US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2017

National Seminar

May 31-June 2, 2017
Hilton Baltimore

September 6-8, 2017
Grand Hyatt Denver

Co-Sponsored by the American Bar Association.

Table of Contents

2017 National Seminars

Baltimore, MD (May 31-June 2) ● Denver, CO (September 6-8)

Seminar will be held all day Wednesday & Thursday, and until 12:00 p.m. Friday

Tuesday

Check-In 4:00 p.m. – 6:00 p.m.

Wednesday (Day 1)

Check-In will begin at 7:00 a.m.

8:15 a.m. – 8:45 a.m. **Plenary Session – Welcome/Commission Update**

8:45 a.m. – 9:00 a.m. **BREAK**

9:00 a.m. – 12:15 p.m.
(Concurrent Sessions)

Informational booths ongoing in the foyer …

- Helpline Live!
- Interactive Sourcebook Demo
- Sentencing Research Studies
- CLE Information Table

Introduction to Guidelines

9:00 a.m. – 10:30 a.m.	Basic Relevant Conduct
10:30 a.m. – 10:45 a.m.	BREAK
10:45 a.m. – 12:15 a.m.	Basic Criminal History

Advanced Guidelines Issues

9:00 a.m. – 10:30 a.m.	Advanced Relevant Conduct
10:30 a.m. – 10:45 a.m.	BREAK
10:45 a.m. – 12:15 p.m.	Advanced Criminal History

12:15 p.m. – 1:45 p.m. **LUNCH (on your own)**

1:45 p.m. – 3:15 p.m.	Guns and Drugs*
(Concurrent Sessions)	Immigration Offenses*
	Chapter Three Adjustments
	Multiple Counts*

3:15 p.m. – 3:30 p.m. **BREAK**

3:30 p.m. – 5:00 p.m.	Guns and Drugs*
(Concurrent Sessions)	Immigration Offenses*
	Case Law Update
	Multiple Counts*

5:00 p.m. – 6:30 p.m. **Reception**

*session repeated

Thursday (Day 2)

9:00 a.m. – 12:15 p.m.
(Concurrent Sessions)

BOP Issues/PSR	Categorical Approach	Economic Crimes	Sex Offenses
9:00 a.m. – 10:30 a.m.: SESSION 1			
BOP Issues*	Intro to the Categorical Approach*	Loss Calculation*	Application of Guidelines in Child Sex Crimes and Exploitation Offenses*
10:30 a.m. – 10:45 a.m.: BREAK			
10:45 a.m. – 12:15 p.m.: SESSION 2			
Related Guidelines to BOP Issues*	Applying the Categorical Approach*	Restitution*	Advanced Guideline Issues in Sex Offenses*

12:15 pm – 1:45 pm
LUNCH BREAK

Informational booths ongoing in the foyer …
- Helpline Live!
- Interactive Sourcebook Demo
- Sentencing Research Studies
- CLE Information Table

1:45 pm – 5:00 pm
(Concurrent Sessions)

BOP Issues/PSR	Categorical Approach	Economic Crimes	Sex Offenses
1:45 pm – 3:15 pm: SESSION 1			
BOP Issues*	Intro to the Categorical Approach*	Loss Calculation*	Application of Guidelines in Child Sex Crimes and Exploitation Offenses*
3:15 pm – 3:30 pm: BREAK			
3:30 pm – 5:00 pm: SESSION 2			
Related Guidelines to BOP Issues*	Applying the Categorical Approach*	Restitution*	Advanced Guideline Issues in Sex Offenses *

*session repeated

Friday (Day 3)

8:15 a.m. – 9:45 a.m.	Emerging Technologies
(Concurrent Sessions)	Organizational Guidelines
	Tips from the Bench
9:45 a.m. – 10:00 a.m.	**BREAK**
10:00 a.m. – 12:00 p.m.	Ethics
(Concurrent Sessions)	The Probation Officer Interactive Roundtable

*session repeated

COURSE DESCRIPTIONS

For those new to federal sentencing, we recommend that before attending the seminar, you complete the online course – Federal Sentencing: The Basics, available on our website (www.ussc.gov/education). This interactive course provides an overview of the federal sentencing system, and is based on the primer of the same name, published in September 2015.

BOP Issues

Paul Irby, Craig Pickles, Rachel Pierce, and Krista Rubin (Thursday)

Part 1 will be offered from 9:00 to 10:30 and again from 1:45 to 3:15
Part 2 will be offered from 10:45 to 12:15 and again from 3:30 to 5:00

Part 1 of this session will focus on BOP policies regarding the placement, designation and treatment of offenders. The panel will discuss how the language of the PSR and other relevant court documents impact the placement, designation, and treatment of offenders. This session will provide suggestions on how to best assist the court in achieving an appropriate placement for a particular offender based upon their individual circumstances.

Part 2 of this session will discuss BOP policies addressing the calculation of credit and will include a demonstration of the application of §5G1.3 (Undischarged Terms of Imprisonment). Scenarios will be used to demonstrate how credit is calculated in particular circumstances, and the panel will identify suggested language to best assist the court in achieving the appropriate sentence under §5G1.3. Finally, the panel will discuss application of §5K2.23 (Discharged Terms of Imprisonment).

Case Law Update

Alan Dorhoffer (Wednesday 3:30-5:00)

This course will update attendees on Supreme Court and important Circuit Court decisions issued during the past year. Alan will review scenarios designed to provide a broad overview of recent cases. Scenario topics include the categorical approach, restitution, and supervised release conditions, among others. Some of the topics will be covered in greater depth during other courses throughout the seminar.

Categorical Approach

Ebise Bayisa (Thursday)

Part 1 will be offered from 9:00 to 10:30 and again from 1:45 to 3:15
Part 2 will be offered from 10:45 to 12:15 and again from 3:30 to 5:00

Part 1 is highly recommended for those new to the categorical approach. Attendees will leave this course with an understanding of the steps necessary to analyze whether a prior conviction may be used as a predicate offense for recidivist enhancements such as career offender and Armed Career Criminal. The step-by-

step instruction will guide students through the new categorical approach post-*Mathis*, with an emphasis on determining whether the statute at issue is divisible.

Part 2 is highly recommended for those who have experience using the categorical approach, or who attended Part 1. In this session, Ebise will guide attendees through an analysis of several real-world statutes. The goal of this session is to facilitate attendees gaining practice and confidence in applying the categorical approach to actual cases.

A case law update on this topic is available in your seminar workbook.

Chapter Three Adjustments

Peter Madsen (Wednesday 1:45–3:15)

In the course, attendees will learn about the major Chapter Three adjustments in the Guidelines Manual, including acceptance of responsibility, obstruction of justice, role adjustments, and the vulnerable victim enhancement, among others. A case law update on this topic is available in your seminar workbook.

Criminal History (Basic)

Rusty Burress (Wednesday 10:45–12:15)

This session will use scenarios and an audience response system to demonstrate basic application principles of the criminal history rules. Topics include assignment of points, determination of sentence length, applicable time frames for counting prior sentences, excluded offense types, and the interplay between criminal history and relevant conduct.

Criminal History (Advanced)

Peter Madsen & Rachel Pierce (Wednesday 10:45–12:15)

Exploration of more advanced criminal history rules and how they affect determination of the criminal history score through use of scenarios. These include sentenced imposed upon revocation, single/separate sentences, special rules for career offenders, and 924(c) offenses.

Economic Crimes

Peter Madsen and Raquel Wilson (Thursday)

Part 1 will be offered from 9:00 to 10:30 and again from 1:45 to 3:15
Part 2 will be offered from 10:45 to 12:15 and again from 3:30 to 5:00

Part 1 of the Economic Crimes series, taught by Peter Madsen, will focus on loss calculations and victim issues. Participants will work through examples and scenarios to learn special rules for determining loss in commonly occurring fraud offenses, such as those involving credit cards, health care fraud, investment schemes, government benefits programs, and identity theft. Participants will also practice applying the guidelines' definition of "victim" and related sentencing adjustments.

Part 2 of the Economic Crimes series, taught by Raquel Wilson, will focus on restitution issues, including determining who is a victim, which harms are compensable, and the difference between loss calculations and restitution awards.

A case law update on this topic is available in your seminar workbook.

Emerging Technologies in Cybercrime

John Bendzunas, Moderator (Friday 8:15-9:45)

The panel will discuss emerging digital platforms and their implications in federal sentencing practice. The interactive panel discussion will explore emerging technological trends in cybercrime, with a focus on investigation of, and sentencing issues arising in unauthorized access to computer cases, aggravated identity theft, and digital currency. Sentencing issues addressed will include victim-related adjustments, criminal conduct occurring outside the United States, and obstruction of justice, among others.

Ethics

Brent Newton, Moderator (Friday 10:00–12:00)

This panel presentation will cover the primary rules of legal ethics generally applicable to defense counsel and prosecutors in criminal cases but also will deal specifically with the ethical issues arising in the federal sentencing context. The presentation will include several realistic hypothetical cases raising ethical issues related to sentencing.

Guns and Drugs

Rachel Pierce (Wednesday 1:45–3:15 and 3:30–5:00)

This course will focus on the interplay between §2K2.1 and §2D1.1 for defendants charged with offenses involving guns and drugs. The course will answer frequently asked questions about the weapon enhancement at §2D1.1, distinctions between the cross reference and the applicable enhancement when the gun is used in connection with another offense at §2K2.1, and the impact of a 924(c) conviction, among others. A case law update on this topic is available in your seminar workbook.

Helpline Live!

Commission Training Staff (Ongoing in the Foyer)

Stump the trainer! Commission training staff will be on-hand to answer your guideline and federal sentencing practice questions throughout the seminar.

Immigration Offenses

Alan Dorhoffer, Peter Madsen (Wednesday 1:45–3:15 (Alan) and 3:30–5:00 (Pete))

This course will highlight the 2016 amendments to the illegal reentry guidelines effective November 1, 2016. Using interactive scenarios, this session will focus on application of the guideline at §2L1.2 (Illegal Reentry) and the criminal history rules that are key to correct application of the guideline. New scenarios will focus on questions that have arisen during the past year this guideline has been in effect.

Multiple Counts

Krista Rubin (Wednesday 1:45–3:15 and 3:30–5:00)

Grouping of multiple counts involves determining a single offense level in cases involving multiple counts of conviction. Krista will demystify grouping by giving participants a decision tree for determining when grouping rules apply and by using scenarios to practice applying those rules. The course will address grouping rules for cases involving a single composite harm, the assignment of units for cases involving separate harms, and cases involving multiple grouping rules.

Organizational Guidelines

Kathleen Grilli & James Strawley (Friday 8:15–9:45)

The instructors will discuss the components of an organizational sentencing, including restitution, fines, and terms and conditions of probation. In this session, attendees will use several scenarios to practice applying the Organizational Guidelines in Chapter 8 of the *Guidelines Manual*.

Plenary Session – Commissioners

Wednesday 8:15–8:45

Commissioners will update attendees on the work of the Commission over the past year, followed by Q&A. Through the mobile app for the seminar, attendees may submit questions for the Commissioners one hour before the start of the session.

Probation Officer Interactive Roundtable

John Bendzunas & Richard Bohlken, Moderators (Friday 10:00–12:00)

The Probation Officers Advisory Group (POAG) and the United States Sentencing Commission (USSC) want your feedback! In this session, officers will form small groups to discuss sentencing issues and recommended policy priorities for the Commission. This session will also include a "Helpline Live" component where officers can ask Sentencing Commission training staff questions regarding sentencing.

Relevant Conduct (Basic)

Rusty Burress (Wednesday 9:00–10:30)

What are the acts the defendant is accountable for in a single defendant case? What are the acts the defendant is accountable for in an offense involving multiple participants? Students will leave this session with the ability to conduct a basic relevant conduct analysis, including an individualized relevant conduct determination in large multi-defendant cases. By the end of this session, you will know the difference between relevant conduct and expanded relevant conduct, the definitions of "same course of conduct, common scheme or plan" and "jointly undertaken criminal activity," and you will understand the interaction between relevant conduct and criminal history.

Relevant Conduct (Advanced)

Ebise Bayisa & Krista Rubin (Wednesday 9:00–10:30)

This course presumes an understanding of basic relevant conduct principles. This session will use advanced scenarios involving different offense types (including fraud, enticement of a minor, drugs and firearms) to demonstrate application of different relevant conduct principles. This session will illustrate how relevant conduct applies to different guideline provisions, including special instructions, and will highlight how relevant conduct impacts other areas of guideline application, like criminal history. Attendees will be better able to avoid common pitfalls in more complicated cases.

Sentencing Research Studies

Kevin Blackwell, Jason Grago, Lou Reedt, and Glenn Schmitt (Ongoing in the Foyer)

Senior social science researchers from the Commission's Office of Research and Data will be on-hand to discuss the Commission's Interactive Sourcebook, as well as recent Commission studies, most notably on recidivism among federal offenders and on youthful offenders sentenced in federal court. Research staff will also preview upcoming research publications.

Sex Offenses

Alan Dorhoffer (Thursday)

Part 1 will be offered from 9:00 to 10:30 and again from 1:45 to 3:15
Part 2 will be offered from 10:45 to 12:15 and again from 3:30 to 5:00

Part I will address application of the guidelines in child pornography, sex trafficking, and failure to register as a sex offender cases. The session will also include a discussion some key findings from the Commission's Report on Federal Child Pornography Offenses.

Part 2 will address advanced guideline issues arising in sex offenses, including relevant conduct and multiple count issues. This session will also discuss issues related to restitution and supervised release conditions in sex offense cases.

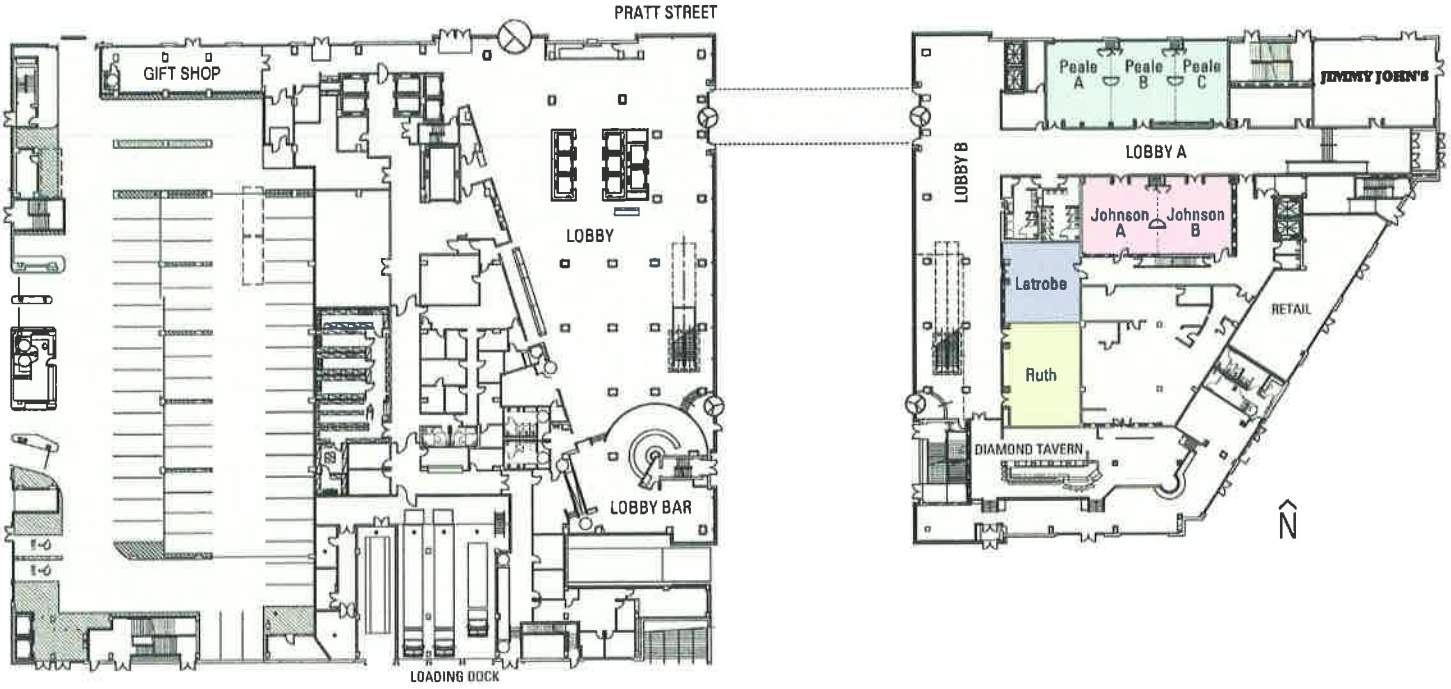
A case law update on this topic is available in your seminar workbook.

Tips from the Bench

Will Carr, Moderator (Friday 8:15–9:45)

A panel of district court judges will discuss sentencing procedure and advocacy, providing helpful information to probation officers and litigants.

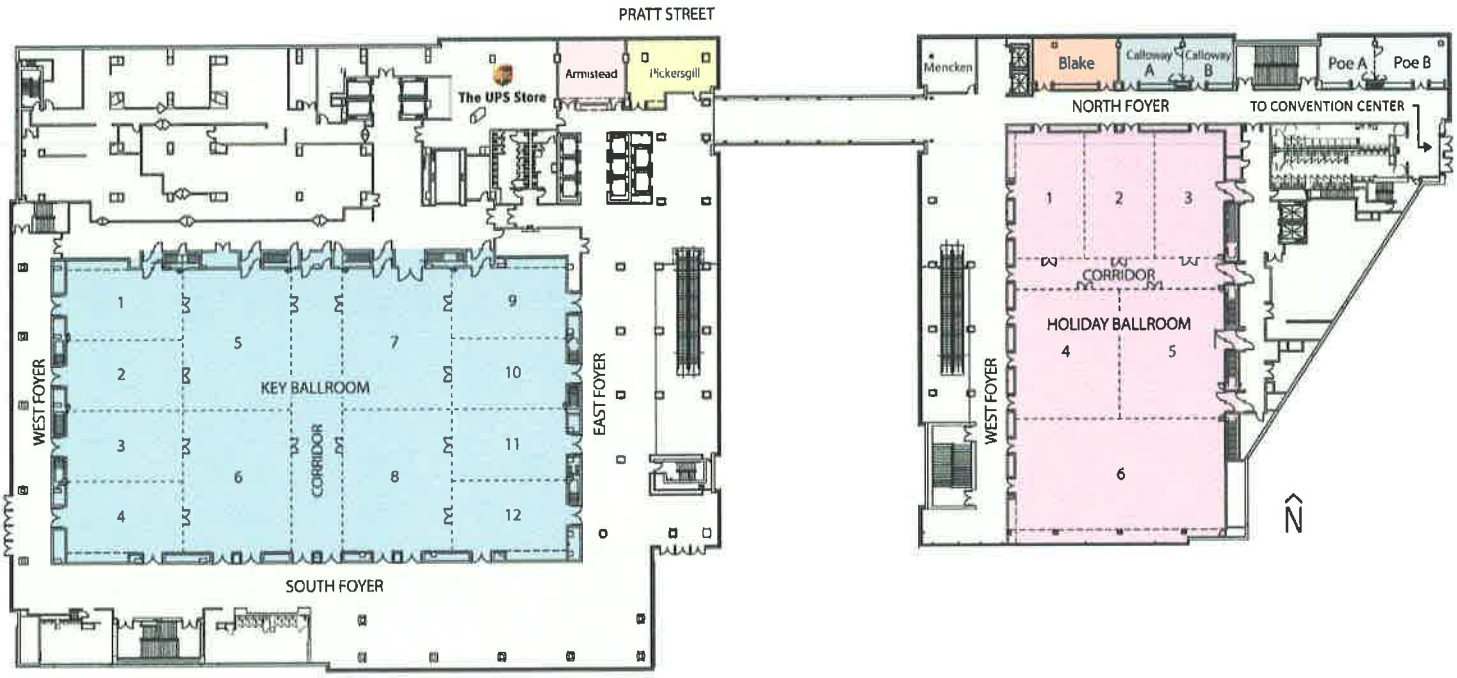
FIRST FLOOR



ROOM NAME	DIMENSIONS	TOTAL SQ FT	MAX CEILING HT	THEATRE	CLASSROOM	BANQUET	CONFERENCE	U-SHAPE	HOLLOW SQUARE	RECEPTION
Johnson	32 ft x 62 ft x 14 ft	1,932	14 ft	150	99	120	50	50	50	150
Johnson A	33 ft x 31 ft x 14 ft	944	14 ft	70	45	50	12	27	30	99
Johnson B	33 ft x 32 ft x 14 ft	988	14 ft	72	45	50	12	27	30	103
Latrobe	32 ft x 33 ft x 14 ft	999	14 ft	70	45	40	18	27	36	90
Lobby A & Lobby B	207 ft x 160 ft x 14 ft	8,718	16.9 ft	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Lobby A	172 ft x 28 ft x 14 ft	3,382	16.9 ft	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Lobby B	39 ft x 160 ft x 14 ft	5,404	16.9 ft	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Peale	34 ft x 76 ft x 14 ft	2,464	13.9 ft	220	126	120	60	60	60	225
Peale A	34 ft x 27 ft x 14 ft	880	13.9 ft	84	45	40	24	27	24	80
Peale B	34 ft x 27 ft x 14 ft	864	13.9 ft	70	45	40	24	27	24	80
Peale C	34 ft x 22 ft x 14 ft	720	13.9 ft	56	30	30	24	24	24	65
Ruth	32 ft x 43 ft x 14 ft	1,287	14 ft	108	60	70	34	32	38	110
Diamond Tavern	159 ft x 78 ft x 12 ft	4,699	12.1 ft	N/A	N/A	N/A	N/A	N/A	N/A	494

Hilton
BALTIMORE

SECOND FLOOR



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  - Additional 19,000 square feet Pre-Function area with floor to ceiling windows
- **Holiday Ballroom**—15,000 square feet
  - Divides into 6 sections
  - Additional 4,500 square feet Pre-Function area with floor to ceiling windows
- **Breakout Rooms**—27 (excludes ballroom sections)
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- 2 Meeting Planner Suites





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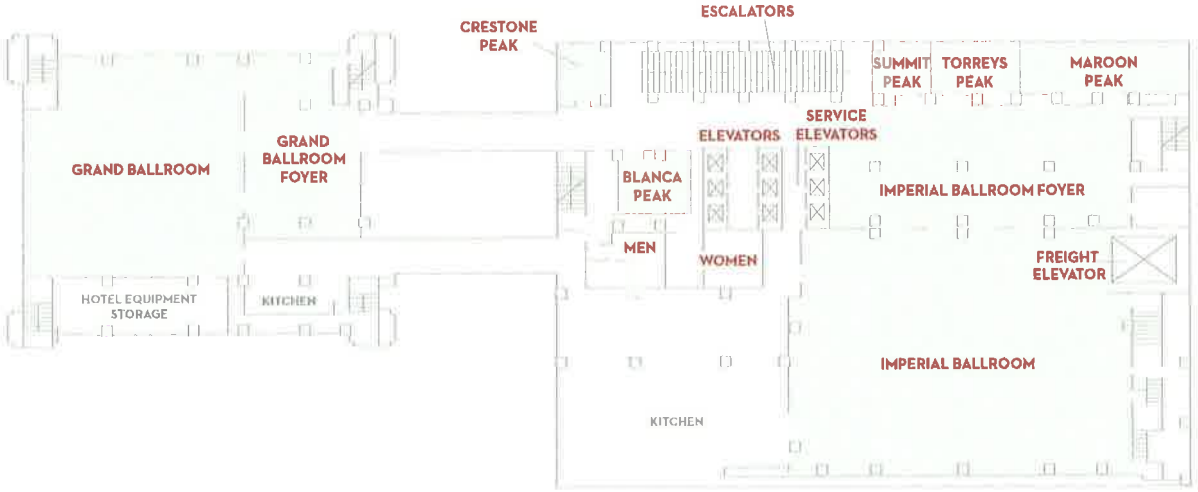
FLOOR PLAN

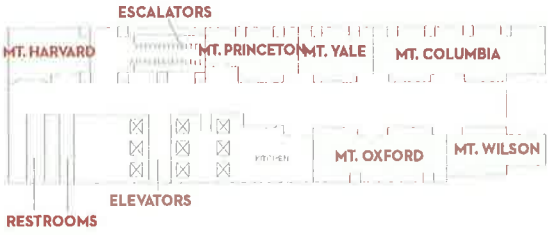
Grand Hyatt Denver Floors

Lobby Level

2nd Floor



3rd Floor



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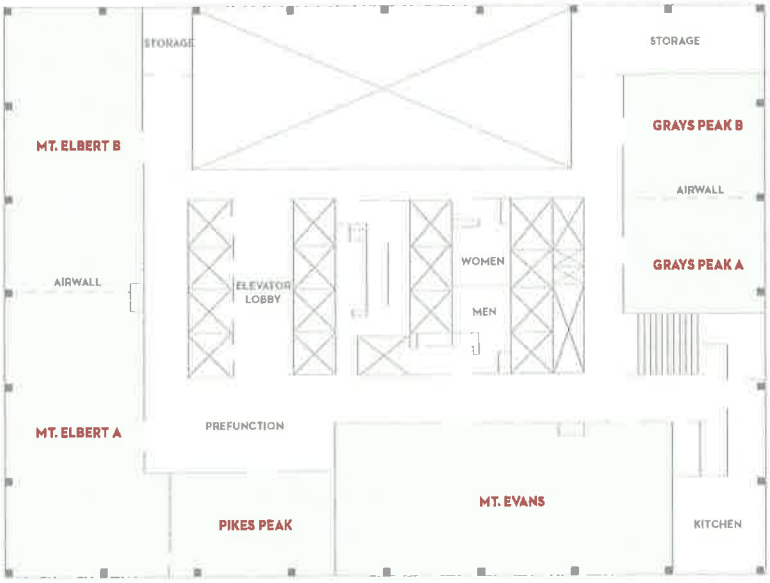
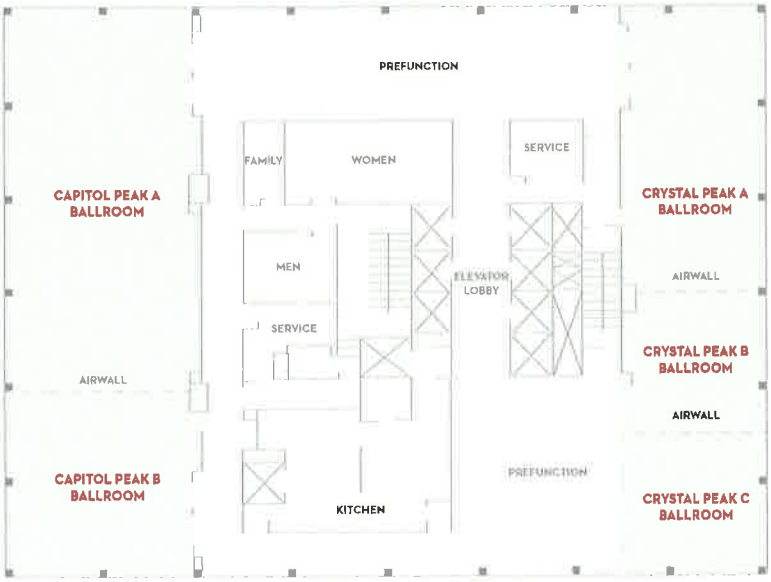
FLOOR PLAN

Atrium Tower

Grand Hyatt Conference Center–2nd Floor



Pinnacle Club–38th Floor



UNITED STATES SENTENCING COMMISSION

2017 NATIONAL SEMINAR

Co-Sponsored by the American Bar Association.

AMERICAN BAR ASSOCIATION Criminal Justice Section

Course Materials

Please check the mobile app for additional materials.

2017 National Seminar

Case Law Update:
Supreme Court and Selected Circuit Court Decisions

Selected Case Law Related to Recent Supreme Court Cases with an Emphasis on sentencing issues and related appellate court cases.

Supreme Court Cases

Beckles v. U.S., 137 S. Ct. 886 (2017). "We hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine."

Dean v. U.S., 137 S. Ct. 1170 (2017). A court can take into account the mandatory minimum under § 924(c) when calculating an appropriate sentence for the predicate offense.

Manrique v. U.S., --S.Ct.--, 2017 WL 1390728 (April 19, 2017). A single notice of appeal from an initial judgment deferring the determination of the restitution amount is not sufficient to invoke appellate review of a later-determined restitution amount in an amended judgment, at least where the Government objects.

Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016). Where there is an unpreserved error in calculating a Sentencing Guidelines range, a defendant is not required to provide additional evidence to show the error affected his or her substantial rights.

"The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that 'improperly calculat[es]' a defendant's Guidelines range, for example, has committed a 'significant procedural error.'"

"The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range... And that explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines. The Government remains free to "poin[t] to parts of the record"—including relevant statements by the judge—"to counter any ostensible showing of prejudice the defendant may make."

Mathis v. U.S., 136 S. Ct. 2243 (2016). "A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element."

The modified categorical approach is available only when a statute lists alternative elements.

Voisine v. U.S., 136 S. Ct. 2272 (2016). Reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under §922(g)(9).

Cert. Grant

Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *cert granted*, 137 S. Ct. 31 (2016) Question Presented: Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Molina-Martinez and Harmless Error

U.S. v. Sanchez, 850 F.3d 767 (5th Cir. 2017). "In imposing a 135-month sentence, the district court stated 'to the extent that I erred in the application of the enhancement of plus six, the sentence would still be the same.' This court has held that similar statements during sentencing provide sufficient basis to conclude that any potential error resulting from an improperly calculated Guidelines range is harmless. The record demonstrates that the judge 'thought the sentence it chose was appropriate irrespective of the Guidelines range.' *Molina–Martinez v. United States*, 136 S.Ct. 1338, (2016)."

U.S. v. Morrison, 852 F.3d 488 (6th Cir. 2017). "Here, in fixing Morrison's sentence at 96 months' confinement, the top of Morrison's Guidelines range, the district court emphasized that the offense was 'extremely dangerous and egregious' and that 'domestic violence is prevalent' throughout Morrison's criminal

Case Law Update:
Supreme Court and Selected Circuit Court Decisions

2017 National Seminar

history. The district court stated that had it determined that aggravated burglary was not a crime of violence, it would have varied upward and ended up with the same Guidelines range. Since the district court would have sentenced Morrison to 96 months without regard to whether his conviction for Tennessee aggravated burglary qualifies as a crime of violence, the alleged error in calculating the Guidelines range would not entitle Morrison to resentencing in any event."

U.S. v. Henderson, --F. App'x--, 2017 WL 56287 (11th Cir. 2016). (unpublished) "Because Henderson was sentenced on the basis of an incorrect, higher guideline range than the applicable one, and the record is silent as to how the district court would have sentenced him absent the error, he has shown 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.' 'Henderson has established plain error, and we vacate his sentence and remand this case for the purpose of resentencing based on the correct total offense level and corresponding guideline range.

Restitution in Non-Economic Crimes

U.S. v. Sizemore, 850 F.3d 821 (6th Cir. 2017). Court had authority to order restitution to compensate defendant's victims for medical expenses, funeral expenses, and lost income and did not abuse its discretion when, precisely following contours of the VWPA, it awarded restitution in full amount from a DUI homicide.

CASE LAW UPDATE SCENARIOS

1. The defendant was found guilty by jury of two counts of robbery (§2B3.1), two counts of felon in possession (§2K2.1), and two counts of possession of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). On two separate occasions, the defendant and his brother robbed two individual methamphetamine dealers. On both occasions, the defendants threatened the victims with a modified semiautomatic firearm.

A violation of 18 U.S.C. § 924(c) provides a mandatory minimum penalty to be imposed consecutively "to any other term of imprisonment imposed on the person," including any sentence for the predicate crime. The first count of 18 U.S.C. § 924(c) provides a mandatory consecutive penalty of 5 years. The second count of 18 U.S.C. § 924(c) carries an additional mandatory consecutive penalty of 25 years.

The court calculated the guideline range for the robbery and felon in possession counts to be 84 – 105 months. The defendant faced an additional mandatory consecutive penalty of 30 years in addition to the guideline sentence imposed on the robbery and felon in possession counts. At sentencing, the defendant urged the court to vary from the guideline range and impose one day for the robbery and felon in possession counts, considering his lengthy mandatory minimum sentences.

The judge stated that he would have agreed to the defendant's request, but he understood that 18 U.S.C. § 924(c) precludes a sentence of one day of imprisonment for the predicate crimes to be followed by the 30-year consecutive penalty mandated by the statute.

Did the judge correctly state that he was prohibited from varying from the guidelines based on the mandatory consecutive minimum sentences required under 18 U.S.C. § 924(c)?

2. The defendant pleaded guilty to one count of felon-in-possession, under 18 U.S.C. § 922(g). The court applied a base offense level of 20 at §2K2.1 because it concluded that the defendant's prior Tennessee state conviction for aggravated burglary qualified as a crime of violence. The defendant's guideline range is77-96 months.

The district court sentenced the defendant to 96 months. The judge emphasized that the offense was "extremely dangerous and egregious" and that "domestic violence is prevalent" throughout the defendant's criminal history. The court also stated that even if the aggravated burglary was not a crime of violence, it would have varied upward to 96 months.

The appellate court has concluded that Tennessee aggravated burglary is not a crime of violence and that the guideline range should have been 27-33 months, and the court determined the guideline range was error.

Must the appellate court remand the case for resentencing?

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3. What if the judge instead stated that he would sentence the defendant to 96 months even if his guideline calculation was incorrect. The judge did not make any statement regarding why 96 months was appropriate but only said that he would sentence at the high end of the range.

If the appellate court determined that the guideline range was calculated incorrectly, will the appellate court remand the case for resentencing?

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4. The defendant pleaded guilty to one count of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g). The defendant had a prior conviction for Massachusetts Armed Robbery (Mass. Gen. Laws Ann. Ch 265, § 17). The PSR stated that this offense qualifies as a crime of violence under the guidelines because the definition enumerates robbery as a crime of violence. The government stated this robbery contains an element of force because the defendant admitted in a plea agreement that he pointed a gun at the victim during the robbery. The defendant objected to the PSR, stating that the prior conviction was not a crime of violence.

Is this offense a crime of violence?

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5. The defendant was convicted of a conspiracy to commit healthcare fraud, conspiracy to distribute controlled substances and conspiracy to receive kickbacks. The defendant, a doctor, and his co-doctors wrote false prescriptions that were filled by pharmacists. The indictment states that the dates of the conspiracy spanned from January 1, 2012 to December 31, 2016. The doctor joined the conspiracy in January 1, 2014.

The court concluded that the total amount of restitution for the entire five-year conspiracy was $1,000,000,000. The court ordered the defendant to pay the full amount of restitution. The defendant has appealed the restitution amount ordered by the court.

Is the district court's order of restitution correct?

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6. Defendant was convicted of Failing to Register as a Sex Offender under the Sex Offender Registration Act (SORNA) found at 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Michigan conviction for sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 12-year old niece when she was left in his care. He received a 7-year sentence for that offense. The defendant has no other prior sex offense convictions.

At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during Lopez's supervised release term:

"Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses."

Is this an appropriate condition?

2017 National Seminar

Categorical Approach:
2017 Annual National Seminar

After the Supreme Court's decision in Mathis v. United States, 136 S. Ct. 2242 (2016), courts continue to grapple with the categorical approach, including the means vs. elements test. This document outlines the four steps in the categorical approach and defines key term frequently used in the analysis.

Steps in the categorical approach:

Step 1 Identify the definition at issue (for example: "violent felony" in ACCA, "crime of violence" in Career Offender)

Step 2 Determine the statute of conviction. If the statute contains multiple crimes and is divisible into separate crimes, use the "modified" approach to determine the defendant's statute of conviction

Step 3 List the elements of the statute of conviction

Step 4 Compare the elements in the statute of conviction to those in the definition

Glossary of Key Terms

Categorical Approach - the method for determining whether an offense (generally a prior conviction) fits within a given definition, such as for "crime of violence" "drug trafficking offense" "violent felony" or other similar terms. To do so, the court must compare the elements of the prior offense to the relevant definition. Under the categorical approach, courts are not permitted to look to the conduct underlying the prior the conviction, only to the statute of conviction, to determine the elements of the prior offense.

Divisible Statute - a statute that sets out different offenses within one statute. For example, a statute with subsections (a) through (d) that sets out burglary of: (a) a habitation, (b) a motor vehicle, (c) and air or water craft, or (d) a coin-operated vending machine or parking meter, is a divisible statute because it sets out four separate burglary crimes. The Supreme Court currently has before it a case in which the Court will decide whether a statute is divisible when it sets out different means of committing an offense (for example kidnapping by force, fear, coercion or fraud) or whether the statute must set out distinct elements in order to be divisible.

Elements Clause ("Force Clause") - that part of a definition that requires that a prior conviction have as an element the use, attempted, or threatened use of physical force against a person [or property]. Although in theory an elements

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Glossary of Key Terms, Cont'd.

clause could require that any specific element be present, as a practical matter the only element that is part of commonly used definitions is the element of the use of force. For this reason, the elements clause is often referred to as the "force clause."

Enumerated Offenses – those offenses that are specifically listed in a definition. For example, both ACCA and the career offender guideline define violent felony and crime of violence, respectively, to include "arson" and "extortion" specifically. The "aggravated felony" definition in Title 8 lists about 20 offenses that constitute aggravated felonies.

Generic Contemporary Definition – the common, modern-day understanding of one of the enumerated offenses. The Supreme Court in *Taylor*, decided that when Congress listed "burglary, arson, extortion" as violent felonies, Congress must have meant the contemporary, generic understanding of those offenses. So, for example, under common law the government would have to prove that a breaking and entering took place "in the nighttime" for the offense to constitute burglary. "In the nighttime" was an element of the offense. But, our modern conception of burglary does not include "in the nighttime" as a modern burglary in most states does not require that the breaking and entering occur at night.

Modified Categorical Approach – similar to the categorical approach, the modified categorical approach is used to determine whether an offense (generally a prior conviction) fits within a given definition, such as for "crime of violence" "violent felony" or similar term. The court must compare the elements of the offense of conviction to the relevant definition. Under the modified approach, the court may use certain additional documents, such as a charging document or plea agreement from the prior conviction, to determine the elements of the offense of conviction.

Overbroad Statutes – a statute that proscribes a larger sphere of conduct than is targeted by the generic offense. For example, a burglary statute that includes habitations, watercraft, aircraft, and coin-operated vending machines, is overbroad compared to generic burglary, which is focused on structures (buildings and homes).

***Shepard* Documents** – the narrow class of additional documents the court is permitted to consult when using the modified categorical approach to determine the elements of the prior conviction. In the Shepard case, the Supreme Court specifically mentioned charging documents (indictments, for instance), transcripts of plea colloquies, and written plea agreements, jury instructions, and comparable judicial records. Similar document may be consulted, but circuit courts have provided further guidance on permissible documents, as state courts produce different kinds of documents depending upon the criminal procedures in that state.

Divisibility in the Categorical Approach:
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When Can I Look at *Shepard* Documents?

Does the statute outline multiple ways to commit one crime or multiple crimes? (Elements v. Means)

- **The statute outlines multiple crimes / different elements and is *divisible*.**
  - **Do all the versions of the offense make up a crime of violence or violent felony?**
    - **SOME DO & SOME DON'T** → Some sections of the statute make up Crime of Violence or Violent Felony. Some do not. → **You may look at the *Shepard* documents only to determine which section of the statute the defendant was convicted of.**
    - **YES** → All the sections of the offense make up a Crime of Violence or Violent Felony and the statute can count as a predicate.
    - **NO** → None of the sections of the offense make up a Crime of Violence or Violent Felony and the statute can never count as a predicate.
- **The statute outlines one crime (or multiple ways to commit one crime) and is *indivisible*.**

→ **You may NOT look at the *Shepard* Documents**

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Categorical Approach:
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Selected Case Law Related to Categorical Approach. The Courts of Appeals have issued a number of opinions relating to sentencing and the guidelines, including cases throughout all of the circuits.

1st Circuit

U.S. v. Faust, 853 F.3d 39 (1st Cir. 2017). Massachusetts resisting arresting is a not a violent felony because the statute listed different means of "resisting" some of which did not necessarily involve violent force.

U.S. v. Mulkern, ---F.3d--, 2017 WL 1363791 (1st Cir. 2017). A conviction for robbery in Maine did not have the requisite level of force required under Johnson I, and isnot a violent felony under ACCA.

U.S. v. Delgado-Sanchez, 849 F.1 (1st Cir. 2017). Puerto Rico conviction for discharging or pointing firearms is a crime of violence under U.S.S.G. §4B2.1

U.S. v. Taylor, 848 F.3d 476 (1st Cir. 2017). Conviction under U.S.S.C. §111 for assaulting a federal officer with a deadly weapon is a crime of violence under ACCA.

U.S. v. Montoya, 844 F.3d 63 (1st Cir. 2016). Massachusetts conviction for assault with a dangerous weapon is categorically a crime of violence under the career offender guideline.

U.S. v. Tavares, 843 F.3d 1 (1st Cir. 2016). Massachusetts statue for assault and battery upon another by means of dangerous weapon is divisible because it lists elements in the alternative. "One set of elements requires a heightened mens rea—intentional conduct—but only slight contact. . . The other set requires merely reckless behavior but an injury that "interfered with the health or comfort of the victim."

2nd Circuit

U.S. v. Hill, 832 F.3d 135 (2nd Cir. 2016). Hobbs Act Robbery is a crime of violence for purposes of 18 U.S.C. §924(c) because by its nature involved a substantial risk of physical force could be used in the course of committing the offense.

U.S. v. Sanchez, ---Fed. Appx.---, 2017 WL 951196 (2nd Cir. 2017). New York statute for criminal sale of a controlled substance in the fifth degree, in violation of N.Y. Penal Law 220.31, is a controlled substance offense as defined in U.S.S.G. §4B1.2

3rd Circuit

U.S. v. Steiner, --F.3d--, 2017 WL 437657 (3d Cir. 2017). On remand from the Supreme Court in light of *Mathis v. U.S.*, the Third Circuit vacated the defendant's sentence, finding Pennsylvania burglary statute is not a predicate "crime of violence" because the statute is too broad as it reaches multiple kinds of unlawful entry.

U.S. v. Robinson, 844 F.3d 137 (3d Cir. Jan 9, 2017). Hobbs Act robbery, when committed and tried with 18 U.S.C. §924(c) offense, is a crime of violence under the elements clause. The circuit Court stated question is not whether Hobbs Act robbery is crime of violence, but whether Hobbs Act robbery committed while brandishing firearm is a crime of violence.

U.S. v. Dahl, 833 F.3d 345 (3d Cir. 2016). The district court erred by failing to apply the categorical approach in determining whether the defendant's prior sex offense convictions were sex offense convictions under §4B1.5. Under the categorical approach, Delaware first and third degree sexual contact are not prior sex offense convictions because Delaware statutes definition of sexual contact is more expansive that the federal sex act and is therefore not a generic match.

4th Circuit

U.S. v. Winston, --F.3d--, 2017 WL 977031 (4th Cir. 2017). Virginia common law robbery is not a violent felony under ACCA because it can be committed with minimal force.

U.S. v. Doctor, 842 F.3d 306 (4th Cir. 2016). South Carolina strong arm robbery is a violent felony under the ACCA.

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U.S. v. White, 836 F.3d 437 (4th Cir. 2016). West Virginia burglary is not a violent felony under the ACCA because the statute included "dwelling house" which does not meet the generic definition of burglary.

U.S. v. Gardner, 823 F.3d 793 (4th Cir. 2016). North Carolina common law robbery is not a violent felony under the ACCA because the offense can be convicted with minimal force.

U.S. v. Evans, --F.3d--, 2017 WL 444747 (4th Cir. 2017). A conviction under the carjacking statute, 18 U.S.C. § 2119(2), qualifies categorically as a crime of violence under 21 U.S.C. § 924(c). The court held that the term "intimidation," as used in the phrase "by force and violence or by intimidation" in the carjacking statute, necessarily includes a threat of violent force within the meaning of the "force clause" of section 924(c)(3).

U.S. v. McNeal, 818 F.3d 141 (4th 2016). "Bank robbery under 18 U.S.C. § 2113(a) is a "crime of violence" within the meaning of the force clause of 18 U.S.C. § 924(c)(3), because it "has as an element the use, attempted use, or threatened use of physical force"—specifically, the taking or attempted taking of property "by force and violence, or by intimidation."

5th Circuit

U.S. v. Howell, 838 F.3d 489 (5th Cir. 2016). After examining how the Texas treats the three mental states listed in §22.01(a) (Assault), the Fifth Circuit concluded that the mental states of "intentionally, knowing, or recklessly" are means and not elements. As the mental states are means, and not elements, the court could not use the modified categorically approach in determining whether the statute involve the use of force. Under the categorical approach, the offense is still a crime of violence under §4B1.2.

U.S. v. Hinkle, 833 F.3d 751 (5th Cir. 2016). Texas "delivery of heroin" did not qualify as a controlled substance offense under §4B1.2. The delivery" element of the statute criminalizes a "greater swath of conduct than the elements of the relevant [Guidelines] offense." This "mismatch of elements" means that Hinkle's conviction for the knowing delivery of heroin is not a controlled substance offense under section §4B1.1. *See also, U.S. v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

U.S. v. Solano-Hernandez, 847 F.3d 170 (5th Cir. 2017). New Jersey 3rd degree endangering welfare of a child is a divisible statute and the court could use the modified approach; however, the court incorrectly relied on the "Reasons for the Sentence" form as there is no indication that defendant assented to the facts in the reason for sentence.

U.S. v. Brewer, 848 F.3d 711 (5th Cir. 2017). Robbery by intimidation under § 2113(a) is a crime of violence at §4B1.2 as the intimidation must involve at least an implicit threat to use force. Because the appellants failed to present any cases showing robbery by intimidation can be accomplished without at least an implicit threat to use force, it is a crime of violence.

U.S. v. Uribe, 838 F.3d 667 (5th Cir. 2016). Texas burglary 30.02 is a divisible statute and the modified categorical approach applies to determine which provision of the statute was the basis for the defendant's conviction.

U.S. v. Bernel-Aveja, 844 F.3d 206 (5th Cir. 2016). Ohio burglary does not meet the generic definition of burglary.

U.S. v. Castro-Alfonso, 841 F.3d 292 (5th Cir. 2016). Tennessee burglary met the generic definition of burglary.

U.S. v. Montiel-Cortes, 849 F.3d 221 (5th Cir. 2017). Nevada robbery sets out alternative means of committing robbery, rather than alternative elements, thus the court should not have used the modified categorical approach. Because Nevada robbery could involve future danger, it does not meet the generic definition of robbery. However, it does meet the generic definition of extortion.

U.S. v. Lara-Martinez, 836 F.3d 472 (5th Cir. 2016). Missouri sexual misconduct involving a child (knowingly inducing a child under 14 to expose genitals for purpose of arousing sexual desire) met the generic definition of sexual abuse of a minor at §2L1.2.

U.S. v. Mendez-Henriquez, 847 F.3d 214 (5th Cir. 2017). Maliciously and willfully discharging a firearm at a motor vehicle is divisible and is a crime of violence as it meets the force clause.

U.S. v. Rico-Mejia, --F. App'x--, 2017 WL 568331 (5th Cir. 2017). Arkansas terroristic threats is not a crime of violence because it lacks physical force as an element. U.S. v. Castleman does not apply because it the case only applies to crimes categorized as domestic violence

U.S. v. Hernandez-Montes, 831 F.3d 284 (5th Cir. 2016). Florida attempted second-degree murder is not a crime of violence as the offense does not require proof of the specific intent to commit the underlying act.

U.S. v. Lobaton-Andrade, --F. App'x--, 2017 WL 543242 (5th Cir. 2017). Arkansas manslaughter is not divisible and the offense is not categorically a crime of violence at §2L1.2. As the statute is indivisible, the court could not use the modified categorical approach.

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U.S. v. Olsen, 849 F.3d 230 (5th Cir. 2017). California possession of meth for sale is a drug trafficking offense under §4B1.2 because the statute required proof of actual or constructive possession of a controlled substance.

6th Circuit

U.S. v. King, -F.3d-, 2017 WL 1173693 (6th Cir. 2017). Michigan home invasion is categorically equivalent to generic burglary as Michigan statute defining dwelling does not encompass more areas than building or structure

U.S. v. Ritchey, 840 F.3d 310 (6th Cir. 2016). Michigan burglary (750.110) does not meet the generic definition of burglary as the statute is not divisible.

U.S. v. Patterson, -F.3d-, 2017 WL 1208425 (6th Cir. 2017). Ohio aggravated robbery (§ 2911.01(A)(1)) is a violent felony under the elements section. According to the Supreme Court of Ohio, "[o]ne cannot display, brandish, indicate possession of, or use a deadly weapon in the context of committing a theft offense without conveying an implied threat to inflict physical harm. It is the very act of displaying, brandishing, indicating possession, or using the weapon that constitutes the threat to inflict harm because it intimidates the victim into complying."

U.S. v. Priddy, 808 F.3d 676 (6th Cir. 2016). Court found that prior conviction under Tennessee law for burglary is a "violent felony" under the enumerated clause of the ACCA and prior conviction under Tennessee law for robbery is a violent felony for ACCA purposes under the use-of-force clause"

U.S. v. Braden, 817 F.3d 926 (6th Cir. 2016). A conviction under Tennessee law for aggravated assault is a violent felony for ACCA purposes under the modified approach for the intentional section of statute.

U.S. v. McBride, 826 F.3d 293 (6th Cir. 2016). Bank robbery by force under 18 U.S.C. § 2113(a) is a crime of violence under the statute that involves the use of force and violence.

U.S. v. Harris, --F.3d--, 2017 WL 1228556 (6th Cir. 2017). Michigan felonious assault is a crime of violence at §2K2.1 because there is no way to commit it without intentionally attempting or threatening physical force against another with a dangerous weapon.

U.S. v. Gooch, 850 F.3d 285 (6th Cir. 2017). Hobbs Act robbery (18 U.S.C. § 1951(b)(1)) is a crime of violence under § 924(c).

U.S. v. Rafdi, 829 F.3d 437 (6th Cir. 2016). 18 U.S.C. § 111(b): forcibly assaulting a federal law enforcement officer is a crime of violence for § 924(c). "Even if the defendant did not come into physical contact with the officers at all, the government still must establish the "forcible" element, and "a threat or display of physical aggression" sufficient "to inspire fear of pain, bodily harm, or death" constitutes the "threatened use of physical force" within the meaning of Johnson I"

7th Circuit

U.S. v. Lynn, 851 F.3d 786 (7th Cir. 2017). Illinois aggravated battery is a divisible statute with two sets of elements such that the modified categorical approach was required.

U.S. v. Cardena, 842 F.3d 959 (7th Cir. 2016). Illinois kidnapping statute is divisible because, "the Illinois kidnapping statute does not list multiple elements with separate methods of satisfying each element; rather, the statute lists three separate ways of committing kidnapping."

U.S. v. Armour, 840 F.3d 904 (7th Cir. 2016). Indiana robbery is a crime of violence under U.S.S.G. §4B2.1 because, "even though statute of conviction permitted robbery to be committed by "putting any person in fear"; Indiana courts interpreted statute so that robbery by placing a person in fear of bodily injury involved explicit or implicit threat of physical force."

U.S. v. Haney, 840 F.3d 472 (7th Cir. 2016). Illinois burglary conviction is not a crime of violence because the statute is overbroad and indivisible.

U.S. v. Edwards, 836 F.3d 831 (7th Cir. 2016). Wisconsin burglary statute is not a violent felony because it is not divisible and covers a greater swath of conduct that generic burglary.

U.S. v. Maxwell, 823 F.3d 1057 (7th Cir. 2016). Minnesota conviction for simple robbery, which states, "whoever . . . takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person. . ." is a crime of violence because it has as an element the use of force.

8th Circuit

U.S. v. Scott, 818 F.3d 424 (8th Cir. 2016). Missouri 2nd degree assault is a crime of violence under force section of §4B1.2 because the offense involved the intentionally or knowingly causing physical injury.

U.S. v. Boots, 816 F.3d 971 (8th Cir. 2016). Iowa intentionally pointing a firearm toward another is a crime of violence. "Both the requirement of '[i]ntentionally point[ing] any firearm toward another' and the requirement of 'display[ing] in a threatening manner any dangerous weapon toward another.' categorically constitute a 'threatened use of physical force' under USSG § 4B1.2(a)(1)."

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U.S. v. Dance, 842 F.3d 1067 (8th Cir. 2016). Missouri second-degree robbery is not a crime of violence because it does not have the necessary element of force.

U.S. v. Winston, ____ F.3d ____, 2017 WL 83393 (8th Cir. 2017). Alabama second-degree battery qualified is a violent felony under ACCA because it is divisible and the relevant Shepard documents showed that the defendant was convicted under the alternative that required causation of injury.

U.S. v. Parrow, 844 F.3d 801 (8th Cir. 2016). Iowa conviction for domestic abuse-strangulation is a crime of violence because the statute required proof that the victim's breathing or blood circulation was impaired by the defendant.

U.S. v. Thomas, 838 F.3d 926 (8th Cir. 2016). Arkansas first-degree battery conviction is a crime of violence because to be convicted, the defendant must inflict serious physical injury and it is impossible to inflict serious bodily injury without using physical force.

U.S. v. McFee, 842 F.3d 572 (8th Cir. 2016). Minnesota making terrorist threats statute is not a violent felony and that statute is not divisible such that the modified categorical approach is not applicable.

U.S. v. Fogg, 836 F.3d 951 (8th Cir. 2016). Minnesota drive-by shooting, which prohibited reckless discharge of a firearm towards a person, is a violent felony under ACCA.

U.S. v. Eason, 829 F.3d 633 (8th Cir. 2016). Arkansas robbery statute is not a violent felony under ACCA because it did not have the requisite level of physical force.

U.S. v. Hertz, 2017 WL 359668 (8th Cir. 2017). Washington second-degree burglary is not a violent felony because it is broader than generic burglary.

U.S. v. Walker, 840 F.3d 477 (8th Cir. 2016). Minnesota third-degree burglary is not categorically a violent felony under ACCA. Rather, the statute is divisible, with one alternative defining a generic burglary, and therefore, the modified categorical approach applied.

U.S. v. Bell, 840 F.3d 963 (8th Cir. 2016). Missouri second degree robbery is not a crime of violence because the statute could be violated with de minimis force, rather the violent physical force required.

9th Circuit

U.S. v. Cisneros, 826 F.3d 1190 (9th Cir. 2016). Oregon burglary does not qualify as a violent felony under the ACCA. "Although Oregon Revised Statutes section 164.205(1) uses disjunctive phrasing to define building — any booth, vehicle, boat, aircraft, or other structure—here "the use of 'or' does not create additional elements." Rather, the disjunctive phrasing creates different means of committing the one offense."

U.S. v. Parnell, 818 F.3d 974 (9th Cir. 2016). Massachusetts armed robbery is not a violent felony. The force required by the actual force prong of robbery under Massachusetts law does not satisfy the requirement of physical force under Johnson I. Massachusetts courts have found that the "degree of force is immaterial," as any force, however slight, will satisfy this prong so long as the victim is aware of it."

U.S. v. Werle, 815 F.3d 614 (9th Cir. 2016). Washington riot statute is over-inclusive and indivisible, and is not a violent felony.

U.S. v. Mendoza-Padilla, 833 F.3d 1156 (9th Cir. 2016). Florida manslaughter does not fall qualify as generic contemporary manslaughter and is not a crime of violence at §2L1.2.

U.S. v. Benally, 843 F.3d 350 (9th Cir. 2016). 18 U.S.C. § 1112 (Involuntary Manslaughter) is not a crime of violence under 18 U.S.C. § 924(c).

U.S. v. Acevedo-De La Cruz, 844 F.3d 1147 (9th Cir. 2017). California violation of protective order involving an act of violence or credible threat of violence is categorically a crime of violence under §2L1.2.

U.S. v. Rocha-Alvarado, 843 F.3d 802 (9th Cir. 2016). Oregon attempted sexual abuse (§163.427(1)(a)(A) qualifies as sexual abuse of a minor at §2L1.2 under the modified categorical approach.

U.S. v. Lee, 821 F.3d 1124 (9th Cir. 2016). California battery against a custodial officer in performance of his duties is not a crime of violence at §4B1.2. The appellate court rejected the government's argument that a battery against a police officer, no matter how slight the force, leads to a "powder keg" situation. California resisting an executive officer is not a crime of violence at §4B1.2.

10th Circuit

U.S. v. Taylor, 843 F.3d 1215 (10th Cir. 2016). Oklahoma assault and battery with a dangerous weapon, Okla. Stat. tit. 21, § 645, is divisible, and defendant's conviction had as an element the use, attempted use, or threatened use of physical force against the person. "[T]he use of a 'dangerous weapon' during an assault or battery always 'constitutes a sufficient threat of force to satisfy the elements clause'".

U.S. v. Maldonado-Palma, 839 F.3d 1244 (2016). New Mexico aggravated assault with a deadly weapon is categorically a crime of violence under § 2L1.2. Although the offense

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encompasses more conduct than generic aggravated assault, the relevant jury instructions have as a required element that the defendant "used" a deadly weapon.

U.S. v. Harris, 844 F.3d 1260 (10th Cir. Jan. 4, 2017). Statutory robbery in Colorado is a "violent felony" under ACCA because it comports with definition of "physical force" provided by Supreme Court in Johnson I.

U.S. v. Dominguez-Rodriguez, 817 F.3d 1190 (10th Cir. 2016). Dominguez–Rodriguez's prior violation of § 841(a)(1) categorically constitutes a "drug trafficking offense" for purposes of § 2L1.2(b)(1)(A) and, therefore, the modified categorical approach is inapplicable.

U.S. v. Martinez-Cruz, 836 F.3d 1305 (10th Cir. 2016). Conviction for conspiracy to possess with intent to distribute a controlled substance under 21 U.S.C § 846 is not categorically a drug trafficking offense for the 12-level increase under USSG § 2L1.2. The contemporary generic definition of conspiracy includes commission of an overt act, and this statute does not require one.

11th Circuit

U.S. v. White, 837 F.3d 1225 (11th Cir. 2016). Alabama first degree possession of marijuana (for purposes other than personal use) is a serious drug trafficking offense under the ACCA. The Eleventh Circuit rejected the defendant's argument that a person could violate the statute by jointly possessing marijuana with another person or by possessing it with intent to administer or dispense it, rather than with intent to distribute it as defendant could not find a case where a person was convicted of that crime.

U.S. v. Fritts, 841 F.3d 937 (11th Cir. 2016). Florida robbery under 812.13(1) is a violent felony under the elements clause of the ACCA. The court noted that the Florida Supreme Court noted, "There can be no robbery without violence, and there can be no larceny with it. It is violence that makes robbery an offense of greater atrocity than larceny."

U.S. v. Brown, 805 F.3d 1325 (11th Cir. 2015). Georgia felony obstruction of justice, which applies to those who obstruct a law enforcement officer "by offering or doing violence" to the officer's person, is a violent felony for ACCA purposes.

U.S. v. Braun, 801 F.3d 1301 (11th Cir. 2015). Florida aggravated felony on a pregnant woman is not a violent felony under the ACCA. Florida battery on a law enforcement officer is not a violent felony. Neither statute has as an element the use of violent, physical force required under Johnson I.

U.S. v. Lockett, 810 F.3d 1262 (11th Cir. 2016). South Carolina's burglary statute is not divisible and is broader than generic burglary offense, and thus South Carolina burglary did not qualify as "burglaries" within meaning of ACCA's enumerated clause.

U.S. v. Hill, 799 F.3d 1318 (11th Cir. 2015). Florida resisting arrest with violence (§ 843.01) is a violent felony because Florida's intermediary courts have held that violence is a necessary element of the offense.

D.C. Circuit

U.S. v. Redrick, 841 F.3d 478 (D.C. Cir. 2016). Maryland conviction for robbery with a deadly weapon is a violent felony under the ACCA.

U.S. v. Sheffield, 832 F.3d 296 (D.C. Cir. 2016). D.C. attempted robbery is not a crime of violence for guidelines purposes because it is indivisible and includes robbery that does not require the use of physical force.

CATEGORICAL APPROACH EXERCISES

Categorical Approach Examples

You are tasked with drafting a Presentence Report for a defendant named John Williams. Mr. Williams has pleaded guilty to one count of Possession of a Firearm by Prohibited Person in violation of 18 U.S.C. §922(g). You have gathered records from Mr. Williams' prior convictions and determined that all of his prior convictions score under Chapter 4.

Your next step is to determine whether Mr. Williams qualifies as an Armed Career Criminal under 18 U.S.C. §924(e) and if not, whether any of his prior convictions affect his base offense level under U.S.S.G. §2K2.1.

RELEVANT FEDERAL STATUTES

18 U.S.C. 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

CATEGORICAL APPROACH EXERCISES

RELEVANT SENTENCING GUIDELINES

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least ***two felony convictions of either a crime of violence or a controlled substance offense***;

(4) **20**, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining ***one felony conviction of either a crime of violence or a controlled substance offense***; or

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

CATEGORICAL APPROACH EXERCISES

Application Notes:

1. Definitions.—For purposes of this guideline— . . .

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Prior Convictions

Date	**Location**	**Offense of Conviction**	**Sentence**
March 3, 2015	St. Louis, MO	Second Degree Robbery Mo. Ann. Stat §570.025	18 months
July 15, 2014	Oklahoma City, OK	Second Degree Burglary Ok. Stat. Title 21, §1435	18 months, 12 months suspended
June 10, 2010	Dallas, TX	Manufacture or Delivery of Controlled Dangerous Substance Tx. Health and Safety Code §481.112(a).	3 years

Texas Conviction

Manufacture or Delivery of Controlled Dangerous Substance

CATEGORICAL APPROACH EXERCISES

Texas Manufacture or Delivery of Controlled Dangerous Substance

Documents you have gathered:

- Judgment indicating that Mr. Williams was convicted of Texas Health and Safety Code §481.112(a).
- A copy of the statute of conviction
- A copy of a plea agreement signed by Mr. Williams that states the following:

> *On June 10, 2010, officers from the Dallas Police Department executed a search warrant at the home located at 100 Forrest Street in Dallas, Texas, Mr. Williams' home. Once inside, the officers found 100 grams of crack cocaine in a bedroom, $2500 in cash, small baggies, a Pyrex dish containing cocaine residue, and other paraphernalia. Mr. Williams was home during the search and when questioned about the drugs, he admitted that the drugs and money belonged to him and that he intended to distribute the drugs.*

Statute of Conviction and Definitions

V.T.C.A., Health & Safety Code § 481.112
§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1
(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1 . . .

V.T.C.A., Health & Safety Code § 481.002
§ 481.002. Definitions
(8) "Deliver" means to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency relationship. The term includes offering to sell a controlled substance, counterfeit substance, or drug paraphernalia.

Case Law Excerpts

United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016)

Texas state courts construing sections 481.112(a) and 481.002(8) of the Texas Health and Safety Code have held that the method used to deliver a controlled substance is not an element of the crime. In *Lopez v. State*, the Texas Court of Criminal Appeals cited approvingly a lower court opinion—*Rodriguez v. State*—in which a "jury charge authorized conviction if the jurors found that Rodriguez delivered marijuana by actually transferring, constructively transferring, or offering to sell." The *Rodriguez* court found no error even though there was the "potential for a non-unanimous verdict," concluding that only one offense was committed. The *Lopez* court opined that "[t]he result was a permissible general verdict because the defendant was charged with two alternative theories of committing the same offense, and not two separate deliveries."

Texas law is therefore clear, as was the Iowa statute in *Mathis*: section 481.002(8)'s listed methods of delivery "are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying [the] single [delivery] element." As the Supreme Court held in *Mathis*, "[w]hen a ruling of that kind exists, a sentencing judge need only follow what it says." The Government cites Texas state court decisions holding that prosecutors must specify the precise method or methods of delivery under section 481.002(8) in a charging instrument, and that when a single form of delivery is alleged, that method of delivery, and no other, must then be proven beyond a reasonable doubt. The Government's interpretation of these Texas decisions confuses evidentiary and notice requirements with the elements of an offense. One of these cases recognizes that Texas law permits a prosecutor to charge more than one method of delivery but does not require proof beyond a reasonable doubt as to each method of delivery charged when more than one method is charged.

Oklahoma Conviction
Second Degree Burglary

Oklahoma Second Degree Burglary

Documents you have gathered

- Judgment indicating that Mr. Williams was convicted after a jury trial of Count One of the Indictment
- The Indictment states in Count One:

> *On July 15, 2014, Mr. Williams broke and entered into the residence at 1234 Willow Street in Oklahoma City with the intent to steal property therein, in violation of Oklahoma Statute Title 21, §1435.*

- Copy of the statute of conviction
- Relevant jury instructions

§ 1435. Burglary in second degree--Acts constituting

Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin-operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

Oklahoma Uniform Jury Instructions-Criminal
OUJI-CR 5-13 Burglary in the Second Degree—Elements

No person may be convicted of burglary in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

- First, breaking;
- Second, entering;
- Third, a/an building/room/booth/tent/(railroad car)/automobile/truck/trailer/ vessel/structure/erection;
- Fourth, of another;
- Fifth, in which property is kept;
- Sixth, with the intent to steal/(commit any felony).

Case Law Excerpts

U.S. v. Hamilton, 06-CR-188-TCK, 2017 WL 368512, at *10 (N.D. Okla. Jan. 25, 2017)

A jury is typically instructed on a single location because location is rarely disputed, and locations typically fit one of the listed items. If there was a case where the location burglarized did not fit within the list, it seems clear a defendant could still be convicted of burglarizing some other type of unlisted structure or erection. This indicates the list is merely one of "illustrative examples." *See Mathis*, 136 S.Ct. at 2256 (internal quotations omitted). Further, in a case where a location arguably fit two of the listed locations, such as a booth shaped like a tent, the state could charge the defendant with burglarizing a "booth or tent." A jury would not have to agree on whether the structure was a booth or tent, and these elements could be listed disjunctively in the appropriate case.

Oklahoma case law and a "peek" at Defendant's charging documents indicate that Oklahoma courts generally *treat* the location more like an element than a means of committing the crime. Prosecutors generally charge and prove, and courts instruct, as to just one location. In turn, Oklahoma appellate case law typically discusses the location as an element. However, because these sources are not explicitly discussing the means/elements distinction in the *Mathis* context, they are not of persuasive value to the Court. Any inferences that can be raised from these sources are insufficient to overcome the legal reasoning in *Mathis* and the similarity between the Oklahoma and Iowa statutory schemes. Like the Iowa statute, the Oklahoma statute lists the locations in the disjunctive and creates an illustrative list of examples. This indicates the Oklahoma legislature intended to create one crime for breaking and entering various locations, not numerous different crimes depending on the location burglarized.

As a practical matter, unless a state's highest criminal court has explicitly ruled on the means/element question raised in *Mathis* and reached a different conclusion than Iowa's court, a disjunctive list of locations in a burglary statute will likely always be considered means. *Mathis* tells courts to look to state law, but this is largely an exercise in futility. How a state charges, instructs, or discusses listed locations in a burglary statute is of little significance because state courts—and therefore state law—are simply not concerned with the means/elements distinction. They deal with real-world crimes as charged. For purposes of determining whether a conviction is an ACCA predicate, federal courts now deal exclusively with crimes in the abstract.

Missouri Conviction
Second Degree Robbery

CATEGORICAL APPROACH EXERCISES

Missouri Second Degree Robbery

Documents you have gathered

- Judgment indicating that Mr. Williams was convicted of Missouri Second Degree Robbery
- A transcript of a guilty plea colloquy where Mr. Williams agrees to the following statement:

> *On March 3, 2010, Mr. Williams approached Victim #1 on the street from behind. Mr. Williams punched Victim #1 in the back of Victim #1's head. Victim #1 fell to the ground, at which point Mr. Williams took Victim #1's laptop bag and fled. Mr. Williams was quickly apprehended and arrested. When questioned, Mr. Williams admitted that he hit Victim #1 and stole the laptop bag.*

- Copy of the statute of conviction

Relevant Statutes

Annotated Missouri Statutes
570.025. Robbery in the second degree--penalty

1. A person commits the offense of robbery in the second degree if he or she forcibly steals property and in the course thereof causes physical injury to another person.
2. The offense of robbery in the second degree is a class B felony.

Annotated Missouri Statutes
570.010. Chapter Definitions

(13) **"Forcibly steals"**, a person, in the course of stealing, uses or threatens the immediate use of physical force upon another person for the purpose of:
(a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
(b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft;

***United States v. Bell*, 840 F.3d 963 (8th Cir. 2016)**

Section 2K2.1 incorporates the definition of "crime of violence" used in § 4B1.2(a). *See* U.S.S.G. § 2K2.1 cmt. n.1. Under the relevant provision of § 4B1.2(a), the phrase "crime of violence" means "any offense [that] ... has as an element the use, attempted use, or threatened use of physical force against the person of another." In Missouri, "[a] person commits the crime of robbery in the second degree when he forcibly steals property." Mo. Rev. Stat. § 569.030.1. The term "forcibly steals" is further defined in a separate statute providing in relevant part that "a person 'forcibly steals,' and thereby commits robbery, when, in the course of stealing ... he uses or threatens the immediate use of physical force upon another person."

Accordingly, Missouri courts have identified § 569.030.1 as setting forth a single indivisible crime containing two generic elements: "stealing and the use of actual or threatened force." At first blush, then, it appears as though Bell's conviction would qualify as a crime of violence: a crime of violence has as an element the use, attempted use, or threatened use of physical force against another person, and an element of second-degree robbery in Missouri is the use or threat of "physical force upon another person." Mo. Rev. Stat. § 569.010(1).

The *amount* of physical force required for a person to be convicted of second-degree robbery in Missouri does not, however, "necessarily" rise to the level of physical force required for a crime of violence under the Guidelines. The Supreme Court has described this as a "demanding requirement." *Shepard v. United States*, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion).

According to the Supreme Court, "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United State*s, 559 U.S. 133, 140, (2010). Thus, the "merest touch" is insufficient, but the "degree of force necessary to inflict pain—a slap in the face, for example" is sufficient to establish "physical force." When determining whether Missouri's second-degree robbery statute requires the level of violent force described in Johnson, we must consider not just the language of the state statute involved, but also the Missouri courts' interpretation of the elements of second-degree robbery. *See id.* at 138, 130 S.Ct. 1265 ("We are ... bound by the [state] Supreme Court's interpretation of state law, including its determination of the elements of [the state statute.]").

Moreover, when our focus is on the generic elements of the offense—as is the case here—rather than a specific defendant's conduct, we must consider the lowest level of conduct that may support a conviction under the statute. *See Moncrieff*e v. *Holder,* —— U.S. ——, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the

case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts [would qualify as a crime of violence].")

A Missouri court upheld a conviction for second-degree robbery in at least one situation where a defendant's conduct appears to have fallen short of using "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. In *State v. Lewis,* the Missouri Court of Appeals sustained a conviction based on the victim's testimony that the defendant " 'bumped' her shoulder and 'yanked' her purse away from her [,]" while "another witness testified that [the defendant] 'nudged' [the victim]," and yet a "third witness testified that there was a 'slight' struggle" over the purse. 466 S.W.3d 629, 631 (Mo. Ct. App. 2015). Significantly, the victim did not testify the slight struggle caused her any pain, or that she was injured by the incident. *Id*. Even more significantly, the court explained the line between the amount of force sufficient to sustain a conviction for second-degree robbery, and insufficient force: "In sum, where there was no physical contact, no struggle, and no injury, [Missouri] courts have found the evidence insufficient to support a [second-degree] robbery conviction. But where *one or more* of those circumstances is present, a jury reasonably could find a use of force." *Id*. at 632 (internal citation omitted) (emphasis added).

In other words, in Missouri a defendant can be convicted of second-degree robbery when he has physical contact with a victim but does not necessarily cause physical pain or injury.[4]

2017 National Seminar

Chapter Three:
Selected Cases Addressing Chapter Three Issues

Selected Case Law Related to Chapter Three Enhancements – The Courts of Appeals have issued a number of opinions relating to sentencing and the guidelines, including enhancements for vulnerable victims and obstruction of justice, as well as reductions for role in the offense and acceptance of responsibility.

Vulnerable Victim

U.S. v. Brown, 843 F.3d 74 (2d Cir. 2016) Although not objected to, the 2-level enhancement for vulnerable victim was due to the victim's unusual vulnerability (she was asleep during the production of images and videos relating to child pornography).

U.S. v. Adeolu, 836 F.3d 330 (3d Cir. 2016) At sentencing, the District Court applied the vulnerable victim sentencing enhancement set forth in U.S.S.G. § 3A1.1(b)(1) based upon Adeolu's fraudulent use of young children's personal information during his offense of aiding and abetting the preparation of materially false tax returns. We write to clarify that a showing of actual harm is not required under the vulnerable victim sentencing enhancement. Rather, our existing test for the application of this enhancement requires a "nexus" between the victim's vulnerability and the crime's success, a requirement clearly met in this case.

U.S. v. Arsenault, 833 F.3d 24 (4th Cir. 2016) Sentencing court did not commit plain error by imposing two-level vulnerability enhancement on defendant who pled guilty to sexually exploiting three minors, although victims' young ages were incorporated into the offense, where two of the minors were unusually vulnerable for reasons unrelated to age, given their special-needs status. Both victims were autistic and one was non-verbal, "which effectively meant he couldn't complain effectively" concerning the abuse inflicted upon him. Defendant pled to 6 counts, sexual exploitation of 3 minors, and the transportation, receipt, and possession of child pornography.

U.S. v. Jones, 842 F.3d 1077 (8th Cir. 2016) We conclude that the district court did not err in applying the enhancement. The court heard evidence showing that Clark had been asleep when the fire started and that Jones would have known that she was impaired because he had supplied her with drugs (butalbital and methamphetamine). Based on Jones' later interactions with police officers, it was not clear error for the district court to find that he was coherent enough to know that Clark had been vulnerable because of her mental condition (she was passed out at the time the defendant threw a flaming blanket on her body). Defendant convicted of second degree murder and received a 324 month sentence.

U.S. v. O'Brien, 50 F.3d 751 (9th Cir. 1995) Here, individuals who developed medical problems and then could not get their claims paid fulfill both the unusually vulnerable "physical or mental condition" and the "otherwise particularly susceptible" criteria of § 3A1.1. Several of the victims had serious physical or mental conditions that required follow-up care. The victims were unusually vulnerable and particularly susceptible once they developed medical conditions, accrued outstanding medical bills, and in some cases needed further treatment-these victims felt compelled to continue paying their premiums in order to avoid losing coverage. The health insurance company and defendants were convicted of operating a fraudulent health insurance scheme.

U.S. v. Birge, 830 F.3d 1229 (11th Cir. 2016) District court correctly applied vulnerable victim enhancement because the defendant should have known that the victims of her scheme (stealing checks from conservatorship accounts from 31 minors and 2 incapacitated adults) were vulnerable. The court rejected the argument that §3A1.1 should only apply if she targeted the victims because they were vulnerable. The defendant was chief clerk of probate court in Georgia, and Georgia law provided that conservators were appointed to protect assets of those who lacked capacity to do so themselves.

U.S. v. Cobb, 842 F.3d 1213 (11th Circuit 2016) Defendant argues that the district court applied the vulnerable-victim enhancement based on the mere possession of medical records, but did not require proof that any

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personal identifying information from those records had actually been used. District court did not plainly err in imposing vulnerable-victim sentencing enhancement following defendant's convictions on various charges arising from his tax fraud scheme, where defendant was found in possession of medical records, and defendant admitted at guilty plea colloquy that he had used information in those medical records to file fraudulent tax returns.

U.S. v. Pierre, 825 F.3d 1183 (11th Cir. 2016) District court correctly applied the vulnerable victim enhancement. "In this particular tax refund fraud scheme, inmates have unique circumstances and immutable characteristics that make them more vulnerable to this type of fraudulent activity. Inmates usually do not file tax returns during periods of incarceration, and they are less likely to know that their identity was stolen." Other circuits have specifically upheld applying this enhancement in child pornography and sexual abuse cases where victims were vulnerable because they were asleep at the time of the abuse. *See U.S. v. Kapordelis*, 569 F.3d 1291, 1316 (11th Cir. 2009); *U.S. v. Newsom*, 402 F.3d 780, 785 (7th Cir. 2005); *U.S. v. Wetchie*, 207 F.3d 632, 633–36 (9th Cir. 2000); *see also U.S. v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013) (noting that sleeping children are "considerably more vulnerable" in context of child pornography production offenses).

Acceptance of Responsibility

U.S. v. Stile, 845 F.3d 425 (1st Cir. 2017) District court did not clearly err in concluding that defendant who had obstructed justice by assaulting government informant, and who then refused to accept relevant responsibility for his misconduct when caught, was not entitled to reduced offense level for allegedly accepting responsibility for charged offense by pleading guilty. U.S.S.G. § 3E1.1(a).

U.S. v. Therrien, 847 F.3d (1st Cir. 2017) Defendant was convicted of distribution of cocaine or cocaine base and being felon in possession of firearm and ammunition. Defendant who went to trial with weak claim of entrapment was not entitled to acceptance of responsibility sentence reduction. U.S.S.G. § 3E1.1(a). Therrien argues that our previous decisions involved traditional entrapment claims and that his "entrapment by estoppel" defense somehow warrants a different outcome. This latter defense, however, only requires that the defendant admit "that he had been told by a government official that his behavior was legal and that he reasonably relied on that advice."

U.S. v. Hudson, 272 F.3d 260 (4th Cir 2001) After pleading guilty to drug trafficking, John Hudson was released on bond pending sentencing. Because of fear over the length of his forthcoming sentence, Hudson fled and failed to appear at his sentencing hearing. After his rearrest, the district court accepted Hudson's explanation for his flight, that he was "scared," and therefore refused to enhance his sentence under U.S.S.G. § 3C1.1 for obstruction of justice. The court also granted Hudson a reduction of his sentence for acceptance of responsibility. Because we conclude that the district court failed properly to apply §§ 3C1.1 and 3E1.1 of the Sentencing Guidelines, we reverse and remand for resentencing.

U.S. v. Lallemand, 989 F.2d 936 (7th Cir. 1993) Defendant initially counseled accomplice to destroy evidence and then later confessed and told accomplice not to destroy evidence. In other words, as long as the defendant's acceptance of responsibility is not contradicted by an ongoing attempt to obstruct justice, the case is an extraordinary case within the meaning of Application Note 4 and simultaneous adjustments under §§ 3C1.1 and 3E1.1 are permissible.

U.S. v. Jensen, 834 F.3d 895 (8th Cir. 2016) Indeed, "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for [her] criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." U.S.S.G. § 3E1.1 cmt. 4. We look to the totality of the circumstances to determine whether a particular case is "extraordinary." Jennifer argues she earned a reduction for acceptance of responsibility because she initiated the investigation into the abuse by taking M.H. to law enforcement to report Brad's sexual abuse. However, we note that Jennifer only took M.H. to law enforcement years after Brad abused her and only after M.H. disclosed the abuse to someone outside of the family. Further, during her proffer interviews, Jennifer refused to admit any involvement and denied that she was the woman pictured with Brad and J.S. She participated in the sexual abuse of several children. She never reported Brad's sexual abuse of the children to law enforcement and failed to disclose their possession of child pornography during the investigation. Various law enforcement officials, as well as the prosecution, afforded Jennifer numerous opportunities to admit her role in the abuse and accept responsibility. Jennifer chose to lie repeatedly during those interviews. For those reasons, we conclude the district court did not clearly err and had an adequate foundation upon which to deny Jennifer's request for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1

U.S. v. Muro, 357 F.3d 743 (8th Cir. 2004) The district court should consider, among other things, whether the obstructive conduct was an isolated incident, whether it was voluntarily or involuntarily terminated, whether the defendant admitted and recanted his obstructive conduct, and to

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what degree he accepted responsibility and aided the prosecution. Id. The phrase "extraordinary cases" refers to a narrow set of occurrences that are "extremely rare and highly exceptional." Id. at 969–70. It is not generally extraordinary when a defendant "merely cease[s] obstructive conduct." Id. at 970. A defendant must earn an adjustment for acceptance of responsibility by performing positive actions that counter his negative ones. Muro failed to take any affirmative action to confirm his acceptance of responsibility after he fled Nebraska. He merely provided an excuse for his flight and failure to appear for his sentencing hearing. Although the district court found credible Muro's claim of fear for his safety, it reasonably concluded that Muro willfully chose the course of conduct that obstructed justice instead of choosing other options, such as contacting Pretrial Services or the DEA to report the threat. Muro continued to violate his conditions of pretrial release by failing to inform authorities where he was and did not cease his obstructive conduct until he was involuntarily apprehended seven months later. His case is therefore no different from many other cases involving flight before sentencing and thus does not qualify as "exceptional."

U.S. v. Hopper, 27 F.3d 378 (9th Cir, 1994) The district court granted Hopper a two-level reduction under § 3E1.1(a) for acceptance of responsibility, but denied Hopper's request for an additional one-level reduction under § 3E1.1(b) because it found his acceptance of responsibility to be untimely. Hopper argues his request for an additional one-level reduction for acceptance of responsibility cannot be denied based solely on timeliness. Hopper is not entitled to a reduction under subsection (b)(2). Hopper entered a guilty plea approximately three weeks prior to his scheduled trial date. At this late date, the prosecution had already spent considerable time and effort in preparing Hopper's case for trial and was substantially prepared to proceed with trial in the event Hopper failed to plead guilty. Because Hopper failed to plead guilty prior to the government's substantial trial preparation and investigation, we hold the district court did not clearly err in concluding Hopper's acceptance of responsibility was untimely under subsection (b)(2).

Obstruction of Justice

U.S. v. Stile, 845 F.3d 425 (1st Cir. 2017) District court did not clearly err in concluding that defendant who had obstructed justice by assaulting government informant, and who then refused to accept relevant responsibility for his misconduct when caught, was not entitled to reduced offense level for allegedly accepting responsibility for charged offense by pleading guilty. U.S.S.G. § 3E1.1(a).

U.S. v. Barson, 845 F.3d 159 (5th Cir. 2016) Sentencing court did not abuse its discretion in finding that testimony by medical clinic's director regarding his lack of knowledge of fraudulent Medicare reimbursement scheme conducted at clinic was lacking in credibility, so as to support sentencing enhancement for obstruction of justice following director's conviction of health care fraud and conspiracy to commit health care fraud. The district court stated during sentencing, "Well, of course, I was here and listened to [Barson's] testimony. I agree with [the government] that much of it was not credible; and because he testified not credibly or untruthfully, that does—that is an obstruction of justice.

U.S. v. Brown, 843 F.3d 738 (7th Cir. 2016) To apply the sentencing enhancement for obstruction of justice based on perjury, a district court must find that a defendant testified untruthfully with the specific intent to obstruct justice rather than as a result of confusion, mistake, or faulty memory. The judge who sentenced Brown imposed the enhancement for obstruction of justice based on the other judge's interim impressions about earlier testimony from police officers. That was not a sufficient factual foundation to support the obstruction of justice enhancement. Vacated and remanded.

U.S. v. Cisneros, 846 F.3d 972 (7th Cir. 2017) District court did not clearly err in finding that narcotics defendant's attempted flight to Mexico, a country of which he was citizen and from which government might have difficulties extraditing him, by purchasing one-way ticket and buying some clothes on his way to airport, so as to avoid having to return to home that he knew was under surveillance, warranted two-level increase in his base offense level at sentencing for obstruction of justice.

U.S. v. Nichols, 847 F.3d 851 (7th Cir. 2017) District Court did not err in applying two-level enhancement for obstruction of justice when sentencing defendant upon his conviction for possession of a firearm by a felon, as it determined defendant made willfully false statements at evidentiary hearing that probation officer promised immunity or leniency in exchange for surrender of firearms or ammunition during officer's home visit.

U.S. v. Jensen, 834 F.3d 895 (8th Cir. 2016) H.J.'s statements clearly indicate that Jennifer coached her and advised her not to reveal Jennifer's involvement in the abuse. Jennifer's tampering with H.J. obstructed the investigation of closely related child pornography charges for both Brad and Jennifer. Jennifer's tampering with H.J. qualifies under U.S.S.G. § 3C1.1 as "threatening, intimidating, or otherwise unlawfully influencing" a witness, which constitutes obstructive conduct related to "the defendant's offense of

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conviction and any relevant conduct" or "a closely related offense."

Role in the Offense – Leadership

U.S. v. Ogyekum, 846 F.3d 744 (4th Cir. 2017) The district court applied these factors and found it "clear that [Agyekum] was a manager or supervisor" in the illegal drug distribution conspiracy, citing his role in running the pharmacy and directing: (1) that the pharmacy would fill out-of-state prescriptions; (2) that the pharmacy would only accept cash for filling oxycodone prescriptions; (3) that the pharmacy charged different prices depending on the risk involved in the transaction; and (4) that those seeking to fill suspicious oxycodone prescriptions were also required to submit prescriptions for non-controlled substances. The court found further that Agyekum "handled all the money [,] ... controll[ing] all the [bank] accounts in every way." Agyekum actually ran the business and directed the activities of the pharmacist at the pharmacy.

U.S. v. Lora-Andres, 844 F.3d 781 (8th Cir. 2016) Imposition of two-level sentencing increase for managerial or supervisory role was warranted for defendant convicted of conspiracy to distribute methamphetamine; cooperating coconspirator testified that she and another coconspirator obtained approximately 40 ounces of methamphetamine from defendant over the course of numerous meetings, that defendant fronted the methamphetamine to them for resale, and that they were required to repay defendant, another coconspirator testified that defendant recruited him into the conspiracy, fronted him large quantities of methamphetamine to sell on his behalf, and twice directed coconspirator to pick up and transport multiple pounds of methamphetamine across state lines.

Role in the Offense – Minor Role

U.S. v. Algahaim, 842 F.3d 796 (2d Cir. 2016) Mitigating role adjustment was not warranted in prosecution for misusing benefits under Supplemental Nutrition Assistance Program (SNAP) by giving cash to customers who used electronic benefit transfer (EBT) cards to redeem SNAP benefits. Defendant's role in committing the charged offenses was virtually identical to codefendant's.

U.S. v. Castro, 843 F.3d 608 (5th Cir. 2016) District court did not clearly err in denying drug courier a downward adjustment in her base offense level at sentencing based on her allegedly minor role in narcotics conspiracy, where defendant, together with her fellow courier, had helped acquire license plates for vehicle used to transport drugs, had traveled thousands of miles on multiple trips for conspiracy, had delivered kilogram amounts of heroin for conspiracy, and had repeatedly taken drug proceeds back to other conspirators.

U.S. v. Torres-Hernandez, 843 F.3d 203 (5th Cir. 2016) District court did not commit clear error in declining to grant minor role reduction to defendant whose criminal conduct consisted of carrying backpack filled with marijuana from Mexico across border into United States; although there was no evidence that defendant had planned or organized criminal activity, only evidence of other individuals involved in criminal enterprise pertained to other transporters like defendant, such that he was not more or less culpable than other individuals.

U.S. v. Hunt, 840 F.3d 554 (8th Cir. 2016) Defendant was not a minor participant in conspiracy to distribute methamphetamine, as would have warranted two-level decrease to his offense level under the Sentencing Guidelines; although defendant's plea agreement held him responsible for only the methamphetamine in two controlled buys, he admitted in plea agreement to being involved in the conspiracy for over two and a half years, according to presentence report, defendant was operating with and for co-conspirator who admitted distributing 45 pounds of methamphetamine, defendant told undercover agent that he typically did not sell smaller amounts, tests showed methamphetamine he sold was very pure, and before his arrest, defendant contacted the agent about obtaining methamphetamine to take to another state.

Abuse of Trust

U.S. v. Adebimpe, 819 F.3d 1212 (9th Cir. 2016) Durable medical equipment ("DME") suppliers in the Medicare program occupied positions of trust with respect to Medicare.

GUIDELINE SCENARIOS
CHAPTER THREE ADJUSTMENTS

For the following scenarios, assume that the defendants were over 18 years old when they committed the offenses, and that they all accepted responsibility for their offenses. Additionally, use the information in Appendix A to answer the questions regarding the scenarios:

Aggravating Role

Scenario #1

The Court determined there were more than 5 participants in a drug conspiracy that spanned several years. At sentencing, the Court determined that the defendant was a manager of the drug conspiracy, based upon his recruitment of others; however, then chose not to apply a role enhancement. If, after the Court determines that a defendant played an aggravating role, can the Court then either refuse to provide a role enhancement? Or would the court be permitted to apply only a 2-level enhancement for being an organizer or leader in the criminal activity?

Scenario #2

Defendant grew more than 1,000 kilograms of marijuana in CA. Over the course of several months he hired another defendant to cultivate and harvest the marijuana. At least 2 additional defendants flew the marijuana to Maryland in their own private airplane. Once the marijuana arrived in Maryland, several other defendants distributed the marijuana.

Scenario #3

Defendant prepared tax returns. She recruited her 2 sisters to help locate identifying information (names, DOB's, and SSN's) necessary to file fraudulent returns. However, the defendant's 2 sisters were only involved for a short period of time and made very little money. Can the defendant still receive an aggravating role enhancement?

Mitigating Role

Scenario #4

Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside. One of those defendants outside of prison helps by mailing completed tax forms and receiving refunds on debit cards, which are then provided to the incarcerated defendants.

The outside help receive a nominal amount of money for their assistance on relatively few occasions - $100 per tax return.

GUIDELINE SCENARIOS
CHAPTER THREE ADJUSTMENTS

Scenario #5

Defendant Davies was convicted of one count Conspiracy to Possess with Intent to Distribute Cocaine and one count Attempt to Possess with Intent to Distribute Cocaine. The conspiracy lasted for approximately 18 months. Defendant Davies's role in the offense did not extend beyond the scope of receiving a delivery of cocaine at the request of a co-defendant and turning the package over to the person who was to pay him. Defendant Davies was only held accountable for the amount of drugs in that one package. There were 28 defendants in the instant case, most of whom were found to be more culpable than the defendant.
Are there any Chapter 3 Adjustments that are applicable in this case?

Scenario #6

Defendants Stevens, Joel, Robins, Tierra, and Marjorie were charged in a 12-count Indictment that included the following counts:

- Count 1 – Conspiracy to Commit Bank Fraud - 18 U.S.C. §§ 1344 and 1349;
- Counts 2 – Aiding and Abetting Bank Fraud - 18 U.S.C. §§ 1344 and 2
- Counts 3 – Aggravated Identity Theft - 18 U.S.C. § 1028A

Defendant Stevens, Joel, and Robins were named in Counts 1, 2, and 3; Defendant Tierra and Marjorie were named in Counts 2 and 3. They were each convicted on all counts in which they were charged.

This case consists of a criminal enterprise that was engaged in numerous criminal activities involving bank fraud with losses exceeding $2,000,000. The overall conspiracy to fraudulently obtain money included passing fraudulent checks at retail stores and returning the items for cash and also depositing fraudulent checks in bank accounts and withdrawing cash. Checks, identification cards, and identification papers were created fraudulently to facilitate the passing and depositing of fraudulent checks. The conspiracy was based on a need for stolen information that would be used to create fraudulent checks and identification documents, which could then be used to obtain money through various methods of check passing, cashing, and deposits/withdrawals. Stevens and others including Joel were proficient in using check creation software. They began doing so in 2006 and did not stop until their arrest in 2011. Information taken from stolen, legitimate checks was entered into a computer program, which would then print checks on specialized check paper stock.

On January 2, 2011, a burglary of the Edible Arrangements retail store in Shoreview, Minnesota, occurred when Stevens and Joel stole a fire safe. Within the safe was information related to employees of the company, including their applications for employment, which listed their name, address, date of birth, Social Security number, and direct deposit forms authorizing their paychecks to be deposited into their personal bank account. As a result, this paperwork held the account and routing numbers of the victims' bank accounts. This stolen information was used during the conspiracy to create fraudulent checks and driver's licenses, which were used to obtain money fraudulently from banks.

At trial, two victims testified about a home burglary and the theft of a motor vehicle, which occurred in August and September 2011 by Marjorie. Checks and documents stolen during the burglaries were linked to participants in the conspiracy when they were used to make approximately$24,000 in fraudulent deposits and $12,000 in fraudulent cash withdrawals.

Robins worked at the Minnesota Board of Psychology. Robins had access to checks that were received through the mail from licensed psychologists to pay their annual licensing fees. Robins originally began copying information from checks, such as names, addresses, and account and routing numbers, to provide to Joel. Joel was connected to others in the conspiracy and recruited Robins to provide this information, which was initially used to create and pass fraudulent checks and obtain credit at Walmart and Sam's Club. Robins also recruited 7 friends and acquaintances to deposit fraudulent and stolen checks at the request of Joel. Joel also provided transportation and direction to the recruited individuals during various check cashing transactions.

Tierra was a bank teller and was recruited by Stevens to provide financial information from victims' accounts, which she had access to in the capacity of her employment. As well as providing financial information, Tierra was sometimes recruited as a specific teller who would accept a fraudulent check without calling management or raising alarms about the authenticity of the check being presented.

Stevens had a contact at a paper shredding company, which contracted with other companies to pick up and destroy their confidential documents en masse. Through this avenue, Stevens could obtain information meant for destruction that could instead be used to make fraudulent checks and identification documents. Stevens had a paid subscription to publicdata.com. He used this website to corroborate information obtained by other means and to obtain valid driver's license numbers that could be used to validate fraudulently created checks. Another website, uniqueIDs.com, was identified by participants as a site where driver's license numbers could be obtained to facilitate the acceptance of fraudulent checks.

Are there any Chapter 3 Adjustments that are applicable for Defendants Stevens, Joel, Robins, Tierra, and Marjorie?

Vulnerable Victim

Scenario #7

Defendant Richards was convicted of two counts Wire Fraud, two counts Mail Fraud, and one count Making and Subscribing False Income Tax Returns. The defendant was licensed as a Certified Financial Planner and was also a self-employed tax return preparer. Over the course of several years, Defendant Richards induced a number of clients to invest their retirement funds and other savings into investment vehicles he created, using self-directed Individual Retirement Accounts (IRAs). The defendant selected tax preparation clients who he knew, from their tax information and his interactions with them, were financially unsophisticated, had available retirement funds, and/or had developed a relationship of trust in him. He knew that the majority of the clients were retired, due to age or disability, or were otherwise

out of work, and that some were nearing retirement. Defendant Richards also knew that many clients entrusted him with all or a substantial portion of their retirement savings.

The defendant misled clients to believe that their funds would be placed and were placed in safe, guaranteed-return investments, when, in fact, he intended to divert and did divert the funds to pay personal and business expenses and to invest in highly-leveraged, risky investments for which he had a consistent history, both before and during the scheme, of incurring large losses. During the course of the scheme, Defendant Richards lost almost all of the client money that he placed in his high-risk investments, while continuing to solicit new clients and to lead his current clients to believe that their investments were doing well.

The defendant was initially charged in county court for the same conduct, and he was arrested on the Indictment. While he was in jail, Defendant Richards instructed his wife to hide a laptop computer which he knew had important financial data and would facilitate his return to criminal activity upon his release from custody. The defendant's wife complied with his request, but after significant further investigation the laptop was recovered.

Scenario #8

Defendant was convicted of Conspiracy to Defraud the Government and Monetary Transactions in Criminal Derived Property (Money Laundering). The defendant used the identification of numerous victims that included inmates serving a prison sentence, as well elderly victims, all without their knowledge. Over the course of several years, the defendant utilized these victim's personal information to secure more than $100,000 from the IRS.

Scenario #9

Defendant was involved in the sexual exploitation of a minor who was 14 years old. The victim had behavioral problems and would often cut herself and threaten suicide. Would an enhancement be applicable in this case a defendant's victim was 14 years old?

Obstruction of Justice

Scenario #10

Would an enhancement be applicable in this case where the defendant lied when she entered a plea of guilty?

Defendant Jackson was convicted of one count Conspiracy to Defraud the Government with Respect to Claims and one count False, Fictitious or Fraudulent Claims. She initially pled guilty to the offenses, but subsequently filed a motion to withdraw her plea of guilty. At the Motion Hearing the defendant testified that at the time she entered a plea guilty, she was aware she was under oath to tell the truth. She then

testified that she lied when she entered her plea of guilty and indicated that she only entered the plea of guilty in order to obtain a sentence of probation. Defendant Jackson also testified that she was not guilty of the charges pending against her. The Court denied the defendant's Motion to Withdraw her plea of guilty.

Scenario #11

Would an enhancement be applicable when a defendant lies about his personal and family background during a PSI interview? For example, the defendant lied about having additional children and being married previously.

Scenario #12

Defendant Bradley was convicted of one count Possession with Intent to Distribute Heroin and one count Felon in Possession of Firearm. After his arrest for the offenses, he began making telephone calls from the jail that included threats to his girlfriend, a witness in this matter. Defendant Bradley was aware of his girlfriend's cooperation with police in this matter, and during one call told her "You act like I ain't gonna get out of here and do something to you over that s**t." In other calls, Defendant Bradley attempted to get his girlfriend to go out and collect his drug profits while he was in jail. In another call he attempted to try and figure out who he believed set him up in this matter, and discussed killing that person when he got out.

Are there any Chapter 3 Adjustments that are applicable in this case?

Scenario #13

Defendants Andrews, Bates were charged in a 12-count Indictment that included the following counts:

- Count 1 – Armed Bank Robbery - 18 USC §§ 2113(a) and (d)
- Counts 2 and 3 – Kidnapping - 18 USC § 1201(a)(1)
- Counts 4 and 5 - Kidnapping of a Minor - 18 USC §§ 1201(a)(1) and 1201(g)
- Count 6 – Possession of Ransom Money - 18 USC § 1202
- Counts 7 through 10 – Hostage Taking - 18 USC § 1203
- Count 11 – Possessing a Firearm in Furtherance of a Crime of Violence - 18 USC § 924(c)(1)(A)(ii)
- Count 12 - Tampering with a Witness, Victim, or an Informant- 18 U.S.C. § 1512

Defendant Andrews was named in Counts 1 through 11; Defendant Bates was named in Counts 1 through 10 and Count 12. They were each convicted on all counts.

Defendant Cross was charged in a separate Indictment with Misprision of a Felony [18 USC § 4] in relation to all of the counts listed above, and Receipt of Ransom Money [18 USC § 1202(a)]. She was convicted of both counts.

The offenses began when Defendants Andrews and Bates began planning to rob the bank where Defendant Andrews had an account. They obtained home address of several bank employees by recruiting Defendant Cross, who had access to the law enforcement data system through her employment, to look up this information.

Defendants Andrews and Bates conducted surveillance on the employees and chose the bank manager as the target after learning that he had a wife and two small children. Defendant Bates subsequently broke into the home of the bank manager and hid in a close until the manager's wife and children returned to the home. Defendant Bates then exited the closet, pointed a gun at the manager's wife and children, and informed them that he would kill them if they didn't cooperate in his robbery plans. Defendant Bates held the manager's wife and children hostage throughout the afternoon and into the evening. The bank manager eventually came home and he was taken hostage as well.

The family was held hostage through the night. The following morning, defendant Andrews went with the bank manager to the bank and withdrew money while Defendant Bates held the manager's family hostage. Once the bank manager returned home, Defendant Andrews picked Defendant Bates and they left the residence.

The following morning, Defendants Andrews and Bates drove to Defendant Cross's residence, where all three of them counted the money. Defendants Andrews and Bates each took a portion of the money and had Defendant Cross hide the rest in Defendant Cross's home. Defendants Andrews and Bates obtained some of the hidden money from Defendant Cross approximately one week later. However, Defendants Andrews and Bates were arrested for the offenses a few weeks later. The next day, Defendant Cross turned over the majority of the remaining money to the police. However, Defendant Cross did not turn over a portion of the money that was still hidden at Defendant Cross's residence. The remaining funds were ultimately recovered during a search of Defendant Cross's home.

Are there any Chapter 3 Adjustments that are applicable for Defendants Andrews, Bates, and Cross?

Acceptance of Responsibility

Scenario #14

Defendant pled guilty to Felon in Possession of a Firearm on June 15, 2016. Prior to his guilty plea, the defendant called a friend and told her she should call detectives and report the firearm possessed by the defendant in fact belonged to an ex-boyfriend of hers. While incarcerated after his guilty plea, the defendant utilized other inmates pin numbers in order to make telephone calls to friends and family. Also, during a cell search, officers located .24 grams of marijuana. Should this defendant receive +2 for obstruction and also lose acceptance of responsibility reduction?

GUIDELINE SCENARIOS
CHAPTER THREE ADJUSTMENTS

Scenario #15

Defendant pled guilty to Felon in Possession of a Firearm on June 15, 2016. Prior to his guilty plea, the defendant called a friend and told her she should call detectives and report the firearm possessed by the defendant in fact belonged to an ex-boyfriend of hers. The defendant's girlfriend did as asked and was subsequently interviewed by federal agents. However, they soon learned she was lying. While incarcerated after his guilty plea and up until sentencing, the defendant remained law abiding. Can a defendant receive +2 for obstruction and also lose acceptance of responsibility reduction?

2017 National Seminar

Criminal History Calculations / USSG §4A1.1 & 4A1.2:
2017 Annual National Seminar

This handout is intended to be a quick reminder of some key considerations when applying the criminal history calculations at &4A1.1 and 4A1.2.

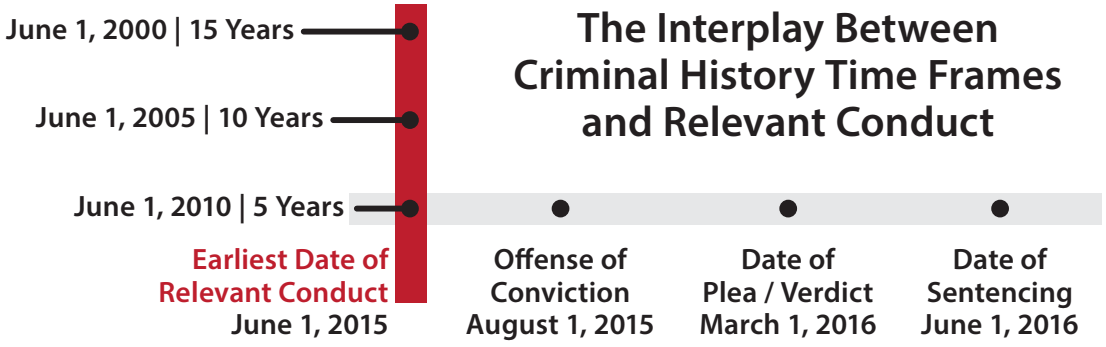
Criminal History Points for Prior Offenses Committed...

...at 18 or Older			...Before 18		
Pts*	Sentence	(Earliest Date of Relevant Conduct) Time Frame	(Earliest Date of Relevant Conduct) Time Frame	Sentence	Pts*
3	> 13 Months	Within 15 years of prior sentence imposition or release	Within 15 years of prior sentence imposition or release	> 13 Months Only If Convicted as an Adult and:	3
2	≥ 60 Days	Within 10 years of prior sentence imposition	Within 5 years of prior sentence imposition or release	≥ 60 Days	2
1 (Max of 4)	All Others**	Within 10 years of prior sentence imposition	Within 5 years of prior sentence imposition	All Others**	1 (Max of 4)

* If Otherwise Countable
** Exceptions May Apply

* If Otherwise Countable
** Exceptions May Apply

The Interplay Between Criminal History Time Frames and Relevant Conduct



Other Consideratons:

§4A1.2(f) – Diversionary Dispositions
§4A1.2(h) – Foreign Sentences
§4A1.2(i) – Tribal Court Sentences
§4A1.2(k) – Revocations of Probation, Parole, Mandatory Release, or Supervised Release

Multiple Prior Sentences / USSG §4A1.2(a)(2):
2017 Annual National Seminar

2017 National Seminar

Multiple Prior Sentences will be Treated as a "Single Sentence" if –

1. Prior sentences are for offense **NOT** separated by an intervening arrest

--- AND ---

2. The offenses **either**:

a. Were named in the same charging document, or

b. Resulted in sentences imposed on the same day

* For Single Sentences, if concurrent - use the longest sentence and if consecutive, aggregate the length of the sentences

Example 1

1. Defendant was convicted of 3 bank robberies that had not been separated by intervening arrests

2. Defendant was sentenced on the same day to 5 years for each robbery to run concurrently

3. Single sentence: 3 points (§4A1.1(a))

4. 1 point added for crime of violence that did not receive points: 2 additional points (§4A1.1(e))

Example 2

1. The defendant's prior record includes two robberies, the second committed after the defendant had been arrested for the first and was out on bail release. The two robbery offenses were subsequently charged in the same indictment and sentenced on the same day, resulting in concurrent sentences of five years each.

2. Intervening arrest

3. Separate sentences: 3 points each (total 6 points)

Career Offender "Override"

Criteria

- Defendant must be at least 18 at the time of the offense
- Instant offense of conviction is a felony for a "crime of violence" or "controlled substance offense"
- Defendant must have at least two prior felony convictions for a "crime of violence" or "controlled substance offense" that are counted separately under §4A1.1(a), (b), or (c)

Override

- Criminal History Category VI
- Offense level determined by a table base on statutory maximum (unless the offense level from Chapters Two and Three is greater)

Career Offender Table

Statutory Maximum	Offense Level *
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

* Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)

To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov

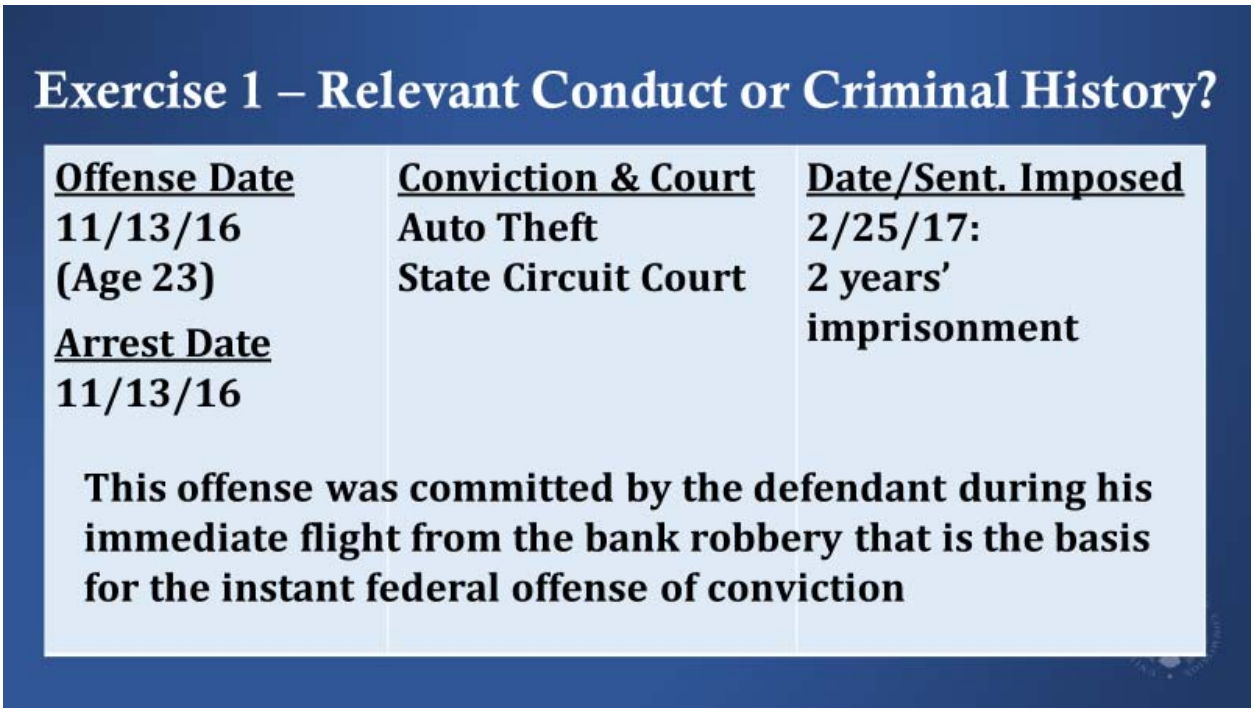
The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

Exercise #1 – Relevant Conduct or Criminal History?

Defendant's instant federal offense of conviction is a bank robbery that occurred on November 13, 2016, which is also established as the earliest date of relevant conduct

In the immediate flight from the robbery, Defendant stole a car to make his getaway

Defendant's prior record includes the following:



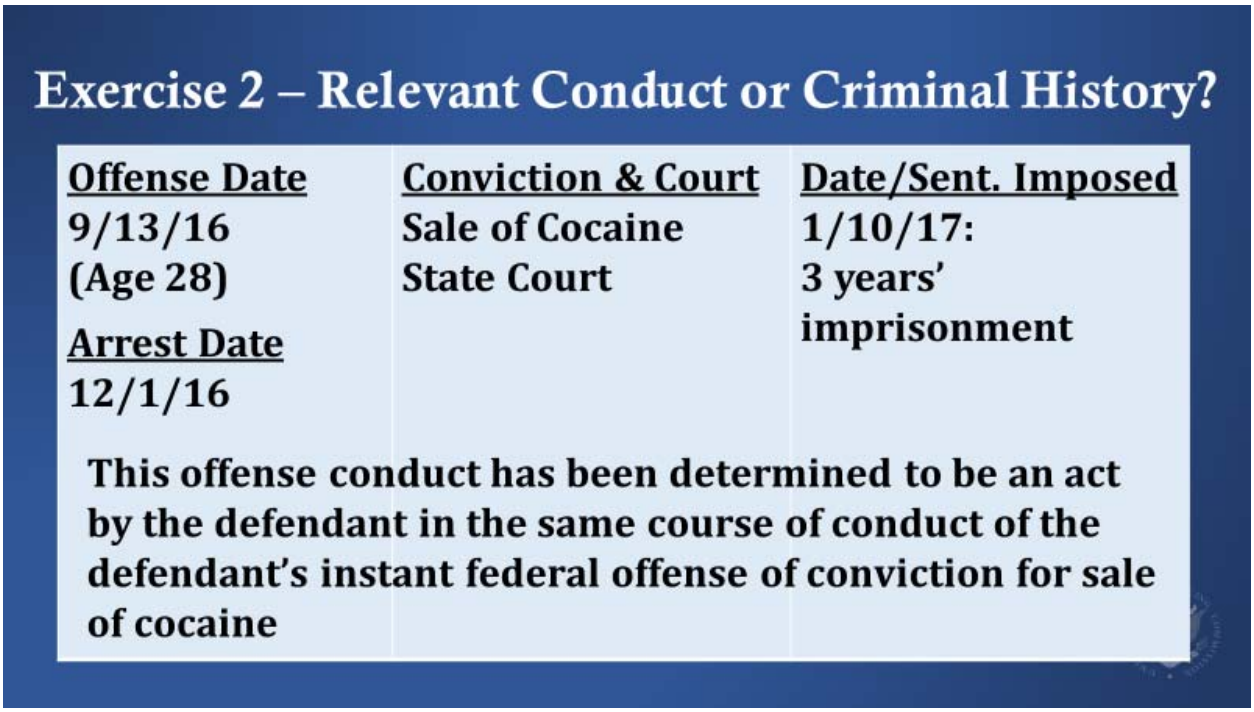
Is the auto theft relevant conduct, criminal history, or both, or neither?

Exercise #2 – Relevant Conduct or Criminal History?

Defendant's instant federal offense of conviction is distribution of cocaine on November 13, 2016

It is established that Defendant's relevant conduct includes a course of conduct including all his cocaine distributions dating back to August 1, 2016

Defendant's prior record includes the following:

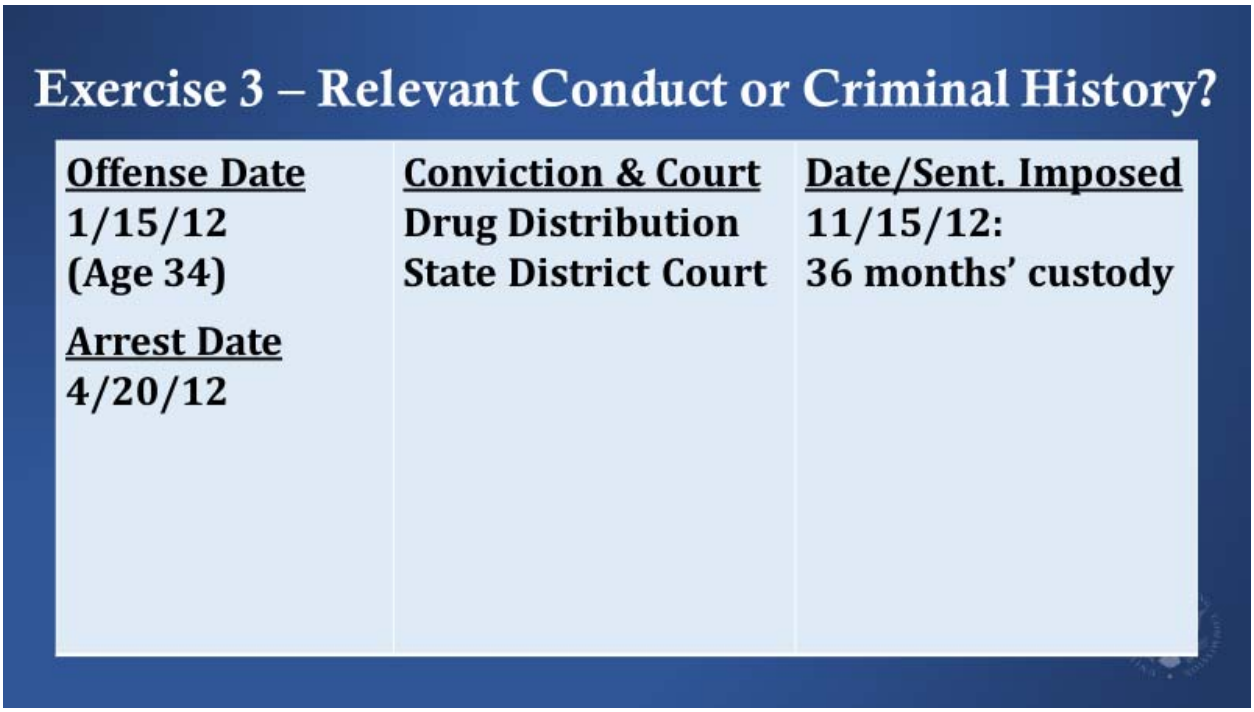


Is the state cocaine sale relevant conduct, criminal history, or both, or neither?

Exercise #3 – Relevant Conduct or Criminal History?

Defendant's instant federal offense of conviction is felon in possession of a firearm

In the application of §2K2.1 (Felon in Possession), Defendant is being given the increased base offense level (BOL 20 instead of BOL 14) based on the following prior felony conviction that Defendant sustained for a controlled substance offense:



Is the state drug distribution relevant conduct, criminal history, or both, or neither?

Exercise #4 – Length of Prior Sentence

Sentence of 3 years' imprisonment, suspended to 6 months' imprisonment & 4 years' probation to follow

What is the maximum sentence imposed?

_____
_____
_____
_____
_____

Exercise #5 – Length of Prior Sentence

Sentence of "time served"

At the time of sentencing the defendant had been in pretrial custody for 5 months

What is the maximum sentence imposed?

_____
_____
_____
_____
_____

Exercise #6 – Length of Prior Sentence

Sentence of 3 years' probation

At the time of sentencing the defendant had been in pretrial custody for 5 months

What is the maximum sentence imposed?

_____
_____
_____

Exercise #7 – Length of Prior Sentence

Sentence of 18 months' imprisonment

This sentence was subsequently reduced by the judge to 90 days' imprisonment

What is the maximum sentence imposed?

_____
_____
_____
_____
_____

Exercise #8 – Length of Prior Sentence

Sentence of 3 to 5 years' imprisonment

What is the maximum sentence imposed?

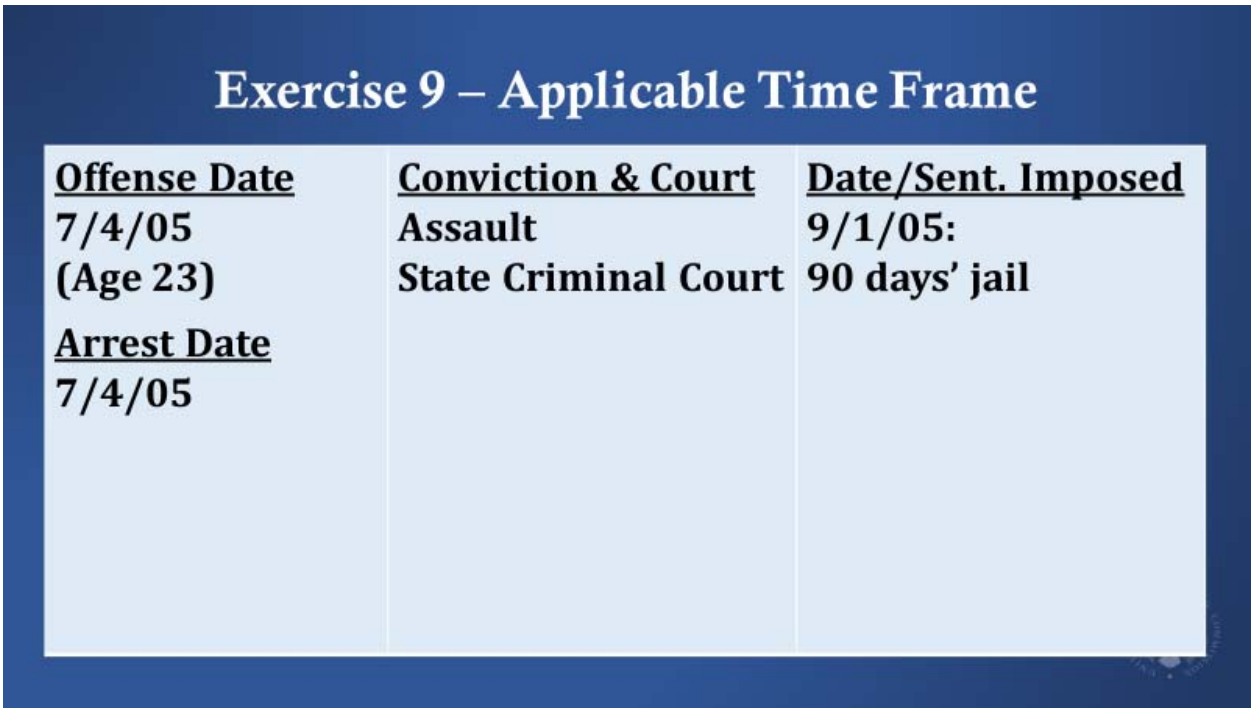
_____
_____
_____
_____
_____

Exercise #9 – Applicable Time Frame

Defendant's instant federal offense of conviction, theft from an interstate shipment, occurred on November 1, 2016

Defendant's earliest date of relevant conduct is January 11, 2015

Defendant's prior record includes the following:



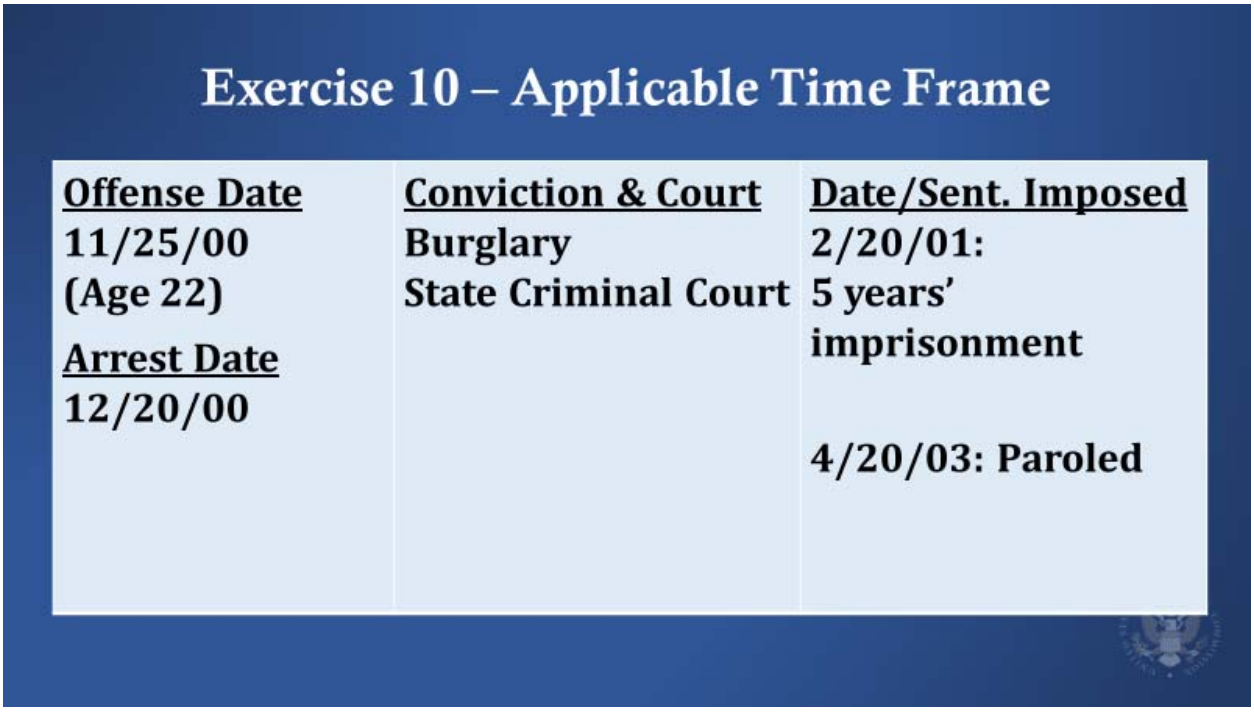
Does this prior fall within the applicable time frame?

_____
_____
_____
_____
_____
_____
_____
_____

Exercise #10 – Applicable Time Frame

Defendant's instant federal offense of conviction is a bank robbery that occurred on March 1, 2017, which is also established as the earliest date of relevant conduct

Defendant's prior record includes the following:



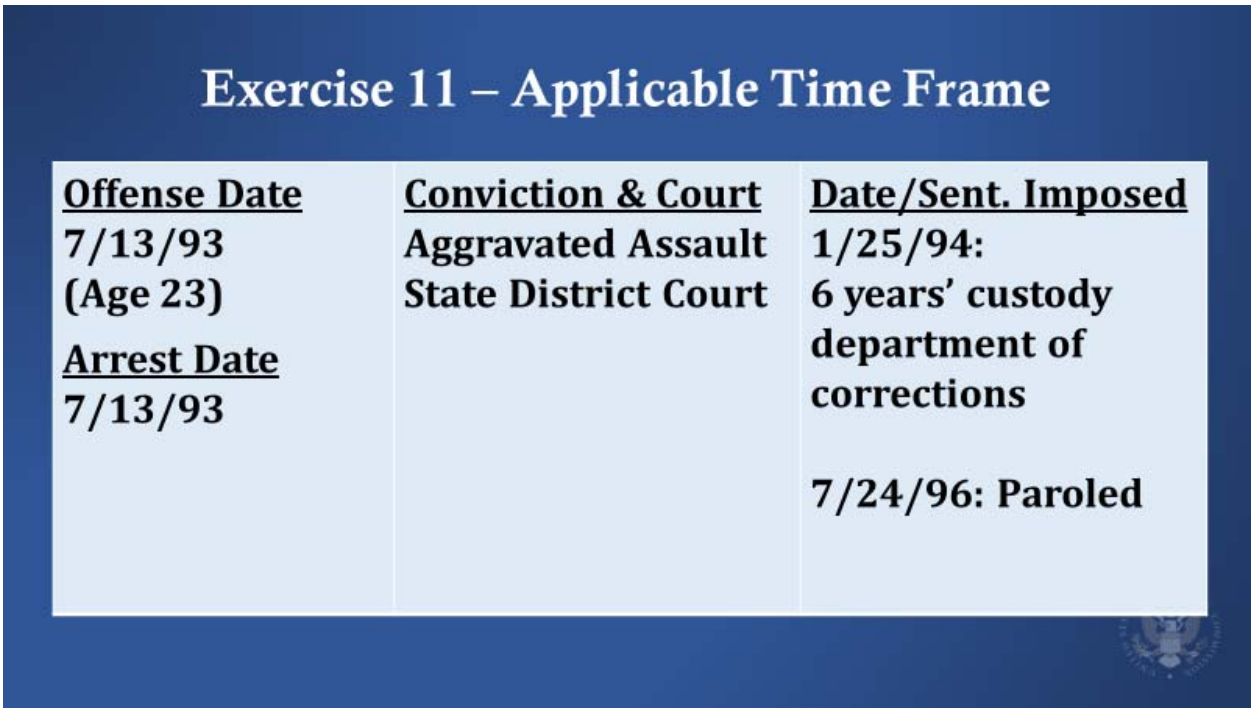
Does this prior fall within the applicable time frame?

Exercise #11 – Applicable Time Frame

Defendant's instant federal conviction is for a drug sale on January 1, 2016

It is established that defendant's earliest date of relevant conduct was a drug sale in the same course of conduct on January 1, 2010

Defendant's prior record includes the following:



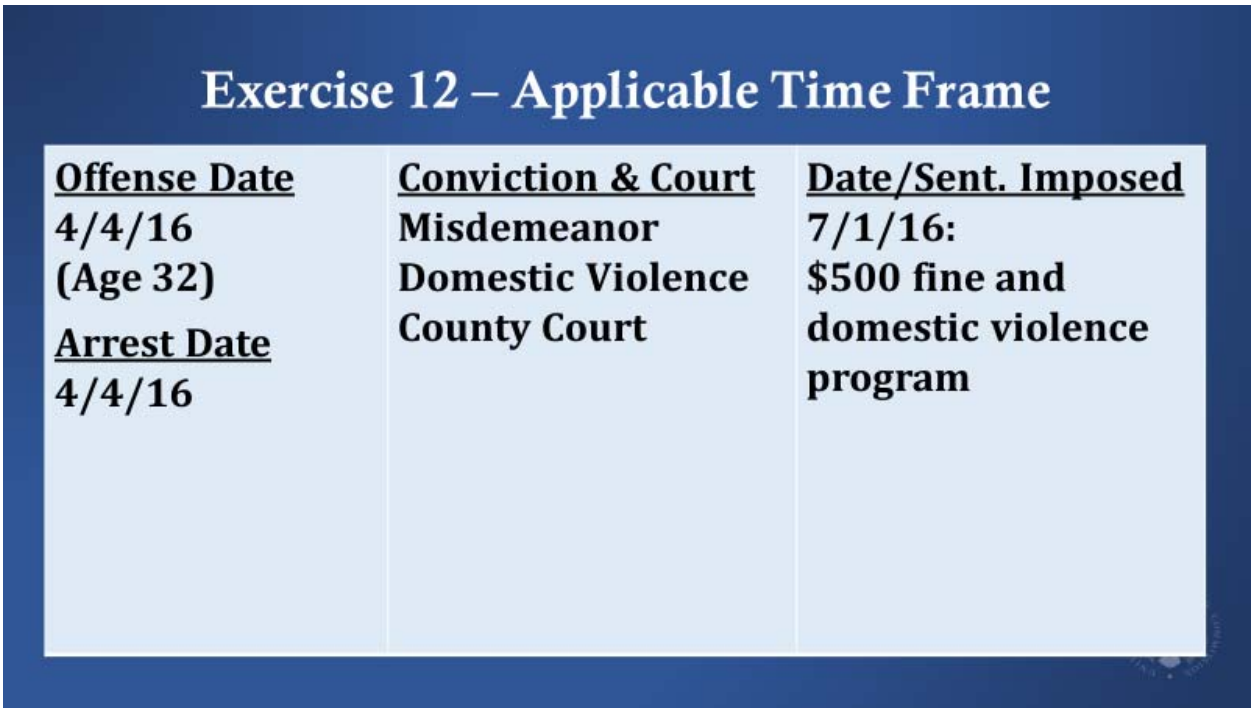
Does this prior fall within the applicable time frame?

Exercise #12 – Applicable Time Frame

Defendant's instant federal offense of conviction, Interstate Transportation of a Stolen Motor Vehicle, occurred on December 1, 2015

Defendant's earliest date of relevant conduct is June 1, 2015

Defendant's prior record includes the following:



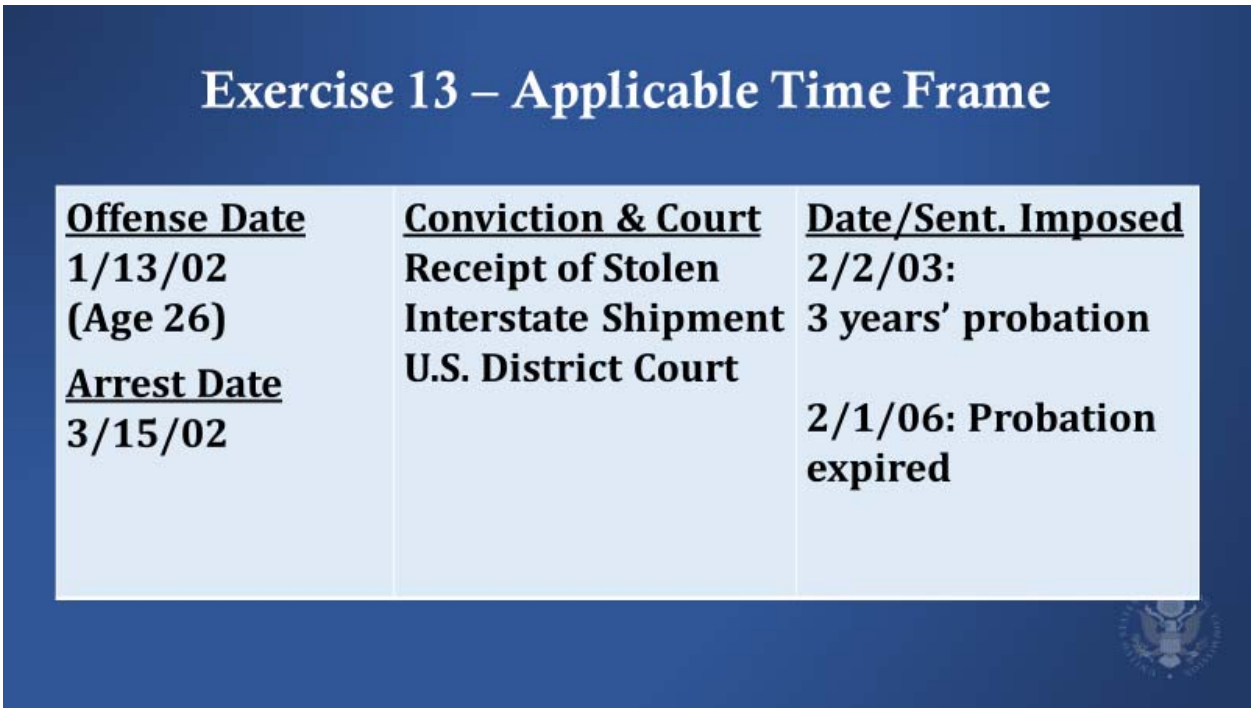
Does this prior fall within the applicable time frame?

Exercise #13 – Applicable Time Frame

Defendant's instant federal conviction is a fraud conspiracy from January 1, 2010 to December 31, 2015

Defendant joined the conspiracy July 1, 2014, which is also established as the defendant's earliest date of relevant conduct

Defendant's prior record includes the following:



Does this prior fall within the applicable time frame?

Exercise #14 – Excluded Misdemeanor and Petty Offense Sentences

How many criminal history points?

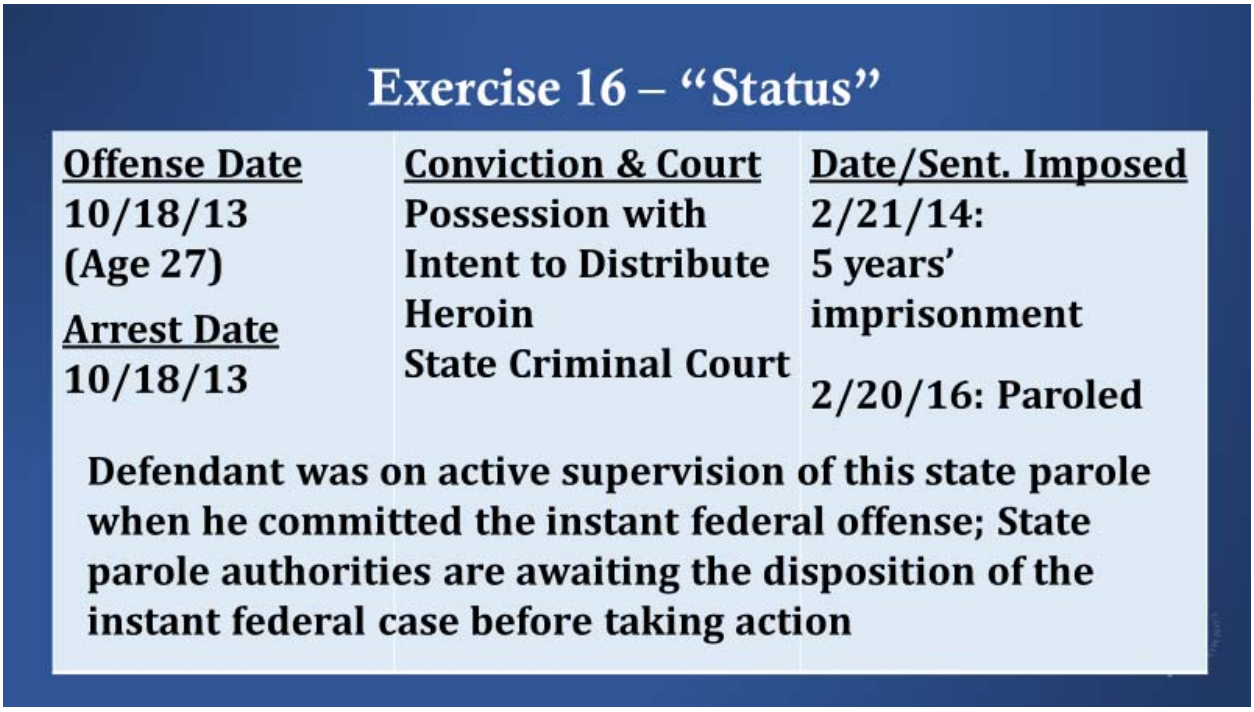
Exercise #15 – Excluded Misdemeanor and Petty Offense Sentences

How many criminal history points?

Exercise #16 – "Status"

Defendant's instant federal offense of conviction is a bank robbery that occurred on November 13, 2016, which is also established as the earliest date of relevant conduct

Defendant's prior record includes the following:



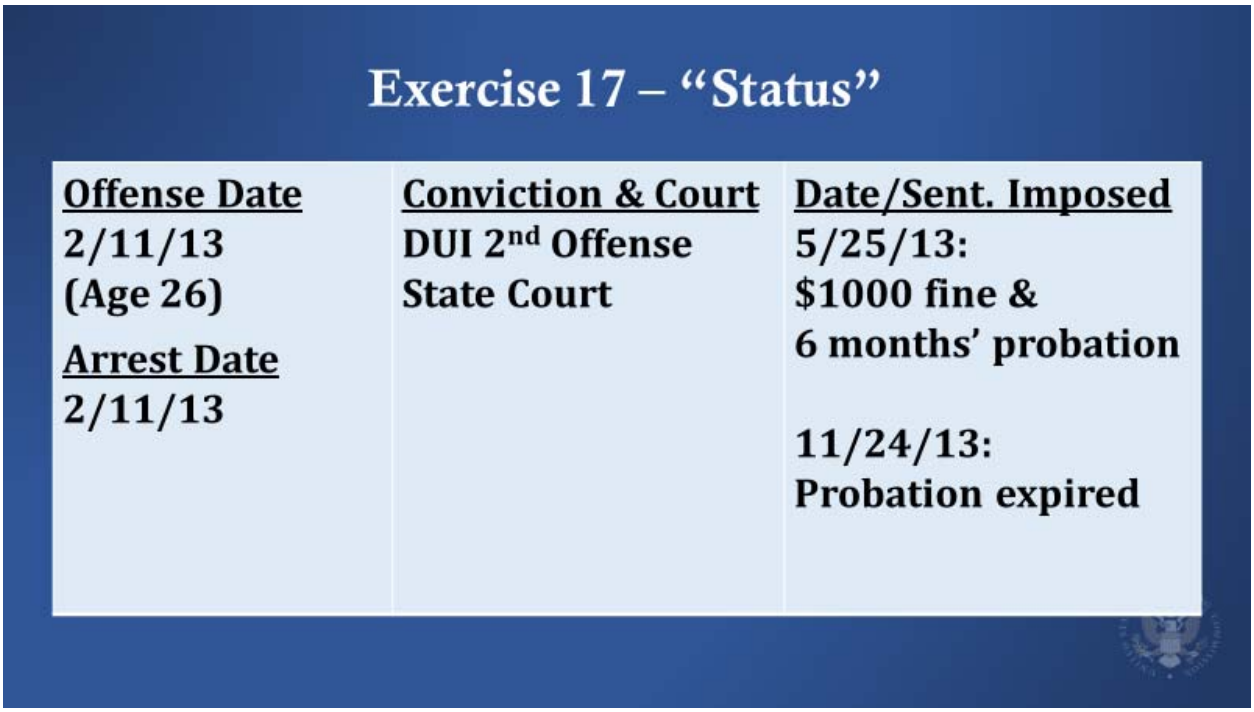
Do criminal history points for "status" apply?

Exercise #17 – "Status"

Defendant's instant federal offense of conviction is a drug sale that occurred on January 1, 2016

It is established that defendant's earliest date of relevant conduct was a drug sale in the same course of conduct on January 1, 2010, and that the relevant conduct continued until January 1, 2016

Defendant's prior record includes the following:



Do criminal history points for "status" apply?

POP QUIZ

1. Defendant was given a civil law violation ticket for Possession of less than 10 Grams of Marijuana. Is this a conviction that results in criminal history points?

2.

Arrest Date	Charge/Docket #	Date/Sent. Imposed
2/07/05	Sale of Heroin, Montgomery County District Ct. Dayton, OH	04/07/05: 2 years imprisonment
02/07/07	Trafficking Cocaine, Montgomery County District Ct. Dayton, OH	04/07/07: 4 years imprisonment

Defendant pled guilty to a drug conspiracy that occurred from 2009 through 2015. Defendant has two prior stat convictions for drug trafficking for which he was sentenced prior to the instant offense of conviction. Are these scored for criminal history purposes?

3. Defendant was sentenced to 20 years in prison in 2000. He was pardoned in 2012 and completed TSR in 2015. He was arrested and convicted for drug trafficking in 2017. Does the pardoned conviction count for criminal history purposes?

4.

Arrest Date	Charge/Docket #	Date/Sent. Imposed
11/24/2007	Ct. 1: Theft (Misd.); Ct. 2: DWI (Felony) Rutherford County Criminal Court Murfreesboro, TN	06/26/09: Ct. 1: 1 year jail Ct. 2: 60 days jail, to be served consecutive to one another

How many criminal history points?

5.

Arrest Date	Charge/Docket #	Date/Sent. Imposed
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?

How many criminal history points?

6.

Arrest Date*	**Charge/Docket #**	**Date/Sent. Imposed**
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) *Warrant issued by the state for attempted murder and possession of gun by felon on 12/20/09	Felon in possession of firearm, Miami Dade County District Court, Miami Florida	01/14/12: 6 months custody DOC

Are these sentences scored separately or as a single sentence?

How many criminal history points?

7.

Arrest Date	**Charge/Docket #**	**Date/Sent. Imposed**
05/06/09 (Age 20)	Aggravated Robbery (Case# 09-432); Rutherford County Criminal Court, Murfreesboro, TN	06/26/09: 1 year custody, consecutive to Case# 09-433
05/06/09 (Age 20)	Aggravated Robbery (Case # 09-433); Rutherford County Criminal Court, Murfreesboro, TN	06/26/09: 9 months' custody, consecutive to Case# 09-432

Are these sentences counted separately or as a single sentence?

How many criminal history points?

8.

Arrest Date	**Charge/Docket #**	**Date/Sent. Imposed**
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?

9.

Arrest Date	**Charge/Docket #**	**Date/Sent. Imposed**
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?

10.

Arrest Date	**Charge/Docket #**	**Date/Sent. Imposed**
01/10/04 (Age 21)	Unlawful Sale, Manufacture or Delivery of a Controlled Substance Within 1000 feet of a place of worship Volusia Co. Cir. Ct. Deland, FL	06/09/04: 24 months' imprisonment suspended, 3 years' probation 05/17/05: Probation revoked, sentenced to FL DOC for 24 months

How many criminal history points?

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?

12. Defendant has three prior convictions that are counted separately. For the first conviction, he was sentenced to 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, his probation terms were revoked. The judge imposed 18 months' imprisonment for the revocation.

How many criminal history points?

ADVANCED CRIMINAL HISTORY EXERCISES

Career Offender 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

BOL: (10-30 KG Heroin) 34

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

Count Two: §2K2.4

Mandatory Consecutive 60 months

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?

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

§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

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"?

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). (i.e. add the mandatory minimum to the minimum and maximum of the "otherwise applicable guideline range".)

What is the resulting guideline range?

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?

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Economic Crimes: Restitution

The need to provide restitution to any victims of the offense is one of the seven factors a judge must consider in imposing a sentence (18 U.S.C. § 3553(a)(7)). Restitution is governed primarily by statutes. The Sentencing Guidelines' statement on restitution is found at §5E1.1.

Main Statutes & Guidelines

18 U.S.C. § 3663A
(Mandatory Victim Restitution Act)

18 U.S.C. § 3663
(Discretionary Restitution Act)

18 U.S.C. § 3664
(Procedures for Enforcement of Restitution)

18 U.S.C. § 2259
(Mandatory Restitution in Sex Offenses)

18 U.S.C. § 3583 (e)
(Conditions of Supervised Release)

§5E1.1
(Restitution)

General Principles

- Loss for the guidelines is not the same as restitution (exception for scheme, conspiracy, or pattern charged as such)
- Restitution does not include relevant conduct
- The purpose of restitution is to make the victim whole
- A victim is one who was directly and proximately harmed by the offense of conviction, and may include the government
- The parties may agree to more restitution in a plea agreement, which must be specifically worded
- Restitution may be ordered as a condition of Supervised Release
- 18 U.S.C. § 3664(d)(5) contains a 90-day deadline for ordering restitution
- Court may take longer than 90 days to determine the amount of restitution
- The defendant's inability to pay is irrelevant to the restitution amount. A court considers the defendant's financial circumstances only in specifying the manner and schedule of payment, not in deciding how much restitution to order (18 U.S.C. § 3664(f)(1)(A))
- The Court (not the probation officer) sets the payment plan
- In the case of jointly undertaken criminal activity, the Court may apportion restitution or deem defendants jointly and severally liable

Of Note

Courts may order restitution as a condition of probation or supervised release even if not required under the MVRA. This also applies to offenses under Title 26 (e.g. tax offenses).

The government can continue to collect restitution even after the period of supervised release has expired.

Restitution can be imposed for victims in a case that has as an element a scheme, conspiracy, or pattern of activity, not in the indictment so long as they are victims of the scheme of which defendant is convicted, and the charge describes the nature and duration of the scheme.

The statute sets a 90 day deadline to order restitution (see 18 U.S.C. § 3664(d)(5)) but there is an exception:
U.S. v. Dolan, 130 S. Ct 2533 (2010) "A sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount."

Common Restitution Pitfalls

- Insufficient factual finding
- Including losses outside of the offense of conviction, either for victims not harmed in the counts of conviction, or losses not caused by the offense of conviction
- In a conspriacy case, holding an individual liable for all losses caused by the conspriacy
- Awarding restitution to "non-victims"
- Not setting a payment schedule
- Failing to offset, or improperly offsetting, restitution award using forfeiture, value of services, recovered losses, etc.

Economic Crimes:
Restitution

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Loss Calculation	Restitution
Loss in a copyright/trademark infringement case is the retail value of the items times the number of items	Must be based on actual, provable loss to a victim of the offense of conviction
Gain may be used as an alternative measure of loss if loss cannot reasonably be determined	A defendant's gain cannot be used as a proxy for actual loss. If actual is too complex to determine, the court can decline to order it
Loss is the greater of actual or intended loss	Intended loss cannot be used
In a conspiracy case, may not include loss caused before the defendant joined	In a conspiracy case, may not include loss caused before the defendant joined
Generally intended to measure offense severity and offender culpability	The principle aim is to ensure that crime victims are made whole for their losses
An incorrect loss calculation is procedural error but may be harmless on appeal	A restitution award in an amount that exceeds actual loss is, in some circuits, an illegal sentence constituting plain error on appeal
The offense, for loss purposes, includes "all reasonably foreseeable acts and omissions of others in furtherance of [any] jointly undertaken criminal activity."	In a jointly undertaken criminal activity, the district court may apportion the full amount of restitution among multiple defendants "to reflect the level of contribution to the victim's loss and economic circumstances of the defendant."
Costs incurred by victims to aid the government in the prosecution and criminal investigation are excluded from loss calculation	Restitution can include reasonable costs, fees, and penalties
Special rules govern specific types of fraud offenses, for example loss in federal procurement cases	Calculation of restitution is consistent across case types – making the victim whole is the driving principle
Relevant conduct, which can include conduct outside the offense of conviction, is used to calculate loss	"Congress intended restitution to be precisely tied to the loss caused by the offence of conviction. Examination of the conduct constituting the commission of a crime only involves consideration of the conduct to which the defendant pled guilty and nothing else."
Unless in a binding plea agreement, the Court is not bound by the parties' calculation of loss before sentencing, even if uncontested	If a defendant explicitly agrees to pay restitution to victims outside the offense of conviction, the Court should impose it unless there is some independent reason not to (such as undue complication)
Loss under §2B1.1 does not require more than an estimate	Restitution requires an exact figure
Loss includes relevant conduct	The MVRA does not contemplate relevant conduct, but does require that "in a case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity" restitution for any person "directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern"
Should be reduced to account for money the victim received from the sale of collateral	Should be reduced to account for money the victim received from the sale of collateral
The causation requirement for loss calculation requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable to the defendant	The causation requirement for restitution requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable to the defendant
Bare assertions in the PSR without more, are insufficient evidence to prove loss	Bare assertions in the PSR without more, are insufficient evidence to prove restitution
The measure of loss to a downstream lender is "the difference between what the successor lender paid for the loan and the proceeds obtained from payments and sale of collateral"	Restitution requires determining which lenders in the chain of title suffered what loss. "If the victim only paid a fraction of [the principle amount] to obtain the loan on the secondary market" return of the principle amount to the victim would be a windfall

Victim - Guidelines	Victim - Restitution
§2B1.1, App. Note 1 - Victim means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. Person includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.	A victim is a person proximately harmed as result of the commission of the offense
§2B1.1, App. Note 4(E) - Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.	

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Economic Crime:
Selected Cases Addressing §2B1.1

Selected Case Law Related to Economic Crimes. The Courts of Appeals have issued a number of opinions relating to sentencing and the guidelines, including cases on the amount of loss, sophisticated means, victims and relevant conduct, identification, and fraud and tax.

Amount of Loss

U.S. v. Free, 839 F.3d 308 (3d Cir. 2016) The district court incorrectly determined the amount of loss in a bankruptcy fraud case. The district court relied primarily on the notion that Free harmed the judicial system by concealing assets to determine loss under §2B1.1. However, that rationale was inconsistent with the Guidelines and incompatible with prior case law. The concept of "loss" under the Guidelines is not broad enough to cover injuries like abstract harm to the judiciary: "In our view, 'loss' has a narrower meaning—i.e., pecuniary harm suffered by or intended to be suffered by victims." The court remanded to allow the district court to determine what, if any, loss to creditors the defendant intended, or the gain he sought by committing the crime. The district court could always consider an upward departure or variance based on the harm to the judiciary.

U.S. v. Harris, 821 F.3d 589 (5th Cir. 2016) The mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a "government benefit" akin to a grant or an entitlement program payment. We accordingly hold that procurement frauds involving contracts awarded under the 8(a) set-aside program, like procurement frauds generally, should be treated under the general rule for loss calculation, not the government benefits rule.

U.S. v. Minor, 831 F.3d 601 (5th Cir. 2016) Reasonable for the district court to calculate intended loss by determining the average actual loss of each account holder whose account Minor successfully breached and then multiplying that average by the total number of accounts Minor intended to access.

U.S. v. Aden, 830 F.3d 812 (8th Cir. 2016) The district court properly calculated loss in a food stamp fraud case when it conducted a comparative statistical analysis comparing transactions from the defendant's store with transactions from comparable stores.

U.S. v. Carpenter, 841 F.3d 1057 (8th Cir. 2016) In a case involving futures contract fraud, the district court's use of one-day high price method for calculating loss was not an abuse of discretion.

U.S. v. Frisch, 704 F.3d 541 (8th Cir. 2013) District court did not procedurally err in accepting government's intended loss calculation during sentencing for defendant convicted of concealment from Social Security Administration (SSA), where court accepted government's reasoning that defendant (age 63) would have continued receiving benefits to which he was not legally entitled until retirement age (age 66) if he had not been caught, and defendant's intent to cease defrauding SSA did not arise until authorities interdicted the offense. Thus, Frisch would have received $38,610 in addition to the $86,160 already received, for a total intended amount of $124,770.

U.S. v. Miller, 588 F.3d 560 (8th Cir. 2009) District court's determination that there was no actual loss attributable to defendant convicted of conspiracy to commit wire fraud and aiding and abetting wire fraud was reasonable; court presided over ten-day jury trial followed by extensive sentencing hearing and found that government offered no proof of actual loss, even though it could have been determined.

U.S. v. Thomas, 841 F.3d 760 (8th Cir. 2016) In a matter of first impression, the Eighth Circuit held that it was appropriate to include $500 minimum loss amount for each unused unauthorized access device the defendant and coconspirators possessed.

U.S. v. Walker, 818 F.3d 416 (8th Cir. 2016) "The §2B1.1 net loss analysis asks whether 'the offender ... transfer[red] something of value to the victim,' not whether the victims' total losses were affected by 'legitimate market factors,' such as market conditions that may have caused the failure of Bixby's corn-stove business."

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Selected Cases Addressing §2B1.1

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U.S. v. Grovo, 826 F.3d 1207 (9th Cir. 2016) "Under Galan, that failure to disaggregate losses caused by the initial abuse was an abuse of discretion, and we must vacate and remand for recalculation of the victim's general losses. We emphasize, however, that the district court's method of apportioning that loss between the defendants here was sound under Paroline. After the court properly disaggregates the victim's general losses, it is therefore permitted to reapply that method in reaching the individual restitution amount."

U.S. v. Tadios, 822 F.3d 501 (9th Cir. 2016) "It was thus not clear error for the district court to include the estimated value of the time that Tadios should have reported as annual leave in calculating the total losses Tadios inflicted on the Tribe. By failing to claim or deduct annual leave for the dates when she visited her husband and told her board she was traveling for work, Tadios harmed the Clinic twice over: first, by getting the Clinic to pay for travel expenses it had no obligation to cover, and again by getting the Clinic to pay her salary for time she was supposed to be working but was not."

U.S. v. Cobb, 842 F.3d 1213 (11th Cir. 2016) District court did not clearly err in finding that the government proved by a preponderance of the evidence that the intended loss was more than $2,500,000. The Government provided reliable and specific evidence of the loss calculation and the district court made a reasonable estimate after reviewing the spreadsheet prepared by the special agent and his testimony at the sentencing hearing. The hot spot device recovered from defendant's residence was dynamic, meaning that it generated a new IP address each time it disconnected from the internet. "In other words, the fact that the IP address could only be linked to 60 or 70 tax returns does not mean that the device was not used to file other tax returns."

U.S. v. Slaton, 801 F.3d 1308 (11th Cir. 2015) "The sentencing guidelines' net loss approach addresses how loss is to be calculated when the [defendant's] fraud or deceit involves a Government Benefits program. Because worker's compensation is a government benefit, the guidelines' net loss approach governs the loss calculation in a fraud case involving worker's compensation."

U.S. v. Zitron, 810 F.3d 1253 (11th Cir. 2016) The district court could use the full amount of the check cashing scheme, and not just the amount of money that was deposited in the bank accounts.

Sophisticated Means Specific Offense Characteristic

U.S. v. Simmerman, 850 F.3d 829 (6th Cir. 2017) Sophisticated means SOC applied based on concealment of embezzled funds. While the embezzlement itself was not sophisticated, the system of manipulating the computer system and creating a dormant account to hide the stolen money, and other methods employed to evade detection, were sophisticated.

U.S. v. Laws, 819 F.3d 388 (8th Cir. 2016) Court correctly applied the sophisticated means SOC. "In combination, the multiple bank accounts, the use of multiple P.O. boxes, the filing of returns with no preparer listed, and the filing of returns listing false addresses demonstrates a carefully-considered attempt to conceal the nature of the scheme, to make identifying its multiple perpetrators more difficult, and to partially obscure the identity of the victims. This, combined with the fact that at least six people were involved in executing the scheme and collectively managed to file more than 200 fraudulent returns claiming over $1.7 million in refunds, makes the offense conduct in this case 'notably more intricate' than the garden-variety conspiracy to defraud the United States or false claim to the IRS."

U.S. v. Feaster, 798 F.3d 1374 (11th Cir. 2015) Sophisticated means SOC (§2B1.1(b)(10)) applied based on the defendant's using her inside position at the VA, the steps she took to conceal the offense after stealing money, and her repeated criminal actions.

U.S. v. Sosa, 777 F.3d 1279 (11th Cir. 2015) Sophisticated means SOC (§2B1.1.(b)(10)) applied, as patients were paid in a "surreptitious manner" to receive fraudulent "treatments." Additionally, the defendant injected HIV-positive patients with inexpensive products such as vitamins, then billed Medicare for expensive injections and infusions.

Victims and Relevant Conduct

U.S. v. Moreno, 809 F.3d 766 (3d Cir. 2016). "Actual loss, in turn, is defined as 'the reasonably foreseeable pecuniary harm that resulted from the offense.'" (quoting U.S.S.G. § 2B1.1 cmt. n. 3(A)(i)). "Pecuniary harm is monetary harm or harm that is otherwise measurable in money. The bar is not high. For example, in the bank fraud context, monetary harm can include even 'the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts.' The reason for this is that 'an account holder who must spend time and resources to dispute fraudulent activity, recoup stolen funds, and repair his or her credit and financial security has suffered a monetizable loss that is a reasonably foreseeable and direct consequence of the defendant's theft or fraud.' The District Court noted that evidence had been

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introduced at trial that Moreno was responsible for over 110 fraudulent appraisals and that the presentence report indicated that the number was closer to 250 fraudulent appraisals."

U.S. v. Brandriet, 840 F.3d 558 (8th Cir. 2016) District Court did not commit clear error in determining that defendant's mail fraud crime, in which he acted as victim's insurance adjuster and stole insurance proceeds arising from accident in which van struck her house, resulted in substantial financial hardship to victim, and in applying the two-level enhancement for substantial financial hardship; defendant stole money earmarked for living expenses, rent and other living expenses are time sensitive, defendant withheld a check for four months and then only passed on roughly half the amount, and ultimate theft was of approximately $30,000.

U.S. v. Sammour, 816 F.3d 1328 (11th Cir. 2016) The district court correctly determined the number of victims SOC in an identity theft scheme. "Sammour's victims qualify as 'victims' under the guidelines because, although the defendants never 'used' their identifications to cash the Treasury checks, Sammour's cohorts 'used' their identifications to obtain the Treasury checks in the first place. Under §2B1.1, Sammour is responsible for all 'relevant conduct,' including the 'reasonably foreseeable acts' of his cohorts that occurred 'in furtherance of' the tax-fraud scheme and 'in preparation for' his crimes."

Identification

U.S. v. Kleiner, 765 F.3d 155 (2d Cir. 2014) Defendant used another person's name and address to create a counterfeit driver's license, which he then presented as his own to the bank victim of his fraud. The two-level sentencing enhancement for unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification was warranted. The counterfeit driver's license, and not simply the number it displayed, was a "means of identification" within meaning of the enhancement.

U.S. v. Suchowolski, 838 F.3d 530 (5th Cir. 2016) After almost a quarter-century's unlawful receipt of social-security benefits in the guise of a person who died in 1990, Ivan Suchowolski pleaded guilty to theft of government property. The plain meaning of the phrase "actual individual," as used in sentencing enhancement for unauthorized means of identification to obtain another means of identification, does not distinguish between living and deceased persons. As the PSR explained, Suchowolski used Stolzenback's name and social-security number to create additional means of identification, through the credit union and bank accounts.

U.S. v. Taylor, 818 F.3d 671 (11th Cir. 2016) District courts may apply the §2B1.1(b)(11)(B)(i) enhancement to a defendant's sentence—even when that defendant has also been convicted of violating § 1028A—if the government demonstrates, by a preponderance of the evidence, that defendant's relevant conduct included the "'production'" of an unauthorized access device." Taylor not only used 'a means of identification' (a stolen identity) to get access to another means of identification/unauthorized access devices (a credit card)—he [also] had the bank add him to the account and create a new credit card with his name on it." Thus, the defendant "willfully caused" or "induced" the production of the unauthorized access devices. The 2-level enhancement was warranted.

Fraud and Tax

United States v. Doxie, 813 F.3d 1340 (11th Cir. 2016) Following the majority of circuits, the court held that the district court did not err when it refused to group fraud counts and tax offense counts under §3D1.2. The offenses involved not only different victims but distinct offense behavior.

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Economic Crime:
Selected Cases Addressing Restitution

Recent Developments in Case Law related to restitution - In the past year, Circuits through the United States have issued a number of opinions related to sentencing and the guidelines, including cases on various aspects of restitution.

Nacchio v. U.S., 824 F.3d 1370 (Fed. Cir. 2016) Nacchio sought to offset his restitution with amounts forfeited to the government, after the government chose to funnel some of the forfeited money to the victims. Emphasizing that restitution and forfeiture serve "distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer," the court held the offset was not permitted. In addition, the forfeiture was pegged to Nacchio's ill-gotten profit, not to the victims' losses, which totaled more than 20 times that amount. Likewise, fines paid may not be deducted from restitution.

U.S. v. Finazzo, 850 F.3d 94 (2d Cir. 2017) Finazzo, while a merchandising executive for Aéropostale, used a company as a supplier in exchange for kickbacks. Finazzo and the co-conspirator from the supply company were both convicted. The Second Circuit noted that the scheme would not necessarily result in a loss to Aéropostale. "For instance, even without inflating the price—and therefore, without inflicting pecuniary loss on Aéropostale—South Bay would receive some profit from any sales to Aéropostale. A portion of Finazzo's worth to South Bay may, therefore, simply derive from steering additional business to South Bay at a non–inflated price." [] [T]he district court must employ a methodology to determine whether the entirety of Finazzo's kickbacks was solely derived from activity that caused loss to Aéropostale. We therefore vacate and remand the district court's restitution calculation regarding Finazzo and Dey, so that the district court may employ a methodology to determine what portion of Finazzo's gain is directly correlated with Aéropostale's loss, or employ some other means of calculating Aéropostale's loss."

U.S. v. Benns, 810 F.3d 327 (5th Cir. 2016) In an attempt to refinance a mortgage, Benns used false documents on a credit application to Bank of America. The application was denied and the property was eventually foreclosed. HUD paid Bank of America for the default and suffered a loss of over $50,000, the difference between what HUD paid Bank of America following foreclosure and the later sale price of the property. There was no evidence that the application resulted in a delayed foreclosure, and in any event, market conditions or other factors could have resulted in the loss. Restitution order was error.

U.S. v. Sheets, 814 F.3d 256 (5th Cir. 2016) If the court finds that more than one defendant has contributed to a victim's loss, the court may hold each defendant jointly and severally liable (each is responsible for payment of the full amount of restitution) or the court may apportion liability to each defendant based on the loss the defendant caused to the victim and the economic circumstances of each defendant. If the court uses a hybrid approach – apportioning liability but holding all defendants jointly and severally liable – the victim may not receive an amount greater than the victim's loss, but each defendant continues to be responsible for payment until the victim is fully repaid. Each defendant's payments are applied to the total sum owed by all defendants.

U.S. v. Fowler, 819 F.3d 298 (6th Cir. 2016) Two doctors were convicted of conspiracy to commit health care fraud involving selling fraudulent prescriptions for controlled substances on the street. The district court abused its discretion when it awarded restitution based on facts that did not have a sufficient indicia of reliability. Trial testimony supported the defendant's claim that only 20% of the prescriptions were illegitimate, yet the government sought and won restitution based on 50% of the total value of medication billed. Restitution also erroneously included prescriptions written by

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another doctor who was not a part of the conspiracy as well as prescriptions written before Fowler joined the conspiracy. The court also failed to account for prescriptions that were only partially fraudulent.

U.S. v. Litos, 847 F.3d 906 (7th Cir. 2017) Bank of America was not entitled to restitution in a mortgage fraud offense because the bank was complicit in the loss—"its reckless decision to make the loans without verifying the solvency of the would-be borrowers, despite the palpable risk involved in, for example, providing mortgage loans to a person who applies for six mortgages in ten days. Bank of America was deliberately indifferent to the risk of losing its own money, because it intended to sell the mortgages and transfer the risk of loss to Fannie Mae for a profit." The Court should have considered a fine, in the amount of the defendant's gain, rather than restitution.

U.S. v. Burns, 843 F.3d 679 (7th Cir. 2016) Burns was convicted of wire and mail fraud for making fraudulent misrepresentations when soliciting investments for his employer, USA Retirement Services ("USARMS"). Unbeknownst to Burns, the investment opportunity was fraudulent; USARMS's owners were operating a Ponzi scheme. The district court erred when it ordered Burns to make restitution in the amount of the entire $3.3 million the investors that he solicited lost as a result of the Ponzi scheme. The district court did not address proximate cause, therefore Burns "may have to pay more than he owes," which is an error affecting the "the fairness, integrity, and public reputation of judicial proceedings."

U.S. v. Yihao Pu, 814 F.3d 818 (7th Cir. 2016) Yihao Pu was convicted of possessing and transmitting trade secrets. He stole proprietary software from two companies' computers and used them to engage in high-volume trading of stocks, resulting in a $40,000 personal loss for Pu. The district court award restitution to one of the companies for forensics work and investigation of Pu's misconduct. The court also found that the intended loss was money the companies spent to develop the algorithms. "A restitution award may include costs incurred by a corporate victim in conducting an internal investigation of the offense. This may include attorney fees or fees paid to other professionals hired to participate in the investigation. However, "'the government must provide an explanation, supported by evidence, of how each professional's time was spent investigating the data breach, being certain that the evidence provides adequate indication that the hours claimed are reasonable.' Then, the court must ensure that the amount claimed was in fact incurred by the investigation of Pu's misconduct." The information the government submitted was insufficient to make these findings.

U.S. v. Titus, 821 F.3d 930 (7th Cir. 2016) Titus was convicted of bank fraud for a mortgage fraud scheme involving straw purchasers obtaining mortgages for multiple homes based on false information. The lenders lost money when "the mortgages were not fully recovered upon the sale or foreclosure of the properties." Titus sought to limit his liability to two fraudulent mortgage applications, but the government argued he was involved in eighteen. In support of this claim, a HUD case agent provided the probation office with a spreadsheet detailing the eighteen fraudulent loans, and the PSR adopted it, resulting in a loss calculation of more than $3,000,000. The government sought more than the loss amount in restitution. The Court of Appeals held that both the loss calculation and the restitution amount lacked factual support. "The district court merely adopted the figure contained in the government's sentencing memorandum and erroneously attributed it to the PSR. Without any factual support for the figure, we cannot evaluate whether $3,760,859 is a reasonable restitution amount." Further, "it is not our role to justify a sentence that lacks a sufficient explanation with our best guess for why the court imposed the sentence that it did."

U.S. v. Adejumo, 848 F.3d 868 (8th Cir. 2017) Restitution order reversed. The government failed to provide sufficient evidence of the ultimate losses defendant caused the victim banks. Banks' documentation showing initial losses did not sufficiently show how much each bank ultimately lost, and was insufficient because of the long delay between the offenses and the restitution hearing. Government agent testimony reflected that banks sometimes recover losses, bank officials merely estimated their ultimate losses, banks sometimes overstate their losses, and agent couldn't remember key details of his communications with banks.

U.S. v. Binkholder, 832 F.3d 923 (8th Cir. 2016) Binkholder was convicted of wire fraud for a scheme in which he took investors' money claiming they were participating in a lucrative real-estate investment scheme. The district court erred in finding that M.U. was a victim. Under restitution statutes, a "victim" is "a person directly and proximately harmed as a result of the commission of a Federal offense."

Economic Crime:
Selected Cases Addressing Restitution

Under the Sentencing Guidelines, a victim is "any person who sustained any part of the actual loss determined under [2B1.1] subsection (b)(1)." While the CVRA is intended to protect the rights of crime victims and ensure that they receive proper restitution for their injuries, the Guidelines are meant to assess the culpability of the defendant. For example, intended loss measures culpability but is not actual loss to a victim for restitution purposes. Also, amounts returned to a victim may offset restitution, but cannot be credited towards the Guidelines' loss calculation.

U.S. v. Carpenter, 841 F.3d 1057 (8th Cir. 2016) The government charged Carpenter with mail and wire fraud arising from a scheme in which he overpaid for commodities to the benefit of certain customers while receiving large payments of money from some customers. Restitution order vacated after the district court failed to directly address the claim that attorneys' fees incurred by the victim were unnecessary. Although the Court of Appeals had "specifically approved of the inclusion of attorney's fees and investigative costs in a restitution award when these losses were caused by the fraudulent conduct," the district court needed to determine "whether the attorney's fees incurred after the government initiated its own investigation were 'necessary' under § 3663A(b)(4)."

U.S. v. Lo, 839 F.3d 777 (9th Cir. 2016) "We have also developed a special notice requirement for appeal waivers relating to restitution orders, holding that in order for that waiver to be valid a defendant must be "given a reasonably accurate estimate of the amount of the restitution order to which he is exposed" at the time the defendant agrees to waive the appeal. [W]e subsequently concluded that a court exceeded its authority in ordering restitution for an amount that was neither clearly stipulated to in a plea agreement nor based on a judicial determination of actual damages after adequate notice to the defendant. "[S]ome precision in the plea agreement is necessary to have a knowing appeal waiver" in the restitution context because "there is neither a statutory limit nor any guidelines covering the amount of restitution orders."

U.S. v. Nosal, 844 F.3d 1024 (9th Cir. 2016) Expenses related to investigation and prosecution are excluded for loss calculations, but not from restitution, which seeks to make the victim whole, where the harm was the "'direct and foreseeable result' of the defendant's wrongful conduct...." Evidence must "demonstrate[e] that it was reasonably necessary for [the victim] to incur attorneys' and investigator's fees to participate in the investigation or prosecution of the offense." Reasonableness test includes whether the fee was reasonable, whether there was unnecessary duplication of tasks between the victim and the attorneys, and whether the outside attorneys were substituting for or duplicating the work of the prosecutors, rather than serving in a participatory capacity.

U.S. v. Thomsen, 830 F.3d 1049 (9th Cir. 2016) Thomsen was convicted on fraud and misuse of a U.S. passport by using the personal information of another person, a crime he committed alone using the mails. Separately, Thomsen was charged, along with three co-defendants, with conspiracy to commit a tax fraud scheme, accomplished by wire fraud, by using others' personal identification to file false returns and obtain tax refunds and tax preparation fees to which he was not entitled. The tax fraud charges were dismissed after his conviction on the passport fraud offense. Despite the charging of aggravated identity theft bearing similarities to the first offense, "[t]he district court clearly erred in holding that the conduct at issue in the second case was sufficiently 'related' to the conduct at issue in the first case to warrant inclusion of losses in the second case in the order for restitution pursuant to 18 U.S.C. § 3663A(a)(2). Consequently, although ordering restitution for related conduct that did not result in a conviction was within 'statutory bounds,' the order for restitution, here, was an abuse of discretion."

U.S. v. Courtney, 816 F.3d 681 (10th Cir. 2016) Defendant was convicted of wire fraud and sentenced to prison in addition to forfeiture of $1,601,825.84, the full value of the fraudulent wire transfers at issue in the underlying case, as well as $493,230.88 in restitution. He argued that the forfeiture order should have been reduced by the amount the lenders received from the properties through mortgage payments and the sale of the properties. The Court of Appeals held that an improperly calculated restitution order (an order to exact a material amount beyond what a statute permits) affects a defendant's substantial rights and undermines the fairness of the judicial proceeding (the third and fourth elements of the plain error standard).

U.S. v. Stein, 846 F.3d 1135 (11th Cir. 2017) In an effort to artificially inflate his company's stock value, Stein drafted three press releases with false sales figures. "The method for calculating actual loss, as opposed to intended loss,

Economic Crime:
Selected Cases Addressing Restitution

under the Sentencing Guidelines is 'largely the same' as the method for establishing actual loss to identifiable victims under the MVRA. [] Thus, it is unsurprising that to prove a victim suffered an actual loss under the MVRA, the government must establish both factual and legal causation in essentially the same manner as it must show causation under the guidelines—by proving but for and proximate causation." Information that two investors relied on the press release, and that some others relied on the press release among other publicly available information about the company, was insufficient to prove that more than 2,400 investors relied on the press releases.

U.S. v. Plate, 839 F.3d 950 (11th Cir. 2016) District Court abused its discretion by giving dispositive weight to the defendants' inability to pay restitution, which is not among the factors listed in § 3553(a), in his decision to impose a prison sentence, indicating that if she had paid back the restitution, he would have been "glad [] to give her probation" before the sentencing hearing. In addition, "the district judge offered to 'immediately convert' Plate's prison term if she paid the restitution at a later date."

GUIDELINE SCENARIOS – ECONOMIC CRIMES

For the following scenarios, assume that the defendants were over 18 years old when they committed the offenses, and that they all accepted responsibility for their offenses. Additionally, use the information in Appendix A to answer the questions regarding the scenarios:

Scenario #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 statutory maximum for § 1343 is 20 years. Which base offense level (BOL) applies at §2B1.1(a)?

Scenario #2
Defendant convicted of 18 U.S.C. § 1343 (Wire Fraud) which carries a 20-year statutory maximum; applicable guideline §2B1.1. Defendant was involved in a ponzi scheme in which he received funds and investments from the wire fraud scheme. Which base offense level (BOL) applies at §2B1.1(a)?

Scenario #3
Defendant convicted of 18 U.S.C. § 1956 (Money Laundering) which carries a 20-year statutory maximum; 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)?

Scenario #4
Defendant convicted of 18 U.S.C. § 371 - Conspiracy to Commit Mail Fraud. Over the course of several years, the defendant used her expertise at the Minnesota Department of Revenue to create false refunds for family members using false names and fictitious businesses. Using multiple schemes, the defendant embezzlement $1.9 million from the state of Minnesota. However, a search of bank records revealed approximately $500,000 in a savings account.

Scenario #5
Defendant convicted of 18 U.S.C. § 371 - Conspiracy to Commit Mail Fraud. Over the course of several years, the defendant used her expertise at the Minnesota Department of Revenue to create false refunds for family members using false names and fictitious businesses. Using multiple schemes, the defendant defrauded the state of Minnesota of $1.9 million. However, a closer analysis of her multiple false refund schemes, investigators learned she had applied for more than $4 million in refunds.

Scenario #6
Defendant orchestrated a fraudulent scheme in which he purported to turn coal byproducts into natural gas. Over the course of several years, the defendant raised approximately $57 million from more than 3,000 investors. Government records reveal approximately $30 million was used by the defendant in pursuit of his natural gas technology. However, the defendant reported he only earned $3.4 million from

his failed enterprise. The technology never worked and the defendant was arrested and convicted of multiple counts of Mail Fraud, Wire Fraud, and Tax Evasion. What is the loss amount?

Scenario #7

Same facts as #6. In addition, numerous victims submitted victim impact statements that included additional losses stemming from unpaid interest, embarrassment, and added stress due to their now precarious financial predicament. Can these additional losses be included in the total loss determination?

Scenario #8

Could you have a mortgage fraud case with $0 loss determination?

Scenario #9 and #10

Defendant is a medical equipment company owner. Convicted on multiple counts of health care fraud and conspiracy. Indictment stated defendant submitted $350,000 in fraudulent bills for power wheelchairs from July 2013 through July 2015. Defendant has records indicating $200,000 of the $350,000 billed was for legitimate services/wheelchairs. PSR also noted defendant submitted additional $150,000 in fraudulent healthcare bills in 2012.

Scenario #11

Defendant is convicted of Mail and Wire Fraud. Defendant defrauded customers of a travel agency and airlines through a scheme in which he collected payment for airline reservations that he canceled without his customers' knowledge. Because the customers had paper tickets in hand, many were not aware the tickets were void until they arrived at the airport. In some instances, customers were forced to purchase last-minute replacement tickets or forego their travel. In others, the airlines allowed the customers to travel on the voided tickets and received no compensation. All told, approximately 372 customers lost money through the City Travel scheme: five lost more than $7,000 apiece, 14 lost over $5,000, and 172 lost more than $1,000.

Scenario #12

Defendant is convicted of Identify Theft. The defendant stole names, Social Security numbers and security clearance levels of roughly 400 members of his former Army unit and sold the information of 98 people to others so they could create false IDs for militia members in case they "ever wanted to disappear and become someone else." The defendant believed he was selling the information to Utah-based militia members, but in reality, they were really undercover FBI agents. Would the defendant be subject to an increase for number of victims?

Scenario #13

Defendant convicted of bank fraud under 18 U.S.C. § 1344. Defendant used forged checks and a stolen identity to attempt bank fraud. In the process, he also used several phishing e-mails to gather information including on-line e-mail addresses and passwords, which then allowed him greater access to additional

accounts with which he could access and continue to perpetrate his scheme. Should the defendant receive an enhancement for sophisticated means?

Scenario #14

Defendant possessed 425 credit card numbers. However, he only sent 267 of those cards to a co-defendant to reencode the stolen credit card information onto professional looking counterfeit credit cards. What is the loss?

Scenario #15

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 personal use. He then also failed to report all of his income to the IRS, resulting in an outstanding tax obligation of $75,000.

Scenario 16, 17, and 18

Defendant, an investment advisor, defrauded a developmentally disabled woman. The defendant had been the investment advisor of the woman's father, and was introduced to the victim as "the person she could trust to manage her money after her father would no longer be able to do so." After the father passed away, the victim inherited her father's assets and the estate's executor spoke with the defendant several times about the importance of ensuring that her funds last as long as possible. Over the next two years, the defendant took nearly all the victim's money. He sold the holdings in the IRA account that was worth $164,000 and convinced the victim to write checks to him to invest in various ventures. He caused the victim to sell her condo and convinced her to move into a much smaller apartment in a more dangerous neighborhood. The defendant pled guilty to mail fraud, wire fraud, and money laundering and was sentenced to sixty months' imprisonment and restitution.

At sentencing, the court determined the loss at §2B1.1 was $575,000, based on the money stolen and various checks he cashed, which also included $24,000 in early distribution tax penalties, $1,000 in wire transfer fees and real estate fees of $5,000 in the loss calculation. The court included a +14 level increase for loss exceeding $550,000 and then also ordered restitution in the same amount of $575,000. Was the court's loss ruling correct? Why or why not?

RESTITUTION CASE STUDIES

An indictment charged Defendant **Smith** with one count of wire fraud and six counts of aggravated identity theft in violation of 18 U.S.C. §1028A. Smith pled guilty to six counts of aggravated identity theft pursuant to a plea agreement which required him to cooperate against a drug trafficking organization. **Smith** also agreed to waive his appellate rights and to pay full restitution to all victims. The government agreed to dismiss the wire fraud count at sentencing.

Smith swindled his victims by seeking monetary investments from friends and family for a sham real estate business. **Smith** claimed that he had set up a real estate and home remodeling company to flip houses in distressed, but up-and-coming neighborhoods. He claimed he needed funding to purchase foreclosed homes and the equipment and supplies needed to rehab the homes. In reality, **Smith** kept the funds for himself, purchasing an expensive car and designer clothing for himself.

In addition, **Smith** convinced his "investors" to give him access to their bank accounts and other personal information so that he could represent to venture capitalists that he had broader and deeper financial backing. This would help convince venture capitalists with deep pockets to make much larger investments into the business than he could obtain from friends and family. He also claimed that he would directly deposit his investors' profits once earned. **Smith** periodically deposited money into the accounts and claimed they were profits. In reality, he had used his friends' and families' personal information to obtain credit cards, get cash advances on those cards, and deposit some of it in his investors' accounts as "profits." He deposited most of the cash advances into accounts he created for himself without the victims' knowledge.

Smith at times drove the victims around town and showed them distressed properties he claimed to have purchased. **Smith** convinced **Victim Three** to further "invest" in the company by renting a 2014 Lamborghini Gallardo for a period of two months. **Smith** claimed that the car would benefit the business because it would positively influence other would-be investors and venture capitalists. **Victim Three** drove the car a few times, but never with a potential "investor." Most of the time, **Smith** drove the Lamborghini. **Smith** convinced **Victim Six** to lease a furnished office in a Class A building, at a cost of $5,000 per month. **Smith** said the office was to be used for the business, but, without **Victim Six's** knowledge, **Smith** used a locked closet in the office to store a distribution amount of heroin and hydrocodone pills, which he delivered to various drug traffickers while he claimed to be working on real estate/home remodeling projects. Six months into the one-year lease, **Smith** was arrested for fraud, and the government searched and seized the drugs. **Victim Six** was unable to get out of the lease, and paid $60,000 in rent for the full-year lease term.

At sentencing, the government sought $300,000 in restitution for the six victims. Which of the following will be included in the restitution order?

$60,000 invested in the company ($10,000 per victim)

$100,000 in cash advances from the credit cards Smith obtained using the victims' personal information

$80,000 ($1,200 per day for two months) in luxury car rental fees for Victim Three

$60,000 ($5,000 per month for 12 months) in rent for the office space for Victim Six

RESTITUTION CASE STUDIES

Defendant **Markus**, an investment advisor, defrauded the developmentally disabled daughter of one of his clients, Wellstone. As Wellstone's health began to decline, **Markus** represented himself to Wellstone and her son as "the person they could trust to manage the money after Ms. Wellstone would no longer be able to do so." After Wellstone passed away, her son inherited her assets. Because of the son's special needs, the estate's executor spoke with **Markus** several times about investing conservatively so that the funds would last as long as possible. Nonetheless, over the next two years, **Markus** took nearly all of the son's money. He sold the holdings in an IRA account worth $164,000 and further convinced the son to write checks to him to invest in various ventures. **Markus** also convinced the son to sell his condo and move to a much smaller apartment in a less desirable area. He took the proceeds from the sale rather than depositing them for the son's benefit.

The estate's executor became suspicious and began an audit of Markus's expenditures. **Markus** had sought to hide his theft by moving the money around different accounts and altering invoices and bills so that it would appear that the money was going to the son's medical care. The executor hired a forensic accountant to trace the transactions, eventually contacting the United States Attorney. The private accountant continued to monitor the case after **Markus** was charged, and gave periodic reports on the case's progress to the executor.

Markus eventually pled guilty to mail fraud, wire fraud, and money laundering and was sentenced to sixty months' imprisonment and restitution.

At sentencing, the court determined that the loss at §2B1.1 was $370,00, based on the money stolen and various checks Markus cashed. Markus's attorney has objected to the PSR's restitution figures, which, in addition to the $370,000, include the following costs paid out of the estate:

$24,000 in early distribution tax penalties;

$6,000 in wire transfer and real estate fees for the sale of the condo; and

$11,000 paid to the forensic accountant (34 hours at a rate of $325 per hour).

What is the proper amount of restitution?

ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING (2017)

Defendant Peter Meyers

Defense Counsel Paul Jones

AUSA Mary Brown

I.

Defendant **Peter Meyers** was charged in a multi-count indictment with conspiracy to distribute over 280 grams of crack cocaine, which (without a statutory enhancement) carries a mandatory minimum of ten years and statutory maximum of life without parole (LWOP). Four codefendants also were charged in the same indictment with the same conspiracy as well as with separate acts of distribution of over 280 grams of crack. The discovery in the case reveals that Meyers played a relatively minor role in the overall conspiracy (helping the leader of the conspiracy keep records of drug sales and also occasionally helping broker small drug deals via telephone) and did not ever personally handle any crack cocaine. The four codefendants all played more significant roles in the conspiracy than Meyers and each personally distributed over 280 grams. Meyers has two prior felony convictions in state court for distribution of very small amounts of crack cocaine (for which he received two short jail sentences) and, consequently, is eligible for the statutory sentencing enhancement of mandatory LWOP under sections 841(b) and 851. None of the other co-defendants have any prior drug convictions. In plea negotiations, Meyers' defense counsel, AFPD **Paul Jones**, got AUSA **Mary Brown** to agree not to seek any statutory enhancement based on Meyers' prior drug convictions, which would keep the statutory sentencing range at 10 years to life. Meyers then entered a guilty plea to the conspiracy count pursuant to a plea agreement whereby the prosecution agreed not seek a statutory enhancement under sections 841(b) and 851 and also not to oppose a sentence at the low-end of the applicable guideline range.

In the presentence report (PSR), the probation officer set forth a sentencing guidelines imprisonment range of 262 to 327 months because of Meyers' career offender status (after credit for acceptance of responsibility). AFPD Jones filed a motion for a sentence below the guidelines imprisonment range in which he requested a departure

and/or a variance on the grounds that: (1) Meyers' career offender status overstates the actual severity of his criminal history; and (2) there is an unfair disparity between Meyers' sentencing range and the sentencing range of his codefendants (none of whom are career offenders) because Meyers is being punished much more severely than others who are more culpable based on their more active roles in the drug trafficking conspiracy. The motion will be heard at the sentencing hearing.

After seeing the PSR's guidelines range, Meyers tells Jones that he wants to withdraw his guilty plea, but Jones convinces him that it would not be in his best interest to do so since a conviction at trial likely would result in a sentence of at least 30 years. At the sentencing hearing, the court asks Meyers if he has anything to say prior to being sentenced. Jones reminds the court that the motion for a departure or variance is pending, but the court, while acknowledging that it will rule on the motion shortly, again asks Meyers if he has anything he would like to say. Meyers then tells the court that he would like to withdraw his guilty plea on the ground that Jones had represented to him that the plea agreement prohibited the enhancement of his sentence on the basis of his prior convictions and that he understood this to mean that he would not be sentenced as a career offender under the sentencing guidelines.

When the court asks AFPD Jones for a response, Jones states that the plea agreement explicitly provides only that there would be no *statutory* sentencing enhancement and that he had reviewed the guidelines with Meyers and given him Jones' "best estimate" of the applicable guideline range prior to the guilty plea (although Jones does not tell the court what that estimate had been). Jones then proceeds to argue in support of the motion for a departure or variance and asks for a sentence of 120 months.

ETHICS SCENARIOS

A. Should Jones have asked for a recess to discuss this matter with Meyers before saying anything to the court about Jones and Meyers' communications?

B. Should Jones have told the court about his pre-plea discussions with Meyers?

C. Should Jones have argued Meyers' motion to withdraw the guilty plea as opposed to arguing the motion for a departure or variance?

D. What are Jones's ethical obligations to Meyers as well as to the court in these circumstances?

II.

Defendant **Peter Meyers**, aged 36 and lacking a criminal record, was charged in a criminal complaint in federal court with three counts of armed bank robbery (involving three different banks) and three corresponding section 924(c) counts (alleging that Meyers had brandished a 9-mm pistol during each of the three robberies). Conviction on all six counts would effectively result in a life sentence (a mandatory 57 years of imprisonment on the three section 924(c) counts to run consecutively to the prison sentence for the bank robberies). Although Meyers did not confess and no eyewitness could identify him as the robber, the prosecution's evidence of Meyers' guilt of the three armed robberies was very strong, including: video surveillance from the three banks that clearly show a white male robber with the same height and body type as Meyers, who is a white male (the robber wore a Halloween mask during each robbery so his face could not be identified); cell-tower evidence from Meyers' cell phone records showing that his cell phone (seized by police when he was arrested) was located very near each bank at the time of each robbery (the three banks were located many miles apart); dozens of $20, $50, And $100 bills with serial numbers matching the money taken from the three banks found in Meyers' wallet, car, and apartment, including some with purple dye stains from a dye pack that had exploded during the third robbery; and a loaded stainless steel 9-mm pistol found in Meyers' car that appears to be the same type as the one brandished by the robber during each of the three robberies (as shown on the video surveillance). In addition, a witness on the street had seen an unidentified person wearing a Halloween mask run out of a bank, get into a car, and drive away at a high rate of speed and had taken a photo of the car's license plate with her iPhone. The license plate was registered in the name of Meyers' sister. FBI agents were thus able to identify Meyers as a suspect.

After being arrested on the complaint, appointed counsel, and having a preliminary hearing in which the foregoing evidence was introduced, Meyers briefly met with his defense attorney, AFPD **Paul Jones**. Meyers angrily asserted that he was innocent of all three armed robberies. He offered no explanation for the cell tower records, his sister's car being identified outside the third bank, and the bank money found in his possession other than to insist that it was a "sheer coincidence or maybe I'm being set up for some unknown

unreason." Meyers also said he had been unemployed during the past two years and had spent virtually all of his time alone in his trailer, and thus would have no way to prove an alibi defense with any concrete evidence. When Jones brought up the issue of whether he should seek a plea bargain to avoid what would be a virtual life sentence for Meyers if he were convicted of three section 924(c) charges, Meyers angrily responded, "I told you I am innocent. I am not pleading guilty to something I didn't do." Jones said that he would continue investigating the case and also carefully examine all of the prosecution's evidence disclosed during pretrial discovery.

After he returned to his office, Jones telephoned the prosecutor, AUSA **Mary Brown**, and asked to arrange for a time for Jones to see the discovery. Brown responded to Jones that, "we can arrange for that after I get an indictment, but at this point I will offer your client a plea bargain offer that may make it unnecessary: if he agrees to waive the indictment, proceed on an information, and plead guilty to the three bank robberies and a single section 924(c) count, I will drop the other two section 924(c) counts. His likely guideline range will be 70-87 months with acceptance of responsibility,[1] so his total prison sentence would be around 13-14 years with the consecutive seven-year section 924(c) sentence for brandishing a firearm." She also said that, "This offer is only good for a week. I am going to the grand jury one week from today to obtain an indictment. If he doesn't agree to the deal, I will get an indictment with all six counts and thereafter won't drop any of them." Jones told Brown that he would give her a response to her plea offer within seven days.

[1] In none of the three robberies did the robber injure or restrain anyone, and in each robbery the amount of money taken was less than $20,000. The offense level for two of the counts thus would be 27 (base offense level of 20 +2 for a financial institution +5 for brandishing a firearm), and the offense level for the count with a corresponding section 924(c) charge would be 22. Because the three bank robbery counts would not be "grouped," 3 additional levels would be added based on 2-½ "units." After 3 levels off for acceptance of responsibility, the final offense level for the three bank robbery counts would be 27, with a corresponding guideline range of 70-87 months (CHC I).

A. What ethical obligation does AFPD Jones have regarding AUSA Brown's plea bargain offer? Could Jones ethically advise Meyers to accept the plea offer without Jones conducting any additional investigation and without actually reviewing the discovery (to which he is not entitled under Fed. R. Crim. P. 16 until after an indictment or information has been returned)?

B. Assume Jones conveys the plea bargain offer to Meyers within the seven-day period and that Meyers adamantly responds, "I told you I'm not taking any plea bargain. I'm innocent." Does Jones have any additional ethical or constitutional obligation (under the Sixth Amendment) to attempt to persuade Meyers to consider the plea bargain offer before it expires?

C. Assume that Jones did not convey the plea offer to Meyers within the seven-day period and that AUSA Brown thereafter withdrew the offer as promised after going to the grand jury and obtaining a six-count indictment. Further assume Meyers went to trial, was convicted of all six counts, and received a prison

sentence of 97 months for the three robberies with a consecutive 57-year sentence for the three section 924(c) counts (for a total sentence of around 65 years). After overhearing a remark by AUSA Brown to Jones made as she was leaving the courtroom following sentencing, Meyers for the first time learned that Brown had made a plea bargain offer to Jones and that Jones had failed to convey the offer to Meyers. Does Meyers have any constitutional basis to challenge his 65-year sentence in a motion for a new trial or section 2255 motion?

III.

Peter Meyers, a 20 year-old heroin addict with no criminal record, was arrested by DEA agents during their execution of a search warrant at a drug stash house. At the time of the raid, Meyers was in the house assisting the home's owner, his second cousin, package heroin for sale. In exchange for assisting his cousin, Meyers was to receive heroin for his own use. At the time of the agents' raid, Meyers' cousin temporarily had left the house and thus was not arrested by the DEA. After he learned of the search of his house, Meyers' cousin fled and remained at large. In the room in which Meyers was packaging heroin when he was arrested, an unloaded single-barrel, single-shot .410 shotgun (the smallest caliber shotgun, typically used for hunting small game) was leaning against the wall of the room in plain view. The agents did not find any unused shotgun shells in the house. Inside shotgun was a single, spent shell. The agents determined that this shell had contained "No. 9 birdshot," the smallest size pellets available. The agents seized a total of 435 grams of heroin as well as the .410 shotgun. Meyers was the only person whom they arrested.

ETHICS SCENARIOS

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 an unloaded .410 shotgun in the room in which your client was packaging heroin. If your client pleads guilty to the heroin charge 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 Brown as follows: "He'll take the deal, but I would like to avoid mentioning the fact that the unloaded shotgun was in the house. Can your factual basis in the plea agreement omit mention of the shotgun and also can you and your agent not provide the probation officer information about the shotgun being in the room? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify him for the safety valve."

A. Assume that AUSA Brown is willing to consider Jones's proposal. Could Brown ethically enter into such an agreement to withhold evidence of the unloaded .410 shotgun from the probation officer and court?

B. 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 when he was packaging the heroin. It's my understanding guns are tools of the trade for drug dealers." How should AFPD Jones respond? How should AUSA Brown respond?

IV.

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?

V.

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).

ETHICS SCENARIOS

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?

2017 National Seminar

Guns and Drugs:
2017 Annual National Seminar

Defendants charged with drug trafficking offenses in federal court are often also charged with firearms offenses in connection with drug trafficking. This document highlights the interplay between the two.

§2D1.1(b)(1) Weapon Enhancement:

§2D1.1(b)(1) Weapon Enhancement:

- If a dangerous weapon (including a firearm) was possessed, add 2 levels.
- Include all firearms that are part of relevant conduct including:
  - All weapons the defendant possessed, including weapons outside the offense of conviction.
  - In some cases, weapons possessed by co-defendants.
- Enhancement applies if the weapon is present, unless it is clearly improbable that the weapon was connected with the offense. *See Application Note 11(A).*

§2K2.1(b)(6) Use of Firearm "In Connection With" Another Offense:

§2K2.1(b)(6): Use of Firearm "In Connection With" Another Offense

- Add 4 levels if the weapon was used in connection with another felony offense.
  - Underlying offense can be any federal, state, or local offense punishable by more than one year, regardless of whether the defendant was charged or convicted of the underlying offense. *See* Application Note 14(C).
- Firearm must have facilitated another offense; however, the other offense cannot be another firearms offense.
- Special rules (Application Note 14(B)):
  - In a drug trafficking offense, the firearm must be in close proximity to the drugs.
  - In a burglary offense, the enhancement applies if the firearm stolen during the course of a burglary.
- Enhancement applies to firearms in the indictment as well as other firearms as part of relevant conduct.

§2K2.1(c)(1): Cross Reference

§2K2.1(c)(1): Cross Reference

- Cross reference only applies to firearms in the count of conviction.
- Cannot bring in relevant conduct.

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Tips for Guideline Application

- Both guidelines consider "expanded" relevant conduct, that is, similar conduct that is part of the same course of conduct, common scheme or plan as the offense of conviction.
- Base offense levels at §2K2.1 determined by factors such as:
  - Status (prohibited person)
  - Type of firearm (e.g. large-capacity)
  - Number and type of prior conviction ("crime of violence"/"controlled substance offense").
- In a drug trafficking offense, the firearm must be in close proximity to the drugs.
- Firearm must be charged in the offense of conviction to apply the cross reference at §2K2.1.
- Weapon enhancement applies at §2D1.1 if firearm is present, unless clearly improbable it is connected with the offense.
- Do not apply weapon enhancements for underlying offense when defendant is also convicted of 18 U.S..C. § 924(c).

Common Statutes

- 21 U.S.C. § 841 (a)(1) (Distribution)
- 21 U.S.C. § 846 (Attempt and Conspiracy to Distribute)
- 18 U.S.C. § 922(g) (Possession of a Firearm by a Prohibited Person)
- 18 U.S.C. § 924(c) (Possessing a Firearm in Furtherance of a Drug Crime)

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Guns and Drugs:
Selected Cases Addressing §2K2.1 and §2D1.1

Selected Case Law Related to Firearms and Drug Trafficking Offenses.

§2K2.1(b)(5) Trafficking of Firearms:

Applying Enhancement

U.S. v. Taylor, 845 F.3d 458 (1st Cir. 2017) (affirming enhancement, finding that the defendant knew or had reason to believe that the person he transferred the sawed-off shotgun to would use the weapon illegally based on the following factors: the sale took place in a private home, not a gun store; the transaction was made in cash; the gun sold was a sawed-off shotgun, which is illegal to possess in almost all situations; the defendant knew the buyer was going to resell the weapons; and, the buyer told the defendant during one of their prior gun sales that he was going to remove the serial number).

U.S. v. Torres, 644 F. App'x 663 (6th Cir. 2016) (unpublished) (enhancement applied because the defendant knew about or had reason to believe the purchasers planned to use the firearms for an unlawful purpose, based on the clandestine nature of the dealings and comments by the undercover team, the fact that the firearm was concealed in a plastic bag, and defendant's statement that the revolver would not leave casings that could be traced to an owner).

U.S. v. Fields, 608 F. App'x 806 (11th Cir. 2015) (unpublished) (enhancement can apply to a defendant who sells a gun to an undercover officer if the defendant believes that the guns will be transferred to a convicted felon). *See also U.S. v. Henry*, 819 F.3d 856 (6th Cir. 2016)).

Rejecting Enhancement

U.S. v. Brewington, --F. App'x--, 2017 WL 1363884 (4th Cir. 2017) (unpublished) (evidence before the district court was insufficient to demonstrate that the defendant knew or had reason to believe the firearms would be possessed unlawfully or that the recipient intended to use or dispose of them unlawfully).

U.S. v. Henry, 819 F.3d 856 (6th Cir. 2016) (court erroneously applied enhancement because the defendant did not sell two guns to one individual, but rather sold one gun each to two people. Sixth Circuit held that the guideline requires the defendant to sell multiple firearms to a single individual).

U.S. v. Johns, 732 F.3d 736 (7th Cir. 2013) (holding it was impermissible double counting to apply both the trafficking enhancement and the enhancement for use of a firearm in connection with another felony offense).

U.S. v. Arechiga-Mendoza, 566 F. App'x 713 (10th Cir. 2014) (unpublished) (enhancement for trafficking was not supported by the facts where the district court failed to make a finding about the defendant's knowledge of the recipients' intentions).

§2K2.1(b)(6): Possessing firearm in connection with another felony or transferring firearm with knowledge or reason to believe it would be possessed in connection with another felony

Applying Enhancement

U.S. v. Posey, 644 F. App'x 253 (4th Cir. 2016) (unpublished) (finding that the firearm had the potential to facilitate the offense of promoting prostitution because the weapon would have encouraged the payment of money owed and would have provided protection to Posey).

U.S. v. Pawlak, 822 F.3d 902 (6th Cir. 2016) (defendant had reason to believe that he was transferring a firearm to a person whose possession would be unlawful because of: the surreptitious nature of the sales (wrapping firearms in a blanket or paper bag, conducting transactions in the privacy of Pawlak's bedroom, and refusing to count the money outside); the "quantity and quality" of the firearms (selling six semi-automatic guns with ammunition to the same buyer on four occasions within 60 days); and the price (double the market value). Additionally, the undercover officer told Pawlak that he left his "truck running because, uh, in case something goes wrong I have to dash for it," implying that he was prohibited from buying the firearm.).

U.S. v. Henry, 819 F.3d 856 (6th Cir. 2016) (affirming enhancement because the joint sale of drugs and firearms has the potential to make a drug transaction easier—thus facilitating it).

Guns and Drugs:
Selected Cases Addressing §2K2.1 and §2D1.1

U.S. v. Johnson, 846 F.3d 1249 (8th Cir. 2017) (affirming enhancement because the district court did not rely solely "on a temporal and spatial nexus between the drugs and firearm." There was significant evidence that the firearm facilitated or had the potential to facilitate the possession with intent to distribute of heroin).

U.S. v. Parrow, 844 F.3d 801 (8th Cir. 2016) (affirming enhancement when the other felony offense was carrying a concealed firearm, which does not fall under the exception of "firearm possessions" offenses).

U.S. v. Chadwell, 798 F.3d 910 (9th Cir. 2015) (enhancement applied based on following facts: gun was found near console of the car from which defendant sold drugs; defendant was under a restraining order for threats of violence; and defendant made every effort to keep police from getting into the car after a traffic stop).

United States v. Tobanche, 643 Fed. Appx. 781 (10th Cir. 2016) (unpublished) (applying the enhancement when drugs and guns were found the defendant's car).

Rejecting Enhancement

U.S. v. Young, 811 F.3d 592 (2d Cir. 2016) (when a defendant receives a sentencing enhancement for "trafficking" in firearms under § 2K2.1(b)(5), Application Note 13(D) prohibits imposition of an enhancement under § 2K2.1(b)(6)(B) based on the defendant's transfer of a firearm with reason to believe it will be used in another felony offense).

U.S. v. Velasquez, 825 F.3d 257 (5th Cir. 2016) (court should not have applied both §2K2.1(b)(5) and (b)(6) because the felony offense forming the basis of its application was the same trafficking offense used to apply the in connection with enhancement and was thus double counting).

U.S. v. Pimpton, 589 Fed. App'x 692 (5th Cir. 2015) (the mere fact that a weapon was found in close proximity to body armor did not mean that the weapon "facilitated" the possession of the body armor).

U.S. v. Gates, 845 F.3d 310 (7th Cir. 2017) (receiving a firearm in exchange for drugs does not support the enhancement as the firearm did not facilitate the sale).

U.S. v. Clinton, 825 F.3d 809 (7th Cir. 2016) ("It is the close proximity that allows the court to find such a connection without any further evidence—the proximity alone provides the evidence that the two are connected. If that 'close proximity' is lacking, then the connection may still be established, but it must be determined through evidence of such a connection.").

U.S. v. Arthurs, 647 F. App'x 846 (10th Cir. 2016) (). rejecting the enhancement because the underlying offense, unlawful possession of antidepressants, was not a felony

§2D1.1(b)(12) Maintaining a premises for purposes of manufacturing or distributing a controlled substance

U.S. v. Carter, 834 F.3d 259 (3d Cir. 2016) (affirming enhancement because the defendant controlled the activities at each location, ensured that his employees were at the house working, oversaw the financial management of both locations, and directed individuals to pay the rent).

U.S. v. Clark, 665 F. App'x 298 (4th Cir. 2016) (unpublished) (affirming enhancement where even though defendant did not own apartment, she regularly stayed there, she was integral to rampant drug activity at the apartment as she occupied it with full knowledge of the drugs, money, and firearms stored there).

U.S. v. Guzman-Reyes, 853 F.3d 260 (5th Cir. 2017) (affirming enhancement even though defendant's name was not on a formal lease agreement as defendant had unrestricted access to the premises and maintained a physical storage space in exchange for a monthly payment).

U.S. v. Romans, 823 F.3d 299 (5th Cir. 2016) (affirming enhancement based on the following factors: defendant's primary use of the body shop was to receive and distribute large quantities of marijuana; he had no role in the legitimate operations of the shop; and at his direction boxes of marijuana were taken to there for delivery to his customers).

U.S. v. Snelson, --F. App'x--, 2017 WL 1488242 (5th Cir. 2017) (unpublished) (affirming enhancement because defendant would sell methamphetamine from various motel rooms, which he leased for up to a week at a time, all for the purpose of distributing drugs).

U.S. v. Winfield, 846 F.3d 241 (7th Cir. 2017) (affirming enhancement even though the defendant used the apartment as a place to live because the record showed that the police seized drugs from the garage, defendant flushed drugs down the toilet when the police approached, an informant bought drugs from the defendant in the apartment four times and spotted additional drugs at each sale. The court added: "nothing in the text of §2D1.1(b)(12) or its application note requires a sentencing court to find that the defendant stored multiple kilograms of drugs over an extended period of time; rather, the court needs to find that a drug-related activity was just one of the defendant's "primary or principal" uses for the premises—as opposed to an "incidental or collateral" (*See also, U.S. v. Thomas*, 845 F.3d 824 (7th Cir. 2017)).

Guns and Drugs:
Selected Cases Addressing §2K2.1 and §2D1.1

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U.S. v. Evans, 826 F.3d 934 (7th Cir. 2016) (affirming enhancement even though defendant used the apartment as a residence because drug activity need not be the exclusive use of the premises for the upward adjustment to apply. "[A] premise can have more than one primary use (drug distribution and residence), and, as long as it is more than 'incidental or collateral,' drug distribution does not have to be the 'sole purpose.'" That drugs were stashed in the apartment shows "storage of a controlled substance for the purpose of distribution.").

U.S. v. Job, 851 F.3d 889 (9th Cir. 2017) (reversing enhancement because the PSR indicated only that methamphetamine had been stored in defendant's kitchen and living room, and there was no evidence at trial or at sentencing that the defendant ever distributed methamphetamine out of his home. The government had not met its burden to prove that the defendant maintained the premises for the primary purpose of manufacturing or distributing methamphetamine).

U.S. v. Marius, --F. App'x--, 2017 WL 473841 (11th Cir. 2017) (unpublished) (affirming enhancement where defendant admitted he sold drugs from house, controlled drugs available for sale at the house, and referred to the house as his "crib").

GUIDELINE SCENARIOS - GUNS AND DRUGS

Scenario #1

Defendant Hill pled guilty to the following offenses:

- Conspiracy to Distribute Methamphetamine; in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - 0 - 20 years' imprisonment
- One count Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and,
- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

The offense conduct involved a total of 35 grams of methamphetamine mixture (not methamphetamine actual or "Ice") and two firearms. The drugs and the guns were found in a safe in the defendant's home. The Indictment for all three offenses only listed one of the two firearms found in the safe.

1. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

2. Does the SOC for using or possessing a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

3. Does the cross reference at §2K2.1(c)(1) apply?

Scenario #2

Defendant Ruger pled guilty to one count Unlicensed Dealing in Firearms which charged that over a three-year period, the defendant, who was not a licensed firearms dealer, engaged in the business of dealing in firearms. During that time, Ruger purchased approximately 300 firearms from numerous Federal firearms licensees (FFLs) and sold them to individuals online and at local gun shows. On all the occasions that Ruger sold firearms, he failed to conduct background investigations before selling the firearms and asked for nothing more than state identification

cards from the purchasers. Some of the firearms were used by the purchasers for unlawful purposes.

1. Does the SOC for trafficking of firearms at §2K2.1(b)(5) apply in this case?

Scenario #3

Defendant Washington pled guilty to one count Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Washington was arrested after a vehicle he was driving was pulled over for a traffic violation. The officer learned there was an active warrant for Washington, so he placed the defendant under arrest. During a search of the vehicle, officers recovered the following items: a plastic bag in the overhead sunglass compartment that contained eight 50mg Tramadol pills, 10 30mg Oxycontin pills, seven 325mg Oxycontin pills, and a second small bag that contained crack cocaine (less than 5 grams). A loaded .40 caliber pistol and a digital scale were found in the locked glove compartment.

1. Does the SOC for use of possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

Scenario #4

Defendant Stacy pled guilty to two counts Distribution of Heroin, in violation of 21 U.S.C. §§(a)(1) and (b)(1)(C), and one count Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Stacy sold 3 grams of heroin to a confidential source who was working with law enforcement on one occasion, and sold 9 grams of heroin to the same undercover source on a second occasion. A few days later, officers conducted a traffic stop of the defendant's vehicle from which they seized a cell phone and U.S. Currency. Most of the U.S. Currency recovered was found to be buy money that was utilized during controlled purchases of heroin from the defendant.

Search warrants were subsequently executed for his vehicle and residence, resulting in the recovery of the following:

- A .40 caliber pistol with a magazine and ammunition located in a console of the couch in the living room;
- A .38 caliber pistol with ammunition located in the dog house in the rear yard; four 12-gauge shotgun shells, located in the dog house in the rear yard; and,
- One plastic bag containing 28.7 gross grams of marijuana, located in the living room. The defendant indicated that the marijuana was for his personal use.

1. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

2. Does the cross reference at §2K2.1(c)(1) apply?

Scenario #5

Defendant Emerson was convicted of the following:

- Unlawful Importing, Manufacturing, or Dealing in Firearms in violation of 18 U.S.C. § 922(a)(1)(A) - Applicable guideline is §2K2.1
- Unlawful Possession and Transfer of a Firearm in violation of 26 U.S.C. §§ 5845(a)(2) and (d), 5861(d), and 5871 - Applicable guideline is §2K2.1, and
- Possession of a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - Applicable guideline is §2D1.1

During approximately a one-month period, Emerson sold undercover ATF agents, and/or confidential informants a total of six firearms and .15 grams of heroin. The sale of the .15 grams of heroin did not occur on the same day as any of the sales of the firearms.

GUIDELINE SCENARIOS - GUNS AND DRUGS

The defendant, the ATF undercover agent, and the confidential informant had numerous telephone conversations and exchanged numerous texts, during which they discussed Emerson selling both guns and illegal drugs (heroin and cocaine) to the ATF undercover agent; however, Emerson was never observed to be in possession of weapons and illegal drugs at the same time.

1. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

2. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

Scenario #6

Defendant Dane was convicted of the following counts:

- Conspiracy to Possess with Intent to Distribute Heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) - Applicable guideline is §2D1.1, and
- Felon in Possession of a Firearm (2 counts) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(1) - Applicable guideline is §2K2.1

During a two-year period, Dane conspired with others to possess with intent to distribute and to distribute heroin, cocaine, and marijuana. Dane was a middle-level participant in the conspiracy. At one point, he was arrested after his vehicle was stopped for traffic violations, at which time he was found to be in possession of heroin, cocaine, marijuana, a large amount of cash, and a .38 caliber revolver. The gun was found to have an obliterated serial number and to be stolen.

The following day, a search warrant was executed at Dane's home, which resulted in the recovery of additional heroin, cocaine, marijuana, scales, more cash, and three additional firearms. One firearm was found to be stolen and one was a semiautomatic firearm that was loaded with a magazine containing 17 rounds of ammunition.

Dane's criminal history computation resulted in a total of 7 points. A previous felony conviction for a controlled substance offense accounted for three of those points.

1. What is the Base Offense Level at §2K2.1?

2. Would the defendant's Base Offense Level change if his previous felony conviction for a controlled substance offense had not been assigned any criminal history points?

3. Do the SOC's for a firearm being stolen at §2K2.1(b)(4)(A) and a firearm having an altered or obliterated serial number at §2K2.1(b)(4)(B) apply in this case?

4. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

Scenario #7

Defendant Christopher was convicted of the following counts:

- Possession with Intent to Distribute Heroin in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B),
- Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and
- Felon in Possession of Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Christopher sold large amounts of heroin and cocaine using three different residences, none of which were owned or occupied by him. Officers conducted surveillance of Christopher for

approximately one week, during which time they observed many different people entering one of the residences and leaving a short time later. They also observed Christopher engaging in hand-to hand transactions with others while sitting in his car that was parked at one of the residences.

Officers conducted a traffic stop of Christopher's vehicle, and later searched that vehicle and the residences that he was using. The officers found a handgun in a hidden compartment of the Christopher's vehicle and a significant amount of cash on him. They also found the following items at the residences:

- First residence- A firearm and mail addressed to the defendant
- Second residence- Drug weighing and packaging material and equipment as well as a firearm
- Third residence- Numerous bags containing illegal drugs located in the dining room and kitchen along with a firearm located in the basement.

The agents received the results from the crime lab for the drugs seized from the third residence, which are as follows: 150 grams of heroin, and 200 grams of cocaine.

1. What is the total marijuana equivalency of all the drugs in this case?

2. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

Scenario #8

Defendant Phillips pled guilty to the following counts:

- Conspiracy to Possess with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) - Applicable guideline is §2D1.1
- Felon in Possession of a Firearm 18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Applicable guideline is §2K2.1, and

GUIDELINE SCENARIOS - GUNS AND DRUGS

- Money Laundering (3 counts) in violation of 18 U.S.C. § 1957 - Applicable guideline is §2S1.1

From January 1, 2013, to August 14, 2016, twelve defendants conspired to possess with intent to distribute and to distribute at least 5 kilograms of cocaine.

Investigation revealed that Phillips was one of the two main cocaine suppliers in the conspiracy, and that he was a leader or organizer. A traffic stop was conducted on Phillips' vehicle. The officer detected a strong odor of marijuana and asked Phillips to exit the vehicle, but he refused and was forcibly removed from the vehicle and arrested.

Phillips had 54.19 grams of heroin in his pants pocket. A large amount of cocaine (206.85 grams) was seized from the back seat of his vehicle. A search of Phillips' residence located the following:

- An additional 251.96 grams of heroin,
- A digital scale,
- Packaging material,
- A heroin grinder, and
- A stolen handgun.

Further investigation into Phillips' activities revealed that he laundered his personal drug proceeds through a local casino on three different occasions, totaling $72,730.

1. What is the quantity of drugs that will be used to calculate the guidelines at §2D1.1?

2. Is the Chapter Three adjustment for Aggravating Role (§3B1.1) applicable in this case?

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2016 Immigration Amendment:

§2L1.2 - Overview, Summary, Calculations, and Application Tips

The Commission amended §2L1.2 - the guideline for Unlawfully Entering or Remaining in the United States. Section 2L1.2 now focuses on three factors: 1) the number of prior illegal reentry convictions, 2) the length of prior felony sentence before first deportation, and 3) the length of felony sentence after reentry.

§2L1.2 Summary

The amendment eliminates the "categorical approach"

Enhancements are based on the length of the prior sentence imposed

Accounts for prior criminal conduct in a broader and more proportionate manner

Reduces the level of the most severe enhancements in the current guideline

Includes a new enhancement for prior illegal reentry convictions

Has separate enhancements for other prior convictions occurring before and after a defendant's first order of deportation or removal

Quick Summary

• Base Offense Level = 8

• (b)(1) Convictions for prior illegal reentries
+4 or +2

• (b)(2) Convictions BEFORE the defendant's first order of deportation
+10, +8, +6, +4, or +2

• (b)(3) Convictions AFTER the defendant's first order of deportation
+10, +8, +6, +4, or +2

For any of these enhancements to apply, the conviction(s) must receive criminal history points.

"Voluntary returns" do NOT count as "Deportations"

The date of the defendant's first order of deportation or removal is an important fact to determine.

§2L1.2 Determinations

(b)(1): Prior Illegal Reentry Offenses

Apply the greater:
(b)(1)(A) – One or more felony convictions for an illegal reentry offense. . . . . .+4
(b)(1)(B) – Two or more convictions for misdemeanors under 8 USC § 1325(a) (illegal entry). . . . . .+2

(b)(2): If before the first order of deportation, the defendant sustained:
• *Apply the greatest:*
Felony sentence 5 years or more. . . +10
Felony sentence 2 years or more. . . .+8
Felony sentence 13 mths or more. . . +6
Any other felony conviction. . . . . .+4
3 or more misdemeanor COVs or drug trafficking. . . . . .+2

DO NOT use illegal reentry convictions for this SOC

(b)(3): If after the first order of deportation, the defendant engaged in criminal conduct resulting in:
• *Apply the greatest:*
Felony sentence 5 years or more. . . +10
Felony sentence 2 years or more. . . .+8
Felony sentence 13 mths or more. . . +6
Any other felony conviction. . . . . .+4
3 or more misdemeanor COVs or drug trafficking. . . . . .+2

DO NOT use illegal reentry convictions for this SOC

Application Tips

"Illegal reentry offense" means 8 USC § 1253 (failure to depart), or 8 USC § 1326 (illegal reentry), or a second/-subsequent offense under 8 USC § 1325(a) (illegal entry)

For offenses committed prior to age 18, the conviction must be an adult conviction under that jurisdiction

Priors have to be countable under criminal history §4A1.1(a), (b), or (c), and are also used for criminal history points

Prior sentence length includes imprisonment given upon revocation of probation, parole or supervised release

If a prior "single sentence" includes both an illegal reentry offense and another felony offense, the respective offenses are used in the application of SOC (b)(1) and (b)(3), if independently the prior would have received criminal history points

There are DEPARTURE provisions addressing:

Seriousness of a prior offense;

Time served in state custody; and

Cultural assimilation.

Of note, in ALIEN SMUGGLING offenses, we amended the definition of minor to include person under 18, and now direct you to apply the minor SOC if "the offense involved" smuggling a minor who was not accompanied by "a parent, adult relative or legal guardian." Finally, we clarified that sexual abuse of an undocumented person warrants the 4-level enhancement for "serious bodily injury."

2016 Immigration Amendment:
§2L1.2 - Frequently Asked Questions

2017 National Seminar

1. Currently, §2L1.2 (Unlawfully Entering or Remaining in the United States) looks to the physical removal (deportation of the defendant). The amendment to §2L1.2, however, looks to something different: the "order of removal or order of deportation." Is it true that the amendment no longer considers the actual physical removal of the defendant?
Yes, the guideline looks to the order of deportation or removal, not the physical removal of the defendant.

2. Is an "order of expedited removal" (an administrative order of removal done by an immigration officer that is NOT conducted by an immigration judge) an "order of removal" as described in the amendment?
Yes. Even though an "order of expedited removal" is not conducted by an immigration judge, it is still considered an "order of removal" for the amendment.

3. Sometimes, the order of removal or order of deportation predates the physical removal or deportation of the defendant by several months or even a year. If the defendant commits another felony offense and is convicted of that offense after the order of deportation or order of removal but before his physical removal or deportation, can that conviction be considered under the §2L1.2(b)(3)?
Yes, a felony conviction that occurs during this time frame can be considered under the SOC (b)(3) so long as it is a felony that receives criminal history points.

4. Sometimes, the defendant is ordered removed in absentia, and is not physically deported until months after he is removed. If the defendant commits a felony offense during this time frame and is convicted of that crime before he is physically removed or deported, can this conviction be considered under the §2L1.2(b)(3)? Yes, a felony conviction that occurs during this time frame can be considered under the SOC (b)(3) so long as it is a felony that receives criminal history points.

5. Is it true that all prior convictions considered under this amendment – prior illegal reentry offenses, offenses committed before the first order of deportation, and offenses committed after the earliest order of deportation – must receive criminal history points?
Yes. Only convictions that receive criminal history points under §4A1.1(a), (b), or (c) are to be used under the amendment.

6. When you have multiple prior convictions that are treated as a "single sentence," can the prior convictions that are NOT assigned criminal history points still be considered for the SOCs?
When multiple prior convictions are treated as a "single sentence" per §4A1.2(a)(2), they all (as a group) receive criminal history points. Therefore, even though the PSR might assign zero criminal history points to a prior conviction that is treated as a "single sentence" with another prior conviction, both prior convictions are, in fact, counted under §4A1.1(a), (b), or (c).

7. Currently, §2L1.2 only allows revocation time to be added to the length of sentence for a prior drug trafficking conviction if the revocation occurred prior to the deportation of the defendant. Is this same rule contained in the amendment?
No. In the amendment, consistent with the rules at §4A1.2, revocation time will be added to the original sentence regardless of when the revocation occurred. In other words, if a defendant commits an offense prior to his earliest date of deportation, then illegally reenters the United States and is revoked on that prior offense, the revocation time will be added to the original sentence even though the revocation occurred after the deportation.

8. Why does the amendment change the definition of "crime of violence"?
The definition was changed to the adopted definition of "crime of violence" to the career offender guideline (§4B1.2) effective August 1, 2016, to provide a consistent definition of "crime of violence" throughout the manual.

For more information or to ask the Commission a question, please call our Helpline at 202-502-4545

Illegal Reentry Scenario #1

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry After Deportation.

On March 13, 2015, during a routine traffic stop, the defendant admitted he was residing in the United States illegally. DHS agents then arrested the defendant.

Defendant has been ordered removed on four previous occasions: 8/28/99, 4/24/00, 1/27/02, and 8/8/03.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
11/3/01	Illegal Reentry (Felony)	Time served (11 months)	0
2/28/03	Trespassing (Misd)	$25 fine	0

Illegal Reentry Scenario #2

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry of a Previously Deported Alien in 2015.

Defendant arrested on unrelated state charges 7/19/10, transferred to ICE custody on 7/17/14.

Defendant was ordered removed on one previous occasion: 10/15/08.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
11/24/07	Theft (Felony)	1 year probation	1
11/27/07	Illegal Entry (Misd.)	30 days custody	1
5/24/08	Illegal Entry (Misd.)	45 days custody	1
8/16/08	Illegal Entry (Misd.)	60 days custody	2
7/19/10	Agg. Sexual Assault of a Child Under 14 (Felony)	5 years imprisonment	3

Illegal Reentry Scenario #3

Defendant convicted of 8 U.S.C. § 1326(a), Removed Alien Found in the United States.

On February 25, 2015, defendant was a passenger in a vehicle pulled over for a routine traffic stop. Police requested assistance from ICE agents who discovered that the passenger had been previously removed from the United States.

Defendant was ordered removed on one previous occasion: December 9, 1993.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
4/7/93	Transporting Illegal Aliens	8 months custody	0

Illegal Reentry Scenario #4

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry After Deportation.

April 29, 2010, defendant was arrested by the state for sale of heroin. While in pretrial detention, a warrant was issued for the defendant in connection with a sexual assault. After serving time for the drug sale, he was deported.

March 16, 2014, the defendant was arrested for the sexual assault committed prior to the defendant's first order of deportation.

Defendant has been ordered removed on one previous occasion: 6/1/10.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
5/3/10	Sale of heroin (Felony)	Deferred Adjudication	1
6/20/14	Sexual Assault (Felony)	10 months custody	2

Illegal Reentry Scenario #5

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry After Deportation.

Defendant was discovered to be unlawfully in the United States after his arrest for a DUI.

Defendant has been ordered removed on two previous occasions: 2/9/11 and 5/1/14.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
3/3/09	Assault (Felony) Robbery (Felony)	1 year jail 1 year jail (consecutive)	3
4/2/12	Illegal Reentry (Felony)	24 months custody	3
1/23/16	DUI (Misdemeanor)	Time served (30 days)	1

Illegal Reentry Scenario #6

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry After Deportation.

Defendant has been ordered removed on one previous occasion: 7/1/11.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
12/28/10	Burglary (Felony)	3 years custody, 2 years sus. Vacated 2013	0
4/2/16	Theft (Felony)	Time served (22 days)	1

Defense counsel noted the sentence was vacated because the only eyewitness to the burglary lied under oath about the defendant's involvement in the residential burglary.

Illegal Reentry Scenario #7

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry of a Previously Deported Alien.

Defendant was ordered removed on one previous occasion: 10/15/08.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
11/24/07	Possession of Ctrl. Substance (Felony)	1 year imprisonment; Parole revoked 3/2/09; 2 months imprisonment imposed	3
5/24/09	Illegal Entry (Misd.)	45 days custody	1
9/19/13	Assault (Misd)	2 years imprisonment	3

Illegal Reentry Scenario #8

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry of a Previously Deported Alien.

Defendant was ordered removed on two previous occasions: 12/15/02 and 6/20/07.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
9/19/2002	Possession of Ctrl. Substance (Felony)	60 days jail	0
11/27/05	Illegal Reentry (Felony) PWID Cocaine (Felony)	41 months imprisonment	3

Illegal Reentry Scenario #9

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry of a Previously Deported Alien.

Defendant was ordered removed on several occasions: 11/18/2007; 4/20/2010; 5/9/2012; and 9/11/2014

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
8/19/07	Burglary, 3rd Degree (Felony)	60 days custody	2
2/24/10	Illegal Entry (Misd.)	45 days custody	1
3/1/12	Illegal Entry (Misd.)	60 days custody	2
1/15/14	Distribution of a Controlled Substance (Felony)	12 to 30 months custody Released to ICE for deportation 9/1/14	3
9/19/15	Aggravated Assault (Felony)	1 year imprisonment	2

Illegal Reentry Scenario #10

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry of a Previously Deported Alien.

Defendant was ordered removed on two occasions: 6/20/2012 and 9/11/2015

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
5/14/11	Theft (Misd.)	1 year custody	3
	DWI (Felony)	60 days custody (consecutive)	
7/10/14	Illegal Reentry (Felony)	14 months imprisonment	3
1/19/16	DWI (Felony)	6 months custody	2

Illegal Reentry Scenario #11

Defendant convicted of 8 U.S.C. § 1326(a), Illegal Reentry After Deportation.

June 12, 2015, defendant was arrested by the state for sale of heroin. He admitted to being in the United States since January 2002.

Defendant has been ordered removed on one previous occasion: 6/1/01.

Defendant's criminal history includes:

Sentence Date	Charge	Sentence Imposed	CH Points
8/23/98	Sale of heroin (Felony)	30 days custody	1
6/20/14	Sexual Assault (Felony)	10 months custody	2

§2L1.2 WORKSHEET – 2016 AMENDMENT

Date the defendant was ordered deported or removed for the FIRST TIME: _____

(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): _____

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

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§2L1.2 WORKSHEET – 2016 AMENDMENT

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☐ (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): _____

(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): _____

§2L1.2 Offense Level Sum: _____

2017 National Seminar

Grouping Multiple Counts of Conviction:
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When a case involves multiple counts of conviction, the court must determine a single, combined offense level representative of all the counts of conviction. This process is known as "grouping" multiple counts. The grouping rules in Chapter 3, Part D are applied to determine a single, combined, offense level.

Key Points about Grouping Multiple Counts of Conviction:

- The grouping rules in Chapter 3, Part D apply to multiple counts of conviction contained in the same indictment or information, or multiple counts contained in different indictments or informations where sentences are to be imposed at the same time or in a consolidated proceeding.

- The grouping rules do not apply to counts of conviction for which the statute: specifies a term of imprisonment to be imposed and requires that specific term of imprisonment run consecutively to any other count of conviction. Common examples: 18 U.S.C. § 924(c) and 18 U.S.C. §1028A. (See §3D1.1.)

- The grouping rules in §3D1.2 apply to closely related counts that are to be treated as a single, composite harm. One offense level will be used to represent all counts grouped under these rules. When these rules are applied to multiple counts, it is referred to as "grouping."

- The rules in §3D1.4 apply to counts that represent separate, distinct harms. This provision provides incremental punishment (additional offense levels) for additional criminal conduct. These rules are often referred to as the "assignment of units."

- Depending upon the specific counts in a particular case, a multiple count case may use: only the grouping rules in §3D1.2, only the assignment of units in §3D1.4, or both.

- Acceptance of Responsibility (§3E1.1) is determined after application of the guidelines to determine a single offense level for multiple counts. A reduction for Acceptance of Responsibility is taken from the single offense level that is determined after all of the grouping rules are applied.

Key Terms

Assignment of Units – the process outlined in §3D1.4, which provides incremental increases (the assignment of additional offense levels) for significant additional criminal conduct that represents separate and distinct harms.

Count Group – the group of closely related counts after application of the grouping rules in §3D1.2. If there are multiple counts or count groups, the grouping rules will still be applied to determine a single, combined offense level.

Grouping – the process outlined in Chapter 3, Part D to determine a single, combined offense level for multiple counts of conviction. Also refers specifically to the rules in §3D1.2, which dictate the determination of a single offense level for closely related counts of conviction.

Grouping Multiple Counts of Conviction:
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Groups of Closely Related Counts (§3D1.2)

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm if:

(a) Counts involve the same victim and the same act or transaction.

(b) Counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) One of the counts embodies conduct that is treated as a specific offense characteristic in, or Chapter 3 adjustment to, the guideline applicable to another count.

(d) Counts use the same guideline and are included for grouping under this subsection. The most commonly applied guidelines to be grouped under this subsection are:

- §2B1.1 (Fraud, Theft)
- §2C1.1 (Bribery)
- §2D1.1 (Drugs)
- §2G2.2 (P/R/T Child Pornography)
- §2K2.1 (Firearms)
- §2L1.1 (Alien Smuggling)
- §2S1.1 (Money Laundering)
- §2T1.1 (Tax Offenses)

Guidelines excluded from grouping under this subsection include:

- All offenses in Chapter Two, Part A (except §2A3.5)
- §2B2.1 (Burglary)
- §2B3.1 (Robbery)
- §2G1.1 (Prostitution)
- §2G2.1 (Production Child
- Pornography)
- §2L2.2 (Document Fraud)

Determining the Combined Offense Level (§3D1.4)

The combined offense level is determined by taking the offense level applicable to the count/count group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Total Number of Units	Add to Highest Offense Level
1 ½	+1
2	+2
2 ½ - 3	+3
3 ½ - 5	+4
More than 5	+5

- The count/group with the highest offense level receives one unit.
- Each remaining count/group that is equally serious or 1 to 4 levels less serious than the count/group with the highest offense level receives one unit.
- Each remaining count/group that is 5 to 8 levels less serious than the count with the highest offense level receives one-half unit.
- Any remaining count/group that is 9 or more levels less serious than the count group with the highest offense level does not receive any unit.

To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

Decision Tree: Grouping Multiple Counts of Conviction

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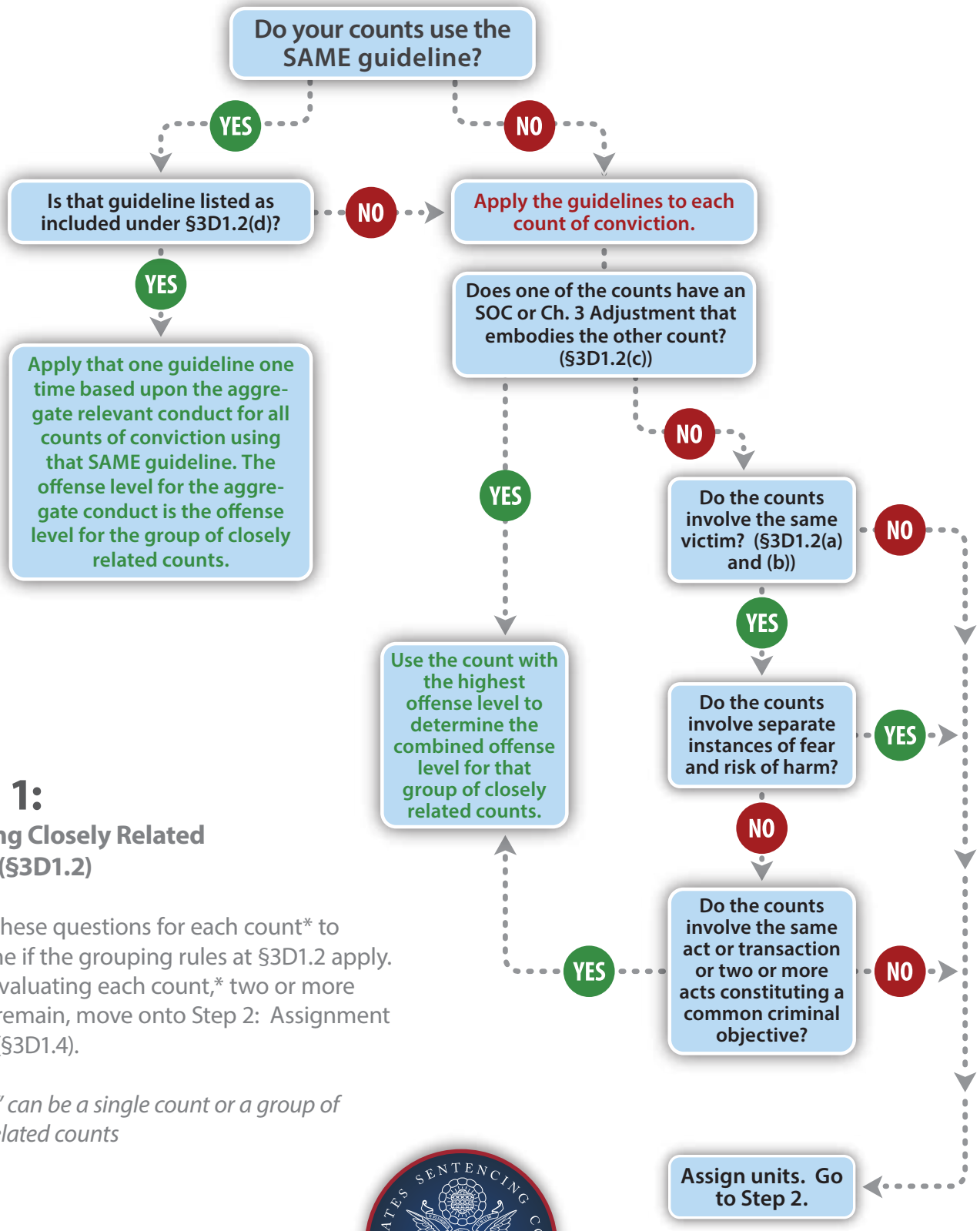

Step 1:

Grouping Closely Related Counts (§3D1.2)

Answer these questions for each count* to determine if the grouping rules at §3D1.2 apply. If, after evaluating each count,* two or more counts* remain, move onto Step 2: Assignment of Units (§3D1.4).

** "Count" can be a single count or a group of closely-related counts*

Flip over for Step 2:

Decision Tree: Grouping Multiple Counts of Conviction
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Step 2:
Assignment of Units (§3D1.4)

If there are two or more counts* remaining after applying Step 1 to all counts* use this checklist to determine a single combined offense level.

Checklist to Determine a Single Combined Offense Level:

1. Identify the count with the highest offense level. If there are two or more counts with the same highest offense level, just select one.
2. Compare the count with the highest offense level to the other remaining counts.
3. The count with the highest offense level receives one unit.
4. Each remaining count that is equally serious or 1 to 4 levels less serious than the count with the highest offense level receives one unit.
5. Each remaining count that is 5 to 8 levels less serious than the count with the highest offense level receives one-half unit.
6. Any remaining count that is 9 or more levels less serious than the count group with the highest offense level does not receive any units.
7. Add up the total amount of units.
8. Using the table below, based on the total number of units, add the appropriate number of offense levels to the offense level of the count with the highest offense level.

Total Number of Units	Add to Highest Offense Level
1 ½	+1
2	+2
2 ½ - 3	+3
3 ½ - 5	+4
More than 5	+5

A reduction for Acceptance of Responsibility (§3E1.1) is determined only after a single combined offense level is established for the multiple counts of conviction. A reduction for Acceptance of Responsibility is based upon consideration of the relevant conduct for all counts .

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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

1. The defendant pled guilty to one indictment that charged him with violating two counts of 18 U.S.C. § 922(u) (theft of firearm from firearms dealer). The guideline applicable to both counts is §2K2.1. Count one occurred in May 2016. The defendant rammed his vehicle into the gun store, broke in, and stole several firearms. Count two occurred in June 2016. The defendant again rammed his vehicle into the same gun store, broke in, and stole several firearms.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

2. The defendant is charged in two separate indictments. He pled guilty to both indictments. The first indictment is from the Eastern District of Pennsylvania. This indictment charges that the defendant committed both wire fraud and mail fraud from 2006 through 2008. The wire fraud and mail fraud scheme involved the defrauding of federal student loan programs. The applicable guideline is §2B1.1. The second indictment is from the Western District of North Carolina and charges the defendant with access device fraud. This scheme occurred from 2014 through 2015. The defendant fraudulently used stolen credit cards. The applicable guideline in this case is also §2B1.1.

The cases involve different victims and completely separate fraudulent schemes. However, they are being consolidated for sentencing.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

3. The defendant has pled guilty to two counts of robbery (§2B3.1). Count one describes the robbery of the First National Bank on March 11, 2016. The second count describes the robbery of Main Street Bank on June 20, 2016.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

4. 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). Defendant was part of a marijuana conspiracy involving several other participants. Upon his arrest, agents discovered he was previously deported for aggravated assault and therefore was unlawfully in the United States.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

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 drug trafficking.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

6. 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 several sales of meth with a confidential informant. After arrest, the defendant obstructed justice by providing materially false information to DEA agents. The defendant provided the names of co-defendants who were not, in fact, involved in the drug trafficking.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

7. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in March, 2016. During the robbery, he possessed a Glock pistol and pointed it at the teller as he demanded the money from her drawer. The defendant was arrested months later after finally being identified by authorities. It was during his arrest at his home that agents discovered three handguns, two 9mm pistols, and a .44 Magnum revolver. The Glock pistol possessed during the robbery was never recovered. The conviction for felon in possession names only the guns found during the search of the defendant's residence.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

8. Defendant is convicted of three 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 over the course of a weekend on three occasions: May 1, 2 and 3, 2016. On each occasion, the defendant photographed the victim.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

9. Defendant is convicted of two counts: possession with intent to distribute cocaine (§2D1.1) and carjacking (§2B3.1). The defendant, over the course of several months, distributed approximately 3 kilos of cocaine. In October 2016, the defendant carjacked the vehicle of a gang rival with the intent to rob his competition's supply of drugs – the rival gang member stored his drugs in his car. The defendant was armed, although no one was injured. The robbery guideline contains a one-level increase if the object of the offense was to take a controlled substance.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

10. The defendant pled guilty to one count of bank fraud (§2B1.1) and one count of money laundering (§2S1.1). The defendant was a bank branch manager who used his position to process fraudulent loans that the defendant deposited into his own account for personal gain.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

11. The defendant pleaded guilty to three counts of felon in possession (§2K2.1), one count of distribution of oxycodone (§2D1.1), one count of distribution of heroin (§2D1.1), and one count of using a firearm in connection with a drug trafficking offense, a violation of 18 U.S.C. § 924(c). The three firearms that are the subject of the felon in possession counts were carried by the defendant during various drug sales.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

_____

ORGANIZATIONAL WORKSHEET A

OFFENSE LEVEL

Defendant _____ District/Office _____

Docket Number _____

Count Number(s) _____ U.S. Code Title & Section _____:_____; _____:_____

Guidelines Manual Edition Used: 20___ (*Note*: The Worksheets are keyed to the November 1, 2016 *Guidelines Manual*)

Preliminary Determination of Inability to Pay Fine

- If it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1, a determination of the guideline fine range is unnecessary (*See* §§8C2.2(a)). In such a case, skip to Worksheet D, Item 1.
- If it is readily ascertainable through a preliminary determination of the minimum guideline fine range that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary (*See* §8C2.2(b)). In such a case, skip to Worksheet D, Item 1.

INSTRUCTIONS

For each count of conviction (or stipulated offense listed at §8C2.1), complete a separate Worksheet A.

Exceptions:

1. Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (*See* §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (*See* §3D1.2(a) and (b)).
2. For counts of conviction (or stipulated offenses) not listed at §8C2.1, skip to Worksheet D, Item 1 (*See* §8C2.10).

Offense Level (*See* §8C2.3)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum, the adjusted offense level, in the box provided below.*

Guideline	Description	Level

If this worksheet does not cover all counts of conviction or stipulated offenses listed at §8C2.1, complete Worksheet B. Otherwise, enter this sum on Worksheet C, Item 1.

Sum ☐
(Adjusted Offense Level)

Notes:

☐ Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

**Note*: Chapter Three Parts A, B, C and E, *do not* apply to organizational defendants.

ORGANIZATIONAL WORKSHEET B

MULTIPLE COUNTS
OR STIPULATION TO ADDITIONAL OFFENSES

Defendant _____ Docket Number _____

INSTRUCTIONS

STEP 1: Determine if any of the counts group. All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (*See* §3D1.2(a)). Explain the reasons for grouping:

_____

_____

_____

STEP 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various Worksheets "A" (Worksheet A, Item 1) that comprise the group (*See* §3D1.3). Note that a "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

STEP 3: Enter the number of units to be assigned to each group (*See* §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (½) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s) _____ ☐ _____ Unit

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s) _____ ☐ _____ Unit

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s) _____ ☐ _____ Unit

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s) _____ ☐ _____ Unit

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s) _____ ☐ _____ Unit

6. Total Units

_____ Total Units

7. Increase in Offense Level Based on Total Units (*See* §3D1.4)

1 unit:	no increase	2½ – 3 units:	add 3 levels
1½ units:	add 1 level	3½ – 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

☐

8. Highest of the Adjusted Offense Levels from Items 1–5 Above

☐

9. Combined Adjusted Offense Level (*See* §3D1.4)

Enter the sum of Items 7 and 8 here and on Worksheet C, Item 1. ☐

ORGANIZATIONAL WORKSHEET C

BASE FINE, CULPABILITY SCORE, AND FINE RANGE

Defendant _____ Docket Number _____

1. Offense Level Total

If Worksheet B is required, enter the combined adjusted offense level from Worksheet B, Item 9. Otherwise, enter the sum (the adjusted offense level) from Worksheet A, Item 1. [ ]

2. Base Fine (*See* §8C2.4(d))

(a) Enter the amount from the Offense Level Fine Table (*See* §8C2.4(d)) corresponding to the offense level total in Item 1 above. $ [ ]

Note: For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014 (*See* §8C2.4(e)(1)).

(b) Enter the pecuniary gain to the organization (*See* §8C2.4(a)(2)). $ [ ]

(c) Enter the pecuniary loss caused by the organization to the extent the loss was caused intentionally, knowingly, or recklessly (*See* §8C2.4(a)(3)). $ [ ]

Note: The following Chapter Two guidelines have special instructions regarding the determination of pecuniary loss: §§2B4.1, 2C1.1, 2C1.2, 2E5.1, 2E5.6, and 2R1.1.

(d) Enter the amount from Item (a), (b), or (c) above, whichever is greatest. $ [ ]

3. Culpability Score (*See* §8C2.5)

(a) Start with five points and apply (b) through (g) below. (*See* §8C2.5(a)) [5]

(b) **Involvement/Tolerance** (*See* §8C2.5(b))
Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0". §_____ [ ]

(c) **Prior History** (*See* §8C2.5(c))
Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0". §_____ [ ]

Enter the earliest date of relevant conduct for the instant offense: _____

(d) **Violation of an Order** (*See* §8C2.5(d))
Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0". §_____ [ ]

(e) **Obstruction of Justice** (*See* §8C2.5(e))
If no adjustment is applicable, enter "0". §_____ [ ]

(f) **Effective Program to Prevent and Detect Violations of Law** (*See* §8C2.5(f))
If no adjustment is applicable, enter "0". §_____ [ ]

(g) **Self-Reporting, Cooperation, and Acceptance of Responsibility** (*See* §8C2.5(g))
Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0". §_____ [ ]

4. Total Culpability Score

Enter the total of Items 3(a) through 3(g). [ ]

Organizational Worksheet C
Base Fine, Culpability Score, and Fine Range [Page 2 of 2]

Defendant _____ Docket Number _____

5. Minimum and Maximum Multipliers (*See* §8C2.6)

Enter the minimum and the maximum multipliers from the table at §8C2.6 corresponding to the total culpability score in Item 4 above.

Note: If the applicable Chapter Two guideline is §2R1.1, neither the minimum nor the maximum multiplier shall be less than 0.75. (*See* §2R1.1(d)(2)).

(a) Minimum Multiplier ☐

(b) Maximum Multiplier ☐

6. Fine Range (*See* §8C2.7)

(a) Multiply the base fine (Item 2(d) above) by the minimum multiplier (Item 5(a) above) to establish the minimum of the fine range. Enter the result here and at Worksheet D, Item 4(a).

Minimum of fine range $ ☐

(b) Multiply the base fine (Item 2(d) above) by the maximum multiplier (Item 5(b) above) to establish the maximum of the fine range. Enter the result here and at Worksheet D, Item 4(a).

Maximum of fine range $ ☐

7. Disgorgement (*See* §8C2.9)

Skip this item if any pending or anticipated civil or administrative proceeding is expected to deprive the defendant of its gain from the offense.

(a) Enter the amount of pecuniary gain to the defendant from Item 2(b) above. $ ☐

(b) Enter the amount of restitution already made and remedial costs already incurred. $ ☐

(c) Enter the amount of restitution and other remedial costs to be ordered by the court. (*See* §§8B1.1 and 8B1.2.) $ ☐

(d) Add Items (b) and (c) and enter the sum. $ ☐

(e) Subtract the sum of restitution and remedial costs (Item (d)) from the amount of pecuniary gain to the defendant (Item (a)) to determine undisgorged gain. Enter the result here and at Worksheet D, Item 4(b). If the amount of undisgorged gain is less than zero, enter "0". $ ☐

ORGANIZATIONAL WORKSHEET D

GUIDELINE WORKSHEET

Defendant _____ Docket Number _____

Note: Unless otherwise specified, all items on Worksheet D are applicable to all counts of conviction.

1. Restitution (*See* §8B1.1)

(a) If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason:

_____

(b) Enter whether restitution is statutorily mandatory or discretionary:

_____

(c) Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute:

_____

2. Remedial Orders (§8B1.2), Community Service (§8B1.3), Order of Notice to Victims (§8B1.4)

List if applicable. Otherwise enter "N/A".

_____

_____

3. Criminal Purpose Organization (*See* §8C1.1)

If a preliminary determination indicates that the organization operated primarily for a criminal purpose or primarily by criminal means, enter the amount of the organization's net assets. This amount shall be the fine (subject to the statutory maximum) for all counts of conviction.

$

4. Guideline Fine Range (*Only* for counts listed under §8C2.1)

(a) Enter the guideline fine range from Worksheet C, Item 6.

$ to $

(b) Disgorgement (*See* §8C2.9)

Enter the result from the Worksheet C, Item 7(e). The court shall add to the fine determined under §8C2.1 (Determining the Fine Within the Range) any undisgorged gain to the organization from the offense.

$

☐ Check if guideline fine range was not calculated because of preliminary determination of inability to pay fine (*See* §8C2.2).

5. Counts Not Listed Under §8C2.1 (*See* §8C2.10)

Enter the counts not listed under §8C2.1 and the statutory maximum fine for each count. The court **may** impose an additional fine for these counts.

_____

_____

Organizational Worksheet D — Guideline Worksheet
[Page 2 of 3]

Defendant _____ Docket Number _____

6. Reduction of Fine Based on Inability to Pay (*See* §8C3.3)

Check the applicable box(es):

☐ There is evidence that the imposition of a fine within the guideline fine range would impair the organization's ability to make restitution to victims. In such a case, the court **shall** reduce the fine below that otherwise required (*See* §8C3.3(a)).

☐ There is evidence that the organization, even with use of a reasonable installment schedule, is not able or likely to become able to pay the minimum guideline fine. In such a case, the court **may** impose a fine below that otherwise required (*See* §8C3.3(b)).

7. Fine Offset (*See* §8C3.4)

Multiply the total fines imposed upon individuals who each own at least five percent (5%) interest in the organization by those individuals' total percentage interest in the organization, and enter the result. The court **may** reduce the fine imposed on a closely held organization by an amount not to exceed the fine offset.

$ _____

8. Imposition of a Sentence of Probation (*See* §8D1.1)

(a) Probation is required if any of the following apply. Check the applicable box(es):

☐ (1) Probation is necessary as a mechanism to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3).

☐ (2) Any monetary penalty imposed (*i.e.*, restitution, fine, or special assessment) is not paid in full at the time of sentencing and restrictions appear necessary to safeguard the defendant's ability to make payments.

☐ (3) At the time of sentencing the organization has 50 or more employees and does not have an effective program to prevent and detect violations of law.

☐ (4) Within the last five years prior to sentencing, the organization has engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication.

☐ (5) An individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense; and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication; and any part of the misconduct underlying the instant offense occurred after that adjudication.

☐ (6) Probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.

☐ (7) The sentence imposed upon the organization does not include a fine.

☐ (8) Probation is necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). State purpose(s):

_____

_____

(b) Length of Term of Probation (*See* §8D1.2). If probation is imposed, the guideline for the length of such term of probation is: (Check the applicable box)

☐ (1) At least one year, but not more than five years if the offense is a felony

☐ (2) No more than five years if the offense is a Class A misdemeanor

(c) Conditions of Probation (*See* §§8D1.3 and 8D1.4). List any mandatory conditions (§8D1.3), recommended conditions (§8D1.4), and any other special conditions that may be applicable.

_____

_____

_____

ORGANIZATIONAL GUIDELINES SCENARIOS

1. Defendant A has pleaded guilty to one count of money laundering in violation of 18 U.S.C. § 1956. Defendant A is a successful advertising agency that employs 200 people. The sole owner of the advertising agency (Owner) was approached by his neighbor (Neighbor) who stated that he needed "help cashing some checks." Neighbor proposed that he would write $10,000 checks to Defendant A, and that Defendant A need not provide any advertising services. Instead, Neighbor asked Defendant A to return $9,000 in cash to Neighbor and to keep the remainder for itself. Owner agreed, and this arrangement continued for several months, with Defendant A taking in over $250,000 in checks from Neighbor, before Neighbor was arrested for being part of a criminal operation.

During the period in which Defendant A was involved in the scheme, it continued to conduct its other legitimate business. There is no other evidence of illegal activity in the company's past.

The current market value of Defendant A's assets is approximately $3 million. The company's annual net income was approximately $200,000.

Defendant A has cooperated with the investigation and Owner has written a statement accepting responsibility on behalf of the company.

The court has previously sentenced Owner to a prison term and a $20,000 fine for this activity.

How would the company's guidelines be calculated in this case?

1A. Assume the same facts as Fact Pattern 1, except Defendant A has pleaded guilty to three counts of money laundering and the crime occurred prior to November 1, 2015.

How will the guideline fine be calculated?

2. Defendant B has pleaded guilty to one count of price-fixing in violation of 15 U.S.C. § 1. Defendant B is a successful automotive component manufacturer that employs

150 people. Defendant B also manufactures commercial lighting products, but the violation did not involve this aspect of the business.

During a three-year period, Defendant B and three other manufacturers conspired to fix prices for taillights and other automotive components sold to customers in the United States and elsewhere. Defendant B, through its Owner, regularly communicated with competitors to agree on product pricing and pricing structures designed to limit competition and maintain high prices. Records demonstrate that the total volume of commerce affected by the conspiracy and attributable to Defendant B over the three-year period was $12 million in automotive components.

There is no evidence of other misconduct in the company's 15-year history. The current market value of the company's assets is approximately $20 million. The company's annual net income is approximately $1,750,000.

The company has cooperated with the investigation and the company's president has written a statement accepting responsibility on behalf of the company.

How would the company's guidelines be calculated in this case?

3. Defendant C is a corporation that has pleaded guilty to one count of making contributions in the name of another person in violation of 2 U.S.C. § 441f. The brother of Defendant C's CEO is a candidate for congress. In an effort to help his brother's campaign, the CEO approaches fifteen employees and suggests that the corporation will give them a $3,000 bonus in exchange for making a $2,500 donation to the brother's campaign.

How would the company's guidelines be calculated in this case?

Organizational Worksheet D — Guideline Worksheet
[Page 3 of 3]

Defendant _____ Docket Number _____

9. Special Assessments (*See* §8E1.1)

Enter the total amount of special assessments required for all counts of conviction.

10. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as necessary.

Completed by _____ Date _____

2017 National Seminar

Relevant Conduct / §1B1.3:
2017 Annual National Seminar

This provision, located at §1B1.3, specifies the conduct for which a defendant may be held accountable in the determination of the offense level. The conduct need not have been formally charged or proved at trial, so long as the sentencing court finds the facts by a preponderance of the evidence. Relevant conduct may include the defendant's conduct as well as the conduct of others under certain circumstances.

Key Points about Relevant Conduct

- Serves as a "gatekeeper" in determining the conduct to be considered in the application of the existing guideline factors.
- Will limit the conduct that can be used in guideline application. However, for purposes of sentencing, generally all information can be used. (See 18 U.S.C. § 3661, §1B1.4.)
- Sentencing accountability is not always the same as criminal liability. In other words, a person convicted of conspiracy may not necessarily be held accountable for the whole conspiracy under the provisions of relevant conduct.
- Relevant conduct determines application of the base offense levels, specific offense characteristics, and cross references in Chapter Two and the adjustments in Chapter Three.
- The determination of the relevant conduct for Chapters Two and Three of a particular offense will also impact the determination of a single offense level for multiple counts of conviction (Chapter 3, Part D), the calculation of criminal history points (Chapter 4), and adjustments for undischarged terms of imprisonment (§5G1.3).
- Relevant conduct is unaffected by jurisdiction and the statute of limitations.

Key Terms

Defendant – acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant

Offense – the offense of conviction and all relevant conduct

Jointly Undertaken Criminal Activity – a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy

Same Course of Conduct – acts or offenses sufficiently connected by similarity, regularity, and temporal proximity to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.

Common Scheme or Plan – acts or offenses substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose or similar *modus operandi*

Relevant Conduct / §1B1.3:
2017 Annual National Seminar

2017 National Seminar

The Relevant Conduct Analysis is Keyed to the Offense of Conviction, and Requires Determinations of "Who" and "When"

Who:

- Acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused **by the defendant;** and
- **Acts of others** that:
  - were within the scope of the jointly undertaken criminal activity,
  - in furtherance of that criminal activity, and
  - reasonably foreseeable in connection with that criminal activity

When:

- That occurred **during** the commission of the offense of conviction, **in preparation** for that offense, or to **avoid detection or responsibility** for the offense of conviction
- **Only for offenses listed as included at §3D1.2(d)**, Relevant Conduct includes acts of the defendant and acts of others within the jointly undertaken criminal activity that were the same course of conduct or common scheme or plan as the offense of conviction.

Relevant conduct also includes:

- All harm that resulted from the acts described above, and
- any other information outside of the above analysis that is specified in the applicable guideline.

For more information or to ask the Commission a question, please call our Helpline at 202-502-4545

To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

BASIC RELEVANT CONDUCT EXERCISES

Exercise #1

- Defendant convicted of one count of Bank Robbery, citing a specific robbery
- Applicable guideline §2B3.1 (Robbery)
- It is determined that Defendant possessed a firearm during the robbery
- Will the §2B3.1(b)(2) SOC "if a firearm was brandished or possessed, increase by 5 levels" apply?

Exercise #1-Variation

- While Defendant was actually robbing the bank there was no indication that he possessed a firearm
- After exiting the bank, in carjacking a vehicle for his getaway, Defendant discharged a firearm
- Will the §2B3.1(b)(2) SOC "if a firearm was discharged, increase by 7 levels" apply?

Exercise #2

- Defendant convicted of bank robbery; Applicable guideline §2B3.1
- Co-participant possessed a firearm during the robbery, a fact unknown to Defendant until the co-participant brandished it
- Will the §2B3.1 SOC for "if a firearm was brandished or possessed" apply for Defendant?

Exercise #3

- Defendant is convicted of a count charging a three-year conspiracy to import 5 kg or more of cocaine, with multiple participants and multiple importations
- Applicable guideline §2D1.1 (Drugs)
- During the three years of the conspiracy a total of 300 kg was imported
- It is determined that Defendant
  - joined the conspiracy after its first year of operation, during which 100 kg had been imported, and
  - after Defendant joined the conspiracy, his undertaking was limited to two importations, each in a quantity of 5 kg
- What quantity of drugs will be used to establish Defendant's base offense level at §2D1.1(a)(5)?

BASIC RELEVANT CONDUCT EXERCISES

Exercise #4

- Defendant convicted of one count: Conspiracy to Commit Health Care Fraud (18 USC §§ 1349 & 1347) in the three-years from January 2014 through December 2016

- Applicable guideline §2X1.1 (Conspiracy) which directs use of §2B1.1 (Fraud/Theft)

- The three-year conspiracy involved numerous fraudulent claims by a health clinic to Medicare for services never provided

- The conspiracy included a total of 12 participants, with each fully involved in the fraud activity, but only during the period he/she was employed by the clinic

- Defendant doctor joined the clinic and began participating in the illegal activity during the final ten months of the conspiracy, but Defendant doctor knew of all the preceding defrauding

- Does Defendant doctor's relevant conduct include:

    - All the fraudulent acts by all the participants and all the resulting losses during the three-year conspiracy?

    - Only the fraudulent acts and resulting losses by Defendant doctor and other participants during Defendant doctor's involvement in the conspiracy?

    - Only the fraudulent acts and resulting losses by Defendant doctor?

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Exercise #5

- Defendant convicted of sale of 1 kg of cocaine on a single occasion; Applicable guideline §2D1.1

- The sale was to a member of a gang engaged in user-amount sales

- It is determined that Defendant additionally sold 1 kg of cocaine to a member of the gang each week for 40 weeks

- What quantity of drugs will be used to determine Defendant's base offense level at §2D1.1(b)(5)?

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Exercise #6

- Defendant convicted of felon in possession of a firearm, a pistol, on a specific date

- Applicable guideline §2K2.1 (Firearms)

- A search of defendant's house the day after he had been arrested in possession of the firearm (the offense of conviction) revealed two additional firearms, both pistols, one with an obliterated serial number

- How many firearms will be counted for the §2K2.1(b)(1) SOC for number of firearms?

- Will the §2K2.1(b)(4)(B) SOC for obliterated serial number apply?

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Exercise #7

- Defendant is convicted of one count of bank robbery; Applicable guideline §2B3.1

- There were no injuries in this robbery

- However, on the day prior to the robbery of conviction, the defendant committed another bank robbery in a similar manner, and in which he struck a teller, resulting in serious bodily injury

- In the application of the robbery guideline, will the §2B3.1(b)(3)(B) SOC for serious bodily injury apply?

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Exercise #8

- Defendant convicted of one count of conspiracy to traffic 1 kg or more of heroin during a period of 100 weeks

- Applicable guideline §2D1.1 (Drugs)

- Conspiracy involved 100 occasions of heroin being transported into the district from a major city in a nearby state; 1 kg of heroin was transported on each occasion

- Defendant's undertaking involved only two of those occasions, #51 & #52, although he was aware of the other occasions

- For what quantity of drugs is defendant accountable?

- Defendant never carried a firearm nor did he aid, abet, counsel, command, induce, procure, or willfully cause his co-participants to do so

- However, one of his co-participants on occasion #51 carried a gun

- Will defendant get the 2-level increase for the SOC at §2D1.1(b)(1): "If a . . . firearm . . . was possessed . . . ." ?

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Exercise #9

- Defendant convicted of one count of Mail Fraud (18 USC § 1341) citing the submission of a fraudulent claim of $5,000 to an insurance company on a specific date

- Applicable guideline §2B1.1 (Fraud)

- In the same month that Defendant made the fraudulent claim in the count of conviction, he also submitted fraudulent $5,000 claims of the same nature to ten additional insurance companies

- Which of the following acts and losses are included in Defendant's relevant conduct:

    - The fraudulent act and resulting loss in the count of conviction?

    - The fraudulent acts and resulting losses related to the ten additional insurance companies?

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ADVANCED RELEVANT CONDUCT SCENARIOS

These 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?

_____
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_____

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 firearm 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?

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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?

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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?

_____
_____
_____
_____

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?

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5. The defendant 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?

_____
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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?

_____
_____
_____

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? Why or why not?

_____

_____

_____

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?

_____

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?

_____

_____

_____

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?

_____

_____

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_____

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 to her son's bank account, the $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?

_____

_____

(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?

_____

2017 National Seminar

Selected Sex Offense Statutes and Guidelines:

Production of Child Pornography, Failure to Register as Sex Offender, & §4B1.5

This primer provides an overview of the federal offenses of Production of Child Pornography and Failure to Register as a Sex Offender. The primer will discuss the statutes and relevant guidelines, and provides guideline application pointers.

Production of Child Pornography

- **Main statute:** 18 U.S.C. § 2251
- **Statutory Penalties:** 15 Year Mandatory Minimum with 30 Year Statutory Maximum
- **Recidivist Enhancement:** 25 Year Mandatory Minimum with 50 Year Statutory Maximum
- **Guideline:** §2G2.1
- **Guideline Application Pointers:** There are Four Commonly Applied Specific Offense Characteristics:
  - (b)(1) age of the victim
  - (b)(2) defendant engaged in a sex act or contact
  - (b)(4) S/M or other depictions of violence
  - (b)(5) victim in the custody or care of the defendant

The guideline contains a special instruction (§2G2.1(d)) if the offense involves more than one minor victim. The instruction provides that if the offense involved the exploitation of more than one minor, the court shall apply multiple counts as if the exploitation of each minor had been contained in a separate count of conviction.

Failure to Register as Sex Offender

- **Statute:** 18 U.S.C. § 2250(a)
- **Statutory Penalties:** 10 Year Statutory Maximum
- **Guideline:** §2A3.5
- **Base Offense Level (BOL)**: Determined by Classification of Sex Offender
  - BOL 16: Tier III (Aggravated sex abuse, abusive sex contact against minor under 13, kidnapping not by parent;)
  - BOL 14: Tier II (Sex trafficking, coercion and enticement, transportation for sexual activity, abusive sexual contact, solicitation of minor for prostitution, distribution or production of child pornography)
  - BOL 12: Tier I (Other than Tier II or Tier III offender)
- (b)(1) if while in failure to register status, the defendant committed a sex offense against a minor increase by 6 levels if an adult, or 8 levels if committed against a minor

  (b)(2) if defendant voluntary corrected failure to register or attempted to register, decrease by 3 levels
- **Guideline Application Pointers:**
  To determine which Tier applies, courts typically must use the categorical approach. (*See United States v. Morales*, 800 F.3d 1 (1st Cir. 2015), *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016), *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015), and *United States v. White*, 782 F.3d 1118 (10th Cir. 2015)

Selected Sex Offense Statutes and Guidelines:
Production of Child Pornography, Failure to Register as Sex Offender, & §4B1.5

2017 National Seminar

Repeat and Dangerous Sex Offender against a Minor

- **Guideline:** §4B1.5
  - **(A)** If defendant's offense of conviction is a covered sex offense and defendant committed instant offense subsequent to sustaining at least one sex offense conviction, the offense level determined under Chapter Two and Three or according to a table at §4B1.5(b) based on the statutory and the defendant's criminal history must be at least CHC.

  - **(B)** If the defendant's instant offense of conviction is a covered sex crime and the defendant engaged in a pattern of activity involving prohibited sexual conduct, add five levels to the offense level calculated under Chapters 2 and 3.

- **Guideline Application Pointers:**
  - If defendant qualifies under subsection (A), do not apply subsection (B). The court also may not use the greater of (A) or (B).

  - Court should apply the categorical approach to determine whether defendant's prior conviction is a sex offense conviction under §4B1.5(a) (*See U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)).

  - Under §4B1.5(a):
    - There is no time limit on a prior sex offense conviction. (*See U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)).
    - Prior sex offense conviction must be against a minor and not against an adult (*See U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016)).

  - Under §4B1.5(b):
    - An occasion of "prohibited sexual conduct" may be considered without regard to whether the occasion occurred during of the instant offense (*See U.S. v. Evans*, 782 F.3d 1115 (10th Cir. 2015 and *U.S v. Gibson*, 840 F.3d 512 (8th Cir. 2016)).
    - An occasion of prohibited sexual conduct" may be considered without regard to whether there was a conviction for that conduct.
    - Attempted production of child pornography is prohibited sexual conduct (*See U.S. v. Morgan*, 842 F.3d 1370 (8th Cir. 2016)), and attempted attempts to meet up with a minor can be prohibited sexual conduct (*See U.S. v. Syed*, 616 F. App'x 973 (11th Cir. 2015)).

For more information or to ask the Commission a question, please call our Helpline at 202-502-4545

2017 National Seminar

Sex Trafficking Overview:
Statutes, Guidelines, & Restitution Issues

In response to an increase in sex trafficking offenses, Congress implemented Justice for Victims Act in 2015 to increase efforts to investigate and punish these crimes. The legislation includes, among other things, a new monetary assessment on defendants convicted of certain trafficking statutes. This primer provides an overview of statutes, relevant sentencing guidelines, and special restitution considerations in sex trafficking cases.

Common Statutes Involving Sex Trafficking

18 U.S.C. § 1591 (Sex Trafficking)

- **§ 1591(b)(1):** If the offense was involved force, fraud, or coercion or if the victim was under 14 years of age. *Penalty - 15 Years to Life.*
- **§ 1591(b)(2):** If the offense did not involve force, fraud, or coercion and the victim was older than 14 years of age but less than 18. *Penalty - 10 Years to Life.*

18 U.S.C. § 2421 (Transportation)

- **§ 2421 (a):** Transportation of any individual in interstate commerce with the intent that such individual engage in prostitution. *Penalty - 10 Year Maximum.*

18 U.S.C. § 2422 (Coercion & Enticement)

- **§ 2422 (a):** Whoever coerces, induces or persuades someone to travel for purposes of prostitution. *Penalty - 20 Year Maximum.*
- **§ 2422 (b):** Whoever, using means of interstate commerce, coerces, induces, or persuades someone under 18 to engage in prostitution or illegal sexual activity. *Penalty - 10 Years to Life.*

18 U.S.C. § 2423 (Transportation of Minors)

- **§ 2423(a):** Transportation of an individual under the age of 18 with the intent to engage in criminal sexual activity. *Penalty - 10 Years to Life.*
- **§ 2423(b):** Travel with the intent to engage in illicit sexual conduct. *Penalty - 30 Year Maximum.*
- **§ 2423(c):** Engaging in illicit sexual conduct in foreign places. *Penalty - 30 Year Maximum.*

8 U.S.C. § 1328 (Importation of Alien for Immoral Purposes)

- **8 U.S.C. § 1328 (a):** Importing an alien for purposes of prostitution. *Penalty - 10 Year Maximum.*

Relevant Sentencing Guideline Provisions

§2G1.1: Promotion a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

Base offense level based on statute of conviction:

- *34 (§ 1591 (b)(1))*
- *14 otherwise*

§2G1.3: Travel & Child Sex Trafficking Cases

Base offense level based on statute of conviction:

- *34 (§ 1591(b)(1))* - Victim under 14)
- *30 (§ 1591(b)(2))* - Victim between 14-18)
- *28 (§ 2422(b) or § 2423(a))* - Enticement or transport of minor)
- *24* Otherwise

Number of Sex Trafficking Cases by Statute (FY15)

18 U.S.C. § 2422	180
18 U.S.C. § 2423	125
18 U.S.C. § 1591	122
18 U.S.C. § 2421	62
8 U.S.C. § 1328	4

Sex Trafficking Overview:
Statutes, Guidelines, & Restitution Issues

2017 National Seminar

Special Restitution and Assessments in Sex Trafficking Cases

Mandatory Restitution for Sex Trafficking 18 U.S.C. § 1593

Court must order restitution for any offender convicted of offenses related to trafficking of persons. (18 U.S.C. § 1593 (a)).

The order of restitution shall direct the defendant to pay the victim, through the appropriate mechanism, the full amount of the victim's losses (18 U.S.C. § 1593 (b)(1)).

"The full amount of victim's losses" has the same meaning as outlined in section 2259(b)(3) and in addition shall "include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act. (18 U.S.C. § 1593 (b)(3)).

The term "victim" means any individual harmed as a result of the crime. If the victim is under 18, incompetent, incapacitated, or deceased, the court can appoint the legal guardian of the victim, another family member, or any other suitable by the court as a representative. (18 U.S.C. § 1593 (c)).

Losses Included for Restitution Purposes (18 U.S.C. § 2259):

Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

Justice for Victims of Trafficking Act (18 U.S.C. § 3014)

New Mandatory Assessment

- Imposes an additional assessment of $5000, until the end of fiscal year 2019, on all non-indigent defendants convicted of offenses under these chapters or statutes:
  - **Chapter 77** (peonage, slavery, trafficking in persons);
  - **Chapter 109A** (sexual abuse);
  - **Chapter 110** (sexual exploitation/ abuse of children);
  - **Chapter 117** (transportation for illegal sexual activity);
  - **8 U.S.C. § 1324** (human smuggling)
- The money collected under this section will be used to establish the Domestic Trafficking Victims' Fund, which will go to pay for services for sex trafficking victims and to develop trafficking deterrence programs. (18 U.S.C. § 3014 (c)).
- Any assessment under this section is not payable until a defendant has satisfied all other court-ordered fines, orders of restitution, or any other victim compensation fees. (18 U.S.C. § 3014 (b)).
- The money from this assessment is to be collected in the same manner as fines in criminal cases. (18 U.S.C. § 3014 (f)).
- Under this statute, the defendant is obligated to pay until the assessment is paid in full. (18 U.S.C. § 3014 (g)).

Common Statutes Under 18 U.S.C. § 3014

18 U.S.C. § 1591 -	(Sex trafficking)
18 U.S.C. § 2251 -	(Sexual exploitation of children)
18 U.S.C. § 2252 -	(Material involving the sexual exploitation of children)
18 U.S.C. § 2252A -	(Material containing child pornography)
18 U.S.C. § 2242 -	(Coercion and enticement)

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Sex Offenses: Selected Cases

Selected Case Law Related to Analyzing Supervised Release Conditions and Restitution in sex offenses cases. This document also discusses cases related to sex offense recidivist statutes.

Statutes & Guidelines Implicated

18 U.S.C. § 3583(d)
18 U.S.C. § 3583(k)
§§5D1.1 – 5D1.3

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Common Pitfalls in Supervised Release Conditions for Sex Offense Cases

Court needs to provide notice and explanation regarding imposition of special conditions of supervised release.

Court should examine length of time between instant offense and any prior sexual misconduct.

Conditions that involve fundamental liberties (*e.g.*, association with own children, residency restrictions) need more detailed explanation than other conditions.

If a defendant is convicted of failure to register as a sex offender, court should determine if the prior sex offense conviction involved a computer.

Contact with Minors

U.S. v. Fey, 834 F.3d 1 (1st Cir. 2016). Condition restricting the defendant's contact with children only upon approval of the probation office was vague and overly broad as the defendant was convicted of failure to register as a sex offender based on a rape conviction 17 years prior, where the victim was 16 years old. The condition applied to contact with all minor children yet there was no evidence the defendant was a danger to young children.

U.S. v. Sainz, 827 F.3d 602 (7th Cir. 2016). Condition prohibiting any contact with children was too vague as it would have prevented the defendant from buying a hamburger at a restaurant that employs 16 and 17 year old minors.

U.S. v. Warren, 843 F.3d 275 (7th Cir. 2016). Condition barring defendant from associating or communicating with a minor without express permission of minor's parent or guardian affirmed because his conviction for distributing child pornography included conduct involving posing on an internet forum, soliciting new child pornography images, and encouraging others to post images on the internet.

U.S. v. Shultz, 845 F.3d 879 (8th Cir. 2017). Condition restricting defendant's contact with minor children without written approval from probation officer was reasonable because he was originally convicted of having a sexual relationship with a 14-year old girl when he was 23 years of age, and he had other convictions for violating no-contact orders with other minor females.

U.S. v. Woodall, 782 F.3d 383 (8th Cir. 2015). Condition prohibiting contact with minors without probation officer approval affirmed based on past sex offenses (including abusing his 15 year old stepsister) and never having completed a sex-offender treatment program.

U.S. v. LeCompte, 800 F.3d 1209 (10th Cir. 2015). Restriction on minor prohibition remanded because court did not explain how applying the minor prohibition condition to the conduct here would achieve the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation.

U.S. v. Bear, 769 F.3d 1221 (10th Cir. 2014). Restriction of contact with his children violated defendant's constitutional liberty interest in relationship with his children.

U.S. v. Burns, 775 F.3d 1221 (10th Cir. 2014). Supervised release condition requiring approval to contact own daughter remanded because court did not make particularized finding.

Viewing Pornography

U.S. v. Gall, 829 F.3d 64 (1st Cir. 2016). Condition prohibiting defendant from possessing adult pornography and from entering any location where such pornography is available was remanded because court did not explain why this condition was imposed, whether it was reasonably related to the need for treatment, or whether it was necessary.

U.S. v. Medina, 779 F.3d 55 (1st Cir. 2015). "Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here… fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. There may well be a reason to impose a pornography ban in this case. But if so, the District Court has not yet provided it."

U.S. v. Huor, 852 F.3d 392 (5th Cir. 2017). Court incorrectly imposed condition limiting the defendant's right to possess and view sexually stimulating materials. Defendant's prior rape of a four-year old took place 20 years ago and the court did not rely on any of the defendant's parole violations (which the court could examine on remand).

U.S. v. Sainz, 827 F.3d 602 (7th Cir. 2016). Condition barring access to sexually explicit material was too vague.

Sex Offenses:
Selected Cases

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U.S. v. Sherwood, 850 F.3d 931 (8th Cir. 2017). Supervised release condition related to allowing probation officer access to any requested financial information and from incurring new credit charges without approval of probation officer was financial information was abuse of discretion when defendant was convicted of sex offense.

U.S. v. Martinez-Torres, 795 F.3d 1233 (10th Cir. 2015). "We conclude that on this record the district court abused its discretion in imposing the special condition prohibiting Defendant from viewing or possessing materials depicting or describing sexually explicit conduct."

U.S. v. Poignant, --F. App'x--, 2017 WL 191923 (11th Cir. 2017). (unpublished) Condition prohibiting defendant from viewing, possessing, or producing visual depictions of adults engaged in sexually explicit conduct was affirmed as court found his experiences with adult pornography were linked to his sexual interest in children.

Computer Restrictions

U.S. v. Hinkel, 837 F.3d 111 (1st Cir. 2016). Condition prohibiting defendant from possessing or using a computer or having access to any online service without prior approval was too broad. Condition barring defendant from entering a chat room or sending instant messages without approval was also too broad.

U.S. v. Duke, 788 F.3d 392 (5th Cir. 2015). Condition prohibiting defendant from accessing computer for rest of his life was unreasonable. Lifetime ban on association with minors for life was overbroad.

U.S. v. Ferndandez, 776 F.3d 344 (5th Cir. 2015). Supervised release condition requiring software installation improper because it was not related to defendant's failure to register conviction when his only prior sex offense conviction was for sexual assault of 14 year old, which did not involve a computer.

U.S. v. Dunn, 777 F.3d 1171 (10th Cir. 2015). Condition requiring a defendant convicted of possessing child pornography to submit to computer monitoring and obtain permission to engage in other computer-related activities was plain error because the district court failed to make necessary findings to impose such a harsh restriction that materially affected the defendant's ability to obtain gainful employment.

Sex Offender Treatment

U.S. v. Mercado, 777 F3d 532 (1st Cir. 2015). "In light of the defendant's prior conviction for a sex offense against a minor and his prodigious criminal history, we think it apparent that a sex-offender treatment condition is reasonably related to rehabilitation and protecting the public."

U.S. v. Douglas, 850 F.3d 660 (4th Cir. 2017). Court affirmed condition requiring a "sex offender evaluation" for defendant convicted of SORNA violation despite underlying sex offense being twenty-two years old. The court was concerned about the 14-plus years of evasive actions that the defendant took to avoid apprehension by law enforcement after he failed to register as a sex offender. *See also, U.S. v. Silver*, --F. App'x--, 2017 WL 1407716 (5th Cir. 2017) (unpublished).

U.S. v. Huor, 852 F.3d 392 (5th Cir. 2017). Condition requiring defendant to undergo sex offender treatment was reasonably related to the nature and circumstances of defendant's history. Defendant had previously raped a small child, and had deceived two mothers by using a false name and failing to inform them of his past, earning a place in their homes and placing himself under the same roof as small children.

U.S. v. Von Behren, 822 F.3d 1139 WL 2641270 (10th Cir. 2016). Condition of supervised release that required participation in sex offender treatment, which included a mandatory polygraph, violated the defendant's right against self-incrimination because the questions required the defendant to admit to illegal sexual contact with minors and failure to participate in the polygraph would lead to revocation of his supervised release.

Restitution

U.S. v. Funke, 846 F.3d 998 (8th Cir. 2017). The Eighth Circuit, joining five other circuits, held that future losses could be included in restitution orders for victims of child pornography. The district court properly applied the Paroline factors, considering Funke's "possession of a large number of files involving [Vicky] and his role in distributing files to others over the BitTorrent program." The court did not abuse its discretion in awarding $3,500 in restitution.

U.S. v. Osman, --F.3d--, 2017 WL 1337208 (11th Cir. 2017). Restitution for future expenses, including therapeutic costs for a victim of sexual abuse is appropriate under § 2259 (Mandatory Restitution for Sexual Exploitation of Children) as long as the award is based on a reasonable estimate of those costs (joining 5 circuits which held the same—1st, 2nd, 7th, 9th and 10th).

U.S. v. Baston, 818 F.3d 651 (11th Cir. 2016). Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country. The defendant must pay restitution to the victim for her prostitution in Australia. The district court erred when it reduced her restitution award.

Prior Sex Offense Convictions

U.S. v. Mills, 850 F.3d 693 (4th Cir. 2017). North Carolina's Indecent Liberties with a Child is categorically a crime involving sexual exploitation of a child under 18 U.S.C. § 2251(e).

U.S. v. Wikkerink, 841 F.3d 327 (5th Cir. 2016). Louisiana conviction for aggravated incest qualified as an offense relating to sexual abuse for purposes of the enhanced penalties at 18 U.S.C. § 2252A(b).

U.S. v. Miller, 819 F.3d 1314 (11th Cir. 2016). Florida sexual battery is a prior sex offense conviction under § 2251(e).

SEX OFFENSES SCENARIOS

Scenario 1

Defendant is convicted of one count of possession of child pornography on June 1, 2016. The indictment stated that the defendant possessed 100 images of child pornography on his computer. The government submitted documents showing that on multiple occasions from Aug. 1, 2015 until June 1, 2016, the defendant used a file sharing program to download images of child pornography. The defendant was aware that other people could access his files from the file sharing program. The defendant had over 20,000 images of child pornography on his computer when he was arrested, but the indictment only listed 100 images.

How many images under §2G2.2(b)(7) is the defendant accountable for?

Scenario 2

Same facts as above.

The probation officer applied a 5-level increase for distribution of pornography under §2G2.2(b)(3) based on the defendant's knowledge that other individuals in the file sharing program could access his files. The defendant objected to this increase.

Should the defendant receive an enhancement under §2G2.2(b)(3) (distribution SOC)?

Scenario 3

The defendant is convicted of possession of child pornography under 18 U.S.C. § 2252. The defendant's step-daughter testified at the sentencing hearing that the defendant sexually abused her on numerous occasions 30 years' ago when she was 14. The government argues that the 5-level pattern of activity enhancement at §2G2.2(b)(5) should apply, but the defendant objects because while he admits the conduct took place, it occurred 30 years ago and there was no conviction for the conduct.

Should the enhancement for pattern of activity apply?

SEX OFFENSES SCENARIOS

Scenario 4

Defendant is convicted of Failure to Register as a Sex Offender. The PSR states that because the defendant was convicted of a sex offense, §5D1.2(b)(2) provides, the statutory maximum term of supervised release is recommended.

Does §5D1.2(b)(2) policy statement regarding maximum terms of supervised release apply to this case?

Scenario 5

The defendant is convicted of production of child pornography for producing a video of himself engaging in sexual activity with one of his 13-year old students on July 5, 2016. The defendant admitted that he had sex with another student one time in 2013. The probation officer has applied §4B1.5(b). The defendant objected, arguing that he only has one prior prohibited sexual conduct and that the enhancement should not apply because the enhancement requires two prior instances of sexual abuse.

Should the enhancement at §4B1.5(b) apply?

Scenario 6

The defendant is convicted of sexual abuse of a minor under 18 U.S.C. § 2241 for engaging in sexual conduct with an 11-year old. In 2009, the defendant was convicted of sexual assault of an adult under 18 U.S.C. § 2241. The probation officer applies §4B1.5(a) based on the prior conviction of the assault of the adult.

Should the enhancement apply?

SEX OFFENSES SCENARIOS

Scenario 7

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2016. On July 2, 2016, the defendant also produced child pornography exploiting a different child, age 9.

The probation officer applied a two-level increase for the offense involving a minor under 12 under §2G2.1(b)(1). The government has objected, arguing that the court should impose a four-level increase for a minor under 10.

Should the enhancement at §2G2.1(b)(1) apply?

Scenario 8

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution from June 1, 2016 to June 8, 2016. 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 cross-reference at §2G2.1(c)(1) apply?

Scenario 9

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on a May 10, 2016; applicable guideline §2G2.1. The government also found a video the defendant produced involving a 6-year old. In that same video, a second minor, age 9, was also exploited in the same manner.

Will the special instruction be applied?

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

SEX OFFENSES SCENARIOS

Scenario 10

Count 1 – Trafficking child pornography on April 15, 2016; Applicable guideline §2G2.2; Offense Level 40

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

The probation officer applied §2G2.1(b)(3) for the offense involving distribution of child pornography.

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

Will the counts group?

If so, under which grouping rule?

Scenario 11

Defendant was convicted of Failing to Register as a Sex Offender under the Sex Offender Registration Act (SORNA) found at 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2004 conviction for Texas sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 9-year old niece when she was left in his care. He received a 12-year sentence for that offense. The defendant has two other prior drug trafficking offenses, but no other prior sex offense convictions.

At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during Lopez's supervised release term:

Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses.

Is this an appropriate condition?

United States Sentencing Commission

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United States Sentencing Commission

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