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

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

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

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

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

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

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).

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**.

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

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

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

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

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.

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

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

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

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

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

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

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

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