District of Maryland of two counts of embezzlement (§2B1.1). Defendant is a bank teller who, on two occasions, embezzled \$10,000. Defendant also pled guilty in the Eastern District of Virginia to one count of fraud (§2B1.1). Defendant fraudulently obtained and used 10 credit cards, with a loss totaling \$5,000 (\$500 per card). These two separate cases will be consolidated for sentencing at the same time.

Do these counts group?

Yes, the counts group under §3D1.2(d). Guideline §2B1.1 is listed as included for grouping under rule (d) and the counts of conviction involve the same guideline. It does not matter that the two counts are from different districts and involve two completely distinct crimes. The introductory commentary to Chapter 3, Part D states that the grouping rules apply to multiple counts contained in the same indictment AND to multiple counts contained in different

MULTIPLE COUNT SCENARIOS - TEACHER'S EDITION

indictments for which sentences are to be imposed at the same time or are consolidated for sentencing. Guideline §2B1.1 will be applied one time based upon the aggregate relevant conduct for all counts of conviction even though the two counts involve two completely separate schemes.

3. Defendant is convicted of one count of mortgage fraud (§2B1.1) and one count of tax evasion (§2T1.1). Defendant is a mortgage officer who falsified applications. Defendant also falsified his tax returns.

Do these counts group under rule (d)?

These counts DO NOT group under rule (d). Although both §2B1.1 and §2T1.1 are on the included list for grouping at §3D1.2(d), these two counts do not use the same guideline. Therefore, there cannot be one application of one guideline (as required for rule (d) grouping) to account for the aggregate relevant conduct of both counts. Each count is calculated and you take the higher of the two. However, the Second Circuit, in *U.S. v. Fitzgerald* (232 F.3d 315, 2d Cir. 2000) held that fraud and tax counts are properly grouped under §3D1.2(d).

4. Defendant is convicted of bank robbery (§2B3.1) and assault (§2A2.2). Defendant entered the Wells Fargo bank armed with a knife. The defendant walked behind the counter, pointed the knife at the teller, and demanded that the teller give him all the money in her drawer. After the teller emptied her drawer, which contained only a few hundred dollars, the defendant got angry and slashed the teller across the cheek. The teller had to undergo plastic surgery to repair the injury to her face.

Robbery (§2B3.1)

- BOL 20
- (b)(1) financial institution +2
- (b)(2) dangerous weapon +4
- (b)(3) permanent injury +6

Assault (§2A2.2)

- BOL 14
- (b)(2) dangerous weapon +4
- (b)(3) permanent injury +7

How do these counts group?

These counts group under rule (c). The specific offense characteristic at §2B3.1(b)(3) for permanent injury embodies the conduct of the other count of conviction, the assault (§2A2.2). The offense level for the count group is 32 (the higher offense level of the two counts).

5. Defendant is convicted of transportation of aliens (§2L1.1) and illegal reentry (§2L1.2). Defendant was arrested after crossing the border with three other aliens. Defendant served as a brush guide through the New Mexico desert. While being processed by Border Patrol Agents, it was discovered that the defendant had previously been deported after a conviction for aggravated assault.

Illegal Reentry (§2L1.2)

- BOL 8
- (b)(1) prior COV +16

Transporting Aliens (§2L1.1)

- BOL 12

How do these counts group?

These counts group under either §3D1.2(a) or (b). The first requirement under these grouping rules is that the counts involve the same victim. These two counts (§2L1.1 and §2L1.2) involve the same victim, the societal interest protected by laws governing immigration. The second requirement is that the counts must involve the same act (rule (a)), or the counts must involve two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan (rule (b)). These counts can be viewed as involving the same act or two or more acts connected by a common scheme or plan. The offense level for the count group is 24 (the higher offense level of the two counts).

6. Defendant is convicted of two counts of aggravated assault (§2A2.2). The defendant assaulted his girlfriend on March 2, 2016, causing serious bodily injury. His girlfriend reported the assault to tribal authorities. As a result, the defendant got angry, and again assaulted his girlfriend on March 10, 2016, when he brandished a knife and threatened to harm her.

Assault (§2A2.2)

- BOL 14
- (b)(3) injury +5

Assault (§2A2.2)

- BOL 14
- (b)(2) weapon +3

Do these counts group under the rules at §3D1.2?

These counts DO NOT group under the rules at §3D1.2. Although the counts involve the same guideline, the assault guideline (§2A2.2) is excluded from grouping under rule (d). Rule (c) does not apply because there is not an SOC from the first count that embodies the conduct of the other count of assault. Although the counts involve the same victim, rules (a) and (b) also do not apply. The counts do not involve the same act (the assaults occurred over a week apart), so

rule (a) does not apply. Rule (b) does not apply because the counts represent separate instances of fear and risk of harm. Per Application Note 4 at §3D1.2, the counts cannot be considered to involve two or more acts connected by a common criminal objective due to the separate instances of fear and risk of harm. Units must be assigned at §3D1.4 to determine a single, combined offense level. One unit will be assigned to the first count, which has the greater offense level of 19. Another unit will be assigned to the second assault count, because that offense level of 17 is one to four levels less than the count with the greatest offense level. A total of two units results in an increase of two offense levels, which are added to the greatest offense level. The offense level for this count group is 21.

7. Defendant is convicted of possession with intent to distribute meth (§2D1.1) and false statements (§2B1.1). Defendant is convicted of distribution of 50 grams of methamphetamine (actual). The defendant negotiated the sale of the controlled substance with an undercover agent. After arrest, the defendant provided materially false information to DEA agents. The defendant provided the names of co-defendants who were not, in fact, involved in the drug trafficking.

PWID Meth (§2D1.1)

- BOL 30
- §3C1.2 (Obstruction) +2

False Statements (§2B1.1)

- BOL 6

How do these counts group?

These counts group under rule (c). The Chapter Three Adjustment for Obstruction (§3C1.1) that was applied to the drug count embodies the conduct of the other count of conviction, false statements to a law enforcement officer (§2B1.1). The offense level for this count group is 32.

8. Defendant is convicted of illegal reentry (§2L1.2) and fraudulently acquiring citizenship documents (§2L2.2). Defendant is an alien previously deported for a crime of violence, not authorized to return to the United States. Defendant, after crossing the border from Mexico into California, presented a fraudulent U.S. passport.

Document Fraud (§2L2.2)

- BOL 8
- (b)(1) prior deport +2
- (b)(3) fraud US passport +4

Illegal Reentry (§2L1.2)

- BOL 8
- (b)(1) prior COV +16

How do these counts group?

These counts group under either §3D1.2(a) or (b). The first requirement under these grouping rules is that the counts involve the same victim. These two counts (§2L2.2 and §2L1.2) involve the same victim, the societal interest protected by laws governing immigration. The second requirement is that the counts must involve the same act (rule (a)), or the counts must involve two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan (rule (b)). These counts can be viewed as involving the same act or two or more acts connected by a common scheme or plan, since the defendant fraudulently acquired citizenship in order to remain unlawfully in the United States. The offense level for this count group is 24.

9. Defendant is convicted of drug trafficking (§2D1.1) and felon in possession (§2K2.1). Defendant sold 3 kilos of cocaine to an undercover officer. During the sale, the defendant possessed a handgun.

Drug Trafficking (§2D1.1)

- BOL 26
- (b)(1) weapon +2

Felon in Possession (§2K2.1)

- BOL 24
- (b)(6) firearm in other offense +4

How do these counts group?

These counts group under rule (c). The SOC (b)(1) at §2D1.1 for weapon possession embodies the conduct of the other count of conviction, the felon in possession count (§2K2.1). Alternatively, the SOC (b)(6) at §2K2.1 for possession of a firearm in connection with another offense embodies the conduct of the other count of conviction, the drug count (§2D1.1). The offense level for this count group is 28.

10. Defendant is convicted of one count of possession with intent to distribute marijuana (§2D1.1) and one count of re-entry of a removed alien (§2L1.2). Border Patrol agents encountered the defendant walking through the brush in Texas. The defendant was carrying a large burlap backpack containing marijuana. Defendant reported that he had been recruited to transport marijuana into the United States a month earlier while working in the apple orchards in Mexico.

MULTIPLE COUNT SCENARIOS - TEACHER'S EDITION

Illegal Reentry (§2L1.2)

- BOL 8
- (b)(1) prior felony +4

PWID Marijuana (§2D1.1)

- BOL 10

How do these counts group?

These counts will be assigned units under §3D1.4. The counts do not involve the same guideline and §2L1.2 is not listed as included or excluded for grouping under §3D1.2(d). Rule (d) will not apply. There is no SOC or Chapter Three Adjustment in either §2L1.2 or §2D1.1 that embodies the conduct of the other count of conviction. Rule (c) will not apply. These counts do not involve the same victim – one count harms the societal interest protected by laws governing immigration; the other harms the societal interest protected by laws governing controlled substances. Rules (a) and (b) do not apply. Per §3D1.4, one unit will be assigned to the first count, which has the greater offense level of 12. Another unit will be assigned to the second assault count, because that offense level of 10 is one to four levels less than the count with the greatest offense level. A total of two units results in an increase of two offense levels, which are added to the greatest offense level. The offense level for this count group is 14.

11. Defendant is convicted of two counts of sexual exploitation of a child (§2G2.1). The counts involve the same victim, who is 13 years of age. The defendant engaged in sexual contact with the child on two occasions: May 1, 2016 and June 14, 2016.

Production (§2G2.1)

- BOL 32
- (b)(1) minor +2
- (b)(2) sex act +2
- (b)(5) relative +2

Production (§2G2.1)

- BOL 32
- (b)(1) minor +2
- (b)(2) sex act +2
- (b)(5) relative +2

How do these counts group?

These counts will be assigned units under §3D1.4. Although the counts involve the same guideline, the production guideline (§2G2.1) is excluded from grouping under rule (d). Rule (c) does not apply because there is not an SOC from the first count that embodies the conduct of the other count of assault. Although the counts involve the same victim, rules (a) and (b) also do not apply. The counts do not involve the same act (the exploitations occurred over a month

apart), so rule (a) does not apply. Rule (b) does not apply because the counts represent separate instances of fear and risk of harm. Per Application Note 4 at §3D1.2, the counts cannot be considered to involve two or more acts connected by a common criminal objective due to the separate instances of fear and risk of harm. One unit will be assigned to the first count, which has an offense level of 38. Another unit will be assigned to the second assault count, because that offense level of 38 is equal to the offense level of the first count. A total of two units results in an increase of two offense levels, which are added to the greatest offense level. The offense level for this count group is 40.

12. Defendant is convicted of one count of distribution of heroin (§2D1.1), one count of distribution of cocaine (§2D1.1), one count of felon in possession (§2K2.1), and one count of aggravated assault (§2A2.2). On one occasion, the defendant sold 90 grams of heroin to an undercover agent. A couple of weeks later, the defendant sold the same undercover agent 500 grams of cocaine. While conducting the sale of the cocaine with the undercover agent, the defendant possessed a firearm. When DEA agents arrived to arrest the defendant, the defendant fled in his vehicle, led the officers on a dangerous high speed chase, and purposefully drove his vehicle into one of the agent's cruisers, causing injury.

Distribution Heroin (§2D1.1)

- BOL 22
- (b)(2) violence +2

Distribution Cocaine (§2D1.1)

- BOL 24
- (b)(1) weapon +2
- (b)(2) violence +2

Felon in Possession (§2K2.1)

- BOL 20
- (b)(6) firearm in other offense +4
- §3C1.2 reckless endangerment +2

Aggravated Assault

- BOL 14
- (b)(2) weapon +2
- (b)(3) injury +5
- (b)(7) 18 USC § 111 +2
- §3A1.2 Official Victim +6

How do these counts group?

Using the process outlined in the Multiple Counts decision tree, we first start by identifying whether any multiple counts involve the same guideline. In this scenario, distribution of heroin and distribution of cocaine both involve the same guideline, §2D1.1 (Drug Trafficking). The drug trafficking guideline is listed as included for grouping under §3D1.2(d). As a result, two drug distribution counts will group under rule (d) and the drug guideline (§2D1.1) will be applied one time based upon the aggregate relevant conduct for both counts of conviction.

MULTIPLE COUNT SCENARIOS - TEACHER'S EDITION

Under this one-time calculation, the offense level for this count group is 28. The BOL is 24 (90 grams of heroin plus 500 grams cocaine); plus two offense levels at (b)(1) for weapon possession, and two additional offense levels at (b)(2) for violence.

The next step in the decision tree is to apply the guidelines separately for the remaining counts and then determine if one count (or count group) contains an SOC or Chapter Three adjustment that embodies the conduct of another of the counts.

The guideline calculation for the felon in possession (§2K2.1) contains a two-level increase at §3C1.2 for reckless endangerment during flight. This Chapter Three Adjustment embodies the conduct of the aggravated assault count.

As a result, §2K2.1 and §2A2.2 will be grouped under rule (c). The offense level for this count group is 29 (which comes from the aggravated assault guideline calculation – the greater offense level of the two counts).

Now, in comparing the count group for the two drug counts with the count group for the felon in possession and assault counts, we see that there are SOCs that embody the conduct of the other counts of conviction. The calculation of §2D1.1 contains SOCs for both possession of a weapon and use of violence. Either one of those SOCs can be used to group the drug distribution count group with the felon in possession/assault count group. Those SOCs embody the conduct of the other counts of conviction, although only one is required to trigger application of grouping under rule (c). The combined adjusted offense level for all four counts of conviction is 29.

13. Defendant was arrested in Arlington National Cemetery after committing several offenses. The defendant is convicted of one count of theft (§2B1.1); he stole several objects from the cemetery, with a total loss of \$42,000. He is also convicted of robbery (§2B3.1); he robbed a tourist of her purse, cell phone, and camera for a total loss of \$7000. The defendant is also convicted of assaulting the robbery victim (§2A2.2), as he pushed her from behind, knocking her to the pavement and causing bodily injury.

MULTIPLE COUNT SCENARIOS - TEACHER'S EDITION

Theft (§2B1.1)

- BOL 6
- (b)(1) loss +6
- (b)(5) national cemetery +2
- BOL 14
- (b)(3) injury +3

Robbery (§2B3.1)

- BOL 20
- (b)(3) injury +2

How do these counts group?

Using the process outlined in the Multiple Counts decision tree, the first step is to determine if any of the multiple counts involve the same guideline. None do, so the guidelines will be applied to each count of conviction. Next, we must determine if any of the counts contains an SOC or Chapter Three adjustment that embodies the conduct of the other count. In this scenario, §2B3.1(b)(3) contains an SOC for injury that embodies the conduct of the assault count (§2A2.2). These counts will group under rule (c). The offense level for this count group will be 22, the offense level from the robbery guideline which is the greatest offense level of the two counts. The next step in the decision tree is to determine if any of the remaining counts involve the same victim. The theft and the robbery/assault count group do not involve the same victim. The victim of the theft is Arlington Cemetery, and the victim of the robbery/assault is an individual. As a result, we must move onto §3D1.4 and assign units. One unit is assigned to the robbery/assault count group because it has the greatest offense level – offense level 22. The theft count is eight levels less serious than the offense level for the robbery/assault count group. The theft count, therefore is assigned one-half unit. One and one-half units results in an increase of one offense level, which will be added to the count group with the highest offense level. The offense level for all three counts is 23.

These scenarios are designed to illustrate common principles in restitution cases. They were derived from actual cases, though the facts were changed in some instances to more clearly illustrate the relevant issues.

1. Defendant was convicted of possessing and brandishing a firearm in relation to a crime of violence. He and three others robbed a hotel and casino of \$85,291 dollars. The court ordered restitution for all defendants, to be jointly and severally liable for the full amount, pursuant to the MVRA, 18 U.S.C. § 3663A. The court did not sentence defendant to pay a fine. At the time, defendant had no assets, no credit history, and a weekly income of \$150. Due to the defendant's financial situation, the court announced at sentencing "[r]estitution payments will be made after completion of sentence, and if necessary, a payment plan may be agreed to with either the probation office or the Government. All other terms and conditions will be set in the judgement."

Was the court's ruling regarding restitution correct? Why or why not?

No, the court needs to set the payment plan and may not delegate authority to the probation officer or the government. *U.S. v. Moran-Calderon*, 780 F3d 50 (2015).

2. Same defendant as above. One year into his prison sentence, defendant began cooperating. The government used the information he provided to arrest a fourth co-defendant. When defendant returned for resentencing, the government recommended a one-third reduction of his prison sentence. Noting that the defendant's cooperation had been more "extraordinary" than the government represented, the court announced, "there is going to be another reduction or reward... to remove from the original sentence the order that the restitution is to be joint and several." When asked by the government to clarify the ruling, the court stated, "defendant is to be totally free from any further commitment on the restitution order. I'm giving him an award for his cooperation."

Was the court's ruling correct or incorrect? Why or why not?

No. The court has no authority to remove the restitution order. The court can, at the original sentencing, apportion restitution in accordance with culpability. In this case, the court held each defendant jointly and severally liable at the original sentencing. At the re-sentencing, nothing about the defendant's restitution obligation changed with regard to his culpability or liability for the offense. *U.S. v. Puentes*, 803 F.3d 597 (11th Cir. 2015)

3. Defendant was convicted of Clean Air Act violations. Defendant and several co-defendants formed a salvage company and bought the rights to salvage a former industrial site. Permits allowed the company to tear down existing buildings and obtain salvageable material such as metals and fixtures. However, the site also contained large amounts of asbestos, which the defendant knowingly failed to dispose of properly. Eventually, the EPA intervened and cleaned up the site, which was comprised of 300 acres of privately held property, at a cost of \$16 million dollars. Defendant was sentenced to 60 months' custody, and all defendants were held jointly and severally liable for \$10,000,000 restitution, as requested by the government. Defendant objected to the restitution order, claiming that the government had no possessory interest in the privately held property. The court overruled the objection and ordered restitution.

Was the court's restitution ruling correct or incorrect? Why or why not?

Yes. The government may be considered a victim, as it expended funds for cleanup. This is true even though the government had no possessory interest in the property. The case contains an interesting discussion about the defendant's argument, and suggests that the answer is not clear. Other courts have ruled similarly. This could be an interesting issue to watch. *U.S. v. Sawyer*, 825 F.3d 287 (11th Cir. 2016)

4. Defendant was convicted of conspiracy to commit wire fraud for his role in a "skimming" operation. He and several co-defendants hatched a plan to obtain debit card information by installing a skimming apparatus at convenience store gas pumps. They then used the account information to make cash withdrawals from ATMs in three different states. Originally charged with one count conspiracy to commit wire fraud and two counts of aggravated identity theft, defendant pled guilty to the conspiracy count. Count 1 charged that from on or about February 3, 2012 until on or about March 4, 2013, defendant and others did knowingly transmit or cause to be transmitted funds from Arvest Bank, First United Bank, First Texoma National Bank, Landmark Bank, and Shamrock Bank, by means of a wire in interstate commerce. At his plea to Count 1, defendant admitted to driving the van around the various gas stations so his co-defendants could install the devices. He also withdrew money from ATMs.

The PSR noted evidence that the defendant had withdrawn money from a total of 12 banks as part of the conspiracy. Defendant was sentenced to 63 months' imprisonment, and 3 years' supervised release. The court ordered that defendant pay \$240,682.27 in restitution, which represented the loss to the 12 banks from which the probation officer concluded the defendant had taken money.

Was the court's restitution order correct or incorrect? Why or why not?

No. The indictment named 5 banks. Where the indictment is specific, restitution is limited to the named victims. The court should not have taken relevant conduct into account. *U.S. v. Alisuretove*, 788 F. 3d 1247 (10th Cir. 2015)

5. Same defendant as above. The total amount stolen from the five banks listed in the indictment was \$109,248.40. In the PSR, the probation officer calculated this amount based on police reports noting that suspicious withdrawals started occurring with greater than usual frequency around Thanksgiving of 2011, ending some time in Spring 2013. Defendant objected to the restitution order, claiming that he withdrew from the conspiracy in January, 2013, after his mother-in-law became suspicious of his unexplained source of income. He quit withdrawing money because he feared his mother-in-law would turn him in. Defendant said he told his co-defendants that he would not drive the van or withdraw any more money because he feared his mother-in-law. He said his co-defendants laughed at him and continued to give him debit card access information, but he did not use it. The court rejected defendant's argument and included in the restitution order amounts withdrawn from Christmas 2011 through March 4, 2013.

Was the court's restitution order correct or incorrect? Why or why not?

No. The court considered a time frame outside of that specified in the indictment. The indictment said February 2012 and the restitution award went back to Christmas 2011. The court might also want to explore evidence on the defendant's withdrawal from the conspiracy. *U.S. v. Alisuretove*, 788 F. 3d 1247 (10th Cir. 2015)

6. Defendant was a CPA convicted of 25 counts of aiding and assisting in the filing of a false tax return. He prepared dozens of returns that claimed unreimbursed employee expenses for clients who never told him they had incurred such expenses and never asked him to include such claims on their tax returns. Defendant promised his clients hefty returns and provided his clients with upfront cash in anticipation of the inflated tax refund. IRS became suspicious and initiated an investigation, which revealed that defendant had falsified dozens of returns. At sentencing the IRS provided a spreadsheet detailing all of the falsified returns involved in defendant's criminal scheme, including a number for which defendant was not convicted. The resulting loss amount was \$262,966. The court ordered restitution in the same amount.

Was the court's restitution order correct or incorrect? Why or why not?

No. The court should not have taken into account relevant conduct and instead should have limited restitution to the 25 counts of conviction. The spreadsheet information may have been relevant for the loss calculation, but not for restitution. *US v Udo*, 795 F3d 24 (D.C. Cir 2015)

7. Defendant pled guilty to distribution and possession of child pornography. The court concluded that one victim, Cindy, had been sexually abused 11 years prior to defendant's possession/distribution offense. The losses included future lost earnings, medical expenses, vocational rehabilitation, and the cost of an economic report. The court ordered defendant to pay restitution in the amount of 1.3 million dollars, adopting the recommendation of the restitution amount contained in an expert report. The expert based her restitution recommendation on an estimate of the cost of repairing harm done to Cindy by her abuser and by all those who subsequently possessed and distributed the images of the abuse. Defendant objected to the restitution order. The court overruled the objection.

Was the court's restitution order correct or incorrect? Why or why not?

No. The court erred by lumping together the harm done by Cindy's abuser with the harm done by the possessor and distributor of the pornography. Restitution for this defendant should have been based on the causal connection between his counts of conviction and the harm caused to Cindy. Because the court also considered the harm done by the original abuser, the restitution order was remanded. *U.S. v. Galan*, 804 F.3d 1287 (9th Cir. 2015)

8. Defendant was a city mayor, convicted of bribery, extortion, mail and wire fraud, RICO conspiracy, and tax evasion. The court ordered defendant to pay \$4,548,423 in restitution to the Water and Sewage Department, and to the IRS. The restitution amount represented the defendant's profits from illegal contracts underlying the RICO and extortion counts of conviction. This amount, the government claimed, represented an overall 10% profit margin for the contracts at issue in the counts of conviction, and represented a reasoned approximation of the amount of money the city was unknowingly forced to spend for contracts obtained through fraud and deceit." The court adopted the government's explanation, stating "I don't think there is any way to parse out what the actual loss was as opposed to the improper gain. The law does not require that these numbers be determined with exactness and specificity because it is impossible to do that in hindsight."

Was the court's restitution order correct or incorrect? Why or why not?

No. The court cannot use gain as a measure of restitution owed to the victim. The exception to this rule is sex trafficking cases, where the defendant's gain from the victim's prostitution can be used to measure restitution. In the case above, the court should have attempted to come up with an actual loss figure. Of note, restitution may be offset by gain to the victim. For instance the value of property returned to a victim in a mortgage fraud case, or the value of services rendered if the victim actually received services, such as in a medical billing fraud. *U.S. v. Kilpatrick*, 798 F.3d 365 (2015)

1. Defendant convicted of 18 U.S.C. § 371 (Conspiracy) to commit a violation of 18 U.S.C. § 1343 (Wire Fraud). Per Appendix A, the applicable guideline for § 371 is §2X1.1 which references to §2B1.1. The statutory maximum for § 371 is 5 years; the stat max for § 1343 is 20 years. Which base offense level (BOL) applies at §2B1.1(a)?

Answer – B (BOL 6). It is a 2-part analysis. 18 U.S.C. §371 in Appendix A directs you to go to §2X1.1. The second part is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is only 5 years.

2. Defendant convicted of 18 U.S.C. § 1956 (Money Laundering) which carries a 20 year stat max; applicable guideline §2S1.1. Defendant was involved in a wire fraud scheme and was laundering proceeds from the wire fraud scheme. §2S1.1(a)(1) directs the use of the offense level for the underlying offense from which the laundered funds were derived. Which base offense level (BOL) applies at §2B1.1(a)?

Answer – B (BOL 6). Again, it is a 2-part analysis. 18 U.S.C. §1956 in Appendix A directs you to go to §2S1.1, not §2B1.1, therefore the answer is as noted. The second part is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is 20 years. But, because it does not meet both criteria, it is a BOL of 6.

3. Defendant is convicted of interstate theft. Defendant stole a total of \$110,000 from 12 Walgreen stores. Does the defendant receive an increase at §2B1.1(b)(2) for number of victims?

Answer – B (No). Walgreens is the victim, not each store. Corporate Walgreens suffered the loss, not the individual stores. You could have a scenario where for instance The UPS Store is the victim, but each The UPS Store is independently owned and operated. In that situation, there would be an enhancement under §2B1.1(b)(2)(A) for an offense that involved 10 or more victims because all 12 would have suffered individually.

4. Defendant convicted of bank fraud under 18 U.S.C. § 1344. Defendant used forged checks and a stolen identity to attempt bank fraud. Should the defendant receive an enhancement for sophisticated means?

Answer – B (No). §2B1.1, App. Note 9(B). If you had additional information such as where the defendant obtained the forged checks, where the ID's came from, whether the defendant was a data miner, whether the information was from a phishing (e-mail or acct access) or smishing (text or SMS msg) scam. Did the defendant create numerous false documents? You need to look at the conduct as a whole, not necessarily the pieces, when determining if this SOC applies.

5. A and B were convicted of Conspiracy to Defraud the United States with Respect to Claims - §2B1.1. A steals personal identifying information from a local business and shares them with B. B files the vast majority of the false tax returns listing her address for the refunds. She collects over \$500,000. A files a handful of tax return and collects \$20,000. What amount of loss should Defendant A be held accountable for?

Answer – A – (\$500,000). You need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? It would appear so in this case. They worked in concert with one another.

6. Defendant pled guilty to Securities Fraud (§2B1.1) and Tax Evasion (2T1.1). The defendant was an investment advisor and over the course of 4 years, the defendant used \$41 million of investor money for his own person use. He then also failed to report all of his income to the IRS, resulting in an outstanding tax obligation of \$75,000. Should these two offenses be grouped together and the loss amounts aggregated or are they calculated separately and units assigned?

Answer – B (No). In this case the two tables for each of the counts of conviction are different. §2B1.1 loss table represents the total loss amount. On the other hand, in §2T1.1 cases, you are directed to use the tax loss from the table in §2T4.1. They are not the same and should not be grouped - however, some case law may direct you otherwise - please check the law in your circuit.

7. Defendant convicted of a False Claims Conspiracy - §2B1.1. The defendant filed numerous false tax returns using stolen or fraudulently obtained identification information. Over the course of 4 years she made false claims of \$4,250,000, but only received \$1,250,000 from the IRS. What is the amount of loss?

Answer – A (\$4,250,000). Under §2B1.1, App. Note 3(A), you are directed to determine the greater of actual or intended loss. In this case, the defendant filed or made claims for \$4,250,000 – that is what she intended to do or how much she intended to receive.

Scenario 1

Defendant is convicted of one count of possession of child porn on June 1, 2016. Guideline 2G2.2. The offense of conviction involved the defendant's possession of 100 images of child porn on his computer. On multiple occasions from Aug. 1, 2015 until June 1, 2016, the defendant also distributed child porn in order to get child porn; this involved a total of 2,000 images beyond those in count of conviction.

How many images is the defendant accountable for?

2,100. Section 2G2.2 (Trafficking) is on the "included list" at §3D1.2(d), therefore relevant conduct will include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). The 2,000 images would be same course of conduct to the 100 images listed in the indictment so you would add up all the images together.

Will the defendant receive the SOC for distribution?

Yes. Section 2G2.2 (Trafficking) is on the "included list" at §3D1.2(d), therefore relevant conduct will include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). Here, as the distribution conduct was in the same course of conduct, the SOC would apply.

Scenario 2

The defendant is convicted one count of production of child porn, citing one minor, age 14, exploited during the production on July 15, 2016; Guideline §2G2.1. On July 2, 2016, the defendant also produced child porn exploiting a different child, age 10.

Will the defendant be accountable for the second production exploiting the second child, and can the SOC for minor under age 12 apply?

No. Section 2G2.1 (Production) is on the "excluded list" at §3D1.2(d), therefore relevant conduct will not include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). The court would only be able to apply conduct from the child listed in the indictment on July 15, 2016.

Scenario 3

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution; Guideline §2G1.3. On another occasion that week the defendant transported the minor to a different location for purposes of prostitution and filmed the sexual activity.

Will the defendant be accountable for the second transportation of the child?

No. Section 2G1.3 (Travel/Transportation) is not on either list at §3D1.2(d), but should be treated like other similar offenses on the “excluded list,” meaning relevant conduct will not include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). The court would only be able to examine the conduct for the first minor.

Scenario 4

Same facts as Scenario 3, except on the occasion of the offense of conviction, in addition to the 15-year-old minor cited, there was also an 11-year-old being transported for prostitution.

Will the Special Instruction Apply?

Yes. Section 2G1.3(d)(1) states: “If the relevant conduct of the offense of conviction involved more than one minor victim, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.” As there was more than one minor victim in the offense of conviction who was transported, the special rule would apply.

Will there be a single application looking at the conduct related to both minors, or will there be a separate application for each?

Separate application for each child. Section 2G1.3(d) states that if there was more than one minor in the offense of conviction who was transported each minor is treated as if he/she were in a separate counts of conviction. There were 2 children who were transported for prostitution, so the court would do a separate guideline calculation for each child and then apply §3D1.4 to reach one offense level.

Scenario 5

The defendant is convicted of one count of production of child porn, citing one minor, age 10, exploited during the production on a May 10, 2016; Applicable guideline §2G2.1. In that same production, a second minor, age 9, was also exploited in the same fashion in the same video.

Will the special instruction be applied?

Yes. Section 2G2.1 states: “If the relevant conduct of the offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.” Here, the 9-year old was exploited in the same video, so the special instruction would apply.

Will there be a single application looking at the conduct related to both minors, or will there be a separate application for each?

Separate application for each minor. The special rule at §2G2.1(d) requires that the guideline calculation would have a separate count for each minor.

Scenario 6

Count 1 – Trafficking child porn on April 15, 2016; Applicable guideline §2G2.2; OL 40

Count 2 – Production of child porn, citing one minor exploited during the production on April 15, 2016; Applicable guideline §2G2.1; OL 38

Among the SOCs applied is §2G2.1(b)(3) for the offense involving distribution of child porn

The distribution cited in the trafficking count is the same child porn cited in the production count.

The relevant conduct of the trafficking offense includes not only the child porn cited in the count but also additional distributions by the defendant over a period of six months.

Will the counts group? If so, under which grouping rule?

The counts will group pursuant to §3D1.2(c) which applies “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.” Section 2G2.1(b)(3) provides a 2-level increase if the offense involved distribution and the SOC applied in this case. This SOC embodies conduct from count 1 (distribution conduct), so the 2 counts group pursuant to §3D1.2(c).

Scenario 7

Count 1 – Transportation of 14-year-old for purposes of illegal sexual activity, child porn production, on March 20, 2016, Guideline §2G1.3; OL 32. There was only the minor in the transportation.

Count 2 – Production of child porn, citing the same 14-year-old in the production on March 20, 2016, Applicable guideline §2G2.1; OL 38. There was only the one minor exploited in the production.

Will the cross reference at §2G1.3(c)(1) for production of child porn apply? If so, what is the resulting offense level?

Yes. Section 2G1.3(c)(1) provides a cross reference to §2G2.1 (Production) if the conduct involves production of child pornography if the resulting offense level is higher. Here, as the defendant's transportation count conduct included producing child pornography and the resulting offense level is higher when calculated under §2G.2.1 (38 to 32), the cross reference will apply and the offense level would be increased to 38. The counts would then group pursuant to §3D1.2(a).