



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

National Seminar

May 30-June 1, 2018
Grand Hyatt San Antonio





UNITED STATES
SENTENCING COMMISSION

2018 NATIONAL SEMINAR

Co-Sponsored by the American Bar Association.



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U.S. Sentencing Commission's
2018 Annual National Seminar
on the
Federal Sentencing Guidelines
Grand Hyatt • 600 East Market Street • San Antonio, TX
Wednesday, May 30 – Friday, June 1, 2018

Tuesday, May 29, 2018

Check-In 4:00 pm – 6:00 pm

Wednesday, May 30, 2018 (Day 1)

Check-In will begin at 7:30 am

Breakfast provided at 7:30 am

8:30 am – 10:15 am

Plenary Session: USSC Update/Interactive Overview

10:15 am – 10:30 pm

BREAK

Informational booths ongoing in the foyer...

- Helpline Live!
- CLE Information Table
- Guidelines App Demo

Concurrent Sessions

10:30 am – 12:00 pm

Drugs and Guns – Recurring Issues*

Economic Crimes – Loss/Victims/Restitution

Multiple Counts – Grouping multiple offense types

Relevant Conduct in Conspiracies with Role Adjustments*

12:00 pm – 1:30 pm

LUNCH (on your own)

Concurrent Sessions

1:30 pm – 3:00 pm

Criminal History – Recurring Issues*

Drugs and Guns – Recurring Issues*

Relevant Conduct in Conspiracies with Role Adjustments*

Sex Offenses*

3:00 pm – 3:15 pm

BREAK

Concurrent Sessions

3:15 pm – 4:45 pm

RICO Offenses

Criminal History – Recurring Issues*

Organizational Guidelines

Sex Offenses*

5:00 pm – 6:30 pm

Reception

*session repeated

Thursday, May 31, 2018 (Day 2)

Concurrent Sessions

9:00 am – 10:30 am

Bureau of Prisons – Inmate Classifications and Designations*
Case Law Update – Categorical Approach*
Emerging Technologies in Cybercrimes – Intro to Terminology/Concepts
PSRs and Departures & Variances – How to Get the Most Out of Your PSR*

10:30 am – 10:45 am

BREAK

10:45 am – 12:15 pm

Bureau of Prisons – BOP Inmate Programs*
Case Law Update – Categorical Approach*
Emerging Technologies in Cybercrimes – Child Exploitation
PSRs and Departures & Variances – Sentences Outside the Guideline Range*

12:15 pm – 1:45 pm

LUNCH (on your own)

Concurrent Sessions

1:45 pm – 3:15 pm

Bureau of Prisons – Inmate Classifications and Designations*
Case Law Update – Pitfalls in Supervised Release Conditions & Restitution
Emerging Technologies in Cybercrimes – Case Studies in Phishing Scams,
Privacy, and Email Hacks
PSRs and Departures & Variances – Sentences Outside the Guideline Range*

3:15 pm – 3:30 pm

BREAK

3:30 pm – 5:00 pm

Bureau of Prisons – BOP Inmate Programs*
Case Law Update – Circuit Conflicts & Other Topics Trending in Recent Case Law
Emerging Technologies in Cybercrimes – Case Studies in Bitcoin and Crypto-
Currency
PSRs and Departures & Variances – How to Get the Most Out of Your PSR*

Friday, June 1, 2018 (Day 3)

Breakfast provided at 7:30 am

8:30 am – 9:45 am

Plenary Session - Tips from the Bench

9:45 am – 10:00 am

BREAK

Concurrent Sessions

10:00 am – 12:00 pm

Ethics
Probation Officer Interactive Roundtable

*session repeated



UNITED STATES
SENTENCING COMMISSION

2018 NATIONAL SEMINAR

COURSE DESCRIPTIONS

Bureau of Prisons - Inmate Classifications and Designations

The majority of defendants receive a sentence of imprisonment. How does the BOP use the presentence report and judicial recommendations to classify and designate inmates? This session will discuss the process from sentencing to designation (including medical needs, security level, and more) as well as the role of the presentence report throughout the defendant's period of incarceration in the BOP.

Bureau of Prisons – BOP Inmate Programs

What kind of programming is available at the BOP and in community confinement facilities (halfway houses)? How does the BOP use the presentence report and judicial recommendations to decide who qualifies for treatment and other programs? Does it matter if the court recommends a specific program? All these questions and more will be answered during this session.

Case Law Update – Categorical Approach

In this session, you will work through scenarios that provide an overview of how courts apply the categorical approach to sentencing statutes and guidelines, including those that use the terms “crime of violence” and “violent felony.” The focus of this session is determining whether a statute is “divisible” or “indivisible” and the analysis that flows from that determination.

Case Law Update – Circuit Conflicts & Other Topics Tending in Recent Case Law

Learn about recent Supreme Court decisions and about current Circuit Conflicts on sentencing issues.

Case Law Update - Pitfalls in Supervised Release Conditions and Restitution

This session will address recent Supreme Court and Circuit Court decisions related to supervised release conditions and restitution. Scenarios based on recent case law emphasize appropriate special conditions in sex offense cases. We will also explore how circuit courts determine whether a victim was entitled to restitution and what losses can be included in the restitution order.

Criminal History – Recurring Issues

This course will address frequent pitfalls in this important area. For example, misapplication of the single sentence rule can result in a defendant having a higher criminal history score than that called for by the guidelines. Miscalculation of revocation sentences can lead to similar results. Sometimes a prior sentence doesn't count because it is considered part of the instant offense. Learn how to avoid these and other common mistakes. An understanding of basic criminal history rules is recommended. We highly encourage those new to federal sentencing to complete the short, scenario-based courses online titled "Basic Criminal History" and "The Single Sentence Rule."

Drugs and Guns –Recurring Issues

One of our more popular courses is back. This course will focus on the interplay between §2D1.1 and §2K2.1 for defendants charged with offenses involving drugs and guns. The course will answer frequently asked questions about the weapon enhancement at §2D1.1, distinctions between the applicable enhancement when the gun is used in connection with another offense at §2K2.1 and the cross reference at §2K2.1, and the impact of a § 924(c) conviction, among other topics. This course will also address determination of the offense level in cases involving synthetic cannabinoids, synthetic cathinones, and other synthetic drug cases.

Economic Crimes – Loss, Victims, and Restitution

One of the most frequently requested topic areas will be addressed in this session. Emphasis will be placed on learning the difference between loss at §2B1.1 and restitution by focusing on case-based scenarios to illustrate key points. Participants will work through examples and scenarios to learn special rules for determining loss for commonly occurring economic crimes, such as those involving credit cards, health care fraud, and government contracts. Participants will also practice applying the guidelines' definition of "victim" and related sentencing adjustments.

Emerging Technologies in Cybercrime – Case Studies in Bitcoin and Cryptocurrency

This session will explain what Bitcoin is and how criminals are using it to facilitate criminal activity and avoid detection. We will also provide additional information pertinent to supervising these sophisticated offenders, and will explore sentencing issues surrounding Bitcoin and Cryptocurrencies.

Emerging Technologies in Cybercrime – Case Studies in Phishing Scams, Privacy, and Email Hacks

This session will explain what phishing is, and how criminals utilize it to steal information. We will also cover malware and how it's used by criminals to steal victims' identity, information, and money.

Emerging Technologies in Cybercrime – Child Exploitation

This session will cover the dark web and BitTorrent as well as new web-based methods offenders are using to commit sex crimes. We will also cover investigative, supervisory, and sentencing considerations for sex offenders.

Emerging Technologies in Cybercrime – Intro to Terminology/Concepts

This topic will introduce the concepts involved in malware and hacking, and will address privacy issues in relation to federal crimes sometimes prosecuted under 18 U.S.C. § 1030. Instructors will focus on emerging digital platforms and their implications in federal sentencing practice, including victim-related adjustments, criminal conduct occurring outside the United States, and obstruction of justice, among others.

Ethics

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

Guidelines App Demonstration – (Ongoing in the Foyer)

Swing by and learn how to access the *Guidelines Manual* mobile app, and how to use it. The web-based app is already available for downloading. Use it on your iPad, Surface Pro, or mobile phone. You can also access the app on a desktop or laptop. Visit us in the foyer for more information and a real-time demonstration.

Helpline Live – Commission Training Staff (Ongoing in the Foyer)

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

Multiple Counts – Grouping of Multiple Offense Types

Using the multiple counts decision tree, participants will apply the grouping rules to several real-life scenarios to determine a single offense level for cases involving multiple counts of conviction. The session will address grouping rules for cases involving a single composite harm, the assignment of units for cases involving separate harms, and cases involving multiple grouping rules.

Organizational Guidelines

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

Plenary Session – USSC Update/ Interactive Overview

Commissioners will open the seminar with an update on Commission activities and the background to 2018 Guideline amendments. Then, break out your clickers for an interactive overview of the seminar topics. Answer right or wrong anonymously to help determine which sessions you should attend.

Plenary Session – Tips from the Bench

A panel of district court judges will answer recurring questions about best practices and procedures related to sentencing.

PSRs and Departures & Variances – How to Get the Most Out of Your PSR

In light of the Court’s obligation to sentence consistent with the factors in 18 U.S.C. § 3553(a), how do we ensure that the Court receives all relevant information about the offender? A diverse panel of probation officers and attorneys will discuss evolving best practices for obtaining this information and ensuring it is accurately described in the presentence report.

PSRs and Departures & Variances - Sentences Outside the Guidelines Range

This session will address departures and variances, as well as the importance of the Statement of Reasons form, which courts are required to complete and file after every sentencing. What’s the purpose of all the checkboxes, how is it filled it out, and what happens to it? For litigators, how do I get to the sentence I want? This session will address some of the Commission’s publications that have been of interest to litigators, probation officers and judges, including the career offender, recidivism, and child pornography offender reports. Learn the possible relevance of this information to sentencing.

Probation Officer Interactive Roundtable

The Probation Officers Advisory Group (POAG) and the United States Sentencing Commission (USSC) want your feedback! In this session, officers will form small groups to discuss sentencing issues and recommended policy priorities for the Commission. The Commissioners typically propose policy priorities in the summer and vote to finalize them in August. Come to this session and make your voice heard on what the Commission should work on for the 2019 *Guidelines Manual*.

Relevant Conduct in Conspiracies with Role Adjustment

This session will use a detailed drug trafficking scenario to demonstrate application of relevant conduct principles in multi-defendant cases with jointly undertaken criminal activity. If you think relevant conduct under the guidelines is “the same as *Pinkerton*,” think again. Learn about proper guideline application in these complex cases before you offer or accept a plea agreement, or calculate the offense level in a PSR. Role adjustments will also be addressed. An understanding of basic relevant conduct is recommended. We highly encourage those new to federal sentencing to complete the short, scenario-based course online titled “Basic Relevant Conduct”.

RICO Offenses

This course will take you through the Racketeer Influenced and Corrupt Organizations guideline from start to finish using case-based scenarios. How do you arrive at the proper base offense level, properly determine the underlying offense? How does the guideline interact with Chapter Three (grouping of multiple offenses, offense-based adjustments) and criminal history rules? These questions and more will be answered during this session.

Sex Offenses

Application of the guidelines in child pornography, sex trafficking, and failure to register as a sex offender cases will be addressed in this session. You will gain an understanding of relevant conduct principles, as well as how to group multiple counts of conviction in these cases.

GRAND HYATT SAN ANTONIO

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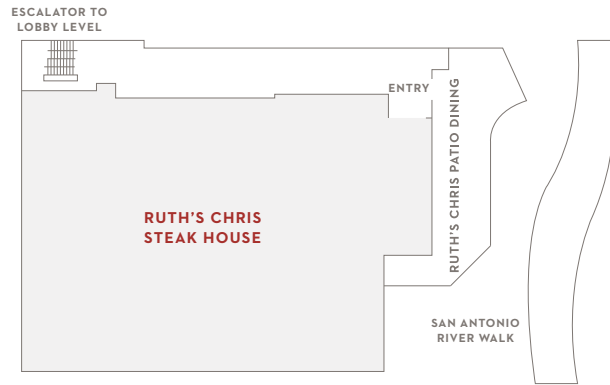
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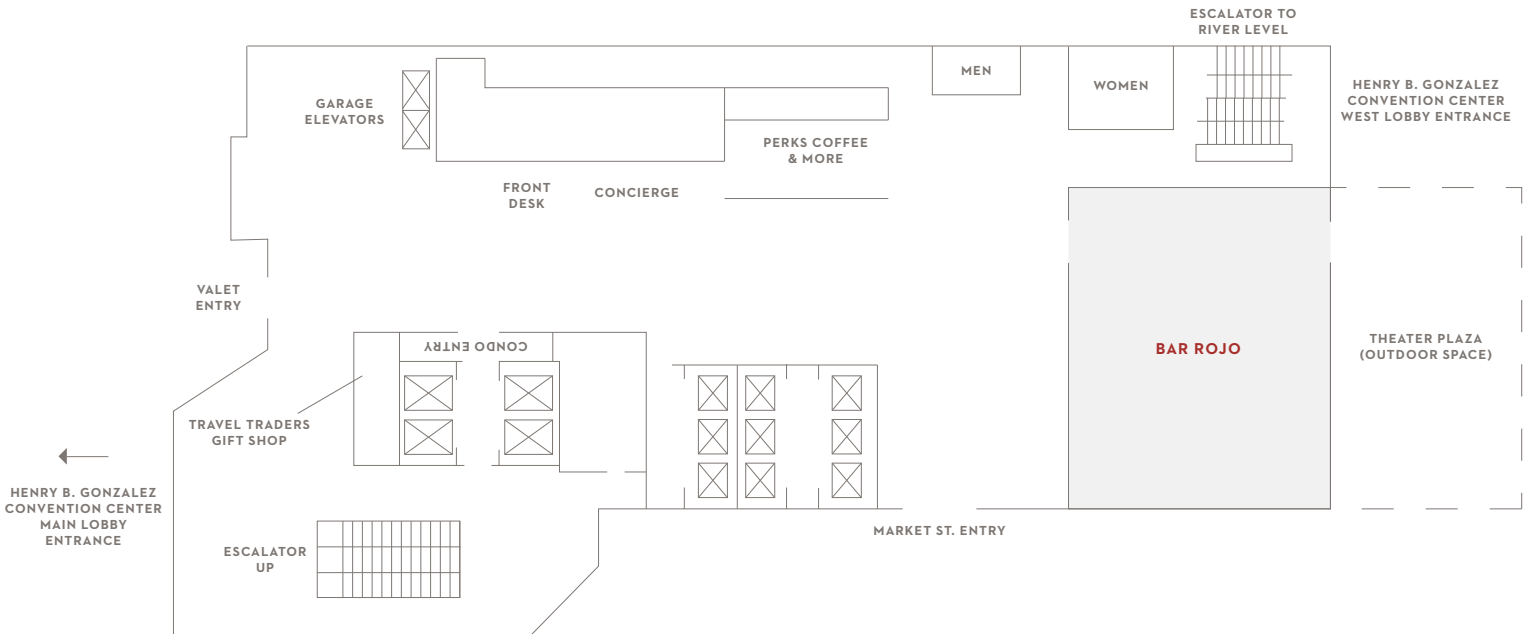
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FLOOR PLAN

River Level



Lobby Level



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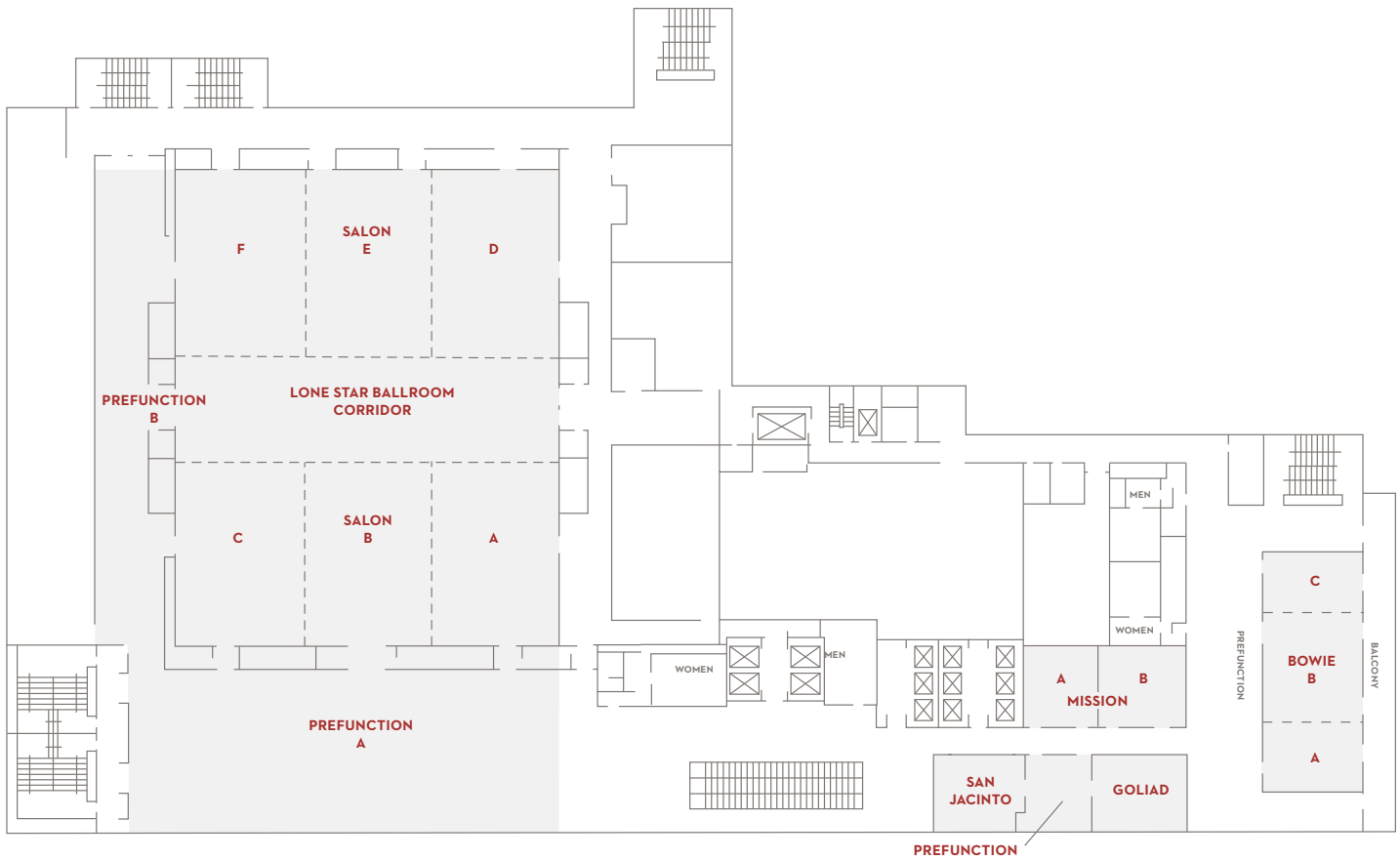
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FLOOR PLAN

Second Floor



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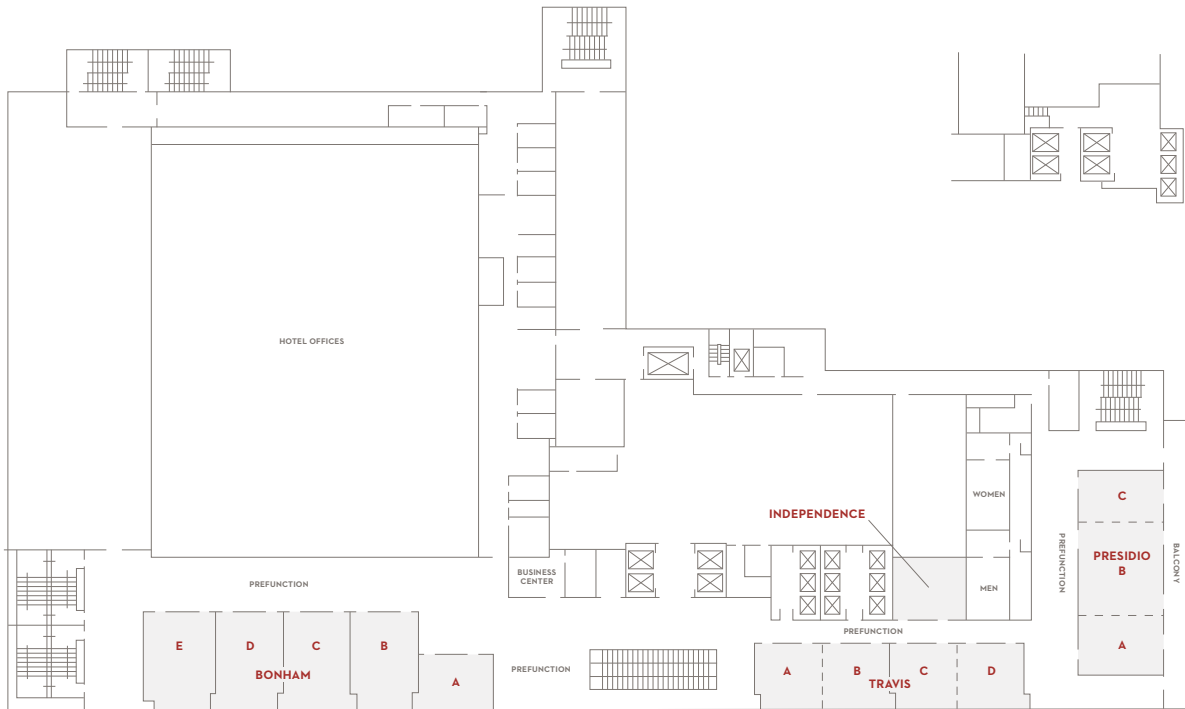
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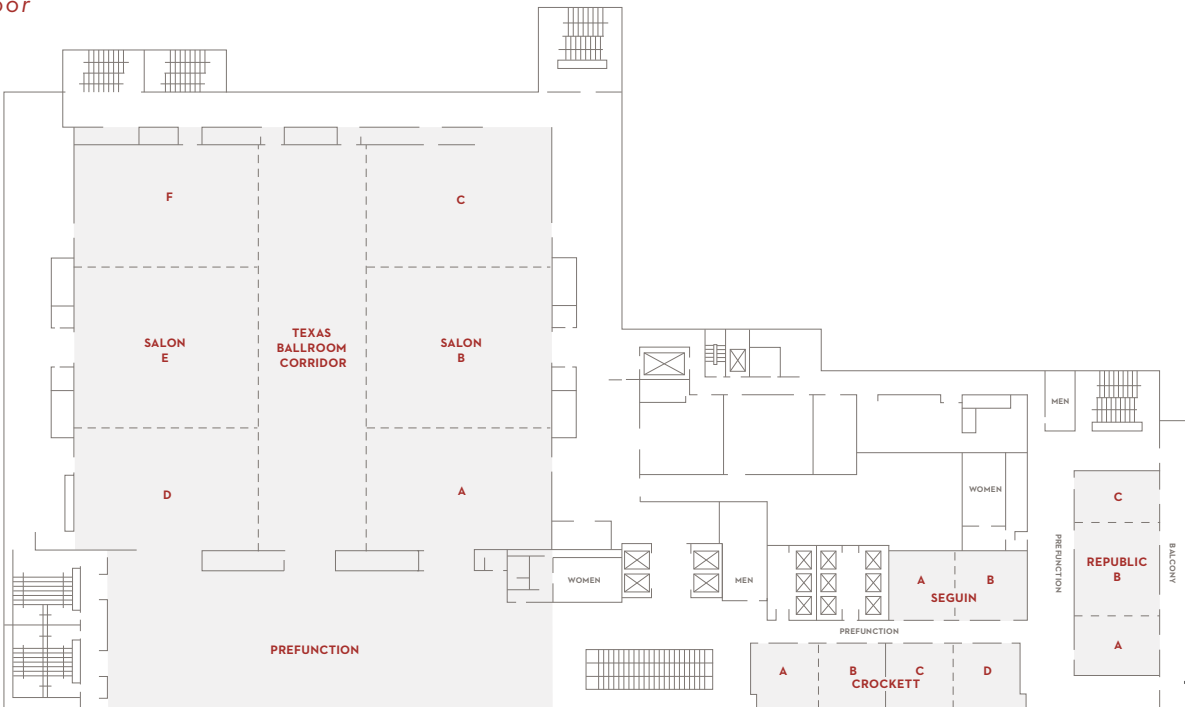
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FLOOR PLAN

Third Floor



Fourth Floor



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ACCOMMODATIONS

1,003 guestrooms including 46 suites

All Accommodations Offer

- Hyatt Grand Bed®
- Complimentary wireless high-speed Internet access
- Flat-screen television with remote control, cable movie channels, in-room pay movies
- Voicemail, two telephones with message light and data port
- Individual climate control
- Electronic door lock
- In-room laptop-sized electronic safe
- Turndown service available upon request
- Full bath amenities and hair dryer
- Coffeemaker with Starbucks® coffee
- Refrigerator
- Iron/ironing board

RESTAURANTS & BARS

- **Ruth's Chris Steak House** – Featuring exceptional food and wine; serving the best USDA prime steaks
- **Perks Coffee & More** – Open 24 hours for your convenience, whether you prefer breakfast, lunch or a late night snack
- **Bar Rojo** – Savor high-end specialty drinks and classic cocktails in our casual, yet upscale lounge

SERVICES & FACILITIES

- In-room dining
- Concierge service
- Multilingual staff
- Assistive listening devices
- ATM
- Laundry/dry cleaning
- Valet parking and self-parking in covered garage
- Travel Traders gift shop

MEETING & EVENT SPACE

- Over 115,000 square feet of flexible meeting and function space accommodating up to 3,600 guests, including two ballrooms: the 31,000-square-foot Texas Ballroom and the 21,000-square-foot Lone Star Ballroom
- A total of 29 breakout rooms encompassing more than 20,000 square feet of space
- 5,200 square feet of exceptional balcony space
- 2,180-square-foot outdoor pool reception area
- The hotel is adjacent to the Henry B. Gonzalez Convention Center for additional meeting and exhibit space

RECREATIONAL FACILITIES

- Heated outdoor lap pool with sundeck
- 24-hour Hyatt StayFit gym, featuring cardio theater, free weights, exercise cycles, treadmills and ellipticals
- Nearby championship golf

LOCATION

Set amidst a blend of histories and a modern city, our urban retreat has a premier location on the San Antonio River Walk and is within walking distance of the Alamo, Tower of The Americas and The Alamo.

VISITOR INFORMATION

- Language: English
- Currency: USD
- Climate: hot summers, warm and cool winters
- Visa: Please refer to your local travel consultant for visa information prior to travel

TRANSPORTATION

- San Antonio International Airport - 9 mi / 11 mins

POINTS OF INTEREST

- Alamo
- River Walk (Paseo Del Rio)
- HemisFair Park
- IMAX Theater
- Shops at La Villita Arts Village
- The Shops at Rivercenter
- The Alamo
- Market Square (El Mercado)
- AT&T Center
- Henry B. Gonzalez Convention Center



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SAN ANTONIO DOWNTOWN DINING AND NIGHTLIFE GUIDE



UPDATED 10.15

SAN ANTONIO
DEEP. IN THE HEART.

Go to VisitSanAntonio.com for a comprehensive listing

Dining

RESTAURANT	ADDRESS	210 AREA	THEME
1 Acenar	146 E. Houston	222.2362	Latin / Tex-Mex
2 Azuca Nuevo Latino	713 S. Alamo	225.5550	Latin / Caribbean
3 Barriba Cantina on the Riverwalk	111 W. Crockett #214	228.9876	Tex-Mex
4 Bella On the River	106 River Walk	404.2355	Mediterranean
5 Biga on the Banks	203 S. St. Mary's	225.0722	Gourmet / Fine Dining
6 Bohanan's	219 E. Houston	472.2600	Prime Steak / Seafood
7 Boudro's	421 E. Commerce	224.8484	Texas Bistro
8 Café Ole	521 River Walk	223.2939	Mexican
9 Casa Rio	430 E. Commerce	225.6718	Mexican
10 Charlie Wants a Burger*	223 Losoya	227.0864	American
11 Chart House	739 E. Cesar E. Chavez	223.3101	Gourmet / Fine Dining
12 Chili's	849 E. Commerce #109	212.8152	American
13 Citrus Restaurant*	150 E. Houston	230.8412	Gourmet / Fine Dining
14 County Line	111 W. Crockett #104	229.1941	BBQ
15 Fig Tree	515 Villita	224.1976	Gourmet / Fine Dining
16 Fogo de Chão	849 E. Commerce	227.1700	Brazilian Steakhouse
17 Guadalajara Grill	301 S. Alamo	222.1992	Mexican / American
18 Hard Rock Café	111 W. Crockett	224.7625	American
19 Hooters	849 E. Commerce #105	229.9464	Sports Theme
20 Houston Street Bistro	204 E. Houston	476.8600	Continental
21 Iron Cactus	200 River Walk #100	224.9835	Mexican
22 Joe's Crab Shack	212 College #100	271.9981	Seafood
23 Kimura	152 E. Pecan #102	444.0702	Japanese
24 La Focaccia	800 S. Alamo	223.5353	Italian
25 La Frite	728 S. Alamo	224.7555	Belgian Bistro
26 La Margarita	120 Produce Row	227.7140	Mexican / Oyster Bar
27 La Paloma Riverwalk	215 Losoya	212.0566	Tex-Mex
28 Landry's	517 N. Presa	229.1010	Seafood
29 Las Canarias*	112 College	518.1063	Gourmet / Fine Dining
30 Las Ramblas*	306 W. Market	298.8040	Spanish
31 Little Rhein Steak House	231 S. Alamo	225.2111	Steak / Fine Dining
32 Lone Star Café	237 Losoya	223.9374	Southwestern / American
33 Luciano	849 E. Commerce #183	223.0500	Italian
34 Lüke	125 E. Houston	227.LUKE	French / German

RESTAURANT	ADDRESS	210 AREA	THEME
35 Maria Mia	849 E. Commerce	272.0403	Tex-Mex
36 Mexican Manhattan	110 Soledad	223.3913	Mexican
37 Michelin's	521 River Walk	223.2939	Italian
38 Mi Tierra Café*	218 Produce Row	225.1262	Mexican
39 Morton's Steak House	300 E. Crockett	228.0700	Steak / Fine Dining
40 Original Mexican Restaurant*	528 River Walk	224.9951	Mexican
41 Ostra*	212 W. Crockett	396.5817	Seafood
42 Paesanos Riverwalk	111 W. Crockett #101	227.2782	Mediterranean / Italian
43 The Palm	233 E. Houston	226.7256	Steak / Fine Dining
44 Poblanos on Main Mexican Restaurant*	115 Main Plaza	357.5609	Tex-Mex
45 Q Kitchen Bar*	123 Losoya	222.1234	Barbecue
46 Rainforest Café	110 E. Crockett	277.6300	Theme
47 Republic of Texas*	526 River Walk	226.6256	"Texas Style"
48 Restaurant Gwendolyn	152 E. Pecan #100	222.1849	Gourmet / Fine Dining
49 Rio Rio Cantina*	421 E. Commerce	226.8462	Tex-Mex
50 Rita's on the River	245 E. Commerce #100	227.7482	Tex-Mex
51 Rosario's	910 S. Alamo	223.1806	Mexican
52 The River's Edge Cafe & Patio Bar*	200 S. Alamo	270.0786	American/ South Texas
53 Ruth's Chris Steak House	600 E. Market	227.8847	Steak / Fine Dining
54 Saltgrass Steak House	502 River Walk	222.9092	Steak
55 Sazo's Latin Grill*	101 Bowie	554.6180	Latin / Tex-Mex
56 Schilo's Delicatessen*	424 E. Commerce	223.6692	Deli
57 Spaghetti Warehouse	1226 E. Houston	299.1114	Italian
58 Sushi Zushi	203 S. St. Mary's	472.2900	Asian
59 Texas de Brazil	313 E. Houston	299.1600	Brazilian Steakhouse
60 Texas Land & Cattle	201 N. St. Mary's	222.2263	Steak
61 Tony Roma's	849 E. Commerce #171	225.7662	Steak / Seafood
62 Waxy O'Connor's	234 River Walk	229.9299	Irish Restaurant / Pub
63 Zocca*	420 W. Market	444.6070	Italian

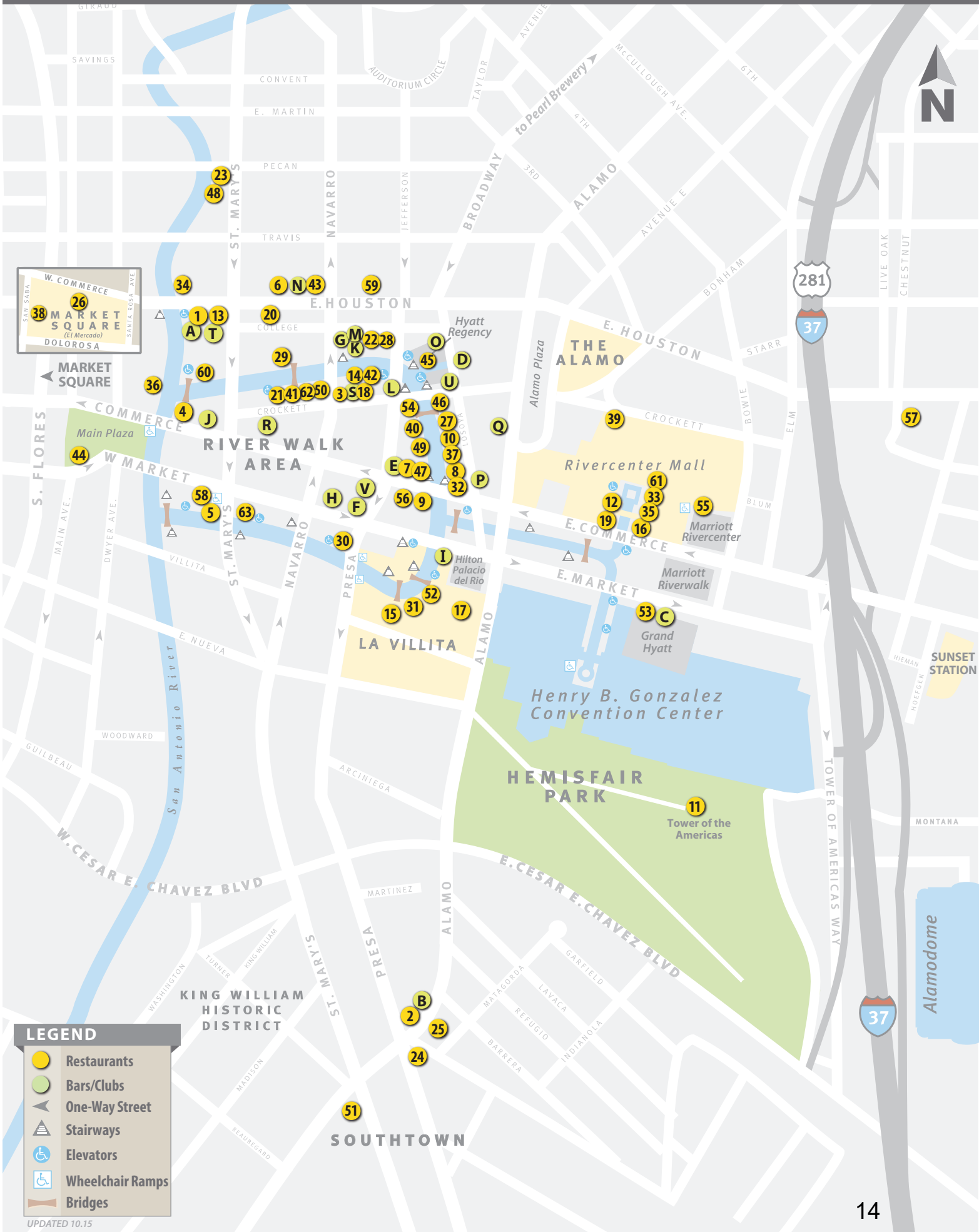
*Serves breakfast and/or brunch

Nightlife

BAR / CLUB	ADDRESS	210 AREA	THEME
A Átomar Bar @ Acenar	146 E. Houston	222.2362	"Hot Mex / Cool Bar"
B Azuca Mojito Bar	713 S. Alamo	225.5550	Latin Mojito Bar
C Bar Rojo	600 E. Market	224.1234	Latin Mojito Bar
D Bier Garten	126 Losoya	212.7299	Bavarian
E Coyote Ugly	409 E. Commerce	465.8459	Like the movie
F Davenport	203 N. Presa	224.5635	Upscale bar
G Dick's Last Resort	406 Navarro	224.0026	"Rowdy of the River"
H Drink Texas	200 Navarro	224.1031	Cocktails
I Durtly Nelly's Irish Pub	200 S. Alamo	224.3343	Irish Bar
J Esquire Tavern	155 E. Commerce	222.2521	Tavern
K Havana Ultra Lounge	212 College	220.1973	Latin / Salsa

BAR / CLUB	ADDRESS	210 AREA	THEME
L Howl at the Moon	111 W. Crockett	212.4770	Piano Bar
M Kremlin	212 College	220.1972	70's / 80's / 90's
N The Last Word	229 E. Houston #10	314.1285	Craft Cocktails
O Mad Dog's British Pub	123 Losoya #19	222.0220	British Pub
P On the Rocks Pub	270 Losoya	228.0000	Pub
Q Pat O'Brien's	121 Alamo Plaza	220.1076	New Orleans Legend
R Soho Wine & Martini Bar	214 W. Crockett	444.1000	Cocktails / Cigar
S Swig Martini Lounge	111 W. Crockett	476.0005	Martini / Cigar
T V-Bar @ Hotel Valencia	150 E. Houston	227.9700	Upscale Bar
U The Worm	123 Losoya	354.1418	Tequila / Mezcal
V Zinc Wine Bar	207 N. Presa	224.2900	Wine & Cigar

Downtown Area



MARKET SQUARE
(El Mercado)
DOLOROSA

W. COMMERCE
SANTA ROSA AVE.
SAN SABA

26
38

LEGEND

- Restaurants
- Bars/Clubs
- One-Way Street
- Stairways
- Elevators
- Wheelchair Ramps
- Bridges

UPDATED 10.15



UNITED STATES
SENTENCING COMMISSION

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Course Materials

Please check the mobile app for additional materials.

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ESP INSIDER EXPRESS

SPECIAL EDITION

Vol. #2 | Issue # 2

2018 Amendments

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Recently Adopted Amendments

Effective November 1, 2018

At a public meeting held on April 12, 2018, the Commission unanimously voted on a slate of new amendments to the *Guidelines Manual*. Among other actions, the Commissioners voted to update the federal sentencing guidelines to address evolving challenges related to the distribution of synthetic drugs. The amendments reflect a collaborative, detailed, and data-driven approach to federal sentencing policy.

Featured:

SYNTHETIC DRUGS
New Ratios and
Definitions.....Pg. 1

ACCEPTANCE OF RESP.
Clarification to RC
Challenges.....Pg. 2

ALTERNATIVES
Nonviolent First
Offenders.....Pg. 2

ILLEGAL REENTRY
New Conviction
Language.....Pg. 2

TRIBAL ISSUES
Tribal Convictions
Departures.....Pg. 3

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More Notable
Information.....Pg. 4

Synthetic Drugs Amendment New Drug Ratios & Synthetic Drug Definitions

At the meeting, the Commissioners approved a multi-part synthetic drugs amendment. The amendment draws upon public comment, expert testimony, and data analysis gathered during a multi-year study of synthetic drugs. Many new synthetic drugs commonly called bath salts, flakka K2, Spice, and Scooby Snax, among others, were not referenced in the federal sentencing guidelines. As a result, courts have faced expensive and resource-intensive hearings. Following a multi-year study and series of public hearings with experts, the Commission determined that synthetic cathinones possess a common chemical structure that is sufficiently similar to treat as a single class of synthetic drugs. Also, while synthetic cannabinoids differ in chemical structure, the drugs induce similar biological responses and share similar pharmacological effects.

In proposing these new drug ratios, the Commission considered among other factors, the severity of the medical harms to the user, the current ratios applied in similar cases,

known trafficking behaviors, and concerns for public safety. The Commission’s actions reflect the evolving nature of these new drugs and will simplify and promote uniformity in sentencing these offenders by providing a marijuana equivalency for synthetic cathinones and synthetic cannabinoids, with departures for further guidance in certain kinds of cases.

A new definition of “fentanyl analogue” raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. To address the severe dangers posed by fentanyl, the Commissioners also voted to adopt a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate 50 percent increase in sentence). While most fentanyl analogues are typically as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl.



* (except any Schedule III, IV, and V substances) | ** A minimum base offense level of 12 applies



NEW LANGUAGE

A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, **but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous.** . . .

Acceptance of Responsibility Clarification on Relevant Conduct Challenges

In response to concerns that some courts have interpreted the commentary to §3E1.1 as automatically precluding the reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct, the Commission amended the commentary. Some commenters had said that courts sometimes deny acceptance of responsibility when the defendant unsuccessfully challenges relevant conduct in the presentence report, and that this has a “chilling effect” on defendants. The new language clarifies that the unsuccessful nature of a challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous.

Alternatives to Incarceration Application Note for Nonviolent First Offenders

A new application note in §5C1.1 provides that judges should consider alternative sentencing options for nonviolent first offenders whose applicable guideline range falls within Zones A or B. Eligible defendants must not have any prior convictions and must not have used violence, credible threats of violence, or possessed a firearm or other dangerous weapon in the offense. The amendment also frees up courts from imposing electronic monitoring as part of home detention, in favor any means of surveillance that is equally effective. (See §5F1.2 (Home Detention))

Judges should consider alternative sentences for certain nonviolent first offenders.

This new application note is consistent with 28 U.S.C. § 994(j), which addresses the “general appropriateness of imposing a sentence other than imprisonment” for certain first-time, nonviolent offenders. It also is consistent with the Commission’s study of recidivism and criminal history, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate.

e-Learning Course

Look for an e-Learning course on applying the Illegal Reentry guideline soon at the Education section of the Commission website.

Illegal Reentry Amendment New Conviction Language

The Commission passed a comprehensive amendment to the illegal reentry guideline in 2016, basing illegal reentry sentences on three main factors: the defendant’s history of returning illegally, criminal conduct committed before the defendant was first ordered deported, and criminal conduct committed after the defendant was first ordered deported. This amendment addresses two discrete

if the defendant “engaged in criminal conduct that at any time resulted in a conviction. . .” This means that a defendant who was ordered deported before his or her conviction, still receives an increase based on the criminal conduct that occurred before the deportation order.

“The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when an illegal reentry offender’s conviction is finalized.”

application issues that have arisen in litigation since then. The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when that conviction is finalized. The graduated enhancements at 2L1.2 (b)(2) now apply

In addition, the sentence length, which determines whether the defendant receives a 10, 8, 6, or 4-level enhancement, includes any revocation sentence imposed on that offense, regardless of whether that revocation sentence was imposed before or after the defendant was ordered deported. This part of the amendment responds to opinions from the Fifth and Ninth Circuit Courts of Appeals, which had reached a different result.

Tribal Issues

Departures for Tribal Convictions

The Commission also voted to adopt the recommendations made by the Tribal Issues Advisory Group (TIAG) in May 2016. In recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA) to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, The Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization) also increased criminal jurisdiction for tribal courts, and also required more robust court procedures and provided more procedural protections for defendants. While the TIAG did not support assigning criminal history points to tribal convictions, they did recommend providing guidance to courts on when to depart based on a defendant's tribal court convictions.

The amendment related to tribal court sentences provides a non-exhaustive list of factors that courts may consider in determining whether a prior tribal court conviction warrants an upward departure from the recommended sentencing range. The six factors outlined in the amendment provide a framework for courts to use when determining whether an upward departure is appropriate to account for tribal convictions. Collectively, these factors balance the rights of defendants and the unique and important status of tribal courts.

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

The amendment also provides a definition for the term “court protection order,” which incorporates the statutory definition of “protection order.” By adopting a clear definition, the guidelines will ensure that court protection orders issued by tribal courts receive treatment consistent with that of other jurisdictions.

Definition: “Court protection order” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). See §1B1.1 (Application Instructions)



PLUS (+)4

If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl . . . or a fentanyl analogue.

Drug Amendment Continued And Other Amendments

In response to legislation and public comment by the Social Security Administration and others, the Commission added a 4-level enhancement and a minimum offense level of 12 to §2B1.1 for specified persons who commit fraud under certain Social Security programs. The legislation increased the statutory maximum for those offenders from five to ten years. The offenders who would receive this increase are already deemed to have abused a position of trust by violating specific statutes, so the four level adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply to these offenders.

The Commission changed the term “Marijuana equivalency” to “Converted drug weight” to avoid confusion. In drug trafficking cases with multiple drugs, the marijuana equivalency was used to convert all the drugs to one universal substance in order to come up with a single drug quantity. Some commenters said that the reference to marijuana was misleading, especially to those less familiar with the Guidelines. The amendment doesn’t change the math, it only changes the terminology to avoid confusion.

“We worked together to develop solutions that improve the federal sentencing guidelines.”

— Circuit Judge William H. Pryor Jr., Acting Chair

DEPARTURE PROVISION

For cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class. Methcathinone is an example of a typical synthetic cathinone, whereas MDPV is more potent, and methylone is less potent, than methcathinone.

DEPARTURE PROVISIONS

For synthetic cannabinoids – upward for cannabinoids in pure, crystalline form, downward when mixed with plant material, and downward for less potent forms of the drug.

Definitions

Fentanyl Analogue: “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).”

Synthetic Cannabinoids: are human-made, mind-altering chemicals developed to mimic the effects of tetrahydrocannabinol (THC), the main psychoactive chemical found in the marijuana plant.

Synthetic Cathinones: are human-made drugs chemically related to cathinone, a stimulant found in the khat plant

*The full set of amendments, including various technical and miscellaneous amendments, will be transmitted to Congress by May 1, 2018. If Congress does not act to disapprove the amendments, they will go into effect on November 1, 2018. More information about this process and the proposed amendments can be found at:

<https://www.uscc.gov/about/news/press-releases/april-12-2018>

ESP HIGHLIGHTS



• There are two new introductory-level e-Learning courses available on our website. Learn the foundational principles of the guidelines through these interactive courses on relevant conduct and calculating the defendant’s criminal history score. These courses are in addition to the e-Learning course on the treatment of multiple prior sentences (the single sentence rule). All three of the programs can be found at: <https://www.uscc.gov/education>.

• Look for an e-Learning course on applying the Illegal Reentry guideline soon at: <https://www.uscc.gov/education>.



2018
National
Seminar

Guidelines App

2018 Annual National Seminar

The USSC is pleased to announce the launch of our web app containing a mobile-friendly version of the current *Guidelines Manual*. The web app features new tools to assist in understanding and applying the federal sentencing guidelines.

The Guidelines App is an interactive web-based application that provides easy access to the full content of the Guidelines Manual and its appendices with enhanced features and improved navigation. The app is accessible through any internet browser on mobile devices, desktop, or laptop computers.

Guidelines App users can instantly:

- Search for the applicable Chapter Two guideline in a case by typing in or selecting the statute of conviction;
- Determine the guideline range in the Sentencing Table, base offense level using the Drug Quantity Table, or marijuana equivalencies for substances referenced in the Drug Equivalency Tables by using the app calculators; or,

- Research a guideline amendment by typing in the amendment
- number or effective date.

Other helpful features of the app include:

- Quick-search by guideline or keyword;
 - Swipe-gesture browsing;
 - Bookmarking, text highlighting, and personal note-taking; and,
- Easy sharing of any part of the
- *Guidelines Manual* via email, text, or social media.



USSC Staff will be on-hand to assist you with downloading and navigating the app. Go to the Live Demo ongoing in the foyer for more information!

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



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



Federal Bureau of Prisons

Program Fact Sheet

Crowding



The Bureau of Prisons ended FY2017 with 6,553 fewer inmates than the prior year. This is the fourth consecutive year of decreases in the inmate population after 34 years of increases. However, the Bureau remains crowded in high, medium and low security facilities.

System-wide:

Minimum:

Low:

Medium:

High:

27

Residential Reentry



The BOP contracts with Residential Reentry Centers (RRCs), also known as halfway houses, to provide assistance to inmates who are nearing release. RRCs help inmates gradually rebuild their ties to the community and facilitate readjustment. Approximately 17-19 months prior to an inmate's release, an RRC referral recommendation is made based on risk factors such as programming and treatment needs. Higher risk offenders are the Bureau's first priority. Home detention monitoring is done by either the RRC or via the Federal Location Monitoring Program with US Probation. An inmate's length of placement could be up to 12 months.

RRC Locations:

Work Release Locations:

Monitoring via Federal Probation Contract:

RRC Average Stay:

Mental Health Care Levels



Mental health care levels (of which there are four) are used to classify inmates based on their need for mental health services. Facility placement ranges from Care Level 1 facilities - which are for inmates who do not require significant mental health care - to Care Level 4 facilities for inmates who require inpatient psychiatric care.

	Male	Female	Total
Level 1:			
Level 2:			
Level 3:			
Level 4:			

Medical Care Levels



Medical Care Levels (of which there are four), are used to align an inmate's medical needs with institution capabilities (including community medical resources). Care Level 1 facilities are assigned to generally healthy inmates, while Care Level 4 facilities are reserved for inmates who require daily nursing care or therapy.

	Male	Female	Total
Level 1:			
Level 2:			
Level 3:			
Level 4:			

Education Status



Inmates who do not have a verified General Educational Development (GED) credential or high school diploma are required to attend an adult literacy program for a minimum of 240 instructional hours or until a GED is achieved, whichever occurs first. Non-English-speaking inmates must take English as a Second Language.

GED Earned in the Bureau of Prisons:

Has GED:

Needs GED:

(GED Enrolled %)

GED COMPLETIONS:

FY	Enrolled	Earned
FY	Enrolled 15,822	Earned
FY	Enrolled 16,013	Earned
FY 2018 (1/31)	Enrolled	Earned

Staffing Ratios



The inmate-to-staff ratio is an important factor in maintaining institution safety. The BOP staffs facilities based on various factors including facility security level, inmate population and facility programs and capabilities.

Inmate to Staff Ratio:

Inmate to Correctional Officer Ratio:

Drug Treatment Participants



The BOP's drug abuse treatment strategy has grown and changed as advances have occurred in substance abuse treatment field. The BOP offers a variety of programs to generate positive outcomes (by reducing relapse and criminality), ranging from residential programs, non-residential programs, drug education, and transitional drug treatment in the community.

Res. Drug Treatment	Non-Res. Drug Treatment	Drug Education	Community Treatment

CATEGORICAL APPROACH SCENARIOS

Question 1

The defendant has a prior conviction for West Virginia Code § 61-2-9(a) which provides:

If any person maliciously shoots, stabs, cuts or wounds any person, or by any means causes him or her bodily injury with intent to maim, disfigure, disable or kill, he or she ... is guilty of a felony and shall be punished by confinement in a state correctional facility not less than two nor more than ten years.

If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500.

Is this a divisible statute?

Question 2

Defendant is convicted of Indiana battery. The statute requires that the defendant intentionally use force that causes serious injury to a person. The defendant claims a light touch such as tickling another person entails force because if the tickled person twitches, falls, and strikes his head on a coffee table, the victim could suffer a serious injury.

Now that the defendant has described a scenario under the statute that does not involve “the amount of force” required under *Johnson*, is this offense no longer a crime of violence under the force clause at §4B1.2?

Question 3

The defendant has a prior robbery conviction under D.C. Code § 22-3571.01. The statute provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person

CATEGORICAL APPROACH SCENARIOS

convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

The government alleges that this offense is a crime of violence under §4B1.2 because it meets the generic definition of robbery. The circuit has defined generic robbery as:

Property to be taken from a person or a person's presence by means of force or putting in fear.

Does D.C. robbery match the generic definition of robbery in this circuit?

Question 4

The defendant is convicted of felon in possession (18 U.S.C. § 922(g)) and has a prior conviction for Colorado drug trafficking under § 18-18-405(1)(a). The probation officer applies base offense level 22 at §2K2.1 because the Colorado drug trafficking offense qualifies as a controlled substance offense under the guideline.

The Colorado drug statute makes it:

unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell or distribute, a controlled substance.

Colorado defines "sell" to mean "a barter, an exchange, or a gift, or an offer therefor."

The guidelines define "controlled substance offense" at §4B1.2 as:

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.

Does the Colorado drug statute qualify as a controlled substance offense under §4B1.2?

RESTITUTION AND SUPERVISED RELEASE SCENARIOS

1. The defendant was convicted of conspiracy to commit healthcare fraud, conspiracy to distribute controlled substances and conspiracy to receive kickbacks. The defendant, a physician, and his partner physicians, wrote false prescriptions that were filled by pharmacists. The indictment states that the dates of the conspiracy spanned from January 1, 2013 to December 31, 2017. The doctor joined the conspiracy in January 1, 2015.

The court concluded that the total amount of restitution for the entire five-year conspiracy was \$1,500,000 (\$300,000 a year in fraudulent billing). The court ordered the defendant to pay the full amount of restitution. The defendant has appealed the restitution order.

Can the defendant be held liable for the entire amount of restitution?

2. The defendant was convicted of health care fraud (18 U.S.C. § 1347). Medicare paid the defendant \$150,000 based on bills submitted by the defendant. At sentencing, the government asks for \$150,000 in restitution for the fraudulent bills submitted to Medicare by the defendant. The defendant argued that \$50,000 of the amount paid by Medicare was for bills that involved legitimate services he provided to patients. The defendant did not offer any proof that the bills he submitted to Medicare were for necessary procedures because he believes the government has the burden to introduce into evidence that some of the bills submitted were legitimate. The court orders \$150,000 in restitution, concluding that the defendant has the burden to prove that \$50,000 were for legitimate work and because he did not offer any evidence, there is no credit against the \$150,000 order.

Will the court's restitution order likely be affirmed on appeal?

3. The defendant was convicted of wire fraud (18 U.S.C. § 1343) based on a scheme involving vehicle-financing rebates. The court imposed a \$160,000 forfeiture award based on the gains from the scheme. Three months after the forfeiture award, the court plans on imposing restitution in the amount of \$280,000. The defendant believes the restitution amount should be reduced by the \$160,000 forfeiture award.

RESTITUTION AND SUPERVISED RELEASE SCENARIOS

Can the court reduce the restitution amount by the forfeiture order?

4. The defendant was convicted of Failing to Register as a Sex Offender, under 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Texas 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 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 supervised release condition in this case?

5. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece and he received a 5-year sentence for that conviction. At sentencing for the drug offense, the government requests the court impose the following supervised release condition:

"Defendant must submit to a psychosexual evaluation upon release from imprisonment."

Is this a reasonable supervised release condition?

6. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece. He received a 15-year sentence for that conviction and was released from prison on August 5, 2017. At sentencing for the drug

RESTITUTION AND SUPERVISED RELEASE SCENARIOS

trafficking offense, the probation officer recommends the following supervised release condition:

“Defendant must submit to a psychosexual evaluation upon release from imprisonment.”

The defendant objects to this condition because his prior sexual conviction was over 15 years ago.

If the judge imposed this condition, will this condition likely be affirmed on appeal?

7. The defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)). The defendant has a history of mental illness and the court imposed the following condition of supervised release:

“The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer.”

Is this a reasonable condition?

2018 National Seminar

Criminal History Calculations / USSG §4A1.1 & 4A1.2: 2018 Annual National Seminar

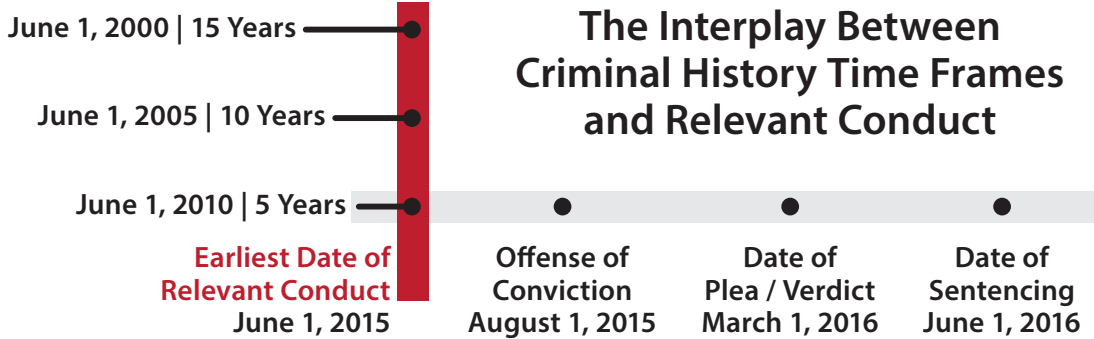
This handout is intended to be a quick reminder of some key considerations when applying the criminal history calculations at §4A1.1 and 4A1.2.

Criminal History Points for Prior Offenses Committed... ...at 18 or Older ...Before 18

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

* If Otherwise Countable
** Exceptions May Apply

* If Otherwise Countable
** Exceptions May Apply



Other Considerations:

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

Multiple Prior Sentences / USSG §4A1.2(a)(2): 2018 Annual National Seminar

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

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

--- AND ---

2. The offenses **either**:
 - a. Were named in the same charging document, or
 - b. Resulted in sentences imposed on the same day

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

Example 1

1. Defendant was convicted of 3 bank robberies that had not been separated by intervening arrests
2. Defendant was sentenced on the same day to 5 years for each robbery to run concurrently
3. Single sentence: 3 points (§4A1.1(a))
4. 1 point added for each crime of violence that did not receive points: 2 additional points (§4A1.1(e))

Example 2

1. The defendant’s prior record includes two robberies, the second committed after the defendant had been arrested for the first and was out on pretrial release. The two robbery offenses were subsequently charged in the same indictment and sentenced on the same day, resulting in concurrent sentences of five years each.
2. Intervening arrest
3. Separate sentences: 3 points each (total 6 points)

Career Offender “Override”

Criteria

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

Override

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

Statutory Maximum	Life ... 37 25 years + ... 34 20 years + ... 32 15 years + ... 29 10 years + ... 24 5 years + ... 17 More than 1 year ... 12	Offense Level *
		* Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)

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



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

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

ARE THESE SCORED CORRECTLY?

1. On October 19, 2016, at 1:44 a.m., the defendant, armed with a Glock pistol, entered Lucky's Convenience Store and robbed the cashier at gunpoint. The cashier gave the defendant all the money in the register's drawer and the store's safe, totaling \$1,387.00.

The defendant was arrested by local law enforcement on October 24, 2016, and was charged with armed robbery. Law enforcement recovered the Glock pistol used during the robbery.

On November 3, 2016, the defendant was charged in federal court with felon in possession of a firearm. The indictment cites only the Glock pistol. The defendant pleaded guilty to one count of 18 U.S.C. § 922(g). The applicable guideline for the instant offense is §2K2.1.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
03/04/2012	Distribution of a Controlled Substance (felony) Wicomico County Circuit Court Salisbury, MD	04/07/2012: 6 months custody	§4A1.1(b)	2
10/24/2016	Armed Robbery (felony) Anne Arundel County Circuit Court Annapolis, MD	01/13/2017: 18 months custody	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

2. The instant offense of conviction is possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(applicable guideline §2D1.1). The indictment alleges that the defendant, from on or about April 29, 2016 through May 30, 2017, distributed over 200 grams of heroin.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
07/10/2012	Driving Under the Influence (misdemeanor) Fort Smith District Court, Fort Smith, AR	7/15/2012: \$500 fine	§4A1.1(c)	1
8/22/2015	Reckless Driving (misdemeanor) Fort Smith District Court Fort Smith, AR	9/1/2015: 3 months' probation 12/1/2015: probation discharged	§4A1.2(c)(1)	0
02/17/2016	Sale of more than 5 grams of Heroin (felony) Oklahoma District Court for Muskogee County	03/27/2016: Time Served (30 days custody)	§4A1.2(a)(1)	0
01/22/2017	Sale of more than 5 grams of Heroin (felony) Oklahoma District Court for Muskogee County	01/24/2018: 90 days custody	§4A1.2(a)(1)	0

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

3. Defendant pleaded guilty to one count of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The instant offense occurred on June 2, 2017. The defendant's relevant conduct includes two other sales of cocaine that occurred on May 19, 2017, and June 17, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/16/2017	Theft (felony) Superior Court of Connecticut; Hartford, CT	07/30/2017: 3 months custody	§4A1.1(b)	2

Defendant was released on bond for the theft offense on April 18, 2017. The probation officer did not assign two criminal history points under §4A1.1(d) for committing the instant offense while under a criminal justice sentence.

Is the defendant's criminal history scored correctly? Why or why not?

4. The instant offense of conviction is embezzlement, in violation of 18 U.S.C. § 656, applicable guideline §2B1.1. The offense occurred from November 2017 through December 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
05/30/2005	Driving While Intoxicated (misdemeanor) Chester County District Court West Chester, PA	06/01/2005: 2 years' probation 05/01/2007: Warrant issued for probation violation; warrant still outstanding	§4A1.1(d)	2

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

5. The defendant was found guilty of armed robbery, in violation of 18 U.S.C. § 2113(a). The applicable guideline is §2B3.1. The robbery occurred on March 7, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
11/18/1988	Second Degree Murder (felony) Superior County Court of Los Angeles County Los Angeles, CA	02/18/1989: 6 years to life imprisonment; 08/31/2001: Released on parole 11/30/2006: Parole revoked, 2 years custody	§4A1.1(a), §4A1.2(k)	3
09/11/2006	Burglary (felony) Superior County Court of Orange County Santa Ana, CA	11/24/2006: 3 years custody, 2 years suspended, probation to follow 6/20/2008: Probation revoked, re-imposition of 2 years suspended custody	§4A1.1(a), §4A1.2(k)	3
05/11/2017	Driving While License Suspended Superior County Court of San Diego County San Diego, CA	06/15/2017: \$200 fine	§4A1.2(c)(1)	0

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

6. The instant offense of conviction is illegal reentry in violation of 8 U.S.C § 1326 (applicable guideline §2L1.2). The defendant illegally reentered the United States on January 28, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/24/2006	Illegal Entry (misdemeanor) U.S. District Court; District of New Mexico Las Cruces Division	4/27/2006: 30 days custody	§4A1.2(e)(2)	0
02/22/2007	Importation of Marijuana (felony) U.S. District Court; District of Arizona Tucson Division	04/29/2007: 8 months custody; 3 years supervised release 05/24/2010: supervised release revoked; 30 days custody	§4A1.1(b), §4A1.2(k)	2
05/22/2010	Illegal Reentry (felony) U.S. District Court; District of Arizona Tucson Division	05/24/2010: 15 months custody; 3 years supervised release	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

7. The instant offense of conviction is bank fraud, in violation of 18 U.S.C. § 1344 (applicable guideline §2B1.1). The offense occurred from January 2017 through September 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
12/05/2004	Theft (felony) Kenton County Circuit Court Covington, KY Case number: 2004-CR-856	4/27/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody	§4A1.1(a), §4A1.2(k)	3
1/29/2005	Theft (felony) Kenton County Circuit Court Covington, KY Case number: 2005-CR-125	04/22/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody concurrent with case number 2004-CR-856	§4A1.2(e)(2),	0
12/07/2006	Robbery (felony) Kenton County Circuit Court Covington, KY	01/12/2007: 15 months custody concurrent with revocation time imposed in case numbers 2004-CR-856 and 2005-CR-125	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

8. The instant offense of conviction is possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The defendant's relevant conduct for this offense began in April 2016 and ended with his arrest in the instant offense on March 15, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
10/15/2014	Second Degree Burglary (felony) Hennepin County District Court Minneapolis, MN CR-14-98484	03/07/2015: 15 months custody	§4A1.1(a)	3
10/15/2014	Aggravated Assault (felony) Hennepin County District Court Minneapolis, MN CR-14-98652	03/07/2015: 15 months custody, to run concurrent with CR-14-98484	§4A1.2(a)(2), §4A1.1(e)	1

Is the defendant's criminal history scored correctly? Why or why not?

SCENARIOS: CRIMINAL HISTORY: RECURRING ISSUES

9. Defendant pleaded guilty to one count of kidnapping, in violation of 18 U.S.C. § 1201 (applicable guideline §2A4.1). The offense occurred on July 21, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
09/14/2010	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-34873	11/27/2010: 8 months custody	§4A1.1(b), §4A1.2(a)(2)	3
09/14/2010	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-37124	11/27/2010: 6 months custody consecutive to 2010-CR-34873	§4A1.2(a)(2)	0

Is the defendant's criminal history scored correctly? Why or why not?

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

§2D1.1(b)(1) Weapon Enhancement:

§2D1.1(b)(1) Weapon Enhancement:

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

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

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

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

§2K2.1(c)(1): Cross Reference

§2K2.1(c)(1): Cross Reference

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



Drugs & Guns

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Tips for Guideline Application

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

Common Statutes

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

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

GUIDELINE SCENARIOS – DRUGS AND GUNS

Scenario #1

Defendant Hill pled guilty to the following offenses:

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

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

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

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

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

Scenario #2

Defendant Jones is convicted of the following:

- Possession with Intent to Distribute Cocaine Hydrochloride in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and
- Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A).

GUIDELINE SCENARIOS – DRUGS AND GUNS

On September 30, 2016 a confidential source (CS) placed a call to the defendant to arrange for the purchase of one ounce of “Molly” (MDMA). The defendant agreed to sell the CS one ounce of “Molly” for \$1,000. They agreed to meet at the Dick’s Sporting Goods parking lot later that day. When the defendant arrived, the CS entered the passenger side of the vehicle and the defendant sold the CS approximately 44 grams of “Molly”. A subsequent laboratory analysis revealed the MDMA was actually Methyloone and had a net weight of 41 grams.

On October 2, 2016, the defendant contacted the CS and indicated that he had several ounces of cocaine hydrochloride for sale. Arrangements were made between the defendant and the CS to make the purchase. The defendant was intercepted on his way to meet the CS when authorities conducted a traffic stop. When the officer approached the defendant’s vehicle, he observed a semi-automatic handgun on the driver’s side floorboard between the defendant’s feet.

The officer asked for permission to search the defendant’s vehicle and his person. A clear plastic bag containing 36.9 grams of cocaine hydrochloride was found on the defendant. The weapon was identified as a .40 caliber Taurus semi-automatic handgun.

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

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

Scenario #3

Defendant Washington was convicted of the following:

- Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C)
- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

Defendant Washington sold methamphetamine to an undercover officer. After the arrest, the officer searched the defendant’s vehicle and found a .40 caliber pistol which is the pistol in the 18 U.S.C. § 924(c) violation. A subsequent search of the defendant’s home resulted in the discovery of several additional firearms that were used in connection with the drug offense.

GUIDELINE SCENARIOS – DRUGS AND GUNS

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

Scenario #4

Defendant Cole has been convicted of the following:

- Distribution of Heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)- 10 years imprisonment to life- Applicable guideline is §2D1.1
- Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(1) - Applicable guideline is §2K2.1

The defendant has two prior convictions for crimes of violence. The defendant went to trial in this case and the adjustment for Acceptance of Responsibility (§3E1.1) will not apply.

The guideline calculations are as follows:

§2D1.1	§2K2.1
BOL 32 (2 kg heroin)	BOL 24 (2 prior COV's)
+ 2 (gun)	+ 2 (5 guns)
	+ 4 (obliterated serial number)
	+ 4 (in connection with felony offense)
= 32	= 34

The defendant qualifies as both a Career Offender (§4B1.1) and an Armed Career Criminal (§4B1.4), however, the calculations under the Career Offender guideline (§4B1.1) come out higher than what the Armed Career Criminal (§4B1.4) guideline calls for.

1. Does the Career Offender (§4B1.1) override apply in this case?

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

GUIDELINE SCENARIOS – DRUGS AND GUNS

- 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?

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

GUIDELINE SCENARIOS – DRUGS AND GUNS

firearm was found to be stolen and one was a semiautomatic firearm that was loaded with a magazine containing 17 rounds of ammunition.

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

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

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

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

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

Scenario #7

Defendant Christopher was convicted of the following counts:

- Possession with Intent to Distribute Heroin in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B),

GUIDELINE SCENARIOS – DRUGS AND GUNS

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

Christopher sold large amounts of heroin and cocaine using three different residences, none of which were owned or occupied by him. Officers conducted surveillance of Christopher for approximately one week, during which time they observed many different people entering one of the residences and leaving a short time later. They also observed Christopher engaging in hand-to-hand transactions with others while sitting in his car that was parked at one of the residences.

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

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

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

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

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

Scenario #8

Defendant Wilson was convicted of the following counts:

- Possession of a silencer in violation of 18 U.S.C. § 922(g)(1)- Applicable guideline is §2K2.1
- 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 and

GUIDELINE SCENARIOS – DRUGS AND GUNS

- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i)- Applicable guideline is §2K2.4.

The defendant always carried a gun during his drug transactions. The defendant also sold five guns and the silencer during one of his drug deals.

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

2. 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?

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

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Economic Crimes: 2018 Annual National Seminar

Economic crimes often require accurate determinations about victims (who they are and how they were harmed), loss (actual vs. intended loss, application of special rules) and restitution (who is a victim of the offense of conviction, and what loss did the defendant cause). Here are just a few pointers to help you make these determinations.

How are Loss and Restitution Similar?

- Bare assertions in the PSR, without more, are insufficient evidence to prove loss or restitution.
- The causation requirement for loss calculations, and for determining restitution, requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable.
- In a conspiracy case, the defendant is not responsible for loss caused before the defendant joined.

How are Loss and Restitution Different?

Loss Determination

- Loss is the greater of actual or intended loss.
- Loss under §2B1.1 does not require more than an estimate – it is a measure of the defendant’s culpability.
- Special rules govern specific types of fraud offenses, for example, loss in federal procurement cases.

Restitution Determination

- Intended loss cannot be used.
- Restitution must be exact. Its purpose is to make the victim whole, not to confer a windfall on the victim.
- Calculation of restitution is consistent across case types – making the victim whole is the driving principle.

Who is a Victim?

Guidelines

- **§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.
- **§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.



Economic Crimes:

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Restitution

- A victim is a person proximately harmed as a result of the commission of the offense.

General Principles and Special Rules Governing Loss

Principles

- Loss includes acts in the same course of conduct, common scheme or plan as the offense(s) of conviction. Those other acts will be included in the loss determination.
 - Intended loss means the pecuniary harm that the defendant purposefully sought to inflict and includes intended pecuniary harm that would have been impossible or unlikely to occur. §2B1.1 App. Note 3.
- For multiple counts sentenced under §2B1.1, do one single application of the guideline based on all relevant conduct.
- Loss can include uncharged and acquitted conduct.
- A reasonable estimate of loss can include such factors as the fair market value of the property unlawfully taken or destroyed, the cost of repairs, and the approximate number of victims multiplied by the average loss to each victim, among other factors.
- Loss does not include emotional distress, harm to reputation, other non-economic harms, costs to the government or victims for investigation and prosecution, or interest. § 2B1.1 App. Note 3(D).
- Credits against loss – loss may be reduced by certain benefits transferred or collateral pledged to the victim before the offense was detected. §2B1.1 App. Note 3(E).

Special Rules for Loss Determinations

- Mortgage Fraud – There is a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of the plea is the fair market value. §2B1.1, App. Note 3(E)(iii).
- Federal Health Care Offenses Involving Government Health Care Programs – The aggregate amount of fraudulent bills submitted to the government health care program is *prima facie* evidence of the amount of intended loss, if not rebutted. §2B1.1 App. Note 3(F)(viii).

Other Special Rules

- Stolen/counterfeit credit cards – \$500 per counterfeit or unauthorized access device
- Government Benefits – not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses
- See §2B1.1, App. Note 3(F) for more special rules

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

Question 1

Defendant obtained 500 credit card numbers. She sent 250 of them to a co-defendant to reencode the stolen credit card information onto professional-looking counterfeit credit cards. What is the loss amount?

Question 2

Defendant obtained 100 credit cards or debit card numbers from abroad, encoding them onto blank cards to withdraw money from ATMs. She used only 10 of the cards and took out \$40 on each of the 10 occasions. Defendant was arrested at home, where investigators recovered the other 90 cards but no money. At the time of sentencing the bank has not recovered any money from the fraudulent withdrawals.

What is the loss amount?

What restitution is owed?

Question 3

Defendant robbed a bank of \$4,237. On his way out, the dye pack inside the bag burst, staining at least half of the bills. Investigators recovered the bag and money at the scene. At sentencing the government maintained that the stained money was unusable.

What is the loss amount? What restitution is owed?

Question 4

Defendant is convicted of Identity Theft. He stole the names, Social Security numbers and security clearance levels of roughly 400 members of his former Army unit, and sold the information of 98 of them 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.

Do any victim-related adjustments apply?

Question 5

Defendant is being sentenced for a fraud offense involving small business contracts. Defendant was working for his father in law’s business and they were legitimately eligible for, and were awarded government contracts based on the father in law’s veteran status. After his father in law died, defendant continued to apply for and receive government contracts. Defendant provided services for the Air Force and NASA, both of whom had no issue with the services defendant provided. Neither agency is seeking restitution.

Should the court discount from the loss amount the value of the services rendered?

Who is the victim and what restitution should the court order?

Question 6

Defendant Walter was convicted of one count of conspiracy to commit health care fraud and one count of conspiracy to pay and receive health care kickbacks. For five years, Walter owned and operated a durable medical equipment company, through which she fraudulently billed Medicare and Medi-Cal for durable medical equipment (mainly motorized wheelchairs) provided to patients who did not need them. She paid kickbacks to recruiters who found patients and doctors who would be paid for prescriptions. During the five-year period, Walter submitted reimbursement claims to Medicare in the amount of \$3,432,776. She was paid \$1,866,261. During the same time period she billed Medi-Cal \$89,011 and was paid \$73,269. Walter’s lawyer stated at sentencing that Walter was familiar with

Medicaid and Medi-Cal rules for reimbursement, and that she expected to receive only the amount she did receive from those programs.

What is the loss amount?

What is the restitution amount?

Question 7

Defendant Tartar and his co-defendant Litos established a company to purchase, rehab, and sell homes. The two assisted buyers by providing them with down payments, however, they falsely claimed on loan applications that the buyers had the funds. They made other, material misrepresentations on the loan documents. Those misrepresentations included fictitious incomes, non-existent bank accounts, and other false assets. The documents contained obvious errors and inconsistencies, and one buyer purchased six homes in a two-week period. Bank of America nonetheless approved the loans. Tartar attended closings posing as the seller's representative, and signed documents falsely affirming that no part of the down payment came from the seller or any third party. After closing Tartar provided the buyers funds to make two mortgage payments, after which, they defaulted on the loans. Intended loss was determined to be between \$1.5 and 3.5 million. Bank of America suffered an actual loss of \$900,000.

What is the loss amount?

What restitution is owed to Bank of America?

Question 8

Sunmola was convicted of fraud involving an online dating scheme. He and his co-defendants created profiles on online dating platforms using fake names and giving the impression that they were successful businessmen. After gaining the women's trust, Sunmola and his co-defendants had the women send

ECONOMIC CRIMES SCENARIOS

electronics purportedly in support of the U.S. military's efforts to defeat ISIS, and electronic money transfers. One victim was 55 and recently divorced from her husband of 20 years.

Over Sunmola's objection, the court applied the vulnerable victim enhancement found at §3A1.1(b)(2). Was the court's ruling correct?

Question 9

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

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

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

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

Will Defendant B receive an enhancement for causing substantial financial hardship to the victim? Why or why not?

Question 10

Myers ran a scheme to steal and resell motor homes. He did this by calling the owners posing as a Carfax employee to obtain the VIN numbers. He then forged titles using the VINs, applied for clone titles in states that did not verify the original title, and stole the homes using master keys he obtained online. Using the clone titles, he sold the homes to unsuspecting motor home dealers. Those dealers

sold the home to other buyers. When the fraud was eventually discovered, the homes were returned to the original owners or to the owners' insurance company.

Who are the victims of Myers' offense?

What losses will be included in the §2B1.1 determination?

Who is owed restitution?

If restitution is ordered, what kinds of damages might be included?

Will any victim-related enhancements apply?

Question 11

White and co-participants bought merchandise in retail stores with fake checks and then returned the merchandise for cash. Over four years, the group targeted 32 stores and caused actual losses of \$627,000. White's plea agreement stated:

Beginning no later than in or around the fall of 2009 and continuing until at least in or around the summer of 2013, in the Western District of Texas, and elsewhere . . . V. White, together with other individuals known and unknown to the Grand Jury, knowingly devised, intended to devise, and participated in a scheme to defraud and to obtain money by means of materially false and fraudulent pretenses, representations, and promises.

ECONOMIC CRIMES SCENARIOS

At sentencing, White objected to being held accountable for the entire \$627,000 actual loss, because he was incarcerated for two years starting in September 2009, then again in August 2012.

The court overruled the objection because White pleaded guilty to the language above. The guideline range was 84-105 months, but the court varied downward and sentenced White to 59 months.

Was the court's ruling correct?

Given the downward variance, will the appellate court care whether the ruling was correct or incorrect?

Question 12

Hearns was convicted at trial of conspiracy to commit bank fraud. The indictment charged that from on or about June 11, 2008 through July 1, 2008, Hearns conspired to knowingly execute a scheme to defraud. She was a loan officer who made materially false statements on a loan application for a prospective buyer who did not qualify for the loan. The prospective buyer was able to obtain the loan to purchase a home (the Brownstone property) despite not having the money for a down payment. The buyer later defaulted and the bank foreclosed on the property.

At sentencing, the government argued that the other fraudulent loans making up the total loss amount of \$865,940.18, were part of the same course of conduct. The probation officer agreed, providing the following support in the PSR: "The government has identified 10 properties (including the Brownstone property) that involved fraud in the mortgage loan process. . . . Government records reflect that Hearns and her co-conspirators were all involved in the scheme to defraud." The court held Hearns accountable for the total loss attributed to the conspiracy, finding that the loss was foreseeable to Hearns and therefore was relevant conduct.

Was the court's ruling correct?

Question 13

Defendant Sharp was named with a total of nine defendants charged with conspiracy to commit access device offenses and use of counterfeit access devices. After a lengthy investigation, authorities executed a search warrant at the home of Defendant Delman, a drug trafficker who also ran a scheme to manufacture and use fraudulent credit cards. At Delman's home, authorities found various equipment used to produce fraudulent credit cards, including a laptop computer an embossing machine, 210 pre-paid gift cards, 150 credit and debit cards, and text files with hundreds of stolen credit card numbers. In total there were 2,326 unique credit card and gift card numbers. Multiplied by \$500, the total loss was \$1,163,000.

Delman recruited Sharp to make purchases using the fraudulent cards. Nine cards were printed with Sharp's name, and video surveillance showed her making two purchases, one at Lowe's Hardware, and another at Kroger (groceries). The PSR assigned the total loss to each of the co-conspirators, stating "each co-conspirator knew the offense involved significantly more transactions than the ones he/she was involved with and that there were others engaging in similar fraudulent transactions. Sharp knew that the leaders could not have afforded their expensive lifestyle based solely on the two fraudulent transactions she performed." The PSR gave Sharp a minimal participant reduction, however, because of her limited involvement.

Is the loss calculation correct as to Defendant Delman?

Is it correct as to Defendant Sharp?

Should Sharp receive a mitigating role adjustment?

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Hacking & Phishing Glossary: 2018 Annual National Seminar

Adware - Adware can mean the software that automatically generates advertisements in a program that is otherwise free, such as an online video game. But in this context it more commonly means a kind of spyware that tracks your browsing habits covertly to generate those ads.

Anonymous - A non-hierarchical hacktivist collective, Anonymous uses hacking (and arguably cracking) techniques to register political protest in campaigns known as “#ops.” Best known for their distributed denial of services (DDoS) attacks, past activities have included attacks against the Church of Scientology; Visa, Paypal, and others who withdrew their services from WikiLeaks’ Julian Assange after that group began releasing war documents; #OpTunisia and others purporting to support the Arab Spring; and a campaign that brought down the website of the Westboro Baptist Church. #Ops are usually marked with the release of a video of a reader in a Guy Fawkes mask using a computer generated voice. Offshoot groups include AntiSec and LulzSec.

AntiSec - An Anonymous splinter group, AntiSec was best known for the hack of security firm Stratfor, publishing credit card numbers and email addresses taken from the company’s site. Jeremy Hammond was arrested for alleged Anti-Sec activities under the alias sup_g.

Back Door - A back door, or trap door, is a hidden entry to a computing device or software that bypasses security measures, such as logins and password protections. Some have alleged that manufacturers have worked with

government intelligence to build backdoors into their products. Malware is often designed to exploit back doors.

Black hat - Black hat hackers are those who engage in hacking for illegal purposes, often for financial gain, though also for notoriety. Their hacks (and cracks) result in inconvenience and loss for both the owners of the system they hack and the users.

Bot - A program that automates a usually simple action so that it can be done repeatedly at a much higher rate for a more sustained period than a human operator could do it. Like most things in the world of hacking, bots are, in themselves, benign and used for a host of legitimate purposes, like online content delivery. However, they are often used in conjunction with cracking, and that’s where their public notoriety comes from. Bots can be used, for instance, to make the content calls that make up denial of service attacks. Bot is also a term used to refer to the individual hijacked computers that make up a botnet.

Botnet - A botnet is a group of computers controlled without their owners’ knowledge and used to send spam or make denial of service attacks. Malware is used to hijack the individual computers, also known as “zombies,” and send directions through them. They are best known in terms of large spam networks,

frequently based in the former Soviet Union.

Brute Force Attack - Also known as an exhaustive key search, a brute force attack is an automated search for every possible password to a system. It is an inefficient method of hacking compared to others like phishing. It’s used usually when there is no alternative. The process can be made shorter by focusing the attack on password elements likely to be used by a specific system.

Clone Phishing - Clone phishing is the modification of an existing, legitimate email with a false link to trick the recipient into providing personal information.

Code - Code is the machine-readable, usually text-based instructions that govern a device or program. Changing the code can change the behavior of the device or program.

Compiler - A compiler is a program that translates high-level language (source code in a programming language) into executable machine language. Compilers are sometimes rewritten to create a back door without changing a program’s source code.

Cookie - Cookies are text files sent from your Web browser to a server, usually to customize information from a website.

Cracking - To break into a secure computer system, frequently to do damage or gain financially, though sometimes in political protest.



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Denial of Service Attack (DoS) - DoS is used against a website or computer network to make it temporarily unresponsive. This is often achieved by sending so many content requests to the site that the server overloads. Content requests are the instructions sent, for instance, from your browser to a website that enables you to see the website in question. Some have described such attacks as the Internet equivalent of street protests and some groups, such as Anonymous frequently use it as a protest tool.

Distributed Denial of Service Attack (DDoS) - A DoS using a number of separate machines. This can be accomplished by seeding machines with a Trojan and creating a botnet or, as is the case with a number of Anonymous attacks, by using the machines of volunteers.

Doxing - Discovering and publishing the identity of an otherwise anonymous Internet user by tracing their online publically available accounts, metadata, and documents like email accounts, as well as by hacking, stalking, and harassing.

Firewall - A system using hardware, software, or both to prevent unauthorized access to a system or machine.

Gray Hat - Just like the rest of life, hacking is often less black or white than it is gray. The term gray hat hacker reflects that reality. A gray hat hacker will break the law in the pursuit of a hack, but does not do so maliciously or for personal gain. Many would argue Anonymous are gray hats.

Hacking - Hacking is the creative manipulation of code, distinguished, albeit amorously, from programming by focusing on the manipulation of already written code in the devices or software for which that code was already written.

Metaphorically it extends to social engineering in its manipulation of social code to effect change. Many prefer to use the term cracking to describe hacking into a machine or program without permission. Hackers are sometimes divided into white hat, black hat, and gray hat hackers.

Hactivist - A hacker whose goals are social or political. Examples range from reporting online anonymously from a country that attacks free speech to launching a DDoS campaign against a company whose CEO has issued objectionable statements. Not to be confused with slacktivism, which refers to push-button activism in which a supporter of a social or political campaign's goals does nothing but register their support online, for instance by "liking" a Facebook page.

Hash - A hash is a number generated by an algorithm from a string of characters in a message or other string. In a communications system using hashes, the sender of a message or file can generate a hash, encrypt the hash, and send it with the message. On decryption, the recipient generates another hash. If the included and the generated hash are the same, the message or file has almost certainly not been tampered with.

IP - Internet protocol address. It's the distinctive numeral fingerprint that each device carries that's connected to a network using Internet Protocol. If you have a device's IP you can often identify the person using it, track its activity, and discover its location. These addresses are apportioned by the regional Internet registries of the IANA (the Internet Assigned Numbers Authority). Crackers can use

knowledge of your IP address to your computer via one of its ports, the points that regulate information traffic flow.

IRC - Internet relay chat is a protocol used by groups and for one-on-one conversations, often utilized by hackers to communicate or share files. Because they are usually unencrypted, hackers sometimes use packet sniffers to steal personal information from them.

Keystroke Logging / Keylogger - Keystroke logging is the tracking of which keys are pressed on a computer (and which touchscreen points are used). It is, simply, the map of a computer/human interface. It is used by gray and black hat hackers to record login IDs and passwords. Keyloggers are usually secreted onto a device using a Trojan delivered by a phishing email.

Logic Bomb - A virus secreted into a system that triggers a malicious action when certain conditions are met. The most common version is the time bomb.

LulzSec - LulzSec is an Anonymous offshoot. It's best-known actions were hacking user information from the website of Sony Pictures and for allegedly shutting down the CIA website with a DDoS attack. LulzSec's best known, however, for Hector Xavier Monsegur, a.k.a. "Sabu," a hacker turned FBI informant, whose intel led to the arrest of four other LulzSec members. He faces the possibility of a long prison term despite his cooperation.

Malware - A software program designed to hijack, damage, or steal information from a device or system. Examples include spyware, adware, rootkits, viruses, keyloggers, and many more. The software can be delivered in a number of ways, from decoy websites and spam to USB drives.



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Master - The computer in a botnet that controls, but is not controlled by, all the other devices in the network. It's also the computer to which all other devices report, sending information, such as credit card numbers, to be processed. Control by the master of the bots is usually via IRC.

NSA - The National Security Agency is the U.S. intelligence group dedicated to intercepting and analyzing data, specifically electronic data.

Payload - The cargo of a data transmission is called the payload. In black hat hacking, it refers to the part of the virus that accomplishes the action, such as destroying data, harvesting information, or hijacking the computer.

Packet Sniffer - Sniffers are programs designed to detect and capture certain types of data. Packet sniffers are designed to detect packets traveling online. Packets are packages of information traveling on the Internet that contain the destination address in addition to content. Packets can be used to capture login information and passwords for a device or computer network.

Phishing - Tricking someone into giving you their personal information, including login information and passwords, credit card numbers, and so on by imitating legitimate companies, organizations, or people online. Phishing's often done via fake emails or links to fraudulent websites.

Remote access - Remote control is the process of getting a target computer to recognize your keystrokes as its own, like changing a TV with a remote control. Gaining remote access allows you to run the target machine completely by using your own, allowing for the transfer of files between the target and the host.

Rootkit - A rootkit is a set of software programs used to gain administrator-level access to a system and set up malware, while simultaneously camouflaging the takeover.

Script Kiddie - A pejorative term for a would-be cracker without technical skills. Script kiddies use prefab cracking tools to attack systems and deface them, often in an attempt to score points with their peers.

Social Engineering - Social engineering is conning people into giving you confidential information, such as passwords to their accounts. Given the difficulty of breaking, 128-bit encryption with brute force, for example, social engineering is an integral element of cracking. Examples include phishing and spear-phishing.

Spam - Unwanted and unsolicited email and other electronic messages that attempt to convince the receiver to either purchase a product or service, or use that prospect to defraud the recipient. The largest and most profitable spamming organizations often use botnets to increase the amount of spam they send (and therefore the amount of money they make).

Spear-phishing - A more focused type of phishing, targeting a smaller group of targets, from a department within a company or organization down to an individual.

Spoofing - Email spoofing is altering the header of an email so that it appears to come from elsewhere. A black hat hacker, for instance, might alter his email header so it appears to come from your bank. IP spoofing is the computer version, in which a packet is sent to a computer with the IP altered to imitate a trusted host in the hope that the packet will be accepted and allow the sender access to the target machine.

Spyware - Spyware is a type of malware that is programmed to hide on a target computer or server and send back information to the master server, including login and password information, bank account information, and credit card numbers.

Syrian Electronic Army - The SEA is a pro-government hacking group, best known for defacing high-profile publications like the New York Times and National Public Radio (and the Daily Dot). Recently, Vice and Krebs on Security have doxed several alleged members of the group. Some have accused them of being less hackers than script kiddies.

Time Bomb - A virus whose payload is deployed at or after a certain time.

Trojan Horse - A Trojan is a type of malware that masquerades as a desirable piece of software. Under this camouflage, it delivers its payload and usually installs a back door in the infected machine.

Virus - Self-replicating malware that injects copies of itself in the infected machine. A virus can destroy a hard drive, steal information, log keystrokes, and many other malicious activities.

Vulnerability - A weak spot hackers can exploit to gain access to a machine.



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Whaling - Spear-phishing that targets the upper management of for-profit companies, presumably in the hope that their higher net worth will result in either more profit, if the cracker is after financial gain, or that their higher profile will ensure the gray hat hacker more exposure for his or her cause.

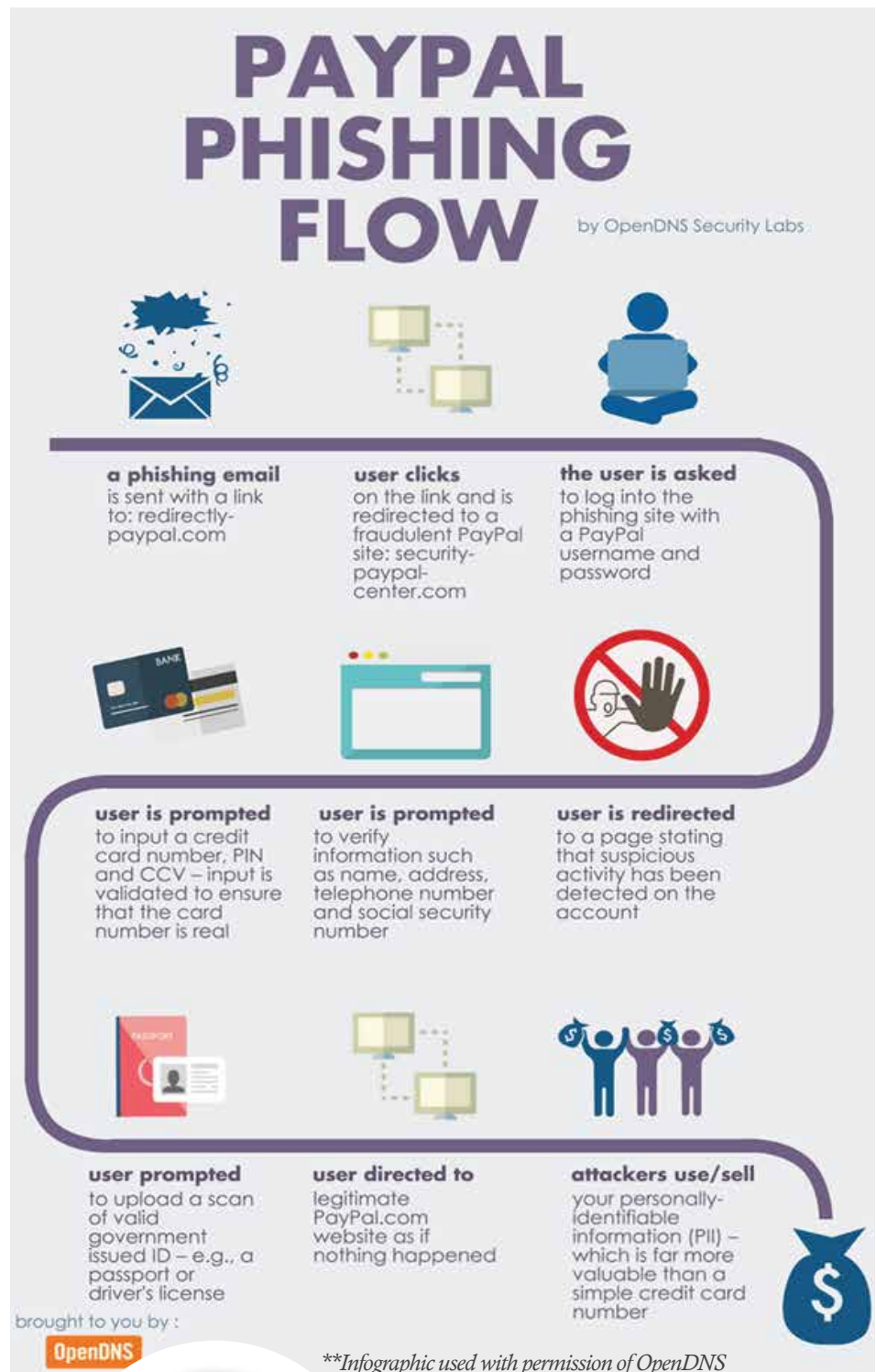
White Hat - An ethical hacker who uses his skills in the service of social good. The term may also be applied to a hacker who helps a company or organization, or users in general, by exposing vulnerabilities before black hat hackers do.

Worm - Self-replicating, standalone malware. As a standalone it does not report back to a master, and unlike a virus it does not need to attach itself to an existing program. It often does no more than damage or ruin the computers it is transmitted to. But it's sometimes equipped with a payload, usually one that installs back doors on the infected machine to make a botnet.

Zero Day Exploit - A zero day attack is a previously unknown vulnerability in a system. A zero day attack is the first such use of the exploit by a cracker.

**This glossary contains terminology and explanations of concepts relevant to various emerging technologies. The purpose of the glossary is to inform the reader of the most commonly used vocabulary terms in the cyber world. This glossary was compiled from various sources readily available on the Internet.*

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

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Address - A Bitcoin address is similar to a physical address or an email. It is the only information you need to provide for someone to pay you with Bitcoin. An important difference, however, is that each address should only be used for a single transaction. Typically consists of between 26 and 35 alphanumeric characters.

Altcoin - A form of cryptocurrency that has the same decentralized, peer-to-peer principles as bitcoin, but which uses its own blockchain and has its own rules of operation. Altcoin is the term used to describe those digital currencies that do not have as big a market capitalization or do not have the recognition of the current incumbent cryptocurrencies such as bitcoin, litecoin and dogecoin.

ASIC - ASIC stands for application specific integrated circuit, which is a specialized silicon chip that performs just one task. In the digital currency space, these chips process SHA-256 in order to mine bitcoin and validate transactions.

ASIC Miner - An ASIC Miner is the hardware that houses the chip of the same name. You put them into your Internet connection via a modem or wireless mode. Bitcoin is independent of your desktop computer.

Bit - Bit is a common unit used to designate a sub-unit of a bitcoin - 1,000,000 bits is equal to 1 bitcoin (BTC or ₿). This unit is usually more convenient for pricing, tips, goods and services.

Bitcoin / BTC (shorthand) - A form of digital currency created in 2009, that is created and distributed on a peer-to-peer basis. It has no central bank - transactions are conducted directly between individuals. Bitcoin is the most popular kind of cryptocurrency.

Bitcoin Index - The live bitcoin news bitcoin index is a weighted average index that shows the value of one bitcoin versus one single unit of currency of each of the majors in the Forex space - EUR, USD, JPY, GBP and AUD.

Bitcoin Whitepaper - Written by Satoshi Nakamoto in 2008, it describes the original plan and protocol for Bitcoin.

BitPay - BitPay is a payment processing company and software that allows merchants such as eBay, Amazon and other online shopping channels to accept bitcoin as payment for its goods and services.

Block - A block is a record in the block chain that contains and confirms many waiting transactions. Roughly every 10 minutes, on average, a new block including transactions is appended to the block chain through mining.

Block Reward - This term refers to the "reward" that the Miner receives for successfully hashing a transaction block.

Blockchain - A digital file distributed to everyone participating in a cryptocurrency network. The blockchain acts as a kind of general ledger, keeping track of all the transactions that happen in the network. Everyone can look at the blockchain to see what transactions have happened on the network, and the blockchain is sealed using cryptography so that no one can tamper with it.

Cold Storage - A security measure for Bitcoin that is disconnected from the internet. Could be a paper wallet [see below], USB stick or hardware wallet.

Confirmation - Confirmation means that a transaction has been processed by the network and is highly unlikely to be reversed. Transactions receive a confirmation when they are included in a block and for each subsequent block. Even a single confirmation can be considered secure for low value transactions, although for larger amounts like \$1,000 US, it makes sense to wait for 6 confirmations or more. Each confirmation exponentially decreases the risk of a reversed transaction.

Cryptocurrency - The broad name for digital currencies that use blockchain technology to work on a peer-to-peer basis. Cryptocurrencies don't need a bank to carry out transactions between individuals. The nature of the blockchain means that individuals can transact between each other, even if they don't trust each other. The cryptocurrency network keeps track of all the transactions and ensures that no one tries to renege on a transaction.

Cryptography - Cryptography is the branch of mathematics that lets us create mathematical proofs that provide high levels of security. Online commerce and banking already uses cryptography. In the case of Bitcoin, cryptography is used to make it impossible for anybody to spend funds from another user's wallet or to corrupt the block chain. It can also be used to encrypt a wallet, so that it cannot be used without a password.

Dogecoin - An altcoin first started as a joke in late 2013. Dogecoin, which features a Japanese fighting dog as its mascot, gained a broad international following and quickly grew to have a multi-million dollar market capitalization.

Double Spend - If a malicious user tries to spend their bitcoins with two different recipients at the same time, this is double spending. Bitcoin mining and the block chain are there to create a consensus on the network about which of the two transactions will confirm and be considered valid.

Exchange - An exchange is exactly how it sounds, somewhere where account holders can exchange one digital currency for another or a Fiat currency for a digital currency.

Faucet - When an individual or team of individuals develop a digital currency, they may pre-mine a certain amount before release and give these pre-mined coins away. This is called a faucet.

FIAT - A Fiat currency is a traditional paperback currency that is regulated by an organization such as the central bank. Examples include the Euro, the US dollar and the Australian dollar.



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Genesis Block - The very first block in the block chain of any digital currency.

Hash - A cryptographic hash is a mathematical function that takes a file and produces a relatively short code that can be used to identify that file. A hash has a couple of key properties: It is unique. Only a particular file can produce a particular hash, and two different files will never produce the same hash. It cannot be reversed. You can't work out what a file was by looking at its hash. Hashing is used to prove that a set of data has not been tampered with. It is what makes bitcoin mining possible.

Hash Rate - The hash rate is the measuring unit of the processing power of the Bitcoin network. The Bitcoin network must make intensive mathematical operations for security purposes. When the network reached a hash rate of 10 Th/s, it meant it could make 10 trillion calculations per second.

Microtransaction - The ability to pay for things in very small sums thanks to the fact that Bitcoin may be extended to 8 decimal places. Microtransactions are especially important to Bitcoin casinos by providing players the ability to deposit and gamble fractions of Bitcoins.

Mining - The act of producing units of a cryptocurrency (such as bitcoins) through some kind of effort. The effort is required so that people can't just create infinite amounts of the digital currency, which would devalue it. In bitcoin, mining requires computing power. Here is a detailed description of how mining works. Bitcoin mining is the process of making computer hardware do mathematical calculations for the Bitcoin network to confirm transactions and increase security. As a reward for their services, Bitcoin miners can collect transaction fees for the transactions they confirm, along with newly created bitcoins. Mining is a specialized and competitive market where the rewards are divided up according to how much calculation is done. Not all Bitcoin users do Bitcoin mining, and it is not an easy way to make money.

Mt. Gox - one of the first Bitcoin exchanges that began liquidating after more than 850,000 of its users' Bitcoins were lost or stolen - an amount equal to more than \$450,000,000 at the time.

Output - When a bitcoin transaction takes place, the output refers to the destination address used in the transaction.

Paper Wallet - Some people prefer to store their bitcoin in the paper wallet - a form of cold storage - in order to improve security. The term simply refers to a printed sheet of paper that holds a number of public bitcoin addresses and corresponding private keys.

P2P - Peer-to-peer refers to systems that work like an organized collective by allowing each individual to interact directly with the others. In the case of Bitcoin, the network is built in such a way that each user is broadcasting the transactions of other users. And, crucially, no bank is required as a third party.

Private Key - A private key is a secret piece of data that proves your right to spend bitcoins from a specific wallet through a cryptographic signature. Your private key(s) are stored in your computer if you use a software wallet; they are stored on some remote servers if you use a web wallet. Private keys must never be revealed as they allow you to spend bitcoins for their respective Bitcoin wallet.

Proof of Work [PoW] - Proof of work simply refers to the output of any efforts to mine bitcoin. In the bitcoin block chain, the hashing of a block takes time and effort, meaning the hash block can be considered proof of work.

Public key - The public key is a string of digits and letters (your bitcoin address). When hashed with a corresponding string known as a private key it digitally signs and online communication.

Satoshi - A Bitcoin "cent", the smallest form of Bitcoins. One Bitcoin is equal to 1 million Satoshis.

Satoshi Nakamoto - the creator of Bitcoin and the author of the original Bitcoin whitepaper and code. His real identity is unknown to the world.

Silk Road - An underground website, as part of the "dark web", that was essentially a black market online. One could purchase illegal drugs, organs or hire assassins online. The site used cryptocurrencies such as Bitcoin and was shut down in 2013 by the FBI.

SHA-256 - Every digital currency must have a cryptographic function that dictates how the hash is constructed. In bitcoin, SHA-256 is this function, and is used as the basis for hash creation (*i.e.* bitcoin's proof of work).

Signature - A cryptographic signature is a mathematical mechanism that allows someone to prove ownership. In the case of Bitcoin, a Bitcoin wallet and its private key(s) are linked by some mathematical magic. When your Bitcoin software signs a transaction with the appropriate private key, the whole network can see that the signature matches the bitcoins being spent. However, there is no way for the world to guess your private key to steal your hard-earned bitcoins.

Transaction Fee - Some transactions that occur in the bitcoin block chain contain transaction fees. These transaction fees are paid to the miner that hashes the block in question.

Wallet - A Bitcoin wallet is loosely the equivalent of a physical wallet on the Bitcoin network. The wallet actually contains your private key(s) which allow you to spend the bitcoins allocated to it in the block chain. Each Bitcoin wallet can show you the total balance of all bitcoins it controls and lets you pay a specific amount to a specific person, just like a real wallet. This is different from credit cards where you are charged by the merchant.

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ETHICS HYPOTHETICALS

ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING (2018)

In all hypos, these are the “players”:

Defendant Peter **Meyers**

Defense Counsel Paul **Jones**

AUSA Mary **Brown**

I.

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

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

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guidelines imprisonment range would have been **121 to 151** months (with a statutory mandatory minimum sentence of **120 months**).

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

1. Does Jones have an ethical obligation to inform the probation officer and district court of the error in the PSR concerning Meyers’s prior criminal history (which would disqualify him for the safety valve and also place him in CHC II)?
2. If not, would Jones act ethically by simply filing a short “statement of non-objection to the PSR” (and its sentencing range of 87-108 months)?
3. Assuming Jones simply filed a “statement of non-objection” to the PSR, may Jones ethically ask the court for a sentence at the bottom of the guidelines range set forth in the PSR (87 months)? May Jones ask for a “variance” below the 87-108 month range (assuming a non-frivolous basis for such a downward variance exists under 18 U.S.C. § 3553(a))?
4. Assuming that Jones has filed a short statement of non-objection to the PSR as it currently exists (i.e., with its 87-108 month range), if the court explicitly asks Jones at sentencing if the PSR and the sentencing calculations within it are correct, how should Jones respond?

II.

Defendant **Peter Meyers**, aged 36 and lacking a criminal record, was charged in a criminal complaint in federal court with three counts of armed bank robbery (involving three different banks) and three corresponding section 924(c) counts (alleging that Meyers had brandished a 9-mm pistol during each of the three robberies). Conviction on all six counts would effectively result in a life sentence (a mandatory 57 years of imprisonment on the three section 924(c) counts to run consecutively to the prison sentence for the bank robberies). Although Meyers did not confess and no eyewitness could identify him as the robber, the prosecution’s evidence of Meyers’ guilt of the three armed robberies was very strong, including: video surveillance from the three banks that clearly show a

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white male robber with the same height and body type as Meyers, who is a white male (the robber wore a Halloween mask during each robbery so his face could not be identified); cell-tower evidence from Meyers' cell phone records showing that his cell phone (seized by police when he was arrested) was located very near each bank at the time of each robbery (the three banks were located many miles apart); dozens of \$20, \$50, And \$100 bills with serial numbers matching the money taken from the three banks found in Meyers' wallet, car, and apartment, including some with purple dye stains from a dye pack that had exploded during the third robbery; and a loaded stainless steel 9-mm pistol found in Meyers' car that appears to be the same type as the one brandished by the robber during each of the three robberies (as shown on the video surveillance). In addition, a witness on the street had seen an unidentified person wearing a Halloween mask run out of a bank, get into a car, and drive away at a high rate of speed and had taken a photo of the car's license plate with her iPhone. The license plate was registered in the name of Meyers' sister. FBI agents were thus able to identify Meyers as a suspect.

After being arrested on the complaint, appointed counsel, and having a preliminary hearing in which the foregoing evidence was introduced, Meyers briefly met with his defense attorney, AFPD **Paul Jones**. Meyers angrily asserted that he was innocent of all three armed robberies. He offered no explanation for the cell tower records, his sister's car being identified outside the third bank, and the bank money found in his possession other than to insist that it was a "sheer coincidence or maybe I'm being set up for some unknown unreason." Meyers also said he had been unemployed during the past two years and had spent virtually all of his time alone in his trailer, and thus would have no way to prove an alibi defense with any concrete evidence. When Jones brought up the issue of whether he should seek a plea bargain to avoid what would be a virtual life sentence for Meyers if he were convicted of three section 924(c) charges, Meyers angrily responded, "I told you I am innocent. I am not pleading guilty to something I didn't do." Jones said that he would continue investigating the case and also carefully examine all of the prosecution's evidence disclosed during pretrial discovery.

After he returned to his office, Jones telephoned the prosecutor, AUSA **Mary Brown**, and asked to arrange for a time for Jones to see the discovery. Brown responded to Jones that, "we can arrange for that after I get an indictment, but at this point I will offer your client a plea bargain offer that may make it unnecessary: if he agrees to waive the indictment, proceed on an information, and plead guilty to the three bank robberies and a single section 924(c) count, I will drop the other two section 924(c)

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counts. His likely guideline range will be 70-87 months with acceptance of responsibility,^[1] so his total prison sentence would be around 13-14 years with the consecutive seven-year section 924(c) sentence for brandishing a firearm.” She also said that, “This offer is only good for a week. I am going to the grand jury one week from today to obtain an indictment. If he doesn’t agree to the deal, I will get an indictment with all six counts and thereafter won’t drop any of them.” Jones told Brown that he would give her a response to her plea offer within seven days.

- A. What ethical obligation does AFPD Jones have regarding AUSA Brown’s plea bargain offer? Could Jones ethically advise Meyers to accept the plea offer without Jones conducting any additional investigation and without actually reviewing the discovery (to which he is not entitled under Fed. R. Crim. P. 16 until after an indictment or information has been returned)?
- B. Assume Jones conveys the plea bargain offer to Meyers within the seven-day period and that Meyers adamantly responds, “I told you I’m not taking any plea bargain. I’m innocent.” Does Jones have any additional ethical or constitutional obligation (under the Sixth Amendment) to attempt to persuade Meyers to consider the plea bargain offer before it expires?
- C. Assume that Jones did not convey the plea offer to Meyers within the seven-day period and that AUSA Brown thereafter withdrew the offer as promised after going to the grand jury and obtaining a six-count indictment. Further assume Meyers went to trial, was convicted of all six counts, and received a prison sentence of 97 months for the three robberies with a consecutive 57-year sentence for the three section 924(c) counts (for a total sentence of around 65 years). After overhearing a remark by AUSA Brown to Jones made as she was leaving the courtroom following sentencing, Meyers for the first time learned that Brown had made a plea bargain offer to Jones and that Jones had failed to convey the offer to

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

ETHICS HYPOTHETICALS

Meyers. Does Meyers have any constitutional basis to challenge his 65-year sentence in a motion for a new trial or section 2255 motion?

III.

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

At trial, because she did not consider it necessary to do so, AUSA Brown did not introduce any evidence related to a **confidential source (“CS”)** who had provided incriminating information about Meyers that had led to the DEA’s wiretaps of Meyers’s cell phone calls. During the wiretaps, the agents monitored Meyers’s calls with Clinton, which led to Meyers’s arrest and indictment. The CS had no involvement in Meyers’s dealings with Clinton. The CS had told DEA agents that he and Meyers had engaged in “several” illegal drug deals during the prior three years, including two deals each involving 10 kilograms of crack cocaine each. According to the CS, “Meyers specifically told me that had distributed the crack cocaine throughout the Los Angeles area.” The DEA did not develop any additional information concerning those two alleged deals other than obtaining cell phone records showing many dozens of calls between the CS and Meyers during the prior three years.

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

ETHICS HYPOTHETICALS

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

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

1. Does AUSA Brown have an ethical and/or constitutional obligation to disclose the rap sheet and case agent’s memo to the defense in Meyers’s case? Why or why not?
2. Alternatively, assume that the information about the CS’s prior convictions and pending charge (including the fact of the charge’s ultimate dismissal) was contained only in the case agent’s file and was not known by AUSA Brown. What duty, if any, does AUSA Brown have regarding the disclosure of the information?

IV.

Peter Meyers, a 20 year-old heroin addict with no criminal record, was arrested by DEA agents during their execution of a search warrant at a drug stash house. At the time of the raid, Meyers was in the house assisting the home’s owner, his second cousin, package heroin for sale. In exchange for assisting his cousin, Meyers was to receive heroin for his own use. At the time of the agents’ raid, Meyers’ cousin temporarily had left the house and thus was not arrested by the DEA. After he learned of the search of his house, Meyers’ cousin fled and remained at large. In the room in which Meyers was packaging heroin when he was arrested, an unloaded single-barrel, single-shot .410 shotgun (the smallest caliber shotgun, typically used for hunting small game) was leaning against the wall of the room in plain view.

ETHICS HYPOTHETICALS

The agents did not find any unused shotgun shells in the house. Inside shotgun was a single, spent shell. The agents determined that this shell had contained “No. 9 birdshot,” the smallest size pellets available. The agents seized a total of 435 grams of heroin as well as the .410 shotgun. Meyers was the only person whom they arrested.

At Meyers’s initial appearance in federal court, AFPD **Paul Jones** was appointed to represent Meyers. The prosecutor, AUSA **Mary Brown**, approached Jones and said: “The agents seized an unloaded .410 shotgun in the room in which your client was packaging heroin. If your client pleads guilty to the heroin charge and cooperates (whether or not he can provide substantial assistance), I’ll not charge him with a section 924 count.” Jones conferred with Meyers, determined that no suppression issues existed, and responded to AUSA Brown as follows: “He’ll take the deal, but I would like to avoid mentioning the fact that the unloaded shotgun was in the house. Can your factual basis in the plea agreement omit mention of the shotgun and also can you and your agent not provide the probation officer information about the shotgun being in the room? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify him for the safety valve.”

- A. May AUSA Brown ethically enter into the plea agreement proposed by Jones – leaving out mention of the unloaded .410 shotgun from the factual basis? May AUSA Brown ethically agree to withhold information about the .410 shotgun from the probation officer assigned to write the presentence report?
- B. Assume Brown and Jones ultimately entered into the agreement. At sentencing, the court specifically asks both attorneys: “The PSR doesn’t say anything about it, but I just want to make sure that the defendant wasn’t armed when he was packaging the heroin. It’s my understanding guns are tools of the trade for drug dealers.” How should AFPD Jones respond? How should AUSA Brown respond?

V.

Peter Meyers, a British citizen, was charged with one count of illegal reentry by a previously deported alien, in violation of 8 U.S.C. § 1326(a). Prior to his sole deportation, he had been convicted in federal court of distributing drugs and given a five-year prison sentence followed by three years of

ETHICS HYPOTHETICALS

supervised release. He was deported after being released from federal prison and thereafter was found in the United States by an immigration agent.

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

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

After receiving the PSR, **AFPD Paul Jones** went to the local detention center to review the PSR with his client Meyers (a copy of which he had previously mailed to Meyers). Meyers informed Jones that “another inmate went to the law library” at the detention center and researched the legal issue of whether Meyers’s statutory maximum is two or 20 years. According to Meyers, the other inmate told him that he should “demand that [his] attorney object to the PSR” on the ground that Meyers’s statutory maximum sentence should be two, not 20, years – because the indictment did not mention Meyers’s prior conviction. Meyers made such a “demand.” Jones explained that, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a majority of the Supreme Court held that an indictment in an illegal reentry case need not allege a pre-deportation conviction nor must such a conviction be admitted by a defendant at a guilty plea hearing in order for the court to sentence a defendant to up to 20 years based on the prior conviction. Meyers told Jones that his fellow inmate had discovered Justice Thomas’s dissenting opinion (from the denial of certiorari) in *Reyes-Rangel v. United States*, 547 U.S. 1200 (2006), in which he had argued that the Court should overrule *Almendarez-Torres*. Jones responded that he was aware that Justice Thomas had “repeatedly” dissented on that ground over the years but that no other Justice seemed to agree with him (at least not in recorded votes) and that *Almendarez-Torres* was still “good law.”

1. What should Jones do, if anything, in response to Meyers’s “demand”?

ETHICS HYPOTHETICALS

2. Further assume that Meyers, citing Justice Thomas's dissenting opinion in *Rangel-Reyes*, raised a *pro se* objection to the PSR (contending his statutory maximum was two years), which was overruled by the district court in sentencing Meyers to 46 months in prison. No other legal issues were raised concerning the validity of Meyers's conviction or sentence. After sentencing, what obligation, if any, does Jones have to consult with Meyers about a pursuing a possible appeal?
3. Assume that Meyers chooses to appeal and that a new defense counsel, **CJA Attorney Maria Gonzalez**, is appointed on appeal. Assume the only legal issue in Meyers's case is the *Almendarez-Torres* issue discussed above. What should Gonzalez do? Should she file an *Anders* brief?

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Grouping Multiple Counts of Conviction: 2018 Annual National Seminar

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

Key Points about Grouping Multiple Counts of Conviction:

- The grouping rules in Chapter 3, Part D apply to multiple counts of conviction contained in the same indictment or information, or multiple counts contained in different indictments or informations where sentences are to be imposed at the same time or in a consolidated proceeding.
- The grouping rules do not apply to counts of conviction for which the statute: specifies a term of imprisonment to be imposed and requires that specific term of imprisonment run consecutively to any other count of conviction. Common examples: 18 U.S.C. § 924(c) and 18 U.S.C. §1028A. (See §3D1.1.)
- The grouping rules in §3D1.2 apply to closely related counts that are to be treated as a single, composite harm. One offense level will be used to represent all counts grouped under these rules. When these rules are applied to multiple counts, it is referred to as “grouping.”
- The rules in §3D1.4 apply to counts that represent separate, distinct harms. This provision provides incremental punishment (additional offense levels) for additional criminal conduct. These rules are often referred to as the “assignment of units.”
- Depending upon the specific counts in a particular case, a multiple count case may use: only the grouping rules in §3D1.2, only the assignment of units in §3D1.4, or both.
- Acceptance of Responsibility (§3E1.1) is determined after application of the guidelines to determine a single offense level for multiple counts. A reduction for Acceptance of Responsibility is taken from the single offense level that is determined after all of the grouping rules are applied.

Key Terms

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

Count Group – the group of closely related counts after application of the grouping rules in §3D1.2. If

there are multiple counts or count groups, the grouping rules will still be applied to determine a single, combined offense level.

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



Grouping Multiple Counts of Conviction:

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Groups of Closely Related Counts (§3D1.2)

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

- (a) Counts involve the same victim and the same act or transaction.
- (b) Counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) One of the counts embodies conduct that is treated as a specific offense characteristic in, or Chapter 3 adjustment to, the guideline applicable to another count.
- (d) Counts use the same guideline and are included for grouping under this subsection. The most commonly applied guidelines to be grouped under this subsection are:
 - §2B1.1 (Fraud, Theft)
 - §2C1.1 (Bribery)
 - §2D1.1 (Drugs)
 - §2G2.2 (P/R/T Child Pornography)
 - §2K2.1 (Firearms)
 - §2L1.1 (Alien Smuggling)
 - §2S1.1 (Money Laundering)
 - §2T1.1 (Tax Offenses)

Guidelines excluded from grouping under this subsection include:

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

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

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

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

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

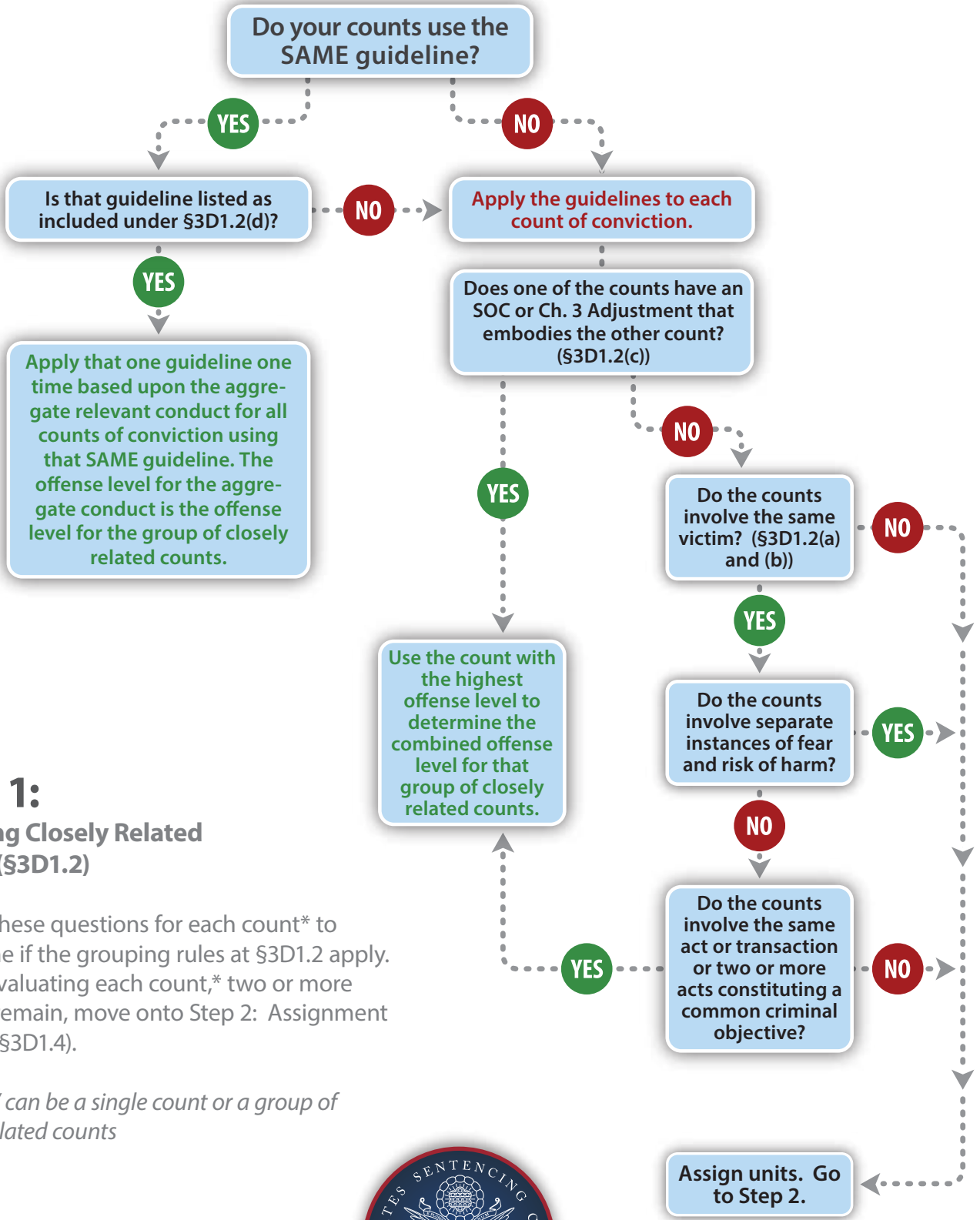
To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov.



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

Decision Tree: Grouping Multiple Counts of Conviction

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Step 1: Grouping Closely Related Counts (§3D1.2)

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

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



Flip over for Step 2:

Decision Tree: Grouping Multiple Counts of Conviction

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Step 2:

Assignment of Units (§3D1.4)

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

Checklist to Determine a Single Combined Offense Level:

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

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

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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

1. The defendant pleaded guilty to two counts. The first count is distribution of fentanyl resulting in death of victim A. The second count is distribution of fentanyl resulting in death of victim B. The guideline applicable to both counts is §2D1.1. Each offense of conviction establishes that death resulted from the use of the fentanyl.

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

2. The defendant is a pharmacist tech who used her position to generate and create fraudulent scripts for opioid medication. She had access through her position to use the computer to create fake prescriptions and then process them using either children's names or fake names to obtain the pills herself. The defendant pled guilty to five counts of acquiring a controlled substance by fraud, a violation of 21 U.S.C. § 843(a)(3). The guideline applicable to all counts is §2D2.2.

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

3. Defendant pleaded guilty to five counts of assault. The applicable guideline for all counts is §2A2.3. The defendant, a former prison guard, pepper sprayed five inmates without cause or justification. The five inmates were all sprayed on the same occasion at the same time.

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

4. The defendant has two counts of conviction. The first count of felon in possession occurred in January 2017. The defendant, a felon, was in possession of a handgun during a traffic stop. The second count is a violation of 18 U.S.C. § 922(o), unlawful possession of a

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

machine gun. This offense occurred in April 2017. The machine gun was found by federal agents when they arrived at the defendant's residence to serve the defendant with an arrest warrant for count one. The guideline applicable to both counts is §2K2.1.

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

5. Defendant is convicted of two counts: illegal reentry (§2L1.2) and alien in possession of a firearm (§2K2.1). The defendant was contacted by law enforcement to provide information about his cousin, who was under investigation for a drug offense. During the interview with law enforcement, it was revealed that the defendant had been residing in the United States illegally for almost 10 years. The defendant also revealed that he was asked by his cousin to "hold onto" his cousin's firearm for a while. The defendant kept the firearm in his closet until he turned it over to law enforcement during the interview.

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

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2017. 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?

7. Defendant is convicted of one count of illegally reentering the United States (§2L1.2), and one count of possession of fraudulent naturalization documents (§2L2.2). The defendant

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

had fraudulent identification documents that he used to obtain employment when he was, in fact, unlawfully remaining 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?

8. 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?

9. Defendant is convicted of one count of sexual exploitation of a child (§2G2.1), and one count of distribution of child pornography (§2G2.2). The counts involve the same victim, who is 13 years of age. The defendant persuaded the victim to produce explicit images of herself. The defendant then distributed the images over the dark web.

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

10. Defendant pleaded guilty to two counts: burglary of a post office (§2B2.1) and possession of stolen mail (§2B1.1). On December 10, 2017, the defendant unlawfully entered the post office and stole a bag of undelivered mail.

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

ORGANIZATIONAL WORKSHEET A

OFFENSE LEVEL

Defendant _____

District/Office _____

Docket Number _____

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

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

Preliminary Determination of Inability to Pay Fine

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

INSTRUCTIONS

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

Exceptions:

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

Offense Level (See §8C2.3)

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

Guideline	Description	Level
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

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

Sum
(Adjusted Offense Level)

Notes:

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

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

ORGANIZATIONAL WORKSHEET B

MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES

Defendant _____

Docket Number _____

INSTRUCTIONS

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

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

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

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit ($\frac{1}{2}$) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

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

Count number(s) _____

_____ Unit

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

Count number(s) _____

_____ Unit

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

Count number(s) _____

_____ Unit

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

Count number(s) _____

_____ Unit

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

Count number(s) _____

_____ Unit

6. Total Units

_____ Total Units

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

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

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

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

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

ORGANIZATIONAL WORKSHEET C

BASE FINE, CULPABILITY SCORE, AND FINE RANGE

[Page 1 of 2]

Defendant _____

Docket Number _____

1. Offense Level Total

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

2. Base Fine (See §8C2.4(d))

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

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

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

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

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

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

3. Culpability Score (See §8C2.5)

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

(b) **Involvement/Tolerance** (See §8C2.5(b))

Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0".

(c) **Prior History** (See §8C2.5(c))

Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0".

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

(d) **Violation of an Order** (See §8C2.5(d))

Enter the specific subdivision and points applicable. If both subdivisions are applicable, use the greater. If no adjustment is applicable, enter "0".

(e) **Obstruction of Justice** (See §8C2.5(e))

If no adjustment is applicable, enter "0".

(f) **Effective Program to Prevent and Detect Violations of Law** (See §8C2.5(f))

If no adjustment is applicable, enter "0".

(g) **Self-Reporting, Cooperation, and Acceptance of Responsibility** (See §8C2.5(g))

Enter the specific subdivision and points applicable. If more than one subdivision is applicable, use the greatest. If no adjustment is applicable, enter "0".

4. Total Culpability Score

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

Organizational Worksheet C

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

Defendant _____

Docket Number _____

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

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

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

(a) Minimum Multiplier

(b) Maximum Multiplier

6. Fine Range (See §8C2.7)

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

Minimum of fine range

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

Maximum of fine range

7. Disgorgement (See §8C2.9)

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

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

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

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

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

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

ORGANIZATIONAL WORKSHEET D

GUIDELINE WORKSHEET

[Page 1 of 3]

Defendant _____

Docket Number _____

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

1. Restitution (See §8B1.1)

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

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

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

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

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

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

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

\$

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

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

\$ to \$

(b) Disgorgement (See §8C2.9)

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

\$

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

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

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

Organizational Worksheet D — Guideline Worksheet

[Page 2 of 3]

Defendant _____

Docket Number _____

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

Check the applicable box(es):

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

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

7. Fine Offset (See §8C3.4)

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

\$

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

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

- (1) Probation is necessary as a mechanism to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3).
- (2) Any monetary penalty imposed (*i.e.*, restitution, fine, or special assessment) is not paid in full at the time of sentencing and restrictions appear necessary to safeguard the defendant's ability to make payments.
- (3) At the time of sentencing the organization has 50 or more employees and does not have an effective program to prevent and detect violations of law.
- (4) Within the last five years prior to sentencing, the organization has engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication.
- (5) An individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense; and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication; and any part of the misconduct underlying the instant offense occurred after that adjudication.
- (6) Probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.
- (7) The sentence imposed upon the organization does not include a fine.
- (8) Probation is necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). State purpose(s):

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

- (1) At least one year, but not more than five years if the offense is a felony
- (2) No more than five years if the offense is a Class A misdemeanor

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

Organizational Worksheet D — Guideline Worksheet

[Page 3 of 3]

Defendant _____

Docket Number _____

9. Special Assessments (See §8E1.1)

Enter the total amount of special assessments required for all counts of conviction.

10. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as necessary.

Completed by _____

Date _____

ORGANIZATIONAL GUIDELINE SCENARIOS

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

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

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

Defendant A has cooperated with the investigation and Owner has written a statement accepting responsibility on behalf of the company.

The court has previously sentenced Owner to a prison term and a \$20,000 fine for this activity.

How would the company’s guidelines be calculated in this case?

- 1A. Assume the same facts as Fact Pattern 1, except Defendant A has pleaded guilty to three counts of money laundering and the crime occurred prior to November 1, 2015.

How will the guideline fine be calculated?

ORGANIZATIONAL GUIDELINE SCENARIOS

2. Defendant B has pleaded guilty to one count of price-fixing in violation of 15 U.S.C. § 1. Defendant B is a successful automotive component manufacturer that employs 150 people. Defendant B also manufactures commercial lighting products, but the violation did not involve this aspect of the business.

During a three-year period, Defendant B and three other manufacturers conspired to fix prices for taillights and other automotive components sold to customers in the United States and elsewhere. Defendant B, through its Owner, regularly communicated with competitors to agree on product pricing and pricing structures designed to limit competition and maintain high prices. Records demonstrate that the total volume of commerce affected by the conspiracy and attributable to Defendant B over the three-year period was \$12 million in automotive components.

There is no evidence of other misconduct in the company's 15-year history. The current market value of the company's assets is approximately \$20 million.

The company's annual net income is approximately \$1,750,000. The company has cooperated with the investigation and the company's president has written a statement accepting responsibility on behalf of the company.

How would the company's guidelines be calculated in this case?

3. Defendant C is a corporation that has pleaded guilty to one count of making contributions in the name of another person in violation of 2 U.S.C. § 441f. The brother of Defendant C's CEO is a candidate for congress. In an effort to help his brother's campaign, the CEO approaches fifteen employees and suggests that the corporation will give them a \$3,000 bonus in exchange for making a \$2,500 donation to the brother's campaign.

How would the company's guidelines be calculated in this case?

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In imposing a federal sentence, the court follows a three-step process. Relevant Guidelines provisions and case law governing this process, as well as rules governing relief from statutory mandatory minimums, are included here for quick reference.

3-Step Approach to Federal Sentencing

Step 1
Guidelines Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines.

Step 2
Departures Consider the Commission's policy statements in formulating the sentence, See §1B1.1(b)
Policy Statements Regarding Departures

- 5K1.1 Substantial Assistance (requires a government motion)
- §5K2.0 Grounds for Departure
- §5K2.1 – 2.24 Various bases for departures
- §5K3.1 Early Disposition Programs (“Fast Track”) (requires a government motion)
- Chapter 2 Guidelines
- Criminal History Departure - §4A1.3
- Chapter Five, Part H - Specific Offender Characteristics

Step 3
Variances Consider § 3553(a) taken as a whole, See §1B1.1(c)
Supreme Court Case Law on Variances

- *Gall v. U.S.*, 552 U.S. 38 (2007)
- District courts may vary from the guidelines based on case-specific circumstances, including factors that are taken into consideration by the guidelines (*e.g.*, criminal history) or that are discouraged or forbidden grounds for departures (*e.g.*, a defendant's family circumstances) *Kimbrough v. U.S.*, 128 S. Ct. 558 (2007); *U.S. v. Spears*, 129 S. Ct. 840 (2009); *Pepper v. U.S.*, 131 S. Ct. 1229 (2011)



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District courts may in appropriate cases vary from the guidelines based on a policy disagreement. Such a sentence “may attract greatest respect when it is based on the particular facts of a case.”

Relief from Mandatory Minimums

Substantial Assistance (18 U.S.C. § 3553(e))

Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e) - Permits a sentence below a mandatory minimum

§5K1.1 - Permits a sentence below the minimum of the guideline range

Each requires a government motion - *Wade v. U.S.*, 504 U.S. 181 (1992); *Melendez v. U.S.*, 518 U.S. 120 (1996)

A sentence below mandatory minimum is to be based only on substantial assistance

Safety Valve (18 U.S.C. § 3553(f))

Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

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Safety Valve (USSG §5C1.2(a))

In the case of an offense subject to a mandatory minimum sentence under 21 U.S.C. §§ 841, 844, 846, 960, or 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds the defendant meets the criteria set forth below:

1. Defendant does not have more than 1 Criminal History Point
 2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense
 3. Offense did not result in death or serious bodily injury
 4. Defendant was not an organizer, leader, manager or supervisor of others in the offense; was not engaged in a Continuing Criminal Enterprise (RICO)
 5. Not later than the time of the sentencing hearing, defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.
- Court may sentence the defendant without regard to mandatory minimums for violations of select drug statutes
 - Court makes the determination; no government motion required
 - Defendant must meet 5-part test
 - Additional variances or downward departures allowed



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Related Case Law

United States v. Winebarger, 664 F.3d 388 (3d Cir. 2011) We note that every circuit court of appeals to address the issue we face today has held that a court may not use factors unrelated to a defendant's assistance to the government in reducing the defendant's sentence below the statutory minimum.

United States v. Coyle, 506 F.3d 680 (8th Cir.2007) We see nothing in Booker or the relevant statutes that prevents a district court in this situation from relying to some degree on both § 3553(a) and § 3553(e) to fashion an appropriate sentence. The text of § 3553(e) prohibits a district court from relying on factors other than assistance as a basis for sentencing below the statutory minimum. But here, the district court had some flexibility above the statutory minimum to determine Coyle's sentence in accordance with the factors in § 3553(a).

United States v. Winebarger, 664 F.3d 388, 393–94 (3d Cir. 2011) (citations omitted) Upon a finding that the “safety valve” factors are met, a district court is authorized by Congress to sentence the defendant “pursuant to [the sentencing guidelines] without regard to any statutory minimum sentence.” 18 U.S.C. § 3553(f). This sweeping “without regard” language stands in marked contrast to the “so as to reflect” language of § 3553(e), which is more circumscribed. [] While § 3553(f) instructs district courts to disregard a statutory minimum in appropriate circumstances, § 3553(e) retains the statutory minimum as a reference point and explicitly notes the factor that such a divergence from the reference point should reflect

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

SENTENCING SCENARIOS

Scenario #1

Defendant Harris is convicted of drug trafficking under 21 U.S.C. § 841. The PSR notes that a 10-year mandatory minimum applies. Due to Harris' lengthy and substantial drug trafficking, as well as his criminal record, his guideline range is above the ten-year minimum - 188-235 months. The government has filed a §5K1.1 motion and a § 3553(e) motion based on the Harris' substantial assistance. Harris debriefed with DEA and ATF agents about sources of drugs and firearms. According to the government, the agents found Harris credible, though they have not been able to generate charges against others based on the information he provided.

Harris's attorney has presented information in mitigation and has requested a variance based on his criminal history category over-representing the seriousness of his criminal history. Harris has several theft convictions tied to his drug use, according to his attorney. Harris has a history of methamphetamine addiction and was using during the offense. Harris suffers from high blood pressure that is controlled by medication. While on bond on this offense, Harris began drug treatment and started taking classes to receive his GED.

Offense Level Computation

Count 1: Conspiracy to Possess with Intent to Distribute and Distribute Cocaine

Base Offense Level: Drug Trafficking (§2D1.1). 34

Specific Offense Characteristics: None. 0

Adjusted Offense Level (Subtotal): 34

Acceptance of Responsibility: -3

Total Offense Level: 31

Guideline Imprisonment Range: Total offense level 31, criminal history category VI = 188 to 235 months.

Mandatory Minimum: 120 months

What is your sentence, and why?

SENTENCING SCENARIOS

Scenario # 2

Defendant Gonzalez was found guilty of Conspiracy to Possess with Intent to Distribute and Distribution of Heroin in violation of 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 851. He is facing a mandatory minimum sentence of 240 months' imprisonment. Defendant Gonzalez sold a significant amount of heroin in order to support his own drug addiction. He was not an organizer, leader, manager, or supervisor of others in the instant offense. He has previous convictions for possession of illegal drugs, but they were all too old to receive criminal history points under Chapter 4 of the Guidelines Manual. The defendant's criminal history computation resulted in a total of 1 point. According to the U.S. Attorney's Office, the defendant cooperated with the government, but his cooperation did not result in a recommendation to the Court for a reduction for substantial assistance.

History and Characteristics of the Defendant:

Defendant Gonzalez had a traumatic childhood. His father was not involved in his life on a consistent basis. His father did not live in the home, as he was a traveling musician, but he would stay with the defendant's family periodically when he came back into town. When his father was there, he was physically abusive toward the defendant's mother in front of the children. The defendant did not have a positive male role model throughout his childhood.

The defendant's family resided in Los Angeles, California, until he was 17 years old. The defendant's mother struggled to support her children throughout his childhood. The defendant often had to beg for money in the streets. The defendant recalled living in a one-room apartment in a bad neighborhood, where the children were exposed to violence and other criminal activity on the streets. He also recalled times when the children had to go without adequate food or clothing. Additionally, when he was 15 years old a gang member that resided in his neighborhood put a gun to his head and pulled the trigger. The gun jammed and the assailant started kicking the defendant, at which time he fled. The assailant then started firing the gun toward the defendant but missed him. Additionally, when the defendant was 17 years old he was riding in a car when another gang member started shooting at the car. The bullets went through the car and struck him in the lower back on the right side. The defendant reported that everyone who resided in the neighborhood was either a gang member, a drug dealer, or both.

Offense Level Computation

Count 1: Conspiracy to Possess with Intent to Distribute and Distribution of Heroin

Base Offense Level: §2D1.1

36

Specific Offense Characteristics: Pursuant to USSG §5C1.2, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below: (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of

SENTENCING SCENARIOS

subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the instant offense; (3) the instant offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the instant offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. Therefore, the Offense Level is decreased by 2 levels.

Acceptance of Responsibility:

-2

Total Offense Level:

-3

31

Guideline Imprisonment Range: Total offense level 31, criminal history category I = 108 to 135 months.

Identify any possible grounds for departures or variances, and provide justification for those departures or variances.

SENTENCING SCENARIOS

Scenario # 3

Defendant Small was found guilty of three counts of Receiving Child Pornography and one count of Possession of Child Pornography. His offenses of conviction involved a more than 3,700 images involving sexual exploitation of a minor, some of which involved material that portrayed sadistic or masochistic conduct.

History and Characteristics of the Defendant:

Defendant Small has no history of involvement with the criminal justice system and has no history of substance abuse issues. He has significant physical health issues including suffering from Type I diabetes for approximately 30 years, with complications resulting in retinopathy, neuropathy, frequent severe hypoglycemia, and seizures. He also suffers from osteoporosis and Meniere's Disease, which results in severe vertigo. Defendant Small suffers from hypercholesterolemia, and he has a history of bronchiectasis. Finally, he was diagnosed with coronary artery disease during the past year. He had two stents placed in his heart during the past year after suffering a heart attack. He uses an insulin pump and is prescribed numerous medications.

Defendant Small was sexually abused by three older males from the time that he was 12 years old until he was 15 years old. He was first exposed to pornography by the three men, which led to them exposing themselves to each other. He was eventually exposed to anal intercourse by one of the men. At the time of the presentence investigation, Defendant Small was being treated for obsessive compulsive disorder and an addiction to internet pornography.

During the presentence investigation, the probation officer learned that Defendant Small molested a child more than 20 years ago on one occasion.

Offense Level Computation

Count Group 1: Three counts Receiving Child Pornography (Counts 1 - 3); Possession of Child Pornography (Count 4)

Base Offense Level: Possession and Receipt of Child Pornography (§2G2.2).	<u>18</u>
Specific Offense Characteristics: Prepubescent minor [§2G2.2(b)(2)].	<u>+2</u>
Specific Offense Characteristics: Sadistic or masochistic material [§2G2.2(b)(4)(A)].	<u>+4</u>
Specific Offense Characteristics: Use of a computer [§2G2.2(b)(6)].	<u>+2</u>
Specific Offense Characteristics: Number of images [§2G2.2(b)(7)(D)].	<u>+5</u>
Adjustment for Obstruction of Justice: Lied to investigators (§3C1.1).	<u>+2</u>
Total Offense Level:	<u>33</u>

Guideline Imprisonment Range: Total offense level 33, criminal history category I = 135 to 168 months.

Identify any possible grounds for departures or variances, and provide justification for those departures or variances.

SENTENCING SCENARIOS

Scenario #4

Defendant Gall is a former professional sports player who was found guilty of one count Wire Fraud and one count False, Fictitious or Fraudulent Statements. He worked for a charitable organization, and over a period of four-and-a-half years he solicited and obtained donations to that charitable organization from numerous individuals and organizations. He used his status as a former professional sports player, and the relationships that he developed as a result of that status, in order to solicit and obtain those donations. He then used the money for his own financial needs, including to pay for personal expenses, including but not limited to his mortgage payments, entertainment, meals, travel, groceries, and dry cleaning. He also used the donations to gamble with (including paying to fly to Las Vegas to gamble) and to pay his gambling debts. The total amount of loss that Defendant Gall caused was between \$173,339.61 and \$200,954.61. During the investigation in the instant case, Defendant Gall lied to FBI agents about using the funds that had been donated to the non-profit organization for his own financial needs. He entered into a plea agreement with the government based on a lower loss amount, and his resulting guideline imprisonment range is 30 months to 37 months, although the presentence investigation report calculated it to be 41 months to 51 months.

History and Characteristics of the Defendant:

Defendant Gall had a tumultuous childhood. He reported that he has never met his father. His family did not have a stable home until he was a teenager. They resided with various friends and relatives, and they relied on their church and other families to feed them. There were also times when the defendant's family members went without food and adequate clothing. Defendant Gall recalled that at times his family had to stay in buildings that were condemned. The buildings did not have electricity or bathrooms, and they only had a wooden stove to cook on and to provide heat. He stated that they stayed in those buildings for up to three months at a time. He recalled being bitten by rats at times while they were in those buildings.

Defendant Gall suffers from frontal lobe brain damage as a result of repeated trauma to the head that he experienced during the thirteen years that he played in professional sports. He suffers from depression and anxiety as a result of this brain damage. Defendant Gall also suffers from a gambling addiction, and he has a history of abusing alcohol while he gambled. He has a consistent employment history. Finally, there is some question about whether or not Defendant Gall was suffering from diminished capacity throughout his involvement in the instant case because of his brain damage.

SENTENCING SCENARIOS

Offense Level Computation

Count Group 1: Wire Fraud and False, Fictitious, or Fraudulent Statements

Base Offense Level: Wire Fraud (§2B5.1).	<u>7</u>
Specific Offense Characteristics: Loss of between \$95,000 and \$150,000 pursuant to Plea Agreement. [§2B1.1(b)(1)(E)].	<u>+8</u>
Specific Offense Characteristics: 10 or more victims. [§2B1.1(b)(2)(A)].	<u>+2</u>
Specific Offense Characteristics: Misrepresentation. [§2B1.1(b)(9)(A)].	<u>+2</u>
Adjustment for Role in the Offense: Abuse of Position of Trust (§3B1.3).	<u>+2</u>
Adjustment for Obstruction of Justice: False Statements (§3C1.1).	<u>+2</u>
Total Offense Level:	<u>23</u>

Guideline Imprisonment Range: Total offense level 23, criminal history category I = 46 to 57 months.

Identify any possible grounds for departures or variances, and provide justification for those departures or variances.

SENTENCING SCENARIOS

Scenario #5

Defendant Schutter (age 23) was found guilty of two counts Threats to Another by Interstate Communications. During a period of approximately one year, he made numerous threats to his adoptive parents. He initially contacted them by telephone on several occasions and left explicitly heinous messages on their voicemail. In the messages he threatened to kill his adoptive parents in cruel and degrading manners. Additionally, on Defendant Schutter's Facebook page he posted a message asking if any of his friends wanted to travel with him to where his adoptive parents resided in order to take their lives. FBI agents spoke with Defendant Schutter after these initial incidents and he admitted to making the calls and leaving threatening messages from another state. Approximately four months later, he resumed his threatening actions toward his adoptive parents. He first drove to their house and yelled at them from the road until law enforcement officers arrived and asked him to leave. He subsequently left six messages on their voicemail in which he threatened to kill them in unspeakable manners.

History and Characteristics of the Defendant:

Defendant Schutter abused marijuana on a regular basis for at least three years before committing the instant offense. He graduated from high school and had a somewhat stable employment history. He suffered from mental health issues during his childhood.

Offense Level Computation

Count Group 1: Threats to Another by Interstate Communications

Base Offense Level: Threats to Another by Interstate Communications (§2A6.1).	<u>12</u>
Specific Offense Characteristics: More than two threats. [§2L1.2(b)(2)(A)].	<u>+2</u>
Adjusted Offense Level (Subtotal):	<u>14</u>
Acceptance of Responsibility:	<u>-2</u>
Total Offense Level:	<u>12</u>

Guideline Imprisonment Range: Total offense level 12, criminal history category I = 10 to 16 months (Zone C).

Identify any possible grounds for departures or variances, and provide justification for those departures or variances.

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- A. **The court adopts the presentence investigation report without change.**
- B. **The court adopts the presentence investigation report with the following changes:** *(Use Section VIII if necessary)*
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report)
- Chapter Two of the United States Sentencing Commission [Guidelines Manual](#)** determinations by court: *(briefly summarize the changes, including changes to base offense level, or specific offense characteristics)*
 - Chapter Three of the United States Sentencing Commission [Guidelines Manual](#)** determinations by court: *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)*
 - Chapter Four of the United States Sentencing Commission [Guidelines Manual](#)** determinations by court: *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)*
 - Additional Comments or Findings:** *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)*
- C. **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline: *(if more than one guideline applies, list the guideline producing the highest offense level)* _____

II. COURT FINDINGS ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

- A. One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.
- B. One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below the mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:
- findings of fact in this case: *(Specify)* _____
- substantial assistance *(18 U.S.C. § 3553(e))*
- the statutory safety valve *(18 U.S.C. § 3553(f))*
- C. No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: _____
Criminal History Category: _____
Guideline Range: *(after application of §5G1.1 and §5G1.2)* _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: \$ _____ to \$ _____

- Fine waived or below the guideline range because of inability to pay.

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

- A. The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.
- B. The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)* .
- C. The court departs from the guideline range for one or more reasons provided in the [Guidelines Manual](#). *(Also complete Section V)*
- D. The court imposed a sentence otherwise outside the sentencing guideline system (*i.e.*, a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

- A. **The sentence imposed departs:** *(Check only one)*
 - above the guideline range
 - below the guideline range
- B. **Motion for departure before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

- 1. **Plea Agreement**
 - binding plea agreement for departure accepted by the court
 - plea agreement for departure, which the court finds to be reasonable
 - plea agreement that states that the government will not oppose a defense departure motion
- 2. **Motion Not Addressed in a Plea Agreement**
 - government motion for departure
 - defense motion for departure to which the government did not object
 - defense motion for departure to which the government objected
 - joint motion by both parties
- 3. **Other**
 - Other than a plea agreement or motion by the parties for departure

C. Reasons for departure: *(Check all that apply)*

- | | | |
|---|--|--|
| <input type="checkbox"/> 4A1.3 Criminal History Inadequacy | <input type="checkbox"/> 5K2.1 Death | <input type="checkbox"/> 5K2.12 Coercion and Duress |
| <input type="checkbox"/> 5H1.1 Age | <input type="checkbox"/> 5K2.2 Physical Injury | <input type="checkbox"/> 5K2.13 Diminished Capacity |
| <input type="checkbox"/> 5H1.2 Education and Vocational Skills | <input type="checkbox"/> 5K2.3 Extreme Psychological Injury | <input type="checkbox"/> 5K2.14 Public Welfare |
| <input type="checkbox"/> 5H1.3 Mental and Emotional Condition | <input type="checkbox"/> 5K2.4 Abduction or Unlawful Restraint | <input type="checkbox"/> 5K2.16 Voluntary Disclosure of Offense |
| <input type="checkbox"/> 5H1.4 Physical Condition | <input type="checkbox"/> 5K2.5 Property Damage or Loss | <input type="checkbox"/> 5K2.17 High-Capacity Semiautomatic Weapon |
| <input type="checkbox"/> 5H1.5 Employment Record | <input type="checkbox"/> 5K2.6 Weapon | <input type="checkbox"/> 5K2.18 Violent Street Gang |
| <input type="checkbox"/> 5H1.6 Family Ties and Responsibilities | <input type="checkbox"/> 5K2.7 Disruption of Government Function | <input type="checkbox"/> 5K2.20 Aberrant Behavior |
| <input type="checkbox"/> 5H1.11 Military Service | <input type="checkbox"/> 5K2.8 Extreme Conduct | <input type="checkbox"/> 5K2.21 Dismissed and Uncharged Conduct |
| <input type="checkbox"/> 5H1.11 Charitable Service/Good Works | <input type="checkbox"/> 5K2.9 Criminal Purpose | <input type="checkbox"/> 5K2.22 Sex Offender Characteristics |
| <input type="checkbox"/> 5K1.1 Substantial Assistance | <input type="checkbox"/> 5K2.10 Victim’s Conduct | <input type="checkbox"/> 5K2.23 Discharged Terms of Imprisonment |
| <input type="checkbox"/> 5K2.0 Aggravating/Mitigating Circumstances | <input type="checkbox"/> 5K2.11 Lesser Harm | <input type="checkbox"/> 5K2.24 Unauthorized Insignia |
| | | <input type="checkbox"/> 5K3.1 Early Disposition Program (EDP) |

Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the [Guidelines Manual](#): *(see “List of Departure Provisions” following the Index in the Guidelines Manual.) (Please specify)*

D. State the basis for the departure. *(Use Section VIII if necessary)*

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE (If applicable)

A. The sentence imposed is: (Check only one)

- above the guideline range
below the guideline range

B. Motion for a variance before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)

1. Plea Agreement

- binding plea agreement for a variance accepted by the court
plea agreement for a variance, which the court finds to be reasonable
plea agreement that states that the government will not oppose a defense motion for a variance

2. Motion Not Addressed in a Plea Agreement

- government motion for a variance
defense motion for a variance to which the government did not object
defense motion for a variance to which the government objected
joint motion by both parties

3. Other

- Other than a plea agreement or motion by the parties for a variance

C. 18 U.S.C. § 3553(a) and other reason(s) for a variance (Check all that apply)

- The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1):
Mens Rea, Extreme Conduct, Dismissed/Uncharged Conduct, Role in the Offense, Victim Impact, General Aggravating or Mitigating Factors: (Specify)

The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1):

- Aberrant Behavior, Lack of Youthful Guidance, Age, Mental and Emotional Condition, Charitable Service/Good Works, Military Service, Community Ties, Non-Violent Offender, Diminished Capacity, Physical Condition, Drug or Alcohol Dependence, Pre-sentence Rehabilitation, Employment Record, Remorse/Lack of Remorse, Family Ties and Responsibilities, Other: (Specify)

Issues with Criminal History: (Specify)

- To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
Acceptance of Responsibility, Conduct Pre-trial/On Bond, Cooperation Without Government Motion for Departure, Early Plea Agreement, Global Plea Agreement, Time Served (not counted in sentence), Waiver of Indictment, Waiver of Appeal, Policy Disagreement with the Guidelines (Kimbrough v. U.S., 552 U.S. 85 (2007)): (Specify)

Other: (Specify)

D. State the basis for a variance. (Use Section VIII if necessary)

DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. Restitution not applicable.

B. Total amount of restitution: \$ _____

C. Restitution not ordered: *(Check only one)*

1. For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s)' losses were not ascertainable (18 U.S.C. § 3664(d)(5)).
5. For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. Restitution is not ordered for other reasons: *(Explain)*

D. Partial restitution is ordered for these reasons: *(18 U.S.C. § 3553(c))*

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

Defendant's Soc. Sec. No.: _____

Date of Imposition of Judgment: _____

Defendant's Date of Birth: _____

Signature of Judge _____

Defendant's Residence
Address: _____

Name and Title of Judge _____

Date: _____

Defendant's Mailing
Address: _____

You are the judge in a multi-defendant drug case. All the defendants have pleaded guilty. Defendants **ADAM BROOKS, CELESTE DRAKE, ELLIOTT FRANKS, GREG HANOVER, ISAAC JONES, KYLE LUCAS**, are charged in the District of Maryland with Indictment with one count of Conspiracy to Distribute and Possession with Intent to Distribute Heroin. The Indictment alleges that beginning in January 2015 until December 30, 2017, the five defendants did conspire to distribute 1 kilogram or more of Heroin in the McCulloh Homes in West Baltimore. The charge carries a ten-year mandatory minimum sentence.

The discovery described the following:

Beginning in January of 2015, Baltimore City Police Department and the DEA began investigating a drug distribution ring in the McCulloh Homes housing project. The investigation centered on Defendant **ADAM BROOKS** who, it was revealed, was a mid-level distributor of heroin. Over the course of two years, the investigation showed that Brooks worked with **ELLIOT FRANKS, GREG HANOVER, ISAAC JONES, KYLE LUCAS** and others, to distribute heroin in West Baltimore. **BROOKS** would get heroin from his supplier and deliver the drugs to street-level dealers who would sell the drugs. Over the course of the investigation, **BROOKS** received and sold over five kilos of heroin.

Whenever **BROOKS** got a shipment of drugs from his supplier, he called **KYLE LUCAS** first to coordinate the sale of the heroin. **LUCAS** and **BROOKS** were distant cousins and had been selling drugs together for several years. **BROOKS** was responsible for acquiring the drugs while **LUCAS** was in charge of finding street-level dealers. **LUCAS** recruited street level dealers to distribute to drugs around West Baltimore. Specifically, **LUCAS** recruited **ELLIOT FRANKS, GREG HANOVER**, and **ISAAC JONES** to act as street level dealers. **LUCAS** determined where the street dealers would sell drugs and what quantity of drugs each dealer would get. After all the drugs were sold, **BROOKS** received a larger portion of the drug proceeds.

ELLIOT had been selling cocaine with other drug dealers in Baltimore beginning in 2014. He began selling heroin for **BROOKS** and **LUCAS** in January 2016. **ELLIOT** and **ISAAC JONES** are step-brothers and have lived together in the same house since 2014. **ISAAC** knew about all of **ELLIOT'S** drug dealing activity but **ISAAC** worked full time as truck driver and did not want to deal drugs.

In June of 2017, **ISAAC** lost his job as a truck driver and, needing money, began dealing drugs with **ELLIOT**. After June, **ISSAC** and **ELLIOT** went to pick up drugs from **LUCAS** and **BROOKS**

RELEVANT CONDUCT IN CONSPIRACIES

every week. After **ISAAC** and **ELLIOT** got the drugs, they coordinated where they were going to make sales and share proceeds.

GREG HANOVER began selling drugs he received from **BROOKS** and **LUCAS** in January 2015. He knew there were other street level dealers who got drugs from **BROOKS** and **LUCAS** but **GREG** has never met anyone else who gets drugs from **BROOKS** and **LUCAS** nor has **Greg** ever seen anyone pick up drugs at the same time he does.

GREG always carries a weapon when he sells drugs because he has been robbed before while carrying drug proceeds. After the robbery, **GREG** was paranoid about being followed. He began constantly changing meeting locations to avoid detection. Sometimes, **GREG'S** girlfriend **CELESTE DRAKE** would accompany him when he made the sales. **CELESTE** sat in the car while he made the sales. She never touched the weapon because **GREG** carried it on his person.

On three occasions, **CELESTE** went by herself to meet with potential drug buyers because **Greg** was afraid he would be robbed again. On these occasions, **CELESTE** got drugs from **GREG**, and conducted the sales by herself. For these three sales, **GREG** paid her \$20 from the drug proceeds.

RELEVANT CONDUCT IN CONSPIRACIES

1. **Brooks** and **Lucas** enter guilty pleas first. Based on the information received from the government and law enforcement officers, the probation officer found that **Brooks** and **Lucas** were responsible for distributing five kilos of heroin. **Brooks** challenges this drug amount in the PSR. **Brooks** argues that the Indictment alleges only one kilo of heroin and any quantity beyond that must be proven beyond a reasonable doubt. What quantity of drugs will **Brooks** be liable for?

2. Would the aggravating role enhancement apply to **Brooks**?

3. **Lucas** is also challenging the drug quantity in his PSR. He argues that he should not be held responsible for the same quantity of drugs as **Brooks**. **Lucas** argues that he is liable for 2 kilos, which is the amount he personally handled. **Lucas** noted that while he and **Brooks** shared the drug proceeds equally, he only worked under **Brooks**' direction and never met the supplier. What quantity of drugs will **Lucas** be liable for?

4. Would the aggravating role enhancement apply to **Lucas**?

RELEVANT CONDUCT IN CONSPIRACIES

5. **Greg** is the next defendant to be sentenced. The PSR states that **Greg** personally sold one kilo of heroin but stated that because he was part of a conspiracy, and knew there were other street level dealers, he should also be liable for the entire quantity of the conspiracy. Will **Greg** be liable for the drugs sold by others in the conspiracy?

6. **Celeste** is sentenced a day after Greg. She made several objections to her PSR. First, she argues that her drug quantity should be limited to the three drug transactions she conducted by herself, which totaled 20 grams. What quantity of drugs is attributable to **Celeste**?

7. The PSR for **Celeste** also added a 2-level enhancement under §2D1.1(b)(1) for possession of a weapon. **Celeste** argues that she never carried a gun and therefore cannot be liable for the weapon. Will **Celeste** get the gun enhancement?

8. **Celeste** also argues that she is eligible for safety valve. The government agrees that she meets four out of the five criteria but argues that she cannot get safety valve because of the weapon. Can **Celeste** get safety valve?

RELEVANT CONDUCT IN CONSPIRACIES

9. Finally, **Celeste** argues that she is eligible for a minor role reduction because she is less culpable than other people in the conspiracy. The government agrees that she is less culpable but argues that she already received a reduction on the drug quantity and therefore, she is not eligible for further reductions. Will **Celeste** get minor role even if she is held responsible only for the quantity of drugs she sold?

10. **Elliot** and **Isaac** are sentenced last. **Elliot** and the government have agreed that **Elliot** is responsible for distributing two kilos of heroin in this conspiracy. However, the PSR noted that **Elliot** was selling drugs prior to joining this conspiracy, totaling 300 grams of cocaine. Government argues that the cocaine should be included in the drug quantity for the instant offense. Will **Elliot** be held responsible for the cocaine he sold before he entered the conspiracy?

11. At **Isaac's** sentencing, the government argues that the drug quantity is two kilos, the same quantity as **Elliot**. The government notes that **Elliot** and **Isaac** lived together during the conspiracy and that **Isaac** knew that **Elliot** was selling heroin. **Isaac** argues he can only be held accountable for the drugs he sold, which totaled 1 kilo. What quantity of drugs will be attributed to **Isaac**?

2018
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RICO 2018 Annual National Seminar

The RICO Act (18 U.S.C. § 1962) provides for criminal prosecution of racketeering activities as part of an ongoing criminal organization. RICO is designed to address the infiltration of legitimate enterprises by organized crime and other illegal ventures.

Relevant Statutes

- 18 U.S.C. § 1962(a)-(d) (Prohibited Activities)
- 18 U.S.C. § 1961(1)-(10) (Definitions)
- 18 U.S.C. § 1963(a)-(m) (Criminal Penalties)

Predicate Acts

A “predicate act” is an enumerated crime in a RICO conspiracy used to constitute a RICO violation

(e.g. murder, kidnapping, gambling, arson, robbery, extortion etc.)

VS.

Overt Acts

An “overt act” is an outward act, however innocent in itself, done in furtherance of a conspiracy

(e.g. transfer of a firearm to another gang member to further the conspiracy)

Overt Acts are not necessarily the same as acts that would constitute RICO predicates.

Frequently Asked Questions

When determining the base offense level under the RICO guidelines, am I comparing the alternative minimum offense level 19 to each of the underlying offenses individually?

No. Compare the 19 (including any Chapter Three Adjustments) to the combined offense level determined for the underlying offenses. That is, apply Chapters Two and Three Parts A, B, C and D to the underlying offenses and determine a combined offense level.

What is the burden of proof required when there is more than one underlying offense?

The majority of circuits that have addressed the issue (1st, 2nd, 6th and 7th) have held that uncharged, underlying offenses may be accounted for under relevant conduct as long as the court finds the offense has been proved by a preponderance of evidence. The Eleventh Circuit, however, employs a beyond a reasonable doubt standard.

When the defendant has prior convictions that are part of the pattern of racketeering activity, are these priors counted for criminal history and not part of the instant offense?

Yes, if the previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, see §2E1.1, Application Note 4.

Relevant Case Law

Burden of Proof for Uncharged Underlying Offenses

Preponderance of the Evidence

United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993)

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008)

United States v. Massino, 546 F.3d 123 (2d Cir. 2008)

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000)

United States v. Garcia, 754 F.3d 460 (7th Cir. 2014)

Beyond a Reasonable Doubt

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001)

Analogizing State Crimes

United States v. Scott, 642 F.3d 791, 801-02 (9th Cir. 2011) (“The special verdict form indicates the jury found [defendant] guilty of conspiring to murder under state law, so the district court properly analogized to the federal offense of conspiracy to murder.”).

United States v. Minicone, 960 F.2d 1099, 1110 (2d Cir. 1992) (defendant convicted of RICO conspiracy based on his involvement in the enterprise’s gambling activity and second degree murder under the New York Penal Code; district court properly analogized the definition of first degree murder in 18 U.S.C. § 1111 and used the applicable guideline for first degree murder at §2A1.1).

See also, *United States v. Carr*, 424 F.3d 213, 231 (2d Cir. 2005) (district court properly applied base offense level for federal offense of first degree murder, reiterating its conclusion in *Minicone* that the absence of reference to premeditation or malice aforethought in the state second degree murder statute does not mean that federal first degree murder is not the most analogous federal offense).

Prior Sentence Rule - §2E1.1, Application Note 4

United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992) (rejecting government’s argument that district court erred in assessing prior conviction only in calculating criminal history and not in calculating base offense level; “district court reasonably construed Note 4 to mean that the conduct underlying the previously imposed sentence should not be used in calculating the base offense level for the instant [RICO] offense”).

United States v. Riccobene, 709 F.2d 214, 232 (3d Cir. 1983) (“The predicate offenses . . . are not themselves the RICO violation[;] they are merely one element of the crime. [RICO] does not prohibit the commission of the individual racketeering acts. Rather, it bans the operation of an ongoing enterprise by means of those acts.”).

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



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

RICO OFFENSES

Santana Falcon has pled guilty to the following offense:

- Ct. One: Racketeering Conspiracy; in violation of 18 U.S.C. § 1962(d) – Not more than life imprisonment

Background on Lincoln Park Crew RICO Conspiracy

For several years, the Lincoln Park housing project in Baltimore, Maryland has been a war zone for violent feuds between several criminal enterprises styled as neighborhood-based street gangs. The Lincoln Park Crew (LPC), which was led by Jose Cerrano until he was murdered by a rival gang in August of 2014, has been the center of the violent conflicts. The LPC has been responsible for multiple murders, attempted murders, shooting, assaults and other acts of violence that arise from the gang's ongoing feuds with other street gangs in Lincoln Park.

In approximately 2004, the LPC started as a group of young men who socialized together and were involved in street-level crime. Among the founders were Jose Cerrano and Pedro Ortiz who were both from Lincoln Park. The LPC eventually developed into a substantial criminal organization with sets of gang members who have engaged in criminal activity in neighboring counties in Maryland. The Lincoln Park housing project is considered LPC territory and in recent years a number of shootings and other violent conflicts have occurred when members of rival gangs have entered LPC territory.

The goals of the LPC include protecting the power of the gang and its members through violence and threats of violence against its rivals (including murdering and attempting to murder rivals of the gang) and enriching the gang and its members by engaging in the distribution of crack cocaine, heroin and other drugs (including prescription drugs), in and around LPC controlled territory and by acting in concert to commit robberies involving the use of violence.

Santana Falcon and the LPC RICO Conspiracy

In approximately 2006 **Falcon** became a member of the LPC because of his affiliation and friendship with the now deceased Jose Cerrano, one of the founders of the gang. As an LPC member, **Falcon** was aware that the LPC sold drugs and committed assaults and shootings of rival gang members. **Falcon** held guns for other LPC members, sold crack cocaine with other members and participated in shootings. Specifically, on November 21, 2011, **Falcon** participated in a shootout with a rival gang. During the shootout two members from the rival gang were shot and injured.

Offense Conduct

In 2009, **Falcon** got involved in the prescription drug business. The Lincoln Park grocery was owned by the Jones family. **Falcon** initially provided protection for the store in exchange for a small amount of money, and by doing this he learned the prescription drug business at the store. The Jones family would purchase pills from customers both inside and outside the store. These individuals would sell their

RICO OFFENSES

legally obtained Medicaid-dispensed prescription drug bottles to the Jones family. After aggregating large quantities and removing the patient labels, the Jones family would re-sell the medication to others. Oxycodone tablets were re-sold in loose form like any other controlled substance.

At some point, **Falcon** began stealing customers of the Jones family. Among other things, **Falcon** would stand on the same block as the grocery and intercept customers who would have otherwise sold their pills to the Jones family at the grocery store.

Falcon is responsible for possessing with intent to distribute approximately 400 grams of Oxycodone.

In 2010, **Falcon** participated in a knife-point robbery of approximately \$50,000 of stolen income tax checks. **Falcon** and another gang member arranged to purchase the checks from an individual, but then **Falcon** decided to rob the individual of the checks instead of purchase them. **Falcon** and his co-conspirator were armed with knives and robbed the individual at knifepoint when he arrived with the checks.

1. How many underlying offenses are in this RICO conspiracy?

2. Is each underlying offense compared to the base offense level of 19?

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Sex Offenses 2018 Annual National Seminar

This document provides an overview of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and includes guideline application pointers as well as information on restitution and supervised release conditions in sex offenses.

Repeat and Dangerous Sex Offender Against Minors

Guideline 4B1.5 applies to offenders whose instant offense of conviction is a covered sex offense against a minor (e.g., Production of Child Pornography, Sex Trafficking, or Sexual Abuse) and who are repeat child sex offenders. The guideline contains a tiered approach to punishing these offenders, depending on whether the defendant has a prior sex offense conviction or the defendant engaged in a pattern of activity involving prohibited sexual conduct.

Section 4B1.5(a) applies to a defendant whose instant offense of conviction is a covered sex crime and the defendant has a prior sex offense conviction. A prior sex offense conviction is defined as any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B) against a minor. A conviction for possession, receipt, and trafficking of child pornography is not included as a prior sex offense conviction. If a defendant qualifies under this subsection, his offense level will be increased based on a table that is tied to the statutory maximum of the instant offense and the defendant's criminal history category is increased to V.

Section 4B1.5 (b) applies to a defendant whose instant offense is a covered sex crime and the defendant engaged in a pattern of activity involving prohibited sexual conduct. A defendant engages in a pattern of activity if on at least two separate occasions, the defendant engaged in a prohibited sexual conduct with a minor. If the court determines that the defendant engaged in a pattern of activity, a 5-level increase applies.

Guideline Application Pointers

§4B1.5(a) (“Prior conviction”)

- If the defendant qualifies under subsection (a), the court cannot apply subsection (b) even if the application of subsection (b) would result in a greater offense level.
- The court should apply the categorical approach to determine whether a prior conviction is a sex offense conviction under §4B1.5(a). (See *U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)).
- The prior conviction does not have to receive criminal history points and there is no time limit on the prior conviction (See *U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)).
- Prior sex offense conviction must be against a minor and not an adult (See *U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016))

§4B1.5(b) (“Pattern of activity”)

- An occasion of “prohibited sexual conduct” may be considered without regard to whether the occasion occurred during of the instant offense (See *U.S. v. Gibson*, 840 F.3d 512 (8th Cir. 2016) and *U.S. v. Evans*, 782 F.3d 1115 (10th Cir. 2015)).
- An “occasion of prohibited sexual conduct” may be considered without regard to whether there was a conviction for that conduct.
- Attempted sexual conduct can be included as prohibited sexual conduct with a minor. (See *U.S. v. Morgan*, 842 F.3d 1370 (8th Cir. 2016))



Sex Offenses

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Restitution

Mandatory Restitution for Sex Trafficking 18 U.S.C. § 1593

Court must order restitution for any offender convicted of offenses related to trafficking of persons. (18 U.S.C. § 1593 (a)).

The order of restitution shall direct the defendant to pay the victim, through the appropriate mechanism, the full amount of the victim's losses (18 U.S.C. § 1593 (b)(1)).

"The full amount of victim's losses" has the same meaning as outlined in section 2259(b)(3) and in addition shall "include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act. (18 U.S.C. § 1593 (b)(3)).

The term "victim" means any individual harmed as a result of the crime. If the victim is under 18, incompetent, incapacitated, or deceased, the court can appoint the legal guardian of the victim, another family member, or any other suitable by the court as a representative. (18 U.S.C. § 1593 (c)).

Supervised Release Conditions

Statutes & Guidelines Implicated

18 U.S.C. § 3583(d)
18 U.S.C. § 3583(k)
§§5D1.1 – 5D1.3

Court needs to provide notice and explanation regarding imposition of special conditions of supervised release.

Court should examine length of time between instant offense and any prior sexual misconduct

Conditions that involve fundamental liberties (e.g., association with own children, residency restrictions) need more detailed explanation than other conditions.

If a defendant is convicted of failure to register as a sex offender, court should determine if the prior sex offense conviction involved a computer.

Losses Included for Restitution Purposes (18 U.S.C. § 2259):

Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

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

SEX OFFENSES SCENARIOS

Scenario 1

Defendant is convicted of one count of possession of child pornography on June 1, 2017. The defendant used a file sharing program to download images of child pornography.

The government believes that the 5-level increase for distribution of pornography under §2G2.2(b)(3) applies based on the defendant's knowledge that other individuals in the file sharing program could access his files.

Should the defendant receive an enhancement under §2G2.2(b)(3) (distribution SOC)?

Scenario 2

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?

Scenario 3

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2017. On July 7, 2017, 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 between 12-16 under §2G2.1(b)(1)(b). The government has objected, arguing that the court should impose a four-level increase for a minor under 12 under §2G2.1(b)(1)(A).

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

SEX OFFENSES SCENARIOS

Scenario 4

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on a December 2, 2017; applicable guideline §2G2.1. In the video, there is another child who is also filmed engaging in sexual activity. Does the special instruction at §2G2.1(d)(1) apply?

Scenario 5

The defendant is convicted 18 U.S.C. § 1594 (Conspiracy to violate 18 U.S.C. § 1591(a), Sex Trafficking of Children). The probation officer applied a base offense level 34, pursuant to §2G1.3(a)(1). The defendant objects, and believes the base offense should be 24, pursuant to §2G1.3(a)(4).

What is the correct base offense level?

Scenario 6

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution on February 5, 2018. The government alleges the defendant also transported a second minor age 16 on February 1 for purposes of prostitution.

Does the special instruction at §2G1.3(d)(1) apply?

Scenario 7

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

SEX OFFENSES SCENARIOS

sexual conduct and that the enhancement should not apply because the enhancement requires two prior instances of sexual abuse.

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

Scenario 8

Count 1 – Trafficking child pornography on April 15, 2017; Applicable guideline §2G2.2; Offense Level 40

Count 2 – Production of child pornography, citing one minor exploited during the production on April 15, 2017; Applicable guideline §2G2.1; Offense Level 38

The probation officer applied §2G2.1(b)(3) for the offense involving distribution of child pornography.

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

Will the counts group?

If so, under which grouping rule?
