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

TEACHERS
- EDITION -

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National Seminar

Advanced Criminal History - Answers

ADVANCED CRIMINAL HISTORY EXERCISES

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?

   No – we are only scoring criminal convictions, and in this case, the ticket was a civil law violation and therefore, not countable.

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 state convictions for drug trafficking for which he was sentenced prior to the instant offense of conviction. Are these scored for criminal history purposes?

Yes – pursuant to §1B1.3, App. Note 5(C), "Conduct Associated with a Prior Sentence.—For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction." In other words, the prior convictions are not relevant conduct to the instant offense and thus, will result in the scoring of criminal history points.

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

Yes – pursuant to §4A1.2, App. Note 10, " Convictions Set Aside or Defendant Pardoned.—A number of jurisdictions have procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

ADVANCED CRIMINAL HISTORY EXERCISES

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?

3 points – pursuant to §4A1.1(a), if the sentence exceeds one year and one month, it is 3 points. The sentences were imposed consecutive to one another and it does not matter whether they are a misdemeanors or felonies, the sentence will still be aggregated.

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?

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

The length of an indeterminate sentence of 4 to 15 years is the stated maximum of 15 years. (*See* 4A1.2, App. Note 2.). The sentence of 15 years of imprisonment concurrently on each sentence results in this being treated as a single sentence of 15 years. (See 4A1.2(a)(2).)

How many criminal history points?

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

ADVANCED CRIMINAL HISTORY EXERCISES

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?

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

How many criminal history points?

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

ADVANCED CRIMINAL HISTORY EXERCISES

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?

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

The sentence of 1 year of imprisonment consecutively with 9 months of imprisonment results in this being treated as a single sentence of 1 year and 9 months. (See §4A1.2(a)(2).)

How many criminal history points?

3 points, as follows:

The single sentence of 1 year and 9 months is 3 points under 4A1.1(a).

Robbery is a crime of violence (see 4B1.2(a)(2)). However, in this case, each robbery contributed to the criminal history point total. Thus, the second robbery count will not result in 1 criminal history point under 4A1.1(e) (see 4A1.1, App. Note 5.).

ADVANCED CRIMINAL HISTORY EXERCISES

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?

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

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?

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

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?

3 points – pursuant to §4A1.2 §4A1.2(k) & App. Note 11. Although the initial sentence would have been too old to count, the revocation sentence was greater than one year and one month, so the time frame expanded to 15 years.

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?

No criminal history points. The original term of 2 years probation is added to the 1 year term of imprisonment imposed upon revocation to result in this being counted as it were a single sentence of 1 year imprisonment. It is noted that the original sentence was imposed 11 years prior to the instant federal offense, therefore the sentence is outside the applicable time period to be counted. (See §4A1.2(k) & App. Note 11, and §4A1.2(e)(2) & App. Note 8.)

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?

5 points – In this case, each original sentence would have been scored separately as one point, for a total of 3 criminal history points. Pursuant to §4A1.2(k) & App. Note 11, the revocation sentence is added to the sentence that will result in the greatest increase in criminal history points. In this case, they are all the same, so it doesn't matter which one you add it to, but the 18 months will result in one of the prior sentences now receiving 3 criminal history points, while the other two will still receive one criminal history point, for a total of 5 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?

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

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"?

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

STEP THREE

Add the mandatory minimum required by the 924(c) count(s) to the minimum and maximum of the guideline range for the NON 924(c) count(s). (*i.e.* add the mandatory minimum to the minimum and maximum of the "otherwise applicable guideline range".)

What is the resulting guideline range?

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

ADVANCED CRIMINAL HISTORY EXERCISES

STEP FOUR

Compare the minimums of the two ranges and choose the higher.

322-387

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

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

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

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Advanced Relevant Conduct - Answers

ADVANCED RELEVANT CONDUCT - TEACHER'S EDITION

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

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

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

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

Yes, again, the analysis is subject to expanded relevant conduct because firearms offenses (§2K2.1) are listed at §3D1.2(d). You can look to same course of conduct, common scheme or plan. Nothing in §1B1.3 advises against using juvenile conduct when determining relevant conduct. *See* U.S. v. Thomas 114 F.3d 228 (DC Cir. 1997) and U.S. v. Gibbs 182 F.3d 408 (6thCir. 1999).

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

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

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

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

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

Which base offense level is applicable? Why?

34. §1B1.3, App. Note 7 says, "An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute." He was convicted of Conspiracy to Engage in the Sex Trafficking of Children, in violation of 18 U.S.C. § 1591(a). But see US. v. Wei Lin, 841 F.3d 823 (9th Cir. 2016)

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

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

Is this special instruction applicable? Why or why not?

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

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

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

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

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

Which base offense level applies? Why?

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

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

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

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

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

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

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

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

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

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

a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

1. the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
2. the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

* * *

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

Which provision of §5G1.3 applies?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) (Apply the greatest) If the offense—

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

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

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

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

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

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Basic Criminal History - Answers

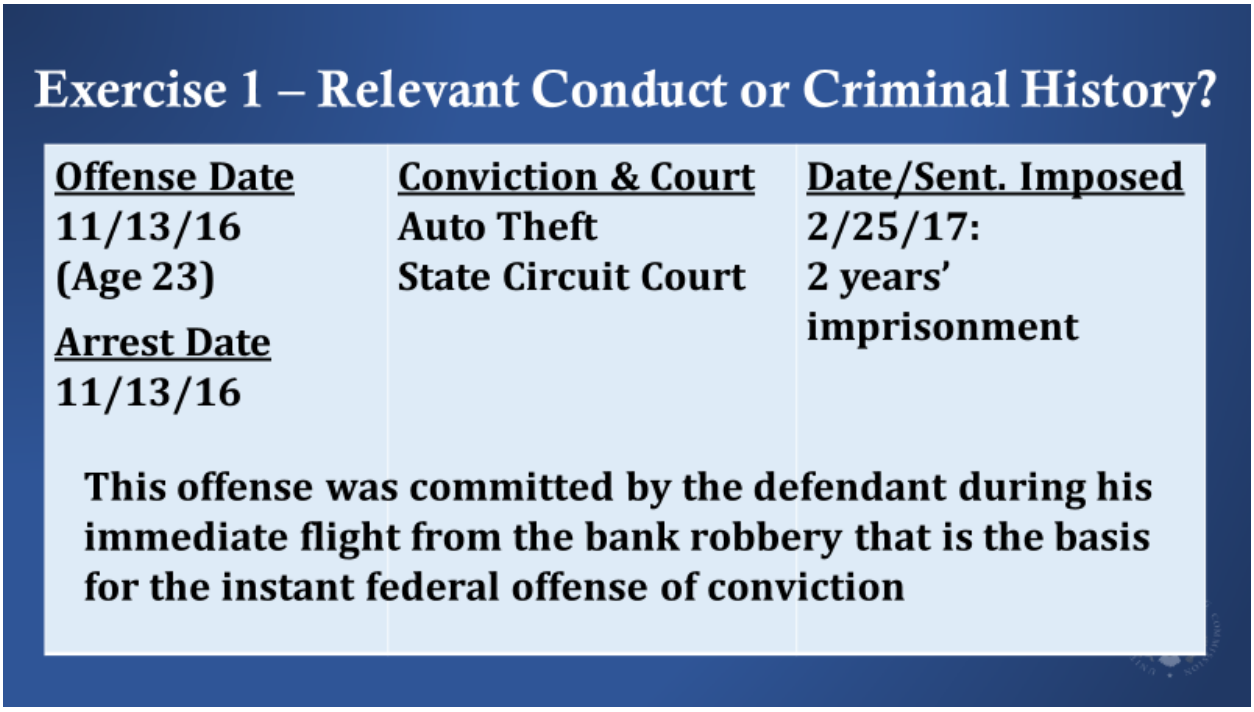
BASIC CRIMINAL HISTORY EXERCISES

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?

Relevant conduct, and not criminal history – So no criminal history points.

The relevant conduct for the instant federal offense of conviction of bank robbery includes the conduct of Defendant stealing a car in the getaway: Defendant committed the act of stealing the car (§1B1.3(a)(1)(A) – the "Who" component of relevant conduct) in the course of attempting to avoid detection or responsibility for the offense of bank robbery (§1B1.3(a)(1) – the "When" component of relevant conduct).

Unless directed otherwise, "prior sentence" means a sentence previously imposed for conduct not part of the instant offense. *See* §4A1.2(a)(1) and App. Note 1: "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)."

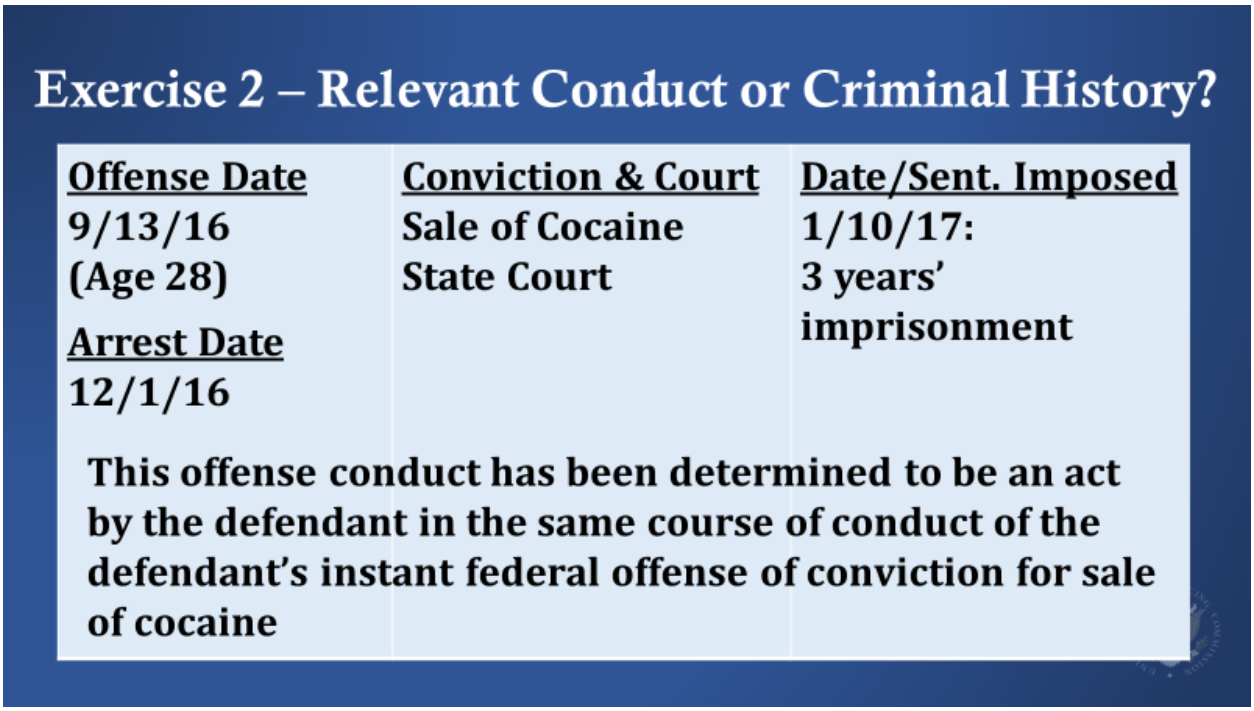
BASIC CRIMINAL HISTORY EXERCISES

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?

Relevant conduct, and not criminal history – So no criminal history points.

The instant federal offense of conviction is a drug distribution for which the applicable Chapter Two offense guideline is §2D1.1. Because that guideline is on the "included" list at §3D12(d), the relevant conduct in the application of the §2D1.1 guideline includes acts in the same course of conduct or common scheme or plan as the offense of conviction. *See* §1B1.3(a)(2) – an expansion of the "When" component of relevant conduct.

It has been determined that the state drug sale was an act committed by Defendant (§1B1.3(a)(1)(A) – the "Who" component of relevant conduct), and that the act was part of the same course of conduct or common scheme or plan as the instant federal offense of conviction

(§1B1.3(a)(2) – the "When" component of relevant conduct). In other words, it is relevant conduct.

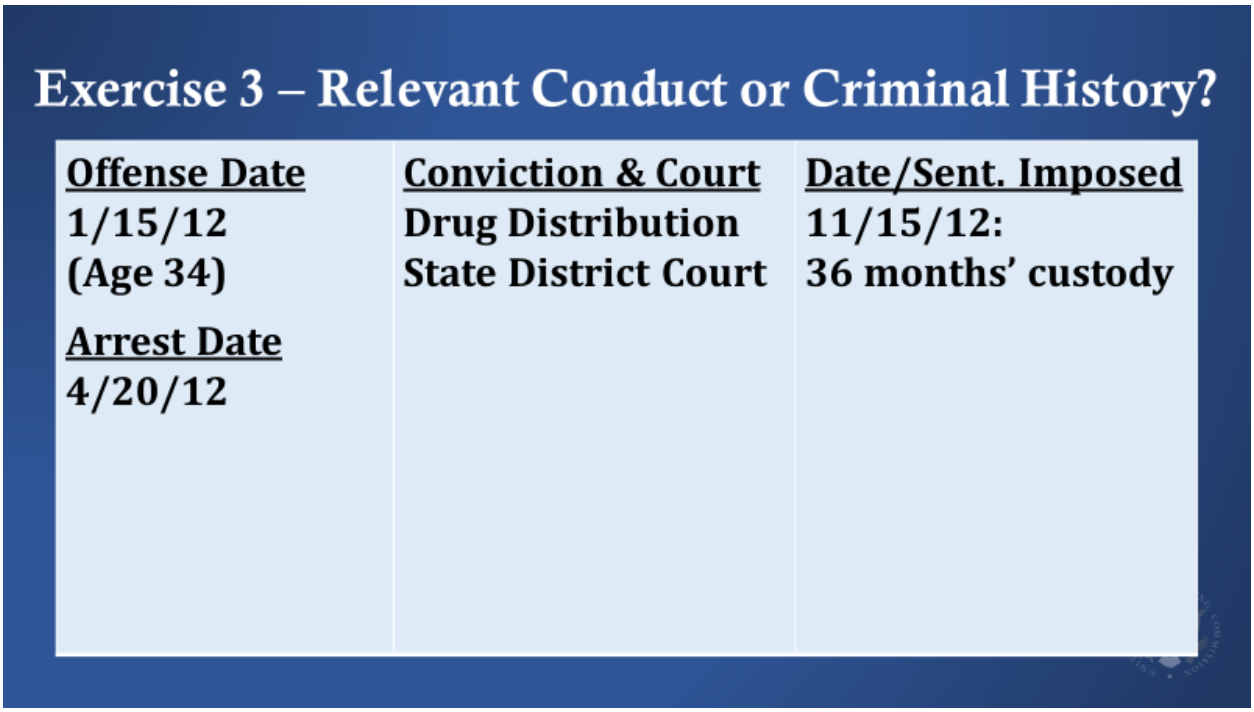
Unless directed otherwise, "prior sentence" means a sentence previously imposed for conduct not part of the instant offense. *See* §4A1.2(a)(1)), which is further explained at App. Note 1: "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)."

Note that relevant conduct directs that if the prior sentence had been imposed prior to Defendant's commission of the instant federal offense of conviction, the offense conduct associated with that sentence would not be considered as part of the same course of conduct or commons scheme or plan as the instant federal offense of conviction. *See* §1B1.3, Application Note 5 (C). Had that been the case in this scenario, it would not be relevant conduct, and would have been counted as criminal history, assuming that the prior sentence otherwise met the other rules at §§4A1.1 and 4A1.2 for being counted under criminal history.

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:



BASIC CRIMINAL HISTORY EXERCISES

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

It is both relevant conduct and criminal history, and will result in an increased base offense level of 20 at §2K2.1(a)(4)(A), and 3 criminal history points for the prior sentence under §4A1.1(a).

The applicable Chapter Two offense guideline for the instant federal offense of conviction of felon in possession of a firearm (18 USC § 922(g)) is §2K2.1. §2K2.1(a)(4)(A) gives an increased base offense level, BOL 20, for committing any part of the instant federal offense subsequent to sustaining one felony conviction of a controlled substance offense. Pursuant to §2K2.1, App. Note 10, for the prior conviction to be used for the increased base offense level at §2K2.1(a)(4)(A), it must be counted under criminal history – And, it will also be counted in the determination of criminal history points.

Because the prior 36-month sentence meets all the criminal history rules for being counted, the increased base offense level will be applied, thus making it relevant conduct under §1B1.3(a)(4). And 3 criminal history points will be added under §4A1.1(a), also making it criminal history.

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?

The maximum sentence imposed is 6 months' imprisonment – 2 criminal history points (§4A1.1(b)).

The sentence of imprisonment includes only the portion that was not suspended, 6 months. *See* §4A1.2(b)(2).

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?

The maximum sentence imposed is 5 months' imprisonment – 2 criminal history points (§4A1.1(b)).

The length of sentence of imprisonment is the stated maximum (§4A1.2(b)(1) & App. Note 2), which in this case is the length of time the defendant is determined to have been in pretrial custody.

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?

The maximum sentence imposed is 3 years' probation – 1 criminal history point (§4A1.1(c)).

A sentence of probation is to be treated as a sentence under §4A1.1(c), unless a condition of probation requiring imprisonment of at least sixty days was imposed. *See* §4A1.2, App. Note 2. There was no such condition imposed in this sentence.

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?

The maximum sentence imposed is 90 days' imprisonment – 2 criminal history point (§4A1.1(b)).

If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended. *See* §4A1.2(b)(2). While the suspension did not occur at the time of the initial sentencing, this was nonetheless a sentence of 18 months' imprisonment suspended to 90 days' imprisonment.

Exercise #8 – Length of Prior Sentence

Sentence of 3 to 5 years' imprisonment

What is the maximum sentence imposed?

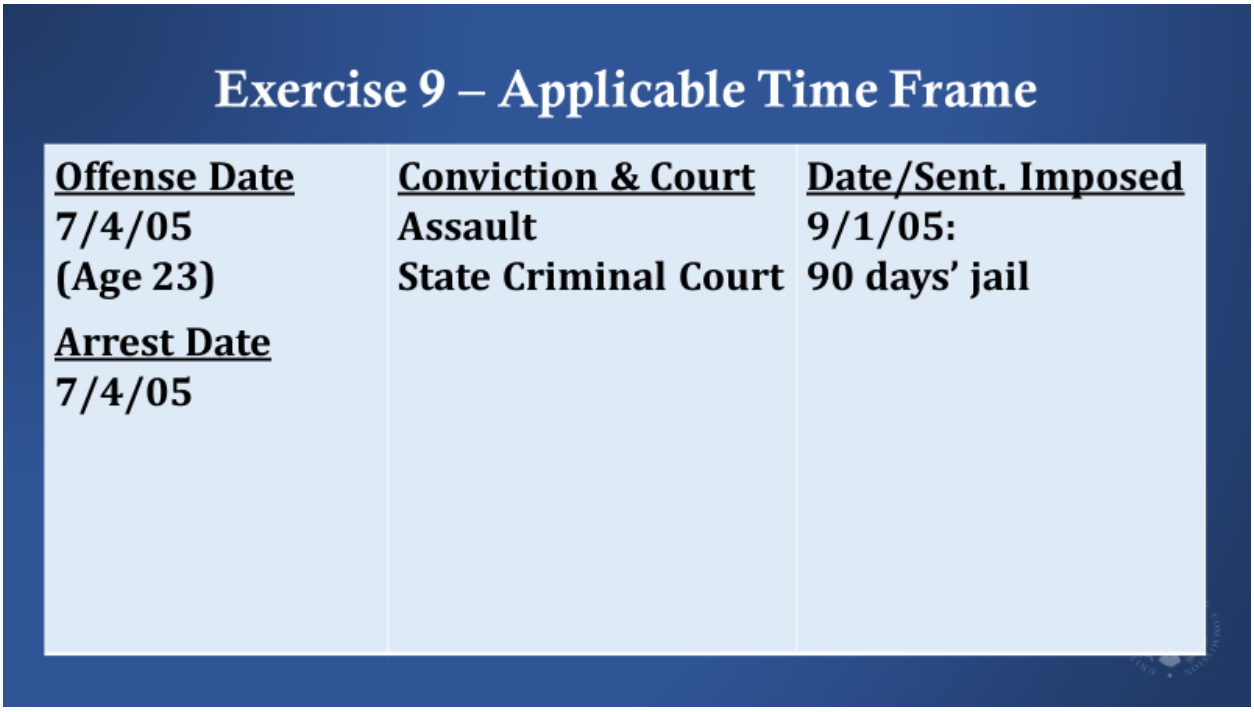
The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed. *See* §4A1.2(b)(1). In the case of an indeterminate sentence of three to five years, the stated maximum is five years. *See* §4A1.2, App. Note 2.

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?

Yes, therefore 2 criminal history points are added (§4A1.1((b)).

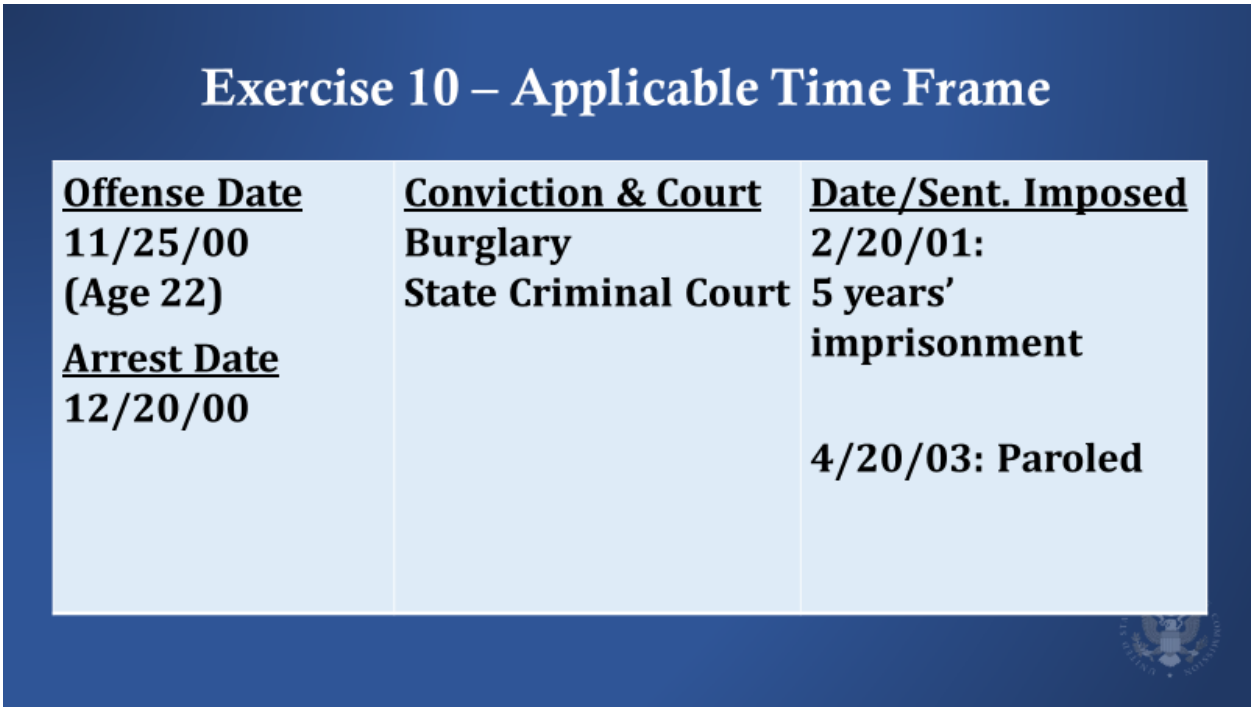
The applicable time period is that the sentence was imposed within ten years of the defendant's commencement of the instant offense (*i.e.*, within 10 years of the earliest date of relevant conduct). *See* §4A1.2(e)(2) & App. Note 8.

The earliest date of Defendant's relevant conduct is January 11, 2015, therefore the applicable time period began on January 11, 2005. Because the sentence was imposed on September 1, 2005, it falls 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?

Yes, therefore 3 criminal history points are added (§4A1.1((a)).

The prior sentence of 5 years' imprisonment resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a sentence greater than a year and a month (13 months) is that the sentence was imposed within 15 years of the defendant's commencement of the instant offense (*i.e.*, within 15 years of the earliest date of

relevant conduct) or that it resulted in the defendant being incarcerated during any part of the 15-year period. *See* §4A1.2(e)(1) & App. Note 8.

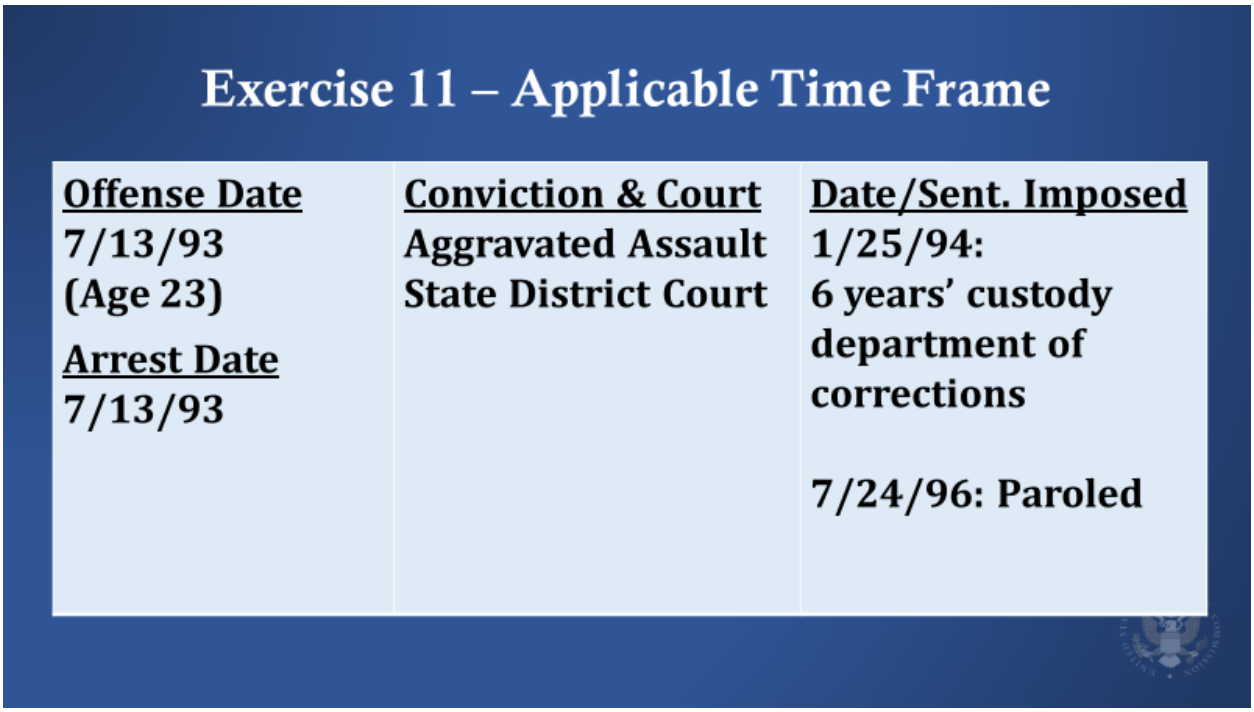
The earliest date of Defendant's relevant conduct is March 1, 2017, therefore the applicable time period began on March 1, 2002. While the date that the prior sentence was imposed, February 20, 2001, was not within the applicable time period, Defendant was not paroled until April 20, 2003, so Defendant was incarcerated on that sentence at a point during the applicable time period.

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?

Yes, therefore 3 criminal history points are added (§4A1.1((a)).

The prior sentence of 6 years' imprisonment resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a sentence greater than a year and a month (13 months) is that the prior sentence was imposed within 15 years of the defendant's commencement of the instant offense (*i.e.*, within 15 years of the earliest date of relevant conduct) or that it resulted in the defendant being incarcerated during any part of the 15-year period. *See* §4A1.2(e)(1) & App. Note 8.

While Defendant's date of the instant federal offense of conviction is January 1, 2016, the earliest date of Defendant's relevant conduct is January 1, 2010, therefore the applicable time period began on January 1, 1995. Although the date that the prior sentence was imposed, January 25, 1994, is not within the applicable time period, Defendant was not paroled until July 24, 1996, so Defendant was incarcerated on that sentence at a point during the applicable time period.

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:

Exercise 12 – Applicable Time Frame

Offense Date	Conviction & Court	Date/Sent. Imposed
4/4/16 (Age 32) Arrest Date 4/4/16	Misdemeanor Domestic Violence County Court	7/1/16: $500 fine and domestic violence program

Does this prior fall within the applicable time frame?

Yes, therefore 1 criminal history point is added (§4A1.1((c)).

The prior sentence of a $500 fine and domestic violence programing resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a prior sentence that is less than 60 days of imprisonment (which would include a sentence that is a fine with no incarceration) is that the prior sentence was imposed within 10 years of the defendant's commencement of the instant federal offense (*i.e.*, within ten years of the earliest date of relevant conduct). *See* §4A1.2(e)(2) & App. Note 8.

While Defendant's date of the instant federal offense of conviction is December 1, 2015, the earliest date of relevant conduct is June 1, 2015. Therefore, the applicable time period began ten years earlier, on June 1, 2005. The date that the prior sentence was imposed is July 1, 2016, which is within the time period.

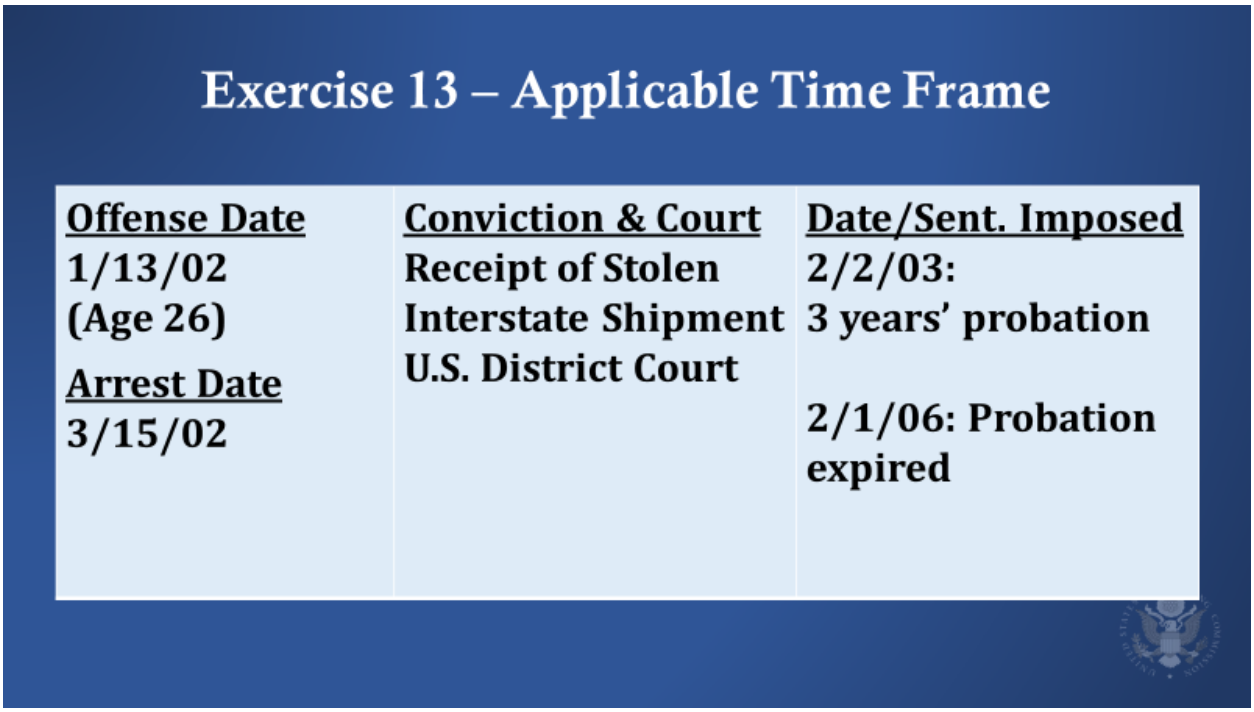
Note that in this case both the date the prior offense was committed (April 4, 2016) and the date for which it was sentenced (July 1, 2016) are both after the date the Defendant's instant federal offense of conviction was committed, and after any of the relevant conduct. That does not affect the criminal history determination however. As defined at §4A1.2(a)(1), "[T]he term 'prior sentence' means any sentence previously imposed … for conduct not part of the instant offense." Previously imposed includes any prior sentence imposed all the way up to the sentencing in the instant federal case, if that prior sentence is otherwise countable.

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?

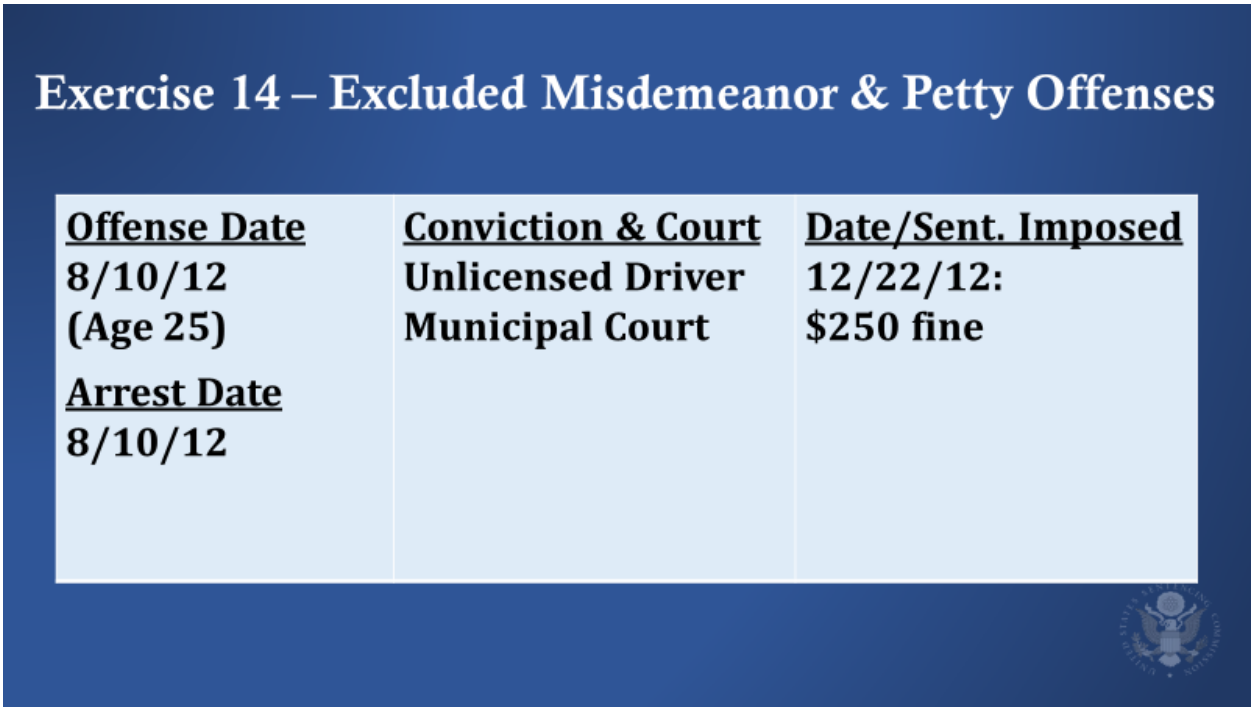
No, it is not within the specified time period, and therefore no criminal history point is added. *See* §4A1.2(e)(3).

The prior sentence for receipt of stolen interstate shipment resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a prior sentence that is less than 60 days of imprisonment (which would include a sentence of probation (*see* §4A1.2(a)(2) & App. Note 2 (last sentence)) is that the prior sentence was imposed within 10 years of the defendant's commencement of the instant federal offense (*i.e.*, within ten years of the earliest date of relevant conduct). *See* §4A1.2(e)(2) & App. Note 8.

While the dates of the instant conspiracy for which Defendant is convicted are from January 1, 2010 to December 31, 2015, Defendant did not join the conspiracy until July 1, 2014, which is the Defendant's earliest date of relevant conduct. *See* §1B1.3, App. Note 3(B) (third paragraph). Therefore, the applicable time period began ten years earlier, on July 1, 2004. The date that the prior sentence was imposed is February 2, 2003, which is prior to the applicable time period. So that prior sentence is not counted.

Note that in this case Defendant's period of probation continued until February 1, 2006, but that has no impact on the date the sentence was imposed.

Exercise #14 – Excluded Misdemeanor and Petty Offense Sentences



How many criminal history points?

No criminal history points due to the sentence imposed for this offense. *See* §4A1.2(c)(1).

This misdemeanor offense of conviction, unlicensed driver, is one which is only counted if the sentence was a term of probation of more than one year, or a term of imprisonment of at least 30 days, or this prior offense is similar to the instant federal offense.

BASIC CRIMINAL HISTORY EXERCISES

Exercise #15 – Excluded Misdemeanor and Petty Offense Sentences

How many criminal history points?

One criminal history point (§4A1.1(c)).

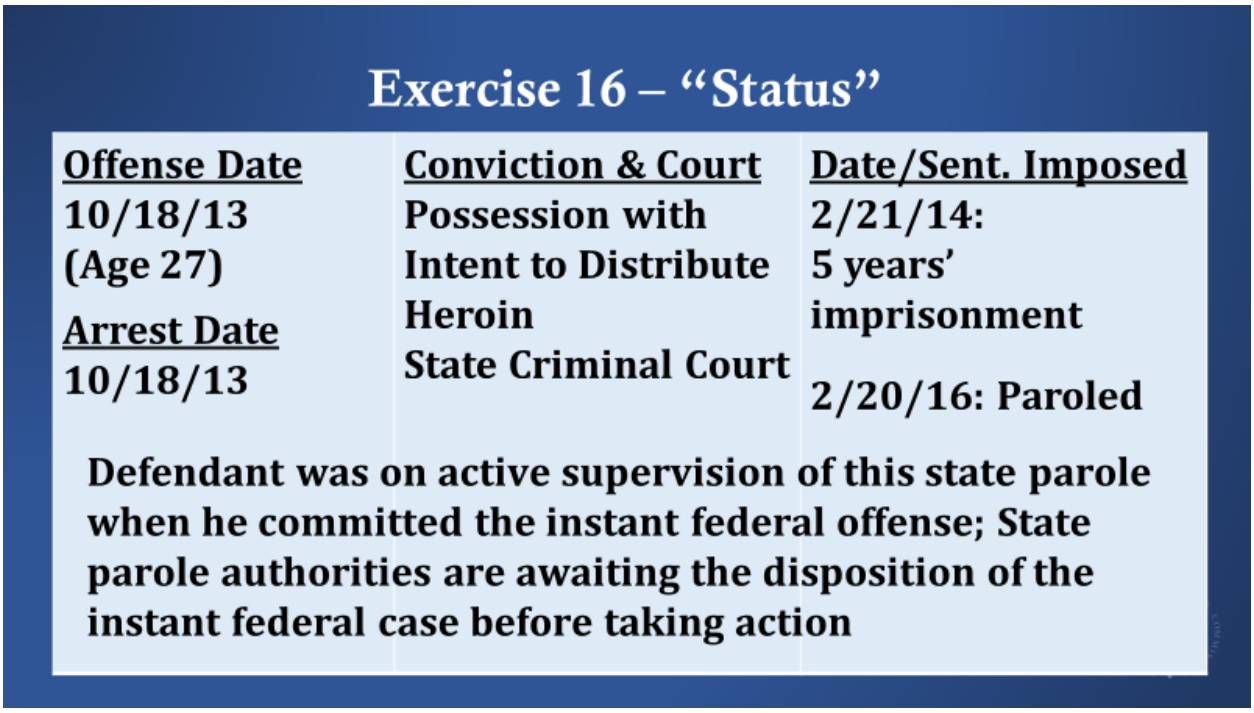
§4A1.2, App. Note 5 directs that convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified (*e.g.*, felony, misdemeanor, petty offense). And the guidelines for "excluded" misdemeanors and petty offenses, at §4A1.2(c)(1) and (c)(2) do not apply to these offenses.

BASIC CRIMINAL HISTORY EXERCISES

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?

Yes, 2 criminal history points apply for "status" (§4A1.1(d)).

The threshold determination as to whether "status" applies, is whether the prior sentence which resulted in the "status" is counted. *See* §4A1.1, App. Note 4. The prior sentence of 5 years' imprisonment resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a sentence greater than 13 months is that the sentence was imposed within 15 years of the defendant's commencement of the instant federal offense (*i.e.*, within 15 years of the earliest date of relevant conduct) or that it resulted in the defendant being incarcerated during any part of the 15-year period. *See* §4A1.2(e)(1) & App. Note 8.

The earliest date of Defendant's relevant conduct in the instant federal offense is November 13, 2016, therefore the applicable time period begins on November 13, 2001. The date that the prior sentence was imposed, February 21, 2014, is within the applicable time period, so that prior sentence will be counted and 3 criminal history points added (§4A1.1(a)).

Defendant was paroled on February 20, 2016, from this countable prior sentence, and was under parole, which is a "criminal justice sentence," when Defendant committed the instant federal offense. *See* §4A1.1(d) & App. Note 4.

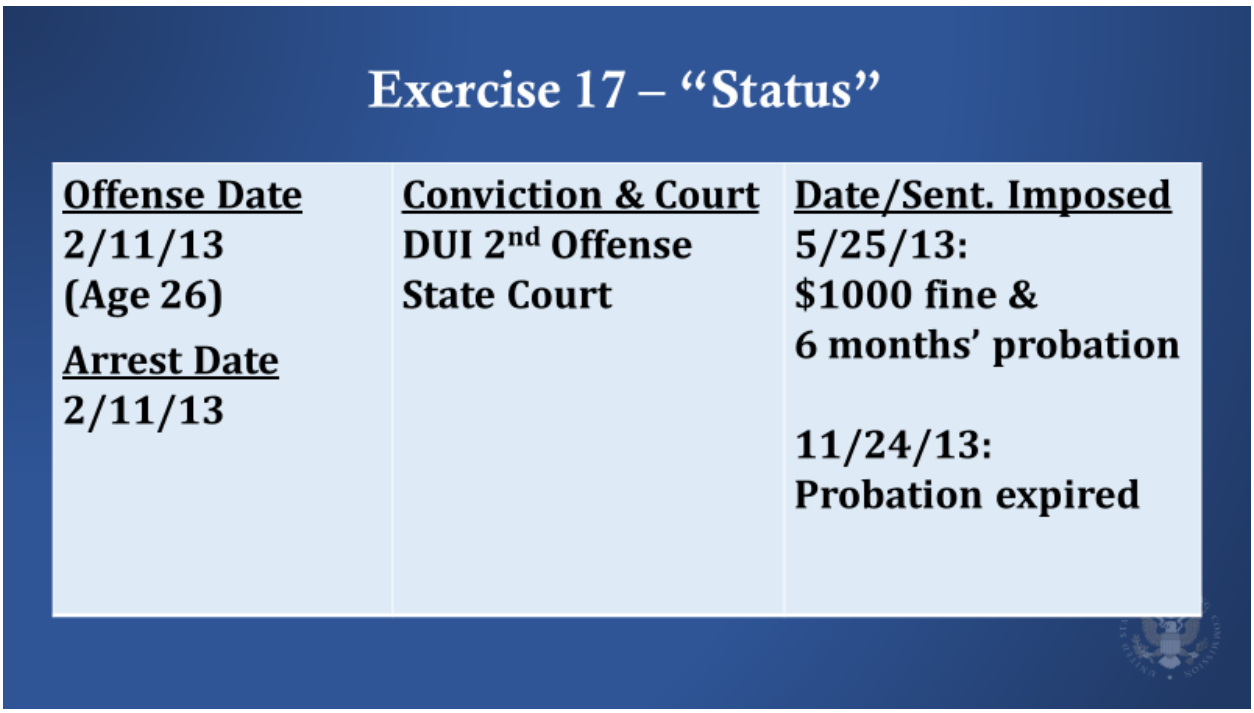
Note that although Defendant was under active parole supervision, that is not required for "status." It is only required that the criminal justice sentence have a custodial or supervisory component; active supervision is not required for "status."

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?

Yes, 2 criminal history points apply for "status" (§4A1.1(d).

BASIC CRIMINAL HISTORY EXERCISES

The threshold determination as to whether "status" applies, is whether the prior sentence which resulted in the "status" is counted. See §4A1.1, App. Note 4. The prior sentence of $1,000 fine & 6 months' probation resulted from an offense committed by the defendant at age 18 or older. Therefore, the applicable time period for a sentence of less than 60 days' is that the sentence was imposed within 10 years of the defendant's commencement of the instant federal offense (meaning the earliest date of relevant conduct), or January 1, 2010 in this case. See §4A1.2(e)(2) & App. Note 8.

Defendant was on the state probation from May 25, 2013 until November 24, 2013, and therefore was under this "criminal justice sentence" during part of the period of Defendant's relevant conduct (January 1, 2010 to January 1, 2016). *See* §4A1.1(d) & App. Note 4.

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

2017

National Seminar

Basic Relevant Conduct - Answers

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)(C) SOC "if a firearm was brandished or possessed, increase by 5 levels" apply?

Yes. The act of possessing a firearm was committed by the defendant – §1B1.3(a)(1)(A) (the "Who" component). And the act occurred "during the commission of the offense of conviction" – §1B1.3 (a)(1) (the "When" component). Therefore, it's relevant conduct, and the §2B3.1(b)(2)(C) SOC, "if a firearm was brandished or possessed, increase by 5 levels," will 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)(A) SOC "if a firearm was discharged, increase by 7 levels" apply?

Yes. The act of discharge of a firearm was committed by Defendant – §1B1.3(a)(1)(A) (the "Who" component). And the act occurred "in the course of attempting to avoid detection or responsibility" for the offense of conviction – §1B1.3 (a)(1) (the "When" component). Therefore, it's relevant conduct, and the §2B3.1(b)(2)(A) SOC, "if a firearm was discharged, increase by 7 levels" will apply.

BASIC RELEVANT CONDUCT EXERCISES

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(b)(2)(C) SOC for "if a firearm was brandished or possessed" apply for Defendant?

Yes. The act of possession of a firearm was committed by a participant within Defendant's scope of jointly undertaken criminal activity (in this case, the robbery), was done by the participant in furtherance of Defendant's joint undertaking, and was reasonably foreseeable – §1B1.3 (a)(1)(B) (the "Who" component). And the act occurred "during" the commission of the offense of conviction – §1B1.3 (a)(1) (the "When" component). Therefore, it's relevant conduct for Defendant, and the §2B3.1(b)(2)(C) SOC "if a firearm was brandished or possessed, increase by 5 levels" will apply to 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)?

Ten kg. In determining Defendant's scope of jointly undertaken criminal activity, Defendant's relevant conduct does not include the conduct of

members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this "bright line rule" takes 100 kg off the table in the determination of Defendant's relevant conduct. (§1B1.3, App. Note 3 (B))

And once Defendant did join the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two importations, and the acts of others in importing 5 kg on each of those two occasions were within the scope of the Defendant's jointly undertaken criminal activity, in furtherance, and reasonably foreseeable – §1B1.3(a)(1)(B)(i)-(iii) (the "Who" component). And these acts occurred "during the commission of the offense of conviction" – §1B1.3(a)(1) (the "When" component). Therefore, the ten kg are relevant conduct for Defendant, and are used to establish Defendant's base offense level at §2BD1.1(a)(5).

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?

BASIC RELEVANT CONDUCT EXERCISES

- 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?

Defendant doctor's relevant conduct includes only the fraudulent acts and resulting losses committed by Defendant doctor and the other participants during Defendant doctor's involvement in the conspiracy.

In determining Defendant's scope of jointly undertaken criminal activity, Defendant's relevant conduct does not include the conduct of members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this "bright line rule" takes the first two years and two months of the conspiracy off the table in the determination of Defendant's doctor's relevant conduct. (§1B1.3, App. Note 3(B))

Once Defendant did join the conspiracy, the facts support that the scope of his jointly undertaken criminal activity was the entirety of the conspiracy for the remaining ten months of the conspiracy. Defendant's relevant conduct includes all the acts he committed (§1B1.3(a)(1)(A)), and also the acts of others within the scope of his jointly undertaken criminal activity (the entirety of the final ten months of the conspiracy) that were in furtherance of his undertaking, and reasonably foreseeable (§1B1.3(a)(1)(B)) – the "Who" component. The acts committed by Defendant, and also those acts committed by the other participants within the scope and in furtherance of Defendant's jointly undertaken criminal activity, occurred during the commission of the offense of conviction (§1B1.3(a)(1)) – the "When" component.

Losses resulting from the acts determined to be relevant conduct for Defendant are themselves relevant conduct, because they are harms resulting from relevant conduct acts. (§1B1.3(a)(3))

BASIC RELEVANT CONDUCT EXERCISES

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(a)(5)?

Forty one kg. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline in this case, §2D1.1, is on the "included list" at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant (§1B1.3(a)(1)(A)) and certain acts of others (under the three-part analysis of §1B1.3(a)(1)(B))) that were part of the same course of conduct or common scheme or plan as the offense of conviction.

Defendant's relevant conduct includes the kg in the offense of conviction, because Defendant committed the act of selling the drug (§1B1.3(a)(1)(A) – the "Who" component), and the act occurred during the commission of the offense of conviction (§1B1.3(a)(1) – the "When" component).

Because relevant conduct in the application of the Chapter Two guideline, §2D1.1, includes acts in the same course of conduct or common scheme or plan as the offense of conviction, Defendant is responsible for the 40 additional kilos he sold (acts of the defendant – §1B1.3(a)(1)(A) – the "Who"), because the facts establish that those 40 sales were in the same course of conduct or commons scheme or plan as the offense of conviction (§1B1.3(a)(2) – the "When")).

Exercise #6

- Defendant convicted of felon in possession of a firearm, a pistol, on a specific date

- Applicable guideline §2K2.1 (Firearms)

BASIC RELEVANT CONDUCT EXERCISES

- 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?

Three firearms will be counted in the application of the §2K2.1(b)(1) SOC for the number of firearms. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline in this case, §2K2.1, is on the "included list" at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant and certain acts of others that were part of the same course of conduct or common scheme or plan as the offense of conviction.

Defendant's relevant conduct includes the firearm in the offense of conviction, because Defendant committed the act of possessing the firearm (§1B1.3(a)(1)(A) – the "Who" component), and the act occurred during the commission of the offense of conviction (§1B1.3(a)(1) – the "When" component).

Because relevant conduct in the application of the Chapter Two guideline, §2K2.1, includes acts in the same course of conduct or common scheme or plan as the offense of conviction, Defendant is responsible for the two additional firearms he possessed (acts of the defendant – §1B1.3(a)(1)(A) – the "Who"), because the facts establish that those two firearms were in the same course of conduct or commons scheme or plan as the offense of conviction (§1B1.3(a)(2) – the "When").

The SOC for obliterated serial number at §2K2.1(b)(4)(B) will apply. This is because a firearm in Defendant's relevant conduct had an obliterated serial number. Note that this applies even though the obliterated serial number was not the firearm cited in the offense of conviction, but was one that was in the same course of conduct or common scheme or plan as the offense of conviction.

Note also that in firearms cases involving the application of the cross reference at §2K2.1(c)(1), the §2K2.1 guideline specifically directs that the firearm must be one cited in the offense of conviction (as opposed to one only in the same course of conduct or common scheme or plan as the offense of conviction).

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?

No. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline for robbery, §2B3.1, is on the "excluded list" at §3D1.2(d), thereby not using expanded relevant conduct pursuant to §1B1.3(a)(2) and not including acts of the defendant and certain acts of others that were part of the same course of conduct or common scheme or plan as the offense of conviction.

So even if one robbery was in the same course of conduct or common scheme or plan as the offense of conviction, the conduct from one robbery will not be used in the application of a different one.

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)

BASIC RELEVANT CONDUCT EXERCISES

- 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 . . . ." ?

Two kg of heroin. Defendant's relevant conduct includes acts he did (§1B1.3(a)(1)(A) – the "Who" component), that occurred during the offense of conviction (§1B1.3(a)(1) – the "When" component). As for Defendant's relevant conduct including acts of others, in determining Defendant's scope of jointly undertaken criminal activity, Defendant's relevant conduct does not include the conduct of members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this "bright line rule" takes the first 50 transportations of a kilo each off the table in the determination of Defendant's relevant conduct. (§1B1.3, App. Note 3 (B))

Once Defendant joined the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two transportations, #51 and #52. If the acts of other participants on those two occasions were within the scope of the Defendant's jointly undertaken criminal activity, in furtherance, and reasonably foreseeable – §1B1.3(a)(1)(B)(i)-(iii) (the "Who" component), and those acts occurred "during the commission of the offense of conviction" – §1B1.3(a)(1) (the "When" component), they are relevant conduct. Based on the facts in this case, each of the kilos on those two occasions are relevant conduct for Defendant, and the 2 kg are used to establish Defendant's base offense level at §2D1.1(a)(5).

Yes, Defendant will get the 2-level increase for the "firearm" SOC at §2D1.1(b)(1). While Defendant himself did not possess a firearm, and was not directly responsible for the co-participant possessing a firearm, the co-participant was within the scope of Defendant's jointly undertaken criminal activity (transportation #51); the co-participant possessed the firearm in furtherance of Defendant's jointly undertaken criminal activity; and it was reasonably foreseeable. Therefore, Defendant's relevant conduct includes the firearm being possessed, and the §2D1.1(b)(1) firearm SOC will apply.

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?

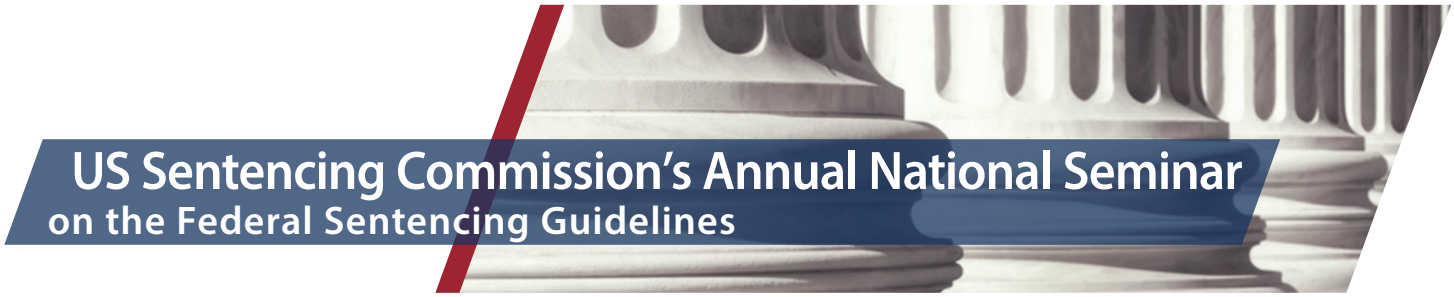
Defendant's relevant conduct will include a total of $45,000 loss.

Specifically as to the offense of conviction, Defendant committed the act of fraud (§1B1.3(a)(1)(A) – the "Who" component), during the commission of the offense of conviction (§1B1.3(a)(1) – the "When" component) that resulted in the $5,000 loss (§1B1.3(a)(3) the harm resulting from the relevant conduct act).

BASIC RELEVANT CONDUCT EXERCISES

Additionally, in beginning the relevant conduct analysis, note that the applicable Chapter Two offense guideline in this case, §2B1.1, is on the "included list" at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant (§1B1.2(a)(1)(A)) and certain acts of others (the three-part analysis of §1B1.3(a)(1)(B)) that were in the same course of conduct or common scheme or plan as the offense of conviction.

The facts support that the ten additional false claims were in the same course of conduct or common scheme or plan as the offense of conviction. Therefore, because Defendant submitted the ten additional false claims of $5,000 each (§1B1.3(a)(1)(A) – the "Who" component), in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2) – the "When" component), these acts are relevant conduct. Therefore, there is an additional $40,000 loss (§1B1.3(a)(3) - the harms resulting from the relevant conduct acts).



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Case Law - Answers

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)?

Answer:

No. The Supreme Court in *Dean v. U.S.*, 137 S. Ct. 1170 (2017), held that a court can consider the mandatory minimum sentence under § 924(c) when calculating an appropriate sentence for the predicate offense. Thus, the judge can consider the 30-year mandatory minimum when considering the sentence for the underlying bank robbery offenses.

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 is 77-96 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 were not a crime of violence, the court 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.

Must the appellate court remand the case for resentencing?

Answer:

In *Molina-Martinez v. U.S.*, 136 S. Ct. 1338 (2016), the Supreme Court held that if there is an error in calculating a guideline range, the court has committed a significant procedural error. However, the Court also noted that if the record shows that the court thought the sentence was proper irrespective of the guideline range and that the sentence was reasonable, the error may be harmless.

In *U.S. v. Morrison*, 852 F.3d 488 (6th Cir. 2017), the Sixth Circuit held that while the district court incorrectly held that aggravated burglary was a crime of violence and improperly calculated the guideline range, the mistake was harmless because the court stated it would have varied upward to the same sentence because the offense was extremely dangerous and egregious, and domestic violence was prevalent throughout the defendant's criminal history. The Sixth Circuit held that even though the court erred in concluding that aggravated burglary was a crime of violence, the error in calculating the range did not entitle the defendant to resentencing because the court's weighing of the factors was reasonable. In this scenario, because the judge provided reasons for the sentence, the court would likely affirm the sentence even with the guideline error.

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?

Answer:

As discussed in question two, a guideline error can be considered harmless if the government can point to parts of the record to show that the court would have imposed the same sentence and the sentence was reasonable. Here, as the district court did not provide any reason for why he/she would impose the same sentence even if the guideline range was calculated incorrectly. If this were the court's only statement, the case would likely be remanded.

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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 under the force clause?

Probably not. For an offense to qualify as a crime of violence at §4B1.2, it must contain as an element the use, attempted use, or threatened use of physical force against the person of another or be listed as an enumerated offense. In making this determination, the court must use the categorical approach. Furthermore, even though the defendant admitted that he pointed a gun during the robbery, facts do not matter under the categorical approach. For this robbery statute to qualify as a crime of violence under the force section at §4B1.2 the Supreme Court has held that the force must involve "force capable of causing pain or injury to another person." See *Johnson v. U.S.*, 130 S. Ct. 1265 (2010). Massachusetts Armed Robbery requires the jury to find the defendant (1) committed a robbery (2) while in possession of a weapon.

The robbery can be committed by (1) force and violence or (2) by assault and putting in fear. After examining Massachusetts case law, both the First and Ninth Circuits have held that the force required by the statute does not satisfy the physical force required by *Johnson*. Massachusetts courts have held that the degree of force is immaterial and that any force, however, slight will satisfy the force prong of the statute. After *Johnson*, a statute requiring only slight force will not fall under the force clause of §4B1.2 or ACCA. *See U.S. v. Starks*, 861 F.3d 306 (1st Cir. 2017) and *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016). Also, even though the statute requires that the defendant possess a weapon, it does not require the use of a dangerous weapon and the victim need not be aware of the weapon's presence. For these reasons, it is unlikely that this statute will qualify as a crime of violence under the force clause at §4B1.2.

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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. 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?

Answer:

No. A defendant cannot be held liable for the entire amount of restitution of a conspiracy if he/she was not in the conspiracy for the entire time. Here, as the defendant joined the conspiracy in 2014, he should not be held liable for any restitution amount prior to this date. *See U.S. v. Fowler*, 819 F.3d 298 (6th Cir. 2016), and *U.S. v. Foley*, 783 F.3d 7 (1st Cir. 2015)

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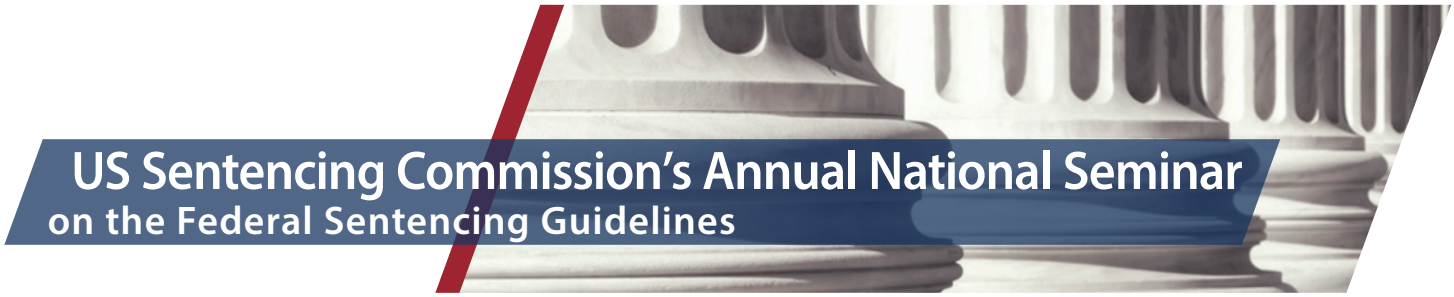
6. Defendant was convicted of Failing to Register as a Sex Offender under the Sex Offender Registration Act (SORNA) found at 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Michigan conviction for sexual assault. In that case, defendant pleaded guilty to 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?

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a computer to commit the offense. Thus, imposing a condition involving computer filtering software does not appear to be related to the purposes listed in § 3553(a). (*See U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015)).



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Categorical Approach - Answers

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 Four.

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

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.

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

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.

ANSWER:

This statute is does not meet the either the definition of serious drug offense under 18 U.S.C. §924(e) or controlled substance offense under U.S.S.G. §4B1.2 because the statute covers a broader range of conduct than the definitions. Specifically, the term "deliver" includes an offer to sell, which is not covered by the definitions for drug offenses.

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, 235 F.Supp.3d 1229 (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.

ANSWER: This burglary is not a violent felony under the ACCA because Oklahoma defines burglary more broadly that generic burglary. Generic burglary includes only breaking and entering into a building or structure. Oklahoma defines burglary to include breaking and entering into a "building/room/booth/tent/(railroad car)/automobile/truck/trailer/ vessel/structure/erection." Further, because the statute is indivisible, it can never be generic burglary.

Missouri Conviction

Second Degree Robbery

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 Stat*es, 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]

ANSWER: This conviction is not a violent felony because the level of force required to commit this offense does rise to the level of "*Johnson*" force; that is, violent purposeful force capable of causing serious bodily injury. As the case suggests, in Missouri, a person can be convicted of second degree robbery with minimal force, without causing injury. Because the most innocent conduct required to commit this offense is less than the required level of force, this cannot be a violent felony.

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Chapter Three Adjustments - Answers

GUIDELINE SCENARIOS – CHAPTER 3 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:

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, the court chose not to apply a role enhancement. If the Court determines that a defendant played an aggravating role, can the Court then 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?

No – if the Court decides that there are 5 or more participants and/or that the defendant was a manager of the drug conspiracy, the court must apply the 3-level for being a manager or supervisor in the criminal activity. *See U.S. v. Jimenez*, 68 F.3d 49 (2d Cir. 1995).

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. Does aggravating role apply?

Yes – +4 at least 5 participants and defendant was a leader or organizer of criminal activity. §3B1.1(a)

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?

Yes – +2 the defendant was an organizer, leader, manager, or supervisor in any criminal activity. There is no requirement regarding the length of time of co-conspirators' involvement. §3B1.1(c)

GUIDELINE SCENARIOS – CHAPTER 3 ADJUSTMENTS

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. Should the defendant on the outside receive a mitigating role reduction?

No, due to the role they played. The defendant was not substantially less culpable, in fact, some may argue she was not only integral but was very aware of the scope of the criminal enterprise and was actively involved in the participation, planning, and organizing of the criminal activity.

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 any Chapter 3 Adjustments applicable?

Yes. Mitigating Role (§3B1.2). Defendant Davies would most likely qualify for a reduction for being a minimal participant. However, at the very least he would qualify for a reduction for being a minor participant. In the actual case, the defendant was determined to be a minimal participant.

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;
- Count 2 – Aiding and Abetting Bank Fraud - 18 U.S.C. §§ 1344 and 2
- Count 3 – Aggravated Identity Theft - 18 U.S.C. § 1028A

Defendants 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 were committed 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.

GUIDELINE SCENARIOS – CHAPTER 3 ADJUSTMENTS

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

Stevens was an organizer or leader in the conspiracy and involved in the scheme since 2006. Stevens participated in obtaining stolen information, creating fraudulent checks and identification cards with this information, and dispensing the information to others for use in obtaining cash. Stevens recruited coconspirators, provided transportation, and directed other participants during both the retail fraud and bank fraud schemes, and he received a portion of the fraudulent proceeds they obtained.

Joel was an organizer or leader in the conspiracy. He recruited individuals to provide checks for use in the conspiracy and others to deposit checks and withdraw funds. Joel worked in conjunction with other leaders to create fraudulent identification documents, and he provided transportation and direction to participants directly committing the fraud inside banks. Joel controlled the fraudulent checks and documents used by these participants and kept a percentage of the fraudulent proceeds they obtained.

Robins is considered a manager or supervisor in the criminal activity that involved 5 or more participants. She helped Joel by recruiting at least 7 others. She is considered to have abused a position of trust. She was recruited to provide account and identifying information she accessed in the scope of her employment.

Tierra is an average (or minor) participant in the offense, though she is considered to have abused a position of trust. Tierra stole personal identifying information in the capacity of her employment as a bank teller and provided it to Stevens and Joel who used this information to create fraudulent checks and identification documents, which were used to purchase merchandise that was later returned for cash.

Marjorie was a minor (minimal) participant in the offense. She was recruited to open a bank account and give the checks to others for use in the scheme. Marjorie also deposited a $9,000 check she knew to be fraudulent with the intent of later withdrawing cash.

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. Will any Chapter Three adjustments apply?

Yes. Vulnerable Victim [§3A1.1(b)] due to age and inability to produce future earnings. Additionally, Obstruction of Justice [§3C1.1] due to the defendant directing or procuring another person to conceal evidence that is material to an official investigation or judicial proceeding.

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.

Yes, if the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels. Many of the individuals whose means of identification were used without authority were incarcerated. These individuals were targeted for their incarceration, as the defendant knew that they would not be filing their own tax return and would be less likely to recognize the fraud or file a true tax return that would block defendant from filing a second. These victims' incarceration made them "particularly susceptible to the criminal conduct," as described in USSG §3A1.1 comment. (n.2), and a 2-level enhancement is applicable.

However, age alone does not make the elderly victims vulnerable unless there is another factor that makes them unusually vulnerable (dementia, Alzheimer's, etc.).

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 based on the fact that the victim was 14 years old?

No. There must be information showing the defendant targeted the 14-year-old because of some particular susceptibility, other than her age, to the criminal conduct. If the defendant specifically targeted

the 14-year-old due to her mental health or behavioral problems, then you may have the information you need for the enhancement.

Obstruction of Justice

Scenario #10

Defendant Jackson was convicted of one count Conspiracy to Defraud the Government with Respect to Claims and one count of 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 of 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.

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

Yes. Adjustment for Obstruction of Justice. §3C1.1 Application Notes 2 and 4(F) indicate that an adjustment for obstruction of justice applies when the defendant's conduct involved providing materially false/inconsistent information to magistrates and district court judges while under oath.

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.

No – USSG §3C1.1 App. Note 5(C) – providing incomplete or misleading information; not amounting to a material falsehood, in respect to a presentence investigation.

Scenario #12

Defendant Bradley was convicted of one count Possession with Intent to Distribute Heroin and one count Felon in Possession of a Firearm. After his arrest for the offenses, he began making telephone calls from the jail that included threats to his girlfriend, a witness in the 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 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?

Yes. Adjustment for Obstruction of Justice. §3C1.1 Application Notes 4(A) indicate that an adjustment for obstruction of justice includes, "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so."

Scenario #13

Defendants Andrews and 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 addresses 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 closet 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 up 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?

Yes. Adjustments for Vulnerable Victim and Obstruction of Justice apply to all three defendants. The adjustment for Vulnerable Victim is appropriate because the bank manager and his wife were chosen as targets in the bank robbery since they had young children. The defendants knew that they were, "otherwise particularly susceptible to the criminal conduct" (see §3A1.1, Application Note 2). The adjustment for Obstruction of Justice is appropriate because the defendants engaged in, "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so" [see §3C1.1, Application Note 4(A)]. **There is also a possible enhancement for the criminal activity being otherwise extensive.

Even though Cross was charged under a different indictment, the relevant conduct analysis would hold her accountable for all acts, committed, aided, abetting, etc. that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. §1B1.3 (a)(1)(A). She played an integral part in getting the name of the victim in the first place. Andrews and Bates also went to Cross's residence after the robbery and counted money. Cross also hid money from the robbery after she went to the police.

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 that 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?

No – often it depends upon when the defendant plead guilty. In addition, the defendant's conduct with his friend and his attempt to get her to file a false police was that only, an attempt. She did not follow through and a few months later, the defendant pleaded guilty anyway. The defendant had no additional post-plea conduct inconsistent with acceptance of responsibility, but a sentence within the guidelines or at the top of the guidelines could take into account that behavior. The Court reasoned that the defendant's use of other jail inmates' pin numbers and .24 grams of marijuana could be and were dealt with by jail officials. Those infractions appeared unrelated to the felon in possession of a firearm charge.

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?

In this case, obstruction happened at the beginning of the investigation and defendant later pleaded guilty, so it might be a case that qualifies, although it would be a factual case-by-case determination.

See §3E1.1, App. Note 4, which provides that there may be extraordinary cases in which both adjustments apply.

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Economic Crimes - Losses - Answers

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:

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)?

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

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)?

Answer – A (BOL 7). It is a 2-part analysis. 18 U.S.C. § 1343 in Appendix A directs you to §2B1.1 and in this case, the statutory maximum penalty for the aforementioned statute of conviction is 20 years or more.

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)?

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

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. What is the proper loss amount?

$1.9 million – Loss is defined at §2B1.1, App. Note 3(A)(i) as the reasonably foreseeable pecuniary harm that resulted from the offense.

GUIDELINE SCENARIOS – ECONOMIC CRIMES

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. What is the loss amount?

$4 million. Intended loss is defined at §2B1.1 App. Note 3(A)(ii) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value). It appears the defendant intended to steal more than $4 million.

Scenario #6

Defendant orchestrated a fraudulent scheme in which he purported that he could 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?

$57 million. Loss is defined at §2B1.1, App. Note 3(A)(i) as the reasonably foreseeable pecuniary harm that resulted from the offense. The defendant solicited investors for a scheme that was never viable or legitimate. Just because the defendant used the money to support his purported natural gas technology product, does not allow the loss figure to be reduced by that amount. As noted in the Eighth Circuit opinion -

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. Walker cites no evidence that the defrauded Bixby investors received any pecuniary benefits from the company while it was under Walker's control. Rather, as the district court noted at sentencing, early victims were induced to invest by Walker's fraudulent misrepresentations and were then lulled into believing that their investments were sound by Walker's repeated fraudulent actions throughout Bixby's disastrous corn-stove and coal-gasification ventures. "For many, perhaps most fraud offenses, actual loss is properly and readily measured by the fair market value of property 'taken' from the victim." United States v. Markert, 774 F.3d 922, 926 (8th Cir.2014). The district court committed no clear error in reasonably estimating the actual loss resulting from Walker's fraud offenses as equaling the total amounts lost by Bixby investors who submitted Victim Impact Statements.

GUIDELINE SCENARIOS – ECONOMIC CRIMES

Scenario #7

Defendant orchestrated a fraudulent scheme in which he purported that he could 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. 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?

No. Pursuant to §2B1.1, App. Note 3(D) - Loss shall not include the following: (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs; (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

Scenario #8

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

Yes. Pursuant to §2B1.1, App. Note 3(E)(i) - Credits Against Loss.—Loss shall be reduced by the following: (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

There have been cases in which the collateral or the fair market value of a property or properties has been sufficient to cover any purported losses – although rare – it can and has happened.

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. What is the loss amount? What is the restitution amount?

Answer – C ($300,000). In this case, we use a little math. We have $350,000 in fraudulent bills, but it appears the defendant has rebutted and can show that $200,000 were not fraudulent. §2B1.1, App. Note 3(F)(viii). Ok, so loss appears to be $150,000. However, based upon expanded relevant conduct, as §2B1.1 is one of those offenses at §3D1.2 for which you can use expanded relevant conduct, you can add an additional $150,000. Therefore, the total loss is $300,000.

Answer – C ($150,000). As to restitution, you can only look to the offense of conviction – you cannot add the relevant conduct portion to the loss. So, as noted above, we have $350,000 in fraudulent bills, but it appears the defendant has rebutted and can show that $200,000 were not fraudulent. §2B1.1, App. Note 3(F)(viii). So, restitution appears to be $150,000.

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. Will the increase for substantial financial hardship apply?

Yes. Pursuant to §2B1.1, App. Note 3(F) - 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.

There are some cases in which the defendant's monetary losses are relatively small, but to them, it was substantial. As long as the record is clear and the court makes a determination based upon factors noted in the application note, an increase for substantial financial hardship may be appropriate.

Scenario #12

Defendant is convicted of identity 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 undercover FBI agents. Would the defendant be subject to an increase for number of victims?

No. Pursuant to §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.

But also –

Pursuant to §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.

In this case, none of the victims' identification was ever used nor did the victims' suffer any financial loss.

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 continue to perpetrate his scheme. Should the defendant receive an enhancement for sophisticated means?

Answer – A (Yes). §2B1.1, App. Note 9(B). If you had additional information such as where the defendant obtained the forged checks, where the ID's came from, whether the defendant was a data miner, whether the information was from a phishing (e-mail or acct access) or smishing (text or SMS msg) scam. Did the defendant create numerous false documents? You need to look at the conduct as a whole, not necessarily the pieces, when determining if this SOC applies.

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?

$212,500 – all 425 credit card numbers. Pursuant to §2B1.1, App. Note 3(F)(i) - Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).

GUIDELINE SCENARIOS – ECONOMIC CRIMES

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 four 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. Should the two offenses be grouped?

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

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. At sentencing, 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?

No - The order was not correct. While the amount of restitution often will equal the actual loss amount at §2B1.1, there are cases where the amounts will be different. Specifically, §2B1.1, Application Note 3(D) excludes interest of any kind, finance charges, late fees, penalties… or similar costs from the loss calculation, the restitution statutes do not contain the same exclusion. Finance charges and late fees can be included in a restitution award. *See e.g.*, *U.S. v. Morgan*, 376 F.3d 1002 (9th Cir. 2002).

Therefore, the loss amount should be reduced from $575,000 to $545,000, which would then, according to the loss table, result in a +12 level increase.

Note: While interest is not included in this scenario, interest is another example of where loss and restitution might be different. *See, e.g.*, *U.S. v. Perry*, 714 F.3d 570 (9th Cir. 2013).

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Economic Crimes - Restitution - Answers

Restitution Scenarios

1) Smitty was convicted of Clean Air Act violations after he and his co-defendants formed a salvage company and bought the rights to salvage a former industrial site for metals and fixtures. The site also had asbestos, which Smitty purposefully failed to dispose of properly. EPA eventually intervened and cleaned up the privately-owned land, at a cost of $16,000,000. Is the government entitled to restitution?

A. No, because the government doesn't own the property
B. No, because the government chose on its own to clean up the property
C. Yes, because the government suffered a loss caused by the defendant

Yes, the government can be a victim. In *U.S. vs Sawyer*, the Sixth Circuit held that a Clean Air Act violation is an offense against property for Mandatory Victim Restitution Act ("MVRA") purposes, and that EPA was a victim of the offense even though it did not have a possessory interest in the property. EPA paid for the cleanup under their statutory authority, and they were entitled to restitution for the cost. *See, U.S. v. Sawyer*, 825 F.3d 287 (11th Cir. 2016).

2) Coffee defrauded numerous investors while he worked at a brokerage firm. Unknown to the investors, Coffee took money from their accounts and placed it in his own account. He also diverted investors' money from low-risk, short-term accounts to high-risk, long-term accounts and took a higher commission. The brokerage firm fired Coffee, liquidated the unauthorized investments at a loss, and repaid the investors the amounts they were defrauded. Does Coffee owe restitution to the company?

A. No, the customers were the victim
B. No, Coffee did not force the company to liquidate at a loss
C. Yes, Coffee's crime caused a loss to the company
D. No, Coffee owes restitution to the victims who should intern reimburse the company

Yes. In U.S. v. Rhodes the Seventh Circuit held that the defendant could be made to pay restitution to restitution to cover the company's losses incurred when liquidating unauthorized investments at a loss to repay defrauded investors. Even though changes in interest rates contributed to the loss, Rhodes had to bear the risk, not the investors, and not the company, which acted quickly and laudably to make the victims whole. *See, U.S. v. Rhodes*, 330 F.3d 949 (7th Cir. 2003).

3) Jones and co-defendants conspired to skim debit card information from gas pumps and withdraw cash from ATMs using the information. Jones pled guilty to Count 1 of the indictment, which charged conspiracy to defraud Arvest, First United, and First Texoma Banks.

The PSR stated that at the PSI interview, Jones admitted to defrauding Landmark Bank in a similar manner, confirming an admission he had previously made to law enforcement upon arrest. Does Jones owe restitution to Landmark Bank?

A. No, Landmark is not in the indictment
B. Yes, he admitted defrauding them
C. Yes, the loss to Landmark is relevant conduct
D. No, because the defendant's admission is not evidence

No. "[The PSR and the district court took into account all financial institutions that suffered losses as a result of the defendants' general criminal activity, and they did not attempt to link the losses suffered by each financial institution to a particular skimming device or gas pump. As a result, it is impossible to determine from the record on appeal whether these seven additional financial institutions were directly and proximately harmed by the wire fraud committed on the five financial institutions listed in the indictment." *See, U.S. v. Alisuretove*, 788 F.3d 1247 (10th Cir. 2015).

4) Taylor was convicted of a mail fraud scheme involving misuse of US passports and aggravated identity theft after he used others' personal information to obtain access devices.

At the same time, Taylor and three others ran a tax fraud scheme using the wires to file false returns and obtain refunds using others' information. Charges included wire fraud and aggravated identity theft. Charges were dismissed when Taylor pled to the mail fraud described above. Does Taylor owe restitution to the tax fraud scheme victims?

A. Yes because it happened at the same time as the wire fraud scheme
B. Yes, if the victims are the same as those for the wire fraud
C. No, the charges were dismissed
D. Yes because aggravated identity theft occurred in both

No. "[T]he United States repeatedly refers to [defendant's] 'multi-year fraudulent scheme' in its brief, but nowhere identifies *evidence* establishing—or identified by the district court as the basis for a finding—that the scheme charged in the second case, in which Thomsen was not convicted, was, in fact, the same scheme as, or was related to, the scheme charged in the first case, in which Thomsen was convicted. At most, the United States has shown that both schemes were designed to obtain tax refunds by fraud and that Thomsen was involved in both of them. That is not enough." *See, U.S. v. Thomsen*, 830 F.3d 1049 (9th Cir. 2016).

5) Kirk was a city mayor, convicted of bribery, extortion, mail and wire fraud, RICO conspiracy and tax evasion. The government sought restitution to the Water and Sewage Department and to the IRS in the amount of defendant's profits from illegal contracts related to the RICO and extortion contracts. The amount requested was an estimate of an overall 10% profit margin on the contracts the city was unknowingly forced to spend for contracts obtained through fraud and deceit. Should the Court award restitution to the government in the amount of Kirk's gain?

A. Yes, when loss cannot be determined, Court can use gain
B. No, restitution must be exact
C. No, there's no loss in a kickback scheme
D. Yes, unless Kirk forfeits the gains to the US Attorney

No. "Upon considering these precedents from other circuits, we are unable to uphold the restitution award. The government essentially conceded that its $4.5 million figure did not represent the city's 'actual loss.' And the district court correctly observed that absent the defendants' extortion, a large portion of that city money would have gone to other contractors (who ostensibly would be additional victims). The government claimed the 'actual loss' would be 'inherently difficult to precisely qualify,' and the court recognized it lacked any data regarding what the DWSD would have paid to other contractors

if the bidding had not been rigged. It appears that the court [] like the district court 'threw up [its] hands too soon.'" *See, U.S. v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015).

6) Parker was employed by a software company until he was convicted of possessing and transmitting their trade secrets, in the form of the company's proprietary software which he used to engage in high-volume stock trading. Noticing irregularities, the company hired a forensics expert to investigate. Parker's theft was discovered and the company contacted the FBI. The firm billed the company for 48 of hours work plus expenses. Is Parker responsible for the money paid to the forensic accountant?

A. Yes
B. No

Maybe, but in this case the Court of Appeals found the district court had committed plain error when it failed to give a complete account of losses. The accounting provided by the government failed to account for employees' time spent on the investigation. As for attorneys' fees, the district court needed to make findings on whether the costs expended were reasonable. *See, U.S. v. Yihao Pu*, 814 F.3d 818 (7th Cir. 2016).

7) Parker was convicted of possessing and transmitting trade secrets. In addition to the costs of the forensics expert, the company incurred costs during the pendency of the case in court. The company sought restitution for hours of review of the government's case file by various employees as well as an outside firm advising the company. Should Parker's restitution order include the money spent on outside review of the government's case file?

A. Yes
B. No
C. Maybe

Probably not. On these facts it doesn't appear that the defendant made the algorithm unusable by the company. He used it for himself and there's no information that he transmitted the proprietary information to anyone else. The court was incorrect in finding the loss amount of $12,000,000, equal to the cost of developing the product. *See, U.S. v. Yihao Pu*, 814 F.3d 818 (7th Cir. 2016).

8) Defendant Benson used false documents on a credit application to Bank of America in an effort to refinance his home and avoid foreclosure. BoA denied the application and the property was foreclosed. Housing and Urban Development suffered a loss of $50,000, the difference between what they paid BoA for the property and the later sale price of the property. Does Benson owe HUD for their loss on the property sale?

A. Yes, the government can be a victim
B. No, his false statement to obtain a mortgage did not cause the loss on the sale
C. Yes, but HUD will have to turn the money over to Bank of America

No. There's no indication that defendant's false statement caused HUD's loss. The crime was making false statements to refinance the loan and avoid foreclosure. "[R]estitution may only be awarded if the government established, by a preponderance of the evidence, direct or proximate causation between Benns's false credit application and HUD's loss when it sold the [] property. [] During resentencing, the government was unable to produce any evidence that the application resulted in a delay or even to

establish when foreclosure proceedings were initiated. The government also failed to submit any evidence that the alleged delay, instead of market conditions or other factors, resulted in the loss. Thus, HUD's loss in this case, [], is outside the scope of the offense of conviction. Benns was indicted and pleaded guilty to one count of filing a false credit application in an attempt to refinance a mortgage. It therefore does not follow that the behavior underlying Benns's offense was the cause of HUD's loss. On these facts, any loss HUD suffered later is not proximate. HUD was not a victim of defendant's crime of conviction. *See, U.S. v. Benns*, 810 F.3d 327 (5th Cir. 2016).

9) Defendant Lightner and co-defendants cheated Bank of America by pretending that various buyers were the source of down-payment money for sixteen home purchases. False documents presented to the Bank contained obvious errors and inconsistencies. One buyer applied to buy six homes during a two-week period. Bank of America claims $900,000 in actual loss. The parties do not dispute the amount of loss. Is Bank of America entitled to restitution of the $900,000 loss?

A. Yes, the actual loss is the same as restitution in this case
B. No, Bank of America knew better

No. On these facts, the bank was found to have participated in the offense. Given the obvious nature of the misrepresentations, the bank was complicit in the criminal behavior. *See, U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017).

10) Defendant Stern tried to inflate his company's stock by releasing press releases with false sales figures. Two investors testified that they read the press releases and relied on them when deciding to invest. Several other investors said they read the press releases but performed independent research on the company as well. A government spreadsheet reflects 2,400 total investors, and the government seeks restitution for all of them after Stern's company goes belly-up. Should the Court order Stern to pay restitution to all 2,400 victims?

A. Yes, they all suffered a loss
B. No, only two investors read and relied on the press release
C. Yes, his false statements caused the company to collapse

No. There was no evidence presented that more than 2 investors relied on the press release with the false statements. It cannot be said that the defendant caused their loss. *See, U.S. v. Stein*, 846 F.3d 1135 (11th Cir. 2017).

11) Bernie made fraudulent misrepresentations via the mail and the wires in the course of soliciting investments for his employer. Little did Bernie know, his employer's business was an entirely fraudulent Ponzi scheme. All of the company's investors lost 3.3 million dollars in the Ponzi scheme. Is Bernie responsible for $3,300,000 in restitution?

A. Yes, that was the loss caused by the company for which he worked
B. Yes, he should have known the company was a fraud
C. No, he did not defraud all of the victims
D. No, he did not personally benefit from the company's Ponzi scheme

No. "Even though the district court may determine that Burns proximately caused the actual loss on remand, there is a reasonable probability that the outcome will be different because the government

did not claim that Burns knew about the Ponzi scheme. For that reason alone, the Ponzi scheme can reasonably be seen as a superseding cause that breaks the causal chain." *See, U.S. v. Burns*, 843 F.3d 679 (7th Cir. 2016).

Restitution Case Studies

In the Smith case, the issue is "what is the count of conviction?" Smith pled guilty to six counts of aggravated identity theft and the government dismissed the wire fraud count. If the government wants restitution for the six victims, it will have to determine what losses were caused by Smith's aggravated identity theft. It's hard to see how the funds invested would qualify, as they had nothing to do with the identity theft. The cash advances, in contrast, did result from the identity theft. The luxury car fees and rent payments also seem unrelated to the identity theft to which Smith pled guilty.

The Markus case highlights the difference between loss calculations and restitution. Whereas §2B1.1 (Fraud and Theft) contains specific direction not to count fees, penalties, and investigation costs as part of loss, under restitution principles, the victim should be made whole for all of his or her losses if they were proximately caused by the defendant's conduct of conviction. A restitution award may include reasonable costs, fees, and penalties.

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Drugs and Guns - Answers

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?

Questions 1 and 2 – No. The SOC for possession of firearm cannot be used because of the Possessing of a Firearm in Furtherance of a Drug Trafficking Crime charge. Section 2K2.4, Application Note 4 indicates, "Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c)." This also precludes the application of §2K2.1(b)(6)(B), however it does not preclude the possible application of the cross reference at §2K2.1(c)(1). The application of the cross reference, however, hinges on whether the firearm is cited in the offense of conviction. In this case at least one of the firearms

is cited in the indictment, thus the cross reference could be applied if the resulting offense level is greater than determined under §2K2.1.

Scenario #2

Defendant Ruger pled guilty to one count of 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?

No. USSG §2K2.1, Application Note 13 states "(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
"(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; **and**
"(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
"(I) whose possession or receipt of the firearm would be unlawful; or
"(II) who intended to use or dispose of the firearm unlawfully" (emphasis added).

There is no evidence to suggest that the defendant knew or had reason to believe that his conduct would result in the transport, transfer, or disposal of firearms to individuals listed above. Additionally, the Application Notes require that the defendant know that these individuals' possession or receipt would be unlawful. This defendant did not know anything about the criminal histories of the individuals as he did not conduct any type of background investigations. Therefore, the 4-level increase for this Specific Offense Characteristic **is not** applicable.

GUIDELINE SCENARIOS - GUNS AND DRUGS

Scenario #3

Defendant Washington pled guilty to one count of 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?

Yes. According to Application Note 14 of USSG §2K2.1, "Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply…(ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively."

In this case, the firearm and a digital scale were located in close proximity to a large quantity of drugs. Therefore, the 4-level increase for this Specific Offense Characteristic **is** applicable.

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.

GUIDELINE SCENARIOS - GUNS AND DRUGS

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?

No. According to Application Note 14 of USSG §2K2.1, "Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply…(ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively."

In this case, the firearms and the quantities of "buy money" that were used to purchase the heroin were not located in close proximity to each other. Therefore, the 4-level increase for this Specific Offense Characteristic **is not** applicable.

GUIDELINE SCENARIOS - GUNS AND DRUGS

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.

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?

It is not clear that the defendant possessed any of the firearms in connection with the drug distribution offense, therefore the SOC at §2K2.1(b)(6)(B) will not apply. The SOC at §2D1.1(b)(1) will not apply either based on the same analysis.

NOTE: The two firearms counts will group together under §3D1.2(d), but the gun count group will not group with the drug count as there is no apparent connection between the guns and the drugs. Assign units accordingly.

GUIDELINE SCENARIOS - GUNS AND DRUGS

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?

The Base Offense Level under §2K2.1 is 22 because the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine and the defendant committed the instant offense subsequent to sustaining a felony conviction for a controlled substance offense [§2K2.1(a)(3)]. However, per Application Note 10 at §2K2.1, if the prior conviction had not scored criminal history points, the BOL would not be 22 as that BOL requires not only a certain type of firearm, but also a prior conviction that received criminal history points. The SOC for the offense involving a firearm that had an altered or obliterated serial number at §2K2.1(b)(4)(B) is applicable. Even though there was a firearm that was stolen and another that had an obliterated serial number, only one of the increases at §2K2.1(b)(4) can be applied. The SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) is applicable in this case. The drugs and guns were found in close proximity to each other.

NOTE: The two firearms counts will group together under §3D1.2(d) and the firearm count group will group with the drug count under §3D1.2(c).

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).

GUIDELINE SCENARIOS - GUNS AND DRUGS

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 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?

The total marijuana equivalency is 190 kilograms. 150 grams of heroin (1gr x 1kg) = 150 kg or marijuana. 200 grams of cocaine (1gm x 200 gm) = 40kg. The SOC for the weapon is applicable because it is not "clearly improbable" that the weapons were connected with the offense. One of the weapons was found in the defendant's truck, where he was observed making drug transactions. Another weapon was found with drug weighing and packaging material and equipment, and a third weapon was found in the residence where the drugs were located, although on a different floor of the residence.

GUIDELINE SCENARIOS - GUNS AND DRUGS

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
- 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?

GUIDELINE SCENARIOS - GUNS AND DRUGS

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

The defendant will be held accountable for a total of 306.15 kg (1gm=1kg) of heroin and 41.37 kg (1gm=200gm) of cocaine. This results in a total of 347.52 kg of marijuana and a BOL of 24. Although the defendant is only convicted of the conspiracy involving cocaine, the heroin will most likely be considered as in the "same course of conduct, common scheme or plan" as the offense of conviction as the facts indicate that the defendant was distributing both cocaine and heroin. The drug guideline, therefore, will be applied on the basis of all the drugs involved and the Chapter Three Adjustment for Aggravating Role will apply to the application of the drug count.

NOTE: The drug count group will group with the money laundering count group under rule (c) per Application Note 6 at §2S1.1. The higher of the two calculations will control. The drugs and money laundering count group will then group with the felon in possession count under rule (c) as the firearm was possessed "in connection with" the drug offenses.

US Sentencing Commission's Annual National Seminar
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2017

National Seminar

Immigration - Answers

Scenario 1 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - no priors**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **0 - no countable criminal history convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **0 - no priors other than Illegal Reentry**

§2L1.2 Offense Level Sum: **8**

Scenario 2 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☒ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **2 - there are 3 prior misd. Illegal Entries**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **4 - 2007 Felony Conviction - 1 year probation**

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

☒ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **10 - 2010 Felony Conviction - 5 years prison**

§2L1.2 Offense Level Sum: **24**

Scenario 3 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - no prior convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **0 - no countable criminal history convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **0 - no countable criminal history convictions**

§2L1.2 Offense Level Sum: **8**

Scenario 4 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - no prior convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **4 - 2010 conviction - deferred adjudication scored**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **0**

§2L1.2 Offense Level Sum: **12**

If AFTER the defendant was deported…the defendant engaged in criminal conduct. In this case, the defendant engaged in the criminal conduct before the deportation and was convicted after he illegally reentered.

Scenario 5

§2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☒ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **4 - prior felony deportation**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☒ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **8 - Felony conviction 2009 - single sentence, aggregate sentences when consecutive - (12 months + 12 months = 24 months)**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **0 - no prior felony convictions, only misd.**

§2L1.2 Offense Level Sum: **20**

Scenario 6 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - no prior convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **0 - sentence was vacated, no criminal history points**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **4 - felony conviction - time served 22 days**

§2L1.2 Offense Level Sum: **12**

Scenario 7 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - only 1 prior misd. conviction (need at least 2)**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☒ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **6**

Add revocation time to original sentence (1 year + 2 months) - However, see U.S. v. Franco-Galvan, 864 F.3d 338 (5th Cir. 2017); U.S. v. Martinez, __ F.3d __ (9th Cir. Sept. 15, 2017)

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☒ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **8**

§2L1.2 Offense Level Sum: **22**

Conviction from 2013, although state classifies offense as a misd., guidelines consider offenses with punishable term of imprisonment exceeding one year a felony - 4A1.2(o)

Scenario 8 §2L1.2 WORKSHEET – 2016 AMENDMENT

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

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☒ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **4 - prior felony conviction - 2L1.2, App. Note 4**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **0 - no convictions that received criminal history points**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☒ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **8 -**

Felony conviction - see 2L1.2, App. Note 4 - can be scored under (b)(1) and (b)(3)

§2L1.2 Offense Level Sum: **20**

Scenario 9

§2L1.2 WORKSHEET – 2016 AMENDMENT

Date the defendant was ordered deported or removed for the FIRST TIME: **11/18/2007**

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☒ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **2 - two prior misd. convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **4 - felony in 2007**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☒ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **8**

Felony from 2014 - 12 to 30 months - use stat max. Use conviction that results in greatest increase - 2015 conviction was only 1 yr. or +4

§2L1.2 Offense Level Sum: **22**

Scenario 10 # §2L1.2 WORKSHEET – 2016 AMENDMENT

Date the defendant was ordered deported or removed for the FIRST TIME: **06/20/2012**

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☒ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **4 - felony conviction**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☒ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☐ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **6 - aggregate sentences (1 year and 60 days)**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **4 - felony conviction**

§2L1.2 Offense Level Sum: **22**

Scenario 11 §2L1.2 WORKSHEET – 2016 AMENDMENT

Date the defendant was ordered deported or removed for the FIRST TIME: **06/01/2001**

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

☐ (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**

☐ (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): **0 - no prior convictions**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): **4 - felony conviction - 30 days**

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

☐ (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**

☐ (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**

☐ (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**

☒ (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**

☐ (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): **4 - felony conviction - 10 months**

§2L1.2 Offense Level Sum: **16**

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Multiple Counts - Answers

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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

PLEASE NOTE: The answers to each scenario follow the recommended process outlined in the Multiple Counts Decision Tree found on the previous two pages of this workbook.

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?

These counts group under §3D1.2(d).

The two counts use the same guideline (§2K2.1), and that guideline is listed as included under §3D1.2(d). Therefore, §2K2.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for the group of closely related counts.

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?

These counts group under §3D1.2(d).

The two counts use the same guideline (§2B1.1), and that guideline is listed as included under §3D1.2(d). Therefore, §2B1.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for the group of closely related counts.

The fact that the defendant is charged in two separate indictments does not affect grouping. The Introductory Commentary to Chapter 3, Part D (Multiple Counts) states that "these rules apply to multiple counts of conviction . . . contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

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?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts use the same guideline (§2B3.1), but that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each robbery count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the robbery counts that embodies the conduct of the other robbery count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim. Two different banks were the victims of the robberies. By process of elimination, then, units will 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?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim* as different societal interests are harmed. By process of elimination, then, units will be assigned under §3D1.4.

* "Victim" is defined in Application Note 2 at §3D1.2. It states that "for an offense in which there are no identifiable victims (*e.g.* drug or immigration offenses where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed." Application Note 2 further states that one count involving the sale of a controlled substance and another count involving an immigration law violation will not group together because different societal interests are harmed.

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?

These counts group under either §3D1.2(a) or (b).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts involve the same victim – the same societal interest (violation of the laws governing immigration) is harmed. The counts do not involve separate instances of fear and risk of harm.

However, the counts involve either the same act or transaction or two or more acts constituting a common criminal objective. As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

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?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating the guidelines for the drug offense, a two-level increase for obstruction of justice at §3C1.1 applies because the defendant made materially false statements to DEA agents to obstruct the investigation of the drug offense. This Chapter 3 adjustment embodies the conduct of the other count of conviction, the false statements count. As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

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?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating §2K2.1 for the felon in possession count, a four-level increase at §2K2.1(b)(6)(B) will apply because the defendant possessed the Glock pistol "in connection with" the bank robbery. The Glock pistol is relevant conduct to the guns listed in the felon in possession count because possessing the Glock is the same course of conduct/common scheme or plan as the offense of conviction (*See* §1B1.3(a)(2) and Application Note 5(B).) This specific offense characteristic embodies the conduct of the other count of conviction, the bank robbery.

Interestingly, the other count of conviction, the robbery, also contains a specific offense characteristic that embodies the conduct of the other offense. When calculating §2B3.1 for the robbery count, an increase at §2B3.1(b)(2)(C) will apply because the defendant possessed a firearm during the robbery offense. This specific offense characteristic for firearm possession embodies the conduct of the other count of conviction, the felon in possession count. Grouping under §3D1.2(c), however, does not require that both counts contain an adjustment that embodies the conduct of the other count of conviction. Only one count must contain an adjustment that embodies the conduct of the other count.

As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

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?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts use the same guideline (§2G2.1), but that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count of sexual exploitation. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim. However, each count involves a separate instance of fear and risk of harm*. By process of elimination, then, units will be assigned under §3D1.4.

*Application Note 4 at §3D1.2 states that "this provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (*e.g.* robbery of the same victim on different occasions involves multiple, separate instances of far and risk of harm, not one composite harm)." The application note also provides another example where counts involving the same victim would not be grouped: "two counts of rape for raping the same person on different days." Sexually exploiting the same child on different occasions does not represent a single composite harm. Rather, multiple instances of sexual exploitation represent separate instances of fear and risk of harm.

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?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating §2B3.1 for the carjacking count, a one-level increase at §2B3.1(b)(6) will apply because the object of the carjacking offense was the taking of a controlled substance, which is part of the defendant's drug offense conduct. This specific offense characteristic embodies the conduct of the other count of conviction, the drug trafficking offense.

Interestingly, the other count of conviction, the drug trafficking offense, also contains a specific offense characteristic that embodies the conduct of the other offense. When calculating §2D1.1 for the drug count, an increase at §2D1.1(b)(2) will apply because the defendant used violence during the drug offense by carjacking his rival dealer. This specific offense characteristic for violence embodies the conduct of the other count of conviction, the carjacking. Grouping under §3D1.2(c), however, does not require that both counts contain an adjustment that embodies the conduct of the other count of conviction. Only one count must contain an adjustment that embodies the conduct of the other count.

The highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

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?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count.

The money laundering guideline (§2S1.1) directs, in Application Note 6, that when the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, "the counts shall be grouped pursuant to subsection (c) of §3D1.2."

The highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

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? (HINT: multiple rules apply in this scenario.)

These counts group under §3D1.2(c) and (d). The 18 U.S.C. § 924(c) count is excluded from the grouping rules in Chapter 3, Part D.

The three counts of felon in possession use the same guideline (§2K2.1) and that guideline is listed as included at §3D1.2(d). Therefore, §2K2.1 will be applied one time based upon the aggregate relevant conduct for the three counts of conviction. The offense level for the aggregate conduct is the offense level for this group of closely related counts.

The two drug distribution counts use the same guideline and that guideline (§2D1.1) is listed as included at §3D1.2(d). Therefore, §2D1.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for this group of closely related counts.

These two count groups, the firearms count group and the drug count group do not use the same guideline. Therefore, these count groups do not group under §3D1.2(d).

When calculating §2D1.1 for the drug counts, an increase at §2D1.1(b)(1) normally would apply because the defendant possessed a firearm during the drug offense. However, because the defendant is also convicted of 18 U.S.C. § 924(c), §2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count group, the felon in possession count group.

Interestingly, the other counts of conviction, the felon in possession counts, also contain a specific offense characteristic that embodies the conduct of the other count group. When calculating §2K2.1 for the felon in possession counts, a four-level increase at §2K2.1(b)(6)(B) normally would apply because the defendant possessed the firearm "in connection with" the drug trafficking offense. However, because the defendant is also convicted of 18 U.S.C. § 924(c), §2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count of conviction.

The highest offense level from either of the two count groups will be used to determine the combined offense level for this group of closely related counts.

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Sex Offenses - Answers

SEX OFFENSES SCENARIOS

Scenario 1

Defendant was 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?

Answer:

20,000 images. Section 2G2.2 (Trafficking) is on the "included list" at §3D1.2(d), therefore relevant conduct will include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). Thus, the 20,000 images would be considered the same course of conduct to the 100 images listed in the indictment and the court would be able to count them to apply the 5-level enhancement for more than 600 images.

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)?

Answer:

Yes, but the court should apply a two-level enhancement at §2G2.2(b)(3), not the five-level enhancement recommended by the probation officer. To apply the 5-level distribution specific offense characteristic, the defendant must distribute child pornography in exchange for valuable consideration. Section 2G2.2, Application Note 1 provides that the defendant must agree to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child. Here, there is no evidence that the defendant agreed to exchange child pornography with a specific person, so the five-level enhancement should not apply. However, as the defendant knew that others could access his files when he joined the file sharing program, the court should apply the two-level enhancement for distribution at §2G2.2(b)(3)(F).

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?

Answer:

Yes. Section 2G2.2, Application Note 1 defines pattern of activity as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by a defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same minor; or (C) resulted in a conviction for such conduct. Here, while the defendant abused his step-daughter 30 years before the instant offense and there was no conviction for that conduct, the court can consider this conduct in determining whether to apply the pattern of activity enhancement. Almost every circuit has permitted a court to consider sexual exploitation that occurred over 15 years prior to the instant offense of conviction. *See, e.g., U.S. v. Alberts*, 859 F.3d 979 (11th Cir. 2017) (conduct occurred 30 years prior to instant offense).

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) recommends the statutory maximum term of supervised release be imposed.

Does §5D1.2(b)(2) (policy statement regarding maximum terms of supervised release) apply to this case?

Answer:

No. While the defendant will qualify for a five-year term of supervised release under 18 U.S.C. § 3583(k), §5D1.2(b) will not apply because "Failure to Register offenses", are not considered "sex offenses". Section §5D1.2(b)(2) applies to offenses that are "sex offenses" and Application Note 1 specifically excludes 18 U.S.C. § 2250 (Failure to register) from the definition of sex offense.

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 it requires two prior instances of sexual abuse.

Should the enhancement at §4B1.5(b) apply?

Answer:

Yes. Section 4B1.5(b), Application Note 4 provides that if a defendant engages in a pattern of activity involving prohibited sexual conduct on at least two separate occasions, the defendant engaged in

prohibited sexual conduct with a minor, a five-level enhancement applies. An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of instant offense or (II) resulted in a conviction for the conduct. Here, while the defendant had only one prior sexual conduct with a minor, the guidelines provide that the instant offense can be considered as part of the pattern of activity.

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?

Answer:

No. §4B1.5(a) applies to a defendant whose instant offense is a covered sex crime and the defendant must have a prior sex offense conviction against a minor. Here, the defendant's prior conviction was for sexual assault of an adult. (*See. e.g., U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016))

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 over 12 under §2G2.1(b)(1). The government has objected, arguing that the court should impose a four-level increase for a minor under 12.

Should the enhancement at §2G2.1(b)(1) apply?

Answer:

No. Section 2G2.1 (Production) is on the "excluded list" at §3D1.2(d), therefore relevant conduct will not include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). Thus, the court would only be able to apply conduct occurring on July 15, 2016 related to the child listed in the indictment. The video that contained the nine-year ago child is not relevant conduct because it did not occur on July 15, so the court cannot apply the specific offense characteristic for a "minor under 12".

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 §2G1.3(c)(1) apply?

Yes. Section 2G1.3(c)(1) provides that if the offense involved producing a visual depiction of a minor, §2G2.1 applies. Here, because the indictment states that the victim was transported between June 1, 2016 to June 8, 2016, the court can apply the cross reference based on the filming of the sexual activity because all conduct involving the minor that occurred during the days alleged in the indictment is considered relevant conduct.

Scenario 9

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on 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?

No. Section §2G2.1(d) provides that if the offense involved the exploitation of more than one minor, Chapter Three, Part D shall apply as if the exploitation of each minor had been contained in a separate count of conviction. While the defendant has produced videos of three children engaged in sexual behavior, the court will only be able to consider the video on May 10, 2016 in calculating the offense level at §2G2.1. Section 2G2.1 (Production) is on the "excluded list" at §3D1.2(d), therefore relevant conduct will not include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). Here, the other video is not relevant conduct to the video cited in the indictment on May 10, 2016, so the special instruction cannot apply.

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

Single application. Because the other video is not included as relevant conduct (see answer above), the court will not apply a separate application for the children in the other video.

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?

Yes.

If so, under which grouping rule?

The counts will group pursuant to §3D1.2(c). Section 3D1.2(c) states: "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Section 2G2.1(b)(3) provides a 2-level increase if the offense involved distribution, and this specific offense characteristic applied in this case. Because the specific offense characteristic embodies conduct from count 1 (distribution conduct), the two counts would group pursuant to §3D1.2(c).

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 the defendant'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?

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a computer to commit the offense. Thus, imposing a condition involving computer filtering software does not appear to be related to the purposes listed at § 3553(a), and the condition would likely not be appropriate. (*See, U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015)).