ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING (2016)

Defendant Peter Meyers

Defense Counsel Paul Jones

AUSA Mary Brown

I.

Defendant **Peter Meyers** pleaded guilty to one count of possessing 15 kilograms of heroin with intent to distribute it and was admonished at the guilty plea hearing that he was facing a statutory mandatory minimum prison sentence of 10 years. After a presentence investigation, the probation officer prepared a PSR, which erroneously stated that Meyers is in Criminal History Category (CHC) I because the probation officer mistakenly concluded that Meyers had no criminal history points. Defense counsel **Paul Jones** knows that Meyers's criminal history score actually should be 3 points and that his CHC should be II because he had a prior felony assault conviction (in another state) for which he received a sentence of 14 months in prison from which he was released 14 years and 11 months before commencing the instant offense. The PSR erroneously stated that Meyers had been released from prison 15 years and 1 month before commencement of the instant offense (which, if true, would result in the conviction being "stale" under USSG §4A1.2(e)(1)). Scoring this prior conviction correctly under the Sentencing Guidelines would disqualify Meyers for the two-level "safety valve" reduction under USSG §2D1.1(b)(17).

The PSR calculated Meyers's adjusted offense level to be 31 by starting with a base offense level of 34 and subtracting 3 levels for acceptance of responsibility. However, the PSR further stated that Meyers qualifies for the two-level "safety valve" reduction under USSG §2D1.1(b)(17) because he has no criminal history points and also that the ten-year statutory mandatory minimum sentence no longer applies to him under 18 U.S.C. § 3553(f). With the application of the "safety valve" and placement of Meyers in CHC I, Meyers's total offense level would be 29 and the corresponding guidelines imprisonment range would be **87 to 108** months (without the 10-year mandatory minimum, the low-end of the guideline range would be 87 months, not 120 months). Had the guidelines calculations been correctly scored in the PSR – *i.e.*, no safety valve and a determination that Meyers is in CHC II – Meyers's guidelines imprisonment range would have been **121 to 151** months (with a statutory mandatory minimum sentence of **120 months**).

Assume that there are no other errors in the PSR. Also assume that the AUSA in the case has filed a short "statement of non-objection to the PSR" (and is unaware of the error in the PSR). Finally, assume that Meyers did not attempt to cooperate with the prosecution and, thus, that the AUSA has not moved the court to downwardly depart based on "substantial assistance."

1. Does Jones have an ethical obligation to inform the probation officer and district court of the error in the PSR concerning Meyers's prior criminal history (which would disqualify him for the "safety valve" and also place him in CHC II)?

2. If not, how should Jones respond to the PSR?

3. May Jones ethically ask the court for a sentence at the bottom of the guidelines range set forth in the PSR (87 months)? May Jones ask for a "variance" below the 87-108 month range (assuming a non-frivolous basis for such a downward variance exists under 18 U.S.C. § 3553(a))?

4. How should Jones respond if the court explicitly asks Jones at sentencing if the PSR and the sentencing calculations within it are correct?

II.

Peter Meyers was charged in federal court in Los Angeles with possession of 6 kilos of cocaine base ("crack" cocaine) with intent to distribute it. Meyers pleaded not guilty and went to trial. At trial, the prosecutor, **AUSA Mary Brown**, introduced evidence that Meyers had acquired the 6 kilograms of crack cocaine in December 2015 from a man named **Roger Clinton**. The jury convicted Meyers of the single charged count of possession with the intent to distribute 6 kilos of crack cocaine. That conviction carries a statutory range of punishment of 10 years to life imprisonment.

At trial, because she did not consider it necessary to do so, **AUSA Brown** did not introduce any evidence related to a **confidential source ("CS")** who had provided incriminating information about Meyers that had led to the DEA's wiretaps of Meyers's cell phone calls. During the wiretaps, the agents monitored Meyers's calls with Clinton, which led to Meyers's arrest and indictment. The CS had no involvement in Meyers's dealings with Clinton. The CS had told DEA agents that he and Meyers had engaged in "several" illegal drug deals during the prior three years, including two deals each involving 10 kilograms of crack cocaine each. According to the CS, "Meyers specifically told me that had distributed

the crack cocaine throughout the Los Angeles area." The DEA did not develop any additional information concerning those two alleged deals other than obtaining cell phone records showing many dozens of calls between the CS and Meyers during the prior three years.

During the presentence investigation in Meyers's case, the probation officer was given access to AUSA's file in the case, which contained a DEA-6 report about the CS. In the PSR, the probation officer included as "relevant conduct" findings about Meyers's two prior drug deals involving 10 kilos of crack cocaine each. Based on a total of 26 kilos of crack cocaine, the PSR calculated Meyers's base offense level at 38 under the Drug Quantity Table in the *Guidelines Manual*. If only the 6 kilograms of crack cocaine (of which Meyers had been convicted at trial) had been considered, Meyers's base offense level would have been calculated at 34. Because Meyers had no prior criminal convictions and also because no specific offense characteristics in the drug-trafficking guideline applied, his resulting guideline range in the PSR – with a base offense level of 38 and no credit for acceptance of responsibility – was **235-293 months**. A base offense level of 34 would have yielded a significantly lower guidelines range of **151-188 months**.

After defense counsel **Paul Jones** received the PSR and saw the "relevant conduct" findings related to the CS's allegations, Jones objected that the evidence of the prior (unadjudicated) drug deals should not be adopted by the district court because it did not have "sufficient indicia of reliability to support its probably accuracy" (USSG §6A1.3, comment.) – in that it was based solely on the hearsay of an unidentified CS.

AUSA Brown's file contains not only the DEA-6 about the CS's allegations concerning Meyers but also a rap sheet of the CS. That rap sheet shows three prior felony convictions (for burglary, impersonating a police officer, and grand theft – all within the past decade). It also shows that, at the time the CS provided the information about Meyers to the DEA, the CS had a pending felony drug-trafficking charge in state court in Pennsylvania. The case agent had written a short memo accompanying the rap sheet that said "the state prosecutor [in the pending case] has agreed to dismiss the charge based on [the CS's] cooperation with the DEA." In fact, the CS's pending state charge was dismissed shortly after Meyers's conviction in the federal case.

1. Does AUSA Brown have an ethical and/or constitutional obligation to disclose the rap sheet and case agent's memo to the defense in Meyers's case? Why or why not?

2. Alternatively, assume that the information about the CS's prior convictions and pending charge (including the fact of the charge's ultimate dismissal) was contained only in the case agent's file and was not known by AUSA Brown. What duty, if any, does AUSA Brown have regarding the disclosure of the information?

III.

Peter Meyers, a British citizen, was charged with one count of illegal reentry by a previously deported alien, in violation of 8 U.S.C. § 1326(a). Prior to his sole deportation, he had been convicted in federal court of distributing drugs and given a five-year prison sentence followed by three years of supervised release. He was deported after being released from federal prison and thereafter was found in the United States by an immigration agent.

Meyers pleaded guilty to the illegal reentry charge in the indictment. At the guilty plea hearing, the federal district judge told Meyers that "the statutory maximum sentence can be up to 20 years under 8 U.S.C. § 1326 depending on your criminal record." The indictment did not specifically mention Meyers's prior drug-trafficking conviction, and the federal prosecutor did not mention it during her recitation of the factual basis for the guilty plea.

Thereafter, when the federal probation officer prepared the PSR, she noted Meyers's prior federal drug-trafficking conviction and stated that the statutory range of punishment was 0-20 years under 8 U.S.C. § 1326(b)(2). Without that prior conviction, Meyers' statutory maximum sentence would be two years of imprisonment under 8 U.S.C. § 1326(a). The PSR stated that Meyers's sentencing guideline range was 46-57 months after credit for acceptance of responsibility (base offense level of 21/CHC III).

After receiving the PSR, **AFPD Paul Jones** went to the local detention center to review the PSR with his client Meyers (a copy of which he had previously mailed to Meyers). Meyers informed Jones that "another inmate went to the law library" at the detention center and researched the legal issue of whether Meyers's statutory maximum is two or 20 years. According to Meyers, the other inmate told him that he should "demand that [his] attorney object to the PSR" on the ground that Meyers's statutory maximum sentence should be two, not 20, years – because the indictment did not mention Meyers's prior conviction. Meyers made such a "demand." Jones explained that, in *Almendarez-Torres*

v. United States, 523 U.S. 224 (1998), a majority of the Supreme Court held that an indictment in an illegal reentry case need not allege a pre-deportation conviction nor must such a conviction be admitted by a defendant at a guilty plea hearing in order for the court to sentence a defendant to up to 20 years based on the prior conviction. Meyers told Jones that his fellow inmate had discovered Justice Thomas's dissenting opinion (from the denial of certiorari) in *Reyes-Rangel v. United States*, 547 U.S. 1200 (2006), in which he had argued that the Court should overrule *Almendarez-Torres*. Jones responded that he was aware that Justice Thomas had "repeatedly" dissented on that ground over the years but that no other Justice seemed to agree with him (at least not in recorded votes) and that *Almendarez-Torres* was still "good law."

1. What should Jones do, if anything, in response to Meyers's "demand"?

2. Further assume that Meyers, citing Justice Thomas's dissenting opinion in *Rangel-Reyes*, raised a *pro se* objection to the PSR (contending his statutory maximum was two years), which was overruled by the district court in sentencing Meyers to 46 months in prison. No other legal issues were raised concerning the validity of Meyers's conviction or sentence. After sentencing, what obligation, if any, does Jones have to consult with Meyers about a pursuing a possible appeal?

3. Assume that Meyers chooses to appeal and that a new defense counsel, **CJA Attorney Maria Gonzalez**, is appointed on appeal. Assume the only legal issue in Meyers's case is the *Almendarez-Torres* issue discussed above. What should Gonzalez do? Should she file an *Anders* brief?

IV.

Peter Meyers, an 18 year-old with no criminal record, was arrested by the DEA as he was driving his car away from a suspected drug dealer's house. Meyers had 54 grams of crystal meth in a baggie in his jacket pocket. In the glove compartment of his car was a loaded 9-millimeter pistol. The agents seized both the drugs and gun, and Meyers was arrested. He was taken into federal custody and charged by a criminal complaint with possession of more than 50 grams of methamphetamine with intent to distribute it. The criminal complaint did not mention the pistol. At Meyers's initial appearance in federal court, **AFPD Paul Jones** was appointed to represent Meyers. The prosecutor, **AUSA Mary Brown**, approached Jones and said: "The agents seized a loaded 9 millimeter pistol in the glove

compartment. If your client pleads guilty to the dope and cooperates (whether or not he can provide substantial assistance), I'll not charge him with a section 924 count." Jones conferred with Meyers, determined that no suppression issues existed, and responded to AUSA Jones as follows: "He'll take the deal, but I would like to avoid mentioning the fact that a loaded gun was in the car. Can your factual basis in the plea agreement omit that fact and also can you and your agent not provide the probation officer information about the gun being in the car? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify for the safety valve."

1. Assume that AUSA Brown is willing to consider Jones's proposal. Could Brown ethically enter into such an agreement to withhold evidence of the loaded pistol from the probation office and court?

2. Assume Brown and Jones ultimately entered into the agreement. At sentencing, the court specifically asks both attorneys: "The PSR doesn't say anything about it, but I just want to make sure that the defendant wasn't armed during the drug deal in this case. It's my understanding guns are tools of the trade for meth dealers." How should AFPD Jones respond? How should AUSA Brown respond?

V.

Defendant **Peter Meyers**, who has a prior felony drug conviction, is facing a potential 10-year mandatory minimum sentence for possession with intent to distribute 10 kilos of cocaine. He has been charged in a criminal complaint; no indictment has been returned yet. **AUSA Mary Brown** wants Meyers to cooperate and advises **AFPD Paul Jones** that, *if* Meyers cooperates and provides substantial assistance, Brown will not file a § 851 notice of enhancement (that, if filed, would raise the mandatory minimum to 20 years) and also will file a motion for a substantial assistance departure under both 18 U.S.C. § 3553(e) and USSG §5K1.1. Thus, the potential swing in Meyers's sentence is 15 years – as a 5-year sentence is not unrealistic should the cooperation prove to be fruitful.

During subsequent debriefings, Meyers fails to provide substantial assistance. The proffer sessions lead to nothing because Meyers simply appears not to know what AUSA Brown thought he did

about certain other drug dealers. Brown then states that, as a matter of "office policy," she must file the § 851 notice.

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

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

1. Should Jones set up the proffer session?

2. What should Jones advise Meyers to say during the debriefing?

3. Assume that Meyers goes to the proffer session intending to tell the truth but, during the debriefing, changes his story and says that the supplier (rather than Meyers) threw the gun in the river after killing the rival drug dealer. Now what should Jones do?

4. Assume that, before the debriefing, Jones told Meyers that he may not lie to or mislead the authorities about his role with regard to the gun, and Meyers then changes his story (to Jones) before the debriefing and tells Jones that he never touched the firearm. How should Jones proceed?

5. Assume that, during the debriefing, Jones learns that the supplier turns out to be one of Jones's former clients. How should Jones proceed?